How to Say You Are Sorry
A Guide to the Background and Risks of Apology Legislation

by

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Abstract

This thesis examines legislation that creates a “safe harbour” for apologies by making them inadmissible as evidence of liability in a civil action. In recent years, jurisdictions across North America and Australia have enacted such “apology legislation” in an effort to encourage apologies. This is allegedly done to assist victims, who often benefit from full and sincere apologies. Legislators are also motivated, however, by the perception that apologies can induce victims to settle or forgo legal action, thereby reducing litigation rates. Whether such a correlation exists, particularly for apologies given under apology legislation, has not been firmly established, and attempting to use apologies in this manner may prove harmful to victims and the state. Apologies are powerful, and if legislators are not careful, they may enact legislation that alters apologies so that they become a source of harm to victims, the legal system, and even society as a whole.
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I. Introduction

“I am sorry,” three words that have the potential to be both emotionally healing and legally devastating. The perceived implications of making an apology are so damaging that many civil defendants (or would-be defendants) refrain from apologizing even when they may wish to do so. In the last twenty-five years the common law’s perceived negative impact on apologies has attracted the attention of legislators who seek to repair the damage. Throughout jurisdictions in Canada, the United States, and Australia there has been a great deal of enthusiasm for the adoption of “apology legislation” that allows for the making of an apology without legal penalty for civil matters. Ontario has been one of the most recent jurisdictions to enact such apology protecting legislation.

Proponents of apology legislation proclaim that apologies offer untold benefits to all parties involved. A true and full apology can offer countless benefits, not only to victims of wrongdoing under the civil law, but also to the apologizing party, the legal system, and even society as a whole. Apologies brought about by apology legislation however are more problematic. The motivations behind enacting such legislation, while often hedged as being helpful to victims, are often really aimed at decreasing lawsuits and increasing rates of settlement. Fostering settlements may render benefits, but there is also a danger that a high cost will be paid if the wrong types of settlements are entered into. In addition, the correlation between apologies and a reduction in litigation rates may not be as strong as proponents of apology legislation would have us believe.
Another concern is that apology legislation may not be as beneficial to victims as it may seem at first glance. The particular wording of the apology legislation is critical, and if legislators are not careful, they may draft legislation that encourages the wrong types of apologies. Such “bad” apologies are not only unlikely to foster settlement and benefit victims, but may in fact cause further harm.

The protection of apologies through legislation may also have serious ramifications for victims, the legal system, and even apologies themselves. Victims could be placed at a disadvantage by not being able to use apologies to prove fault, and it is questionable whether the exclusion of such evidence really is in the best interests of justice. In addition, apology legislation can make the motivations for apologizing unclear, which could negate the positive impact of even the most sincere of apologies. This in turn could lead to a general devaluing of apologies both within the legal sphere and in society.

This thesis examines the background and motivations of apology legislation, and aims to provide not only insight into the dangers of apology legislation, but also some possible solutions to help counteract these pitfalls. While there are many potential problems with apology legislation, through careful legislative drafting some of the dangers posed by apology legislation could be reduced or perhaps even eliminated. The solutions, while never perfect, could help to protect victims and ensure that apology legislation does not cause more harm than good.

II. The Origins, Spread and Types of Apology Legislation

The first apology legislation was drafted in the mid-1980’s by a senator from Massachusetts whose daughter had been hit and killed by a car. Besides the obvious grief caused by the loss of his child, the Senator also became angry when the driver of the car did not
apologize. The Senator later learned that the driver had withheld the apology out of fear that doing so would be considered an admission of guilt.¹

In response, the Senator presented legislation to the Massachusetts legislature that made “benevolent gestures” inadmissible in litigation involving accidents. The legislation that was passed by the legislature was, and continues to be worded as follows:

_Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action._²

“Benevolent gestures” is defined as "actions which convey a sense of compassion or commiseration emanating from humane impulses.” “Accidents” is limited to “an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party,”³ meaning that intentional torts are not protected by the legislation. In addition, the legislation limits the protection to situations where the apology was made to the victim, or his or her family, which includes spouses, parents, grandparents, step parents, siblings, half siblings and adopted children.

The original legislation therefore created a “safe harbour” for certain types of apologies, allowing wrongdoers to offer victims and their families something that would hopefully foster healing and forgiveness. It placed limits on this protection however, limits that not all jurisdictions have followed when enacting their own apology legislation.

Since its adoption in Massachusetts, apology legislation has been enacted throughout the United States, Australia,⁴ and Canada. British Columbia became the first Canadian jurisdiction

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³ Ibid.
to adopt apology legislation when it enacted its *Apology Act*\(^5\) in 2006. Manitoba,\(^6\) Saskatchewan,\(^7\) and Alberta\(^8\) soon followed, although the last two, unlike British Columbia made amendments to preexisting statutes instead of creating stand alone pieces of legislation. Ontario has been the most recent addition, following the lead of British Columbia and Manitoba by drafting a full *Apology Act*,\(^9\) which came into force on April 23, 2009.

It is important to note that not all apology legislation is created equal and the elements of the legislation vary greatly from jurisdiction to jurisdiction.\(^10\) Many jurisdictions, particularly in the United States and several in Australia,\(^11\) have placed limits on the application of their apology legislation to certain areas of the law, such as medical malpractice and/or personal injury.\(^12\) The focus on medical malpractice is particularly strong in America, which is likely due to the high number of malpractice lawsuits filed in the U.S. and the high-profile nature of medical malpractice litigation.\(^13\)

Canadian jurisdictions have not placed such limits on apology legislation and all have set the apology net very wide by basically protecting apologies made by or on behalf of a person “in connection with any matter.”\(^14\) The protection of apologies in Canadian jurisdictions extends to

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\(^5\) S.B.C. 2006, c. 19 [*B.C. Apology Act*].
\(^6\) *The Apology Act*, C.C.S.M. c. A98.
\(^8\) *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 26.1
\(^9\) S.O. 2009, c. 3. [*Ontario Apology Act*]
\(^10\) Desmond, *supra* note 4.
\(^12\) Kleefeld, *supra* note 1 at para 15.
\(^14\) See for example *Ontario Apology Act*, *supra* note 9 at s. 2(1).
all areas of the civil law including negligence and intentional torts.\textsuperscript{15} However, in Ontario apologies made while testifying at a civil proceeding, including an out of court examination, administrative proceeding or arbitration, are not protected for the purposes of that proceeding or arbitration.\textsuperscript{16} Therefore, in Ontario an apology made while testifying or even in discoveries would likely not be protected, and could be used to prove liability.

There are an additional number of aspects to apology legislation that vary from jurisdiction to jurisdiction. For example, some jurisdictions place a time limit of sorts on apologizing by only protecting apologies made within a certain time frame. Illinois only protects apologies made within seventy-two hours of “unanticipated medical outcomes”\textsuperscript{17} (i.e. medical malpractice), while Vermont gives apologizers thirty days, although only for an “oral expression of regret or apology” made by or on behalf of a health care provider or health care facility.\textsuperscript{18} Many jurisdictions have also included protection for apologizers so that they cannot lose their insurance coverage simply because they apologized.

\textbf{III. What Is an Apology?}

The legal definition of “apology” under a particular piece of apology legislation, and what it exactly protects can also vary greatly between jurisdictions. This leads us to an important question for any legislative body that is considering apology legislation: what exactly is an apology? This can be fairly difficult to answer definitely as there appears to be a range of statements and/or actions that can constitute an apology. To most sociologists and psychologists

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\item[\textsuperscript{15}] Kleefeld, \textit{supra} note 1 at para 4.
\item[\textsuperscript{16}] \textit{Ontario Apology Act, supra} note 9 at s. 2(4).
\item[\textsuperscript{17}] 110 Ill Comp Stat Ann 5/8-1901 (2005).
\item[\textsuperscript{18}] Vt Stat Ann §1912 (2006).
\end{itemize}
\end{footnotesize}
an apology at its centre must have “a genuine display of regret and sorrow.”\(^{19}\) However, many would say that simply stating “I’m sorry” does not on its own constitute an apology,\(^{20}\) particularly for more serious transgressions. There is great debate amongst scholars regarding what additional components are required for something to be considered a true apology. As to, many maintain that there must be a commitment by the apologizer to make reparations,\(^{21}\) while other scholars argue that there only needs to be a statement that the act will not be repeated.\(^{22}\) There is even debate as to how many components there are to an apology, the range generally being three to five elements,\(^{23}\) although some say that as many as eight requirements need to be fulfilled to meet the definition of a full apology.\(^{24}\) The majority of scholars, however differently they formulate the requirements, do seem to generally agree that a complete or full apology must at least include the following elements:

1. an acknowledgment of a wrong committed, including the harm that it caused;
2. an acceptance of responsibility for having committed the wrong;
3. an expression of regret or remorse both for the harm and for having committed the wrong; and,
4. a commitment, explicit or implicit, to reparation and, when appropriate, to non-repetition of the wrong.\(^{25}\)


\(^{23}\) Runnels, *supra* note 13 at 143.

\(^{24}\) *Ibid.* at 142.

Possibly one of the most important, and also the most contentious features of a true apology is the act of the apologizer taking responsibly for their wrongful actions and acknowledging fault. For many scholars and victims alike, this is an essential element to a true and full apology.\textsuperscript{26} Without it the apology is considered to be incomplete, and as such they are often referred to as “partial apologies.”\textsuperscript{27}

Like the scholarly definition of the word, the legal definition of an “apology” that is protected under apology legislation can vary greatly from jurisdiction to jurisdiction. For example, Arizona has chosen to specifically state that its legislation protects:

\begin{quote}
any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence.\textsuperscript{28}
\end{quote}

On the other end of the spectrum are jurisdictions like Massachusetts, which as previously noted protects “actions which convey a sense of compassion or commiseration emanating from humane impulses.”\textsuperscript{29} The big difference between these different legal definitions is that the first protects statements of fault, while the second does not. A few American jurisdictions protect statements of fault, however, the majority have chosen to not do so, only extending protection of statements of regret and/or sympathy. Meanwhile, Canadian jurisdictions that have adopted apology legislation have all defined “apology” nearly identically to be:

\begin{quote}
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.\textsuperscript{30}
\end{quote}

\begin{footnotes}
\footnote{Vines, supra note 20 at 7.}
\footnote{Ibid. at 5.}
\footnote{A.R.S. §12-2605 (2005).}
\footnote{Mass. Apology Law, supra note 2.}
\footnote{B.C. Apology Act, supra note 5 at s. 1.}
\end{footnotes}
Therefore, in Canadian jurisdictions, statements of fault are protected from being used as evidence of liability.

All of these definitions of apology under apology legislation share one important characteristic: the definition of apology selected by legislators does not necessarily match the scholarly definition of the word. Jurisdictions that define apologies narrowly and fail to protect statements of fault, such as in most American jurisdictions, are really only protecting partial apologies. Under such legislation, what most scholars would consider to be a full apology would not be protected.31

Meanwhile, jurisdictions that protect statements of fault, as with Canadian jurisdictions, may appear to protect full apologies, however, the legislation could in fact change a seemingly full apology into a partial one. Since apology legislation protects admissions of fault and responsibility, it could lead to an apologizer not taking responsibility for their actions. With an apology given under such apology legislation, an individual can say that they will take responsibility, but can effectively fail to do so without any legal penalty. Yet, it is the act of accepting such responsibility (not just saying it) that makes an apology a full apology. If the apologizer expresses responsibility but does not actually accept responsibility for a wrongful act, then it can be argued that apology legislation transforms the “apology” into a non-apology. In this way, apology legislation potentially transforms full apologies into partial apologies. As shall be seen, the encouragement of apologizing without adequate responsibility could have drastic consequences given that taking responsibility for an offense is seen by many to be a necessary and even essential part of an apology.32

31 Vines, supra note 20 at 25.
IV. Is There a Legal Need For Apology Legislation?

The widespread enthusiasm for apology legislation is hardly surprising given the current popularity of apologies in general. Apologists these days seem to be everywhere. Governments, religious leaders, corporations, and even celebrities all seem to be apologizing. In this so called “Age of Apology,” it has become trendy and almost common place to issue public apologies. Yet, despite their popular use, under the common law an apology can have serious legal ramifications. Technically, apologies are a form of hearsay, however, they have long been considered an exception to the hearsay rule and therefore are admissible as evidence in a court of law. The *United States Rules of Evidence* specifically state that an admission of fault by an opposing party is not hearsay, and the law recognizes an apology, when freely made, as being an admission. As such, apologies can be used as evidence or even viewed as an admission of guilt in a court of law. Apologies can also have a large impact on a defendant’s insurance coverage as many insurance policies negate coverage if the policy holder apologizes.

Since apologies can be admitted and used as evidence, they have traditionally been viewed as litigation suicide by civil defendants. Taken together with the danger of losing insurance coverage, potential litigants have often been advised by their legal representatives to avoid apologizing. Filled with the fear that an apology could destroy their case or that they

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34 USCS Fed Rules Evid R. 801(d)(2).


may lose their insurance, many defendants keep silent even when they would like to apologize, or at least that is the perception.

Apology legislation is often enacted in the name of removing these legal barriers to apologizing, a sentiment that was eloquently expressed in the statement of purpose for Hawaii’s bill\textsuperscript{39} that put forth that state’s apology legislation:

\textit{While it is only civil and humane to apologize and offer sympathy or other expressions of understanding to persons who have been harmed in some way, the reality of lawsuits oftentimes prevents such expressions of apology or sympathy from being made for fear that they will be used subsequently as an admission of liability. Many people will bring a claim or a lawsuit against another person or other entity for the simple reason that there has been no apology or expression of empathy. Particularly in our State, the Aloha State, it is regrettable that members of our statewide community cannot reach out to others in a humane way without fear of having such a communication used subsequently as an admission of liability. This Act will allow such expressions without fear of their being used against those who express such sentiments to others.}\textsuperscript{40}

These noble aims closely match the motivations of the senator in Massachusetts who first championed apology legislation. However, the reality of the need for such motivations must be questioned. Do a great number of would-be apologizers fail to apologize out of fear of subsequent consequences? Does real harm result when an apology is withheld?

Despite the dire warnings given by legislators and legal counsel alike, there is evidence that giving an apology may not always be detrimental to a defendant, even without the protection of apology legislation. In fact, making such an apology may even render legal benefits to a defendant.


\textsuperscript{40}Bill 1477, \textit{A Bill for an Act relating to the Hawaii rules of evidence; Apologies}, 21st Leg., Hawaii, 2001.
There seems to be an assumption that because an apology is admissible as evidence it will automatically establish guilt. This is actually not the case.  

What really matters is not the giving of the apology but what the apologizer specifically says. Stating “I’m sorry” on its own is unlikely to prove a plaintiff’s case, although a more detailed apology that provides elements of the plaintiff’s legal burden, such as a statement of fault, may do so.  

However, even making a “dangerous” apology that includes a statement of fault is not necessarily all bad news for a defendant as there seems to be a certain amount of respect for apologies within courtrooms. While an apology may assist in satisfying a plaintiff’s burden of proof, such indications of remorse are often seen in a positive light by judges and juries. In fact, an apology can be a mitigating factor, and a lack of an apology be taken negatively, as courts may be less likely to award higher damages against defendants who apologize, than those who do not.  

It must also not be forgotten that apologies made during the course of mediation and/or settlement negotiations are already normally afforded protection from being admitted into evidence. Communications made between the parties in an attempt to settle a legal dispute are usually considered to be privileged. It is unlikely that an apology made in the course of attempting to settle would be admissible as evidence, even without the introduction of apology legislation.

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41 Sones, supra note 36 at 9.
42 Ibid. at 10, citing B. Berger, personal communication, 26 March 2006.
44 Ibid. at 119.
Taken together, therefore, the negative attitude towards apologies may not be an accurate reflection of how they are actually treated within a courtroom. However, it cannot be denied that under the common law an apologizer does run the risk of having their apology counted against them in a court of law. As well, the strong perception that apologies are legally damaging makes it likely that people will be advised to not apologize and/or will not do so out of misguided fear of the consequences. In addition, our adversarial court system discourages apologies as a matter of traditional practice. To be conciliatory runs counter to our “you must lose so I can win” legal system,\textsuperscript{47} which even discourages direct contact or conversations between a plaintiff and defendant.\textsuperscript{48}

\textbf{V. The Benefits of Apologies}

Before deciding to encourage apologies by protecting them from being entered as evidence, legislators must carefully consider whether apologies are important enough to warrant erasing a long standing exception to the hearsay rule. There is a mounting body of scientific evidence that suggests that they are of such importance, as a number of studies have supported the commonly held belief that true and full apologies are beneficial. Apologizing, it seems, not only generates benefits for victims of wrongdoing, but also to the individual apologizing, organizations, and even society as a whole. Understanding these benefits may help to assist legislators in the drafting of apology legislation.

a) \textbf{Victims}

\textsuperscript{47} Sones, \textit{supra} note 36 at 9.
\textsuperscript{48} \textit{Ibid.} at 10.
On the surface it can seem odd that an apology could have an impact on a person who has been wronged or even physically harmed. After all, even the most sincere apology cannot change the past, heal a physical wound, or undo a harmful act. Yet, apologies seem to have these kinds of effects on victims.49

Several scientific studies have examined the impact of apologies on victims, and many, although not all, have indicated that an apology can promote emotional healing of an individual who has been harmed. A true and proper apology can help to heal emotional wounds, repair relationships, allow a victim to move on with their life, and in effect mitigate the damage caused.50 According to Lazare in his book On Apology, an apology is so powerful because it satisfies a psychological human need.51 As humans we need to have self-respect and dignity, both of which, Lazare argues, an apology can restore.52

When a wrongdoer express remorse and responsibility, the victim has the opportunity to obtain some form of relief, and release their feelings of resentment and anger.53 Being given a forum to express these feeling to the person who has caused them harm can be very cathartic to a victim. It is an acknowledgement that the victim has been wronged, had a “right” to be upset, and ultimately that they have moral worth.54 This in turn restores self-respect and dignity. In addition, a “complete and heartfelt apology retracts or cancels such messages of degradation and worthlessness”55 that may result from victimization.

49 Marrus, supra note 25 at 76.
50 Govier, supra note 33 at para 8.
51 Lazare, On Apology, supra note 32 at 44-45.
52 Ibid. at 45.
54 Vines, supra note 20 at 9.
55 Govier, supra note 33 at para 6.
There is evidence that an apology can even lead a victim to feel empathy towards the apologizer and that “empathy mediates forgiveness.”56 Forgiveness, despite being a term that is difficult to define universally, has been shown to be very beneficial to a victim’s mental health as it releases their feelings of resentment, anger and hatred towards the offender, helps a victim to accept what has occurred, and diminishes their focus on the past.57 In fact, psychologists have found that repentance by a wrongdoer is one of the most significant factors that influences a victim’s decision to forgive.58 The act of forgiving someone is a courageous and moral act59 and if a victim can reach such a state they can feel pride in having been strong enough to obtain it.

It must be noted that there is some scientific evidence that apologies are not always beneficial to victims and could even be harmful. Some scholars argue that receiving an apology may hinder the forgiveness process, and there is research that indicates that this can particularly be the case when a perpetrator offers an apology for an offence that was intentionally committed.60 In addition, some scholars maintain that apologies may feel good to victims, but are in fact detrimental as they only assist “to cultivate a spurious sense of victimhood.”61 This in turn creates and continues a sense of grievance that is actually unhealthy.62

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59 Ibid. at 71-72.
61 Govier, supra note 33 at para 23.
62 Ibid. at para 24.
Whatever the end result, however, research indicates that many victims feel, for whatever reason, that they need to receive an apology from the person that caused them harm. Therefore, the perception of many in our society is that they want and perhaps even need apologies.

b) Offenders

Despite the impression that an apology can legally damage a defendant’s case, extending an apology can be psychologically beneficial to the apologizing party. In fact, the reasons for apologizing may not be as selfless as we might like to believe. There are many different reasons why an offender may choose to apologize. These motives range from the self-serving, such as to escape or reduce punishment, and/or to relieve a guilty conscience, to the seemingly altruistic, such as apologizing to salvage and restore a damaged relationship, or to help diminish their victim’s pain. Even in these more altruistic reasons, an element of personal benefit to the apologizing party can be seen, as salvaging a relationship could be beneficial to the offender, and diminishing another’s pain can be a means of lessoning an offender’s guilt. Therefore, despite the seemingly altruistic motivations to apologize, the reasons for apologizing are often more self-focused.

Providing an apology can also be empowering to an offender as it shows that they have the moral courage to speak the truth despite suffering negative consequences as a result. In addition, an apology can be a powerful tool in helping to rebuild a wrongdoer’s public image and

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there is some indication that people who apologize are more likely to be seen as good and moral individuals who are unlikely to commit further wrongs. Some even argue that apologies offer little healing to victims, and really only benefit offenders by allowing them a cathartic means to save face and avoid liability.

c) Organizations

Apologizing may also be good for institutions such as businesses and non-profits organizations. While many business leaders find it difficult to apologize, an immediate and properly delivered apology, even when not protected by apology legislation, rarely hurts a company, and actually nearly always helps. It has also been reported that corporations that enable staff to apologize for errors, have significant reductions in litigation and their related costs.

One need only think of the Listeria outbreak that occurred at a Canadian Maple Leaf Foods’ plant in the summer of 2008 as an example of how a full and sincere apology can not only help to overcome a crisis, but benefit a company’s brand name or organization. The situation involved a food-borne illness caused by the bacterium Listeria. Maple Leaf Food meat products contaminated with Listeria were distributed across Canada and the deaths of twenty Canadians were linked to eating tainted meat. When the outbreak was discovered, the CEO of Maple Leaf Foods, Michael McCain, quickly appeared and personally offered a public apology

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67 Vine, supra note 20 at 10.
68 Regehr, supra note 22 at 428.
70 Ibid.
on both the internet and in television ads paid for by the company.\footnote{How Maple Leaf is handling the Listeria outbreak” Canadian Broadcasting Company (28 August, 2008) online: <http://www.cbc.ca/money/story/2008/08/27/f-crisisresponse.html>.
} Despite the risk of losing insurance coverage and having the apology used against the company in litigation, Mr. McCain was explicit in taking full responsibility for what had occurred, saying that “we are deeply sorry,”\footnote{Message from Maple Leaf Foods regarding Listeria Recall” Maple Leaf Foods Channel Youtube (23 August, 2008) online: <http://www.youtube.com/user/MapleLeafFoods#play/uploads/8/cgk3o3AJM2U>.
} and that Maple Leaf was taking immediate action to resolve the crisis.

The move to apologize so quickly and without reservation, restored public confidence in the company. Maple Leaf Foods was subsequently able to settle a class action lawsuit, brought by victims of the outbreak, for $27 million dollars in December 2008. The settlement was reached very quickly in legal terms, and considering the number of victims (the settlement also covered those who had become ill but did not die), the settlement was for a comparatively low amount of compensation.\footnote{Compare it to the $1 billion settlement paid out to 6,000 Canadians who contracted hepatitis C from tainted blood before 1986 and after 1990. Interestingly, when the 2006 settlement was announced victims noted to news organizations that while the money was important, so was the government’s acknowledgement. See “Forgotten victims’ hear tainted blood settlement details” Canadian Broadcasting Company (15 December, 2006) online:< http://www.cbc.ca/health/story/2006/12/15/hepc-settlement.html>.
} The manner in which Maple Leaf’s CEO handled the matter was roundly applauded, and he was even named Canada’s 2008 Business Newsmaker of the Year by the Canadian Press for turning a public health disaster into a business success story.\footnote{Maple Leaf Foods CEO business newsmaker of the year” The St. John’s Telegram (2 January, 2009) online::< www.thetelegram.com/index.cfm?sid=206304&sc=82>.
} A true and full apology therefore can help organizations to not only overcome difficult situations, but benefit from them.

d) Society

Apologies are more than just an interaction between an offender and victim, they also serve an important social function. Scholars argue that apologies, particularly those that acknowledge...
fault, restore moral balance between an offender and victim⁷⁶ and are important moral devices that teach, affirm, and reinforce moral norms in a community.⁷⁷

Apologies are often seen by people as an “appropriate ethical response” to the infliction of harm.⁷⁸ Therefore, an apology is in effect an affirmation by the apologizer that they belong to the wider moral community⁷⁹ and adhere to a certain set of values. An offender who offers a true apology is agreeing that a certain moral code has been broken, and that it was wrong to have done so, thereby proclaiming that the moral code was worth adhering to. In this way, apologies help to both teach and uphold the moral values that we as a society hold dear.

On a more personal level, through an apology the apologizer is in effect repositioning himself as a moral being within the community, while the victim is being recognized as having moral status and moral worth. In addition, a true apology that is given and accepted suggests that the offender and victim share and accept the same moral code,⁸⁰ thereby reaffirming their membership in the same community.

Apologies also serve the public interest since it benefits society as a whole to have individuals who are capable of empathizing with the pain of others⁸¹ and recognizing when they have hurt someone. In effect, being able to truly and authentically apologize means that the offender has a moral compass, which benefits society as a whole. Additionally, apologies offer an unofficial means to resolve disputes without resorting to physical violence or the legal system. This in turn saves individuals and even society from injury, wasted time and financial cost.

⁷⁶ Vines, supra note 20 at 9.
⁷⁸ B.C. Discussion Paper, supra note 11 at 1.
⁷⁹ Vines, supra note 20 at 7.
⁸⁰ Ibid. at 9.
⁸¹ Ibid.
e) The Legal System

Apologies fit well within the relatively new emphasis in our legal system on alternative dispute resolution, and helping victims to heal. The traditional court system, with its rigid procedures and rules of evidence, often does not allow victims to fully express their viewpoints, or offenders to express their regret. Apologies, particularly when part of the settlement process, are a means of addressing the specific needs of a victim.\(^82\) This in turn can help foster settlement, which leads us to one of the main motivations for enacting apology legislation.

VI. Motivating Factors: Encouraging Apologies to Reduce Litigation

As can be seen, the act of apologizing can generate any number of different benefits. While legislators cite many of these as reasons for implementing apology legislation, one of the biggest motivating factors is to reduce litigation rates. Many proponents of apology legislation contend that there is a direct correlation between apologies and lower rates of litigation.\(^83\) This claim is based on the belief that victims who receive apologies are more likely to accept offers of settlement, or may even be deterred from suing in the first place.\(^84\)

Legislators promote this reduction in litigation as a real benefit to litigants (including victims), our judicial system, and the state. By clearing court dockets and lowering litigation costs, everyone wins but the lawyers (or so the argument goes). Medical malpractice in particular has often been cited as benefiting from apology legislation as there is allegedly

\(^82\) Marrus, *supra* note 25 at 88.


evidence that encouraging apologies lowers the number of malpractice lawsuits. 85 It is easy to see why in Canada, with its state-run healthcare system, such a benefit would be of particular interest to legislators. It is also hardly surprising that health care providers have strongly advocated for the introduction of apology legislation in jurisdictions such as Ontario. 86 Yet, whether there really is such a strong positive correlation between apologies and rates of settlement is not as scientifically proven as proponents of apology legislation might have us believe.

a) Apologies and the Decision to Settle or Sue

Arguments made in favour of apology legislation often include antidotal accounts of how an apology in a particular case reduced tension between the parties, opened the lines of communication, and/or otherwise helped to bring about a settlement. 87 From there it is often reported that apologies can have a major impact on litigation rates, for as the theory goes, a forgiving litigant is less likely to file a lawsuit 88 and is also more likely to settle. It is believed that the healing power of an apology helps to change the victim’s emotional status, which in turn means the victim does not need to be as punitive as they would otherwise be against their offender. As a result, victims do not need settlements to be as punishably high, 89 thereby increasing the likelihood that the parties will reach an agreement. If this reasoning is correct, 85 B.C. Discussion Paper, supra note 11 at 2.  
86 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 39 (March 10, 2009) at 1540 (David Orazietti) [Hansard].  
88 Davenport, supra note 83 at 101.  
89 Ibid. at 102.
then ironically, offenders who do not apologize out of fear of litigation may in fact trigger or unnecessarily prolong a lawsuit.90

Given the many benefits rendered by apologies, it would seem to make practical sense that there is a positive correlation between apologies and higher rates of settlement. Unfortunately, much of the “proof” relied upon, is antidotal, and provides little evidence that an apology given under apology legislation will have a major impact on a victim’s decision to litigate or settle. Also, despite the many claims that there is a link between apologies and settlement, there has actually been very little scientific study regarding to what degree apologies in general influence a person’s decision to settle.91 Even in the area of medical malpractice, there is little conclusive data to suggest that apologies significantly reduce the frequency of malpractice actions.92

A few empirical studies have claimed that there is a correlation between the giving of apologies and settlement. However, the majority of these empirical studies contain a fatal flaw: they have not studied people actually involved in civil cases and/or victims who have received apologies. Instead, most of the research findings currently available derive from participants who read a scenario, and then recorded how they imagined they would react and/or feel. Psychology researchers have recognized that such surveys are subject to “artificiality”, as they are only capable of collecting from participants a recollection of their past actions, or their prospective or hypothetical actions. As such, they cannot be relied upon to measure a person’s actual response in the real world.93 In other words, research conducted by asking people how they think they would react, can only tell us what people believe they would do, not what they

90 Kleefeld, supra note 1 at para 11.
91 Robbennolt, “Apologies and Legal Settlement”, supra note 84 at 462.
actually would do if they were faced with the exact same scenario in the real world. Given the moral and social importance given to apologies, the perception of participants that an apology would have a major impact on their decision to sue or settle is hardly surprising. Whether they actually would be so strongly influenced is another question, and not so easily answered.

Some of these studies regarding the supposed influence of apologies on settlement also exhibit major flaws that call the real-world application of their findings into question. For example, in a study conducted by Russell Korobkin and Chris Guthrie, the “apology” being measured: “I know this is not an acceptable excuse, but I have been under a great deal of pressure lately,” does not meet the definition of a true apology. This statement, which contains a qualifier and does not include an apologetic word like “sorry,” may in fact not even qualify as a partial apology since it is more of an excuse than a statement of regret. Therefore, the study’s conclusion that those who receive an apology are marginally more likely to accept an offer of settlement, must be called into question.

In addition, several of the most cited empirical studies in this area have involved a relatively small number of participants with a large number of variables, thereby dividing the number of participants into smaller groups as comparators. For example, a widely cited study by Robbenold that concluded that a full apology positively impacted the participants’ willingness to accept a settlement offer involved one hundred forty-five participants who reviewed one of seven different test scenarios. Another study that concluded that a “full apology is better than
a partial apology and that a partial apology is (often) not different than no apology99 involved three hundred and sixty-one participants who were randomly assigned to one of sixteen experimental conditions.100 Similarly, in a study involving lawyers and apologies, one-hundred and ninety participants101 were asked to respond to one of eighteen different scenarios.102

While within each study there was some cross over between the different test scenarios (for example in the lawyer study only three variables were manipulated), it is discerning that a very small number of participants were asked to respond to the exact same test scenario for each study. In the lawyer study for example, it appears that only ten to eleven participants were assigned to an identical test scenario. The smaller the number of participants for each scenario, the greater the margin of error, and the lower the confidence that the results of the survey can be repeated.103 This is important as it makes it less likely that the results of these studies are an accurate reflection of the general population.104

This lack of scientific evidence is particularly true for partial apologies, as there is little to no scientific data supporting the existence of a positive correlation between partial apologies and lower rates of litigation.105

There are a few studies involving real potential litigants which seem to suggest that there is a positive correlation between the encouragement of apologies and lower rates of litigation. One often cited example of the cost-saving benefits of implementing a policy aimed at

99 Ibid. at 494.
100 Ibid. at 494.
102 Ibid. at 370-371.
104 Rubin, supra note 93 at 606.
105 Runnel, supra note 13 at 152-153.
encouraging apologies is that of the Lexington Veterans Affairs (VA) Medical centre in Kentucky. In 1987 the hospital initiated a policy whereby hospital authorities would seek out a patient and/or their family whenever an “adverse event” occurred at the hospital. The hospital authorities would make the victim aware of the hospital’s error, issue an apology and make an offer of financial compensation. In addition, hospital staff would help the victim to obtain further financial assistance such as disability benefits, and make recommendations regarding legal representation. The hospital has reportedly reaped a great economic reward from this policy as it has had fewer malpractice claims and lower claim costs than hospitals in the private sector. Perhaps even more tellingly, prior to implementing this policy, the Lexington VA hospital’s legal claims payouts were amongst the highest for VA hospitals in America, afterwards it paid among the least. This suggests that the granting of an apology helped to not only stop litigation from occurring, but lowered the amount of money that victims were willing to settle for.

While the Lexington VA hospital appears to have had success with its policy of making apologies, it does not necessarily mean that encouraging apologies through apology legislation encourages settlements, particularly in the private sector. For one, a VA hospital serves a very specific group of people, that being veterans. Perhaps even more important is the fact that at Lexington more than just an apology is being offered. The hospital is not only going out of its way to inform patients of something they might not otherwise have been aware of (thereby

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106 See for example B.C. Discussion Paper, supra note 11 at 2.
107 Davenport, supra note 83 at 86.
108 Ibid. at 87.
109 Ibid. at 86.
110 Taft, “Opportunity or Foil”, supra note 58 at 84.
111 Ibid. at 85.
building trust) but it is also making offers of financial settlement and further support at the same time. More than just an “I’m sorry” is being bestowed. It could even be considered the ultimate true apology since the hospital voluntarily accepts full responsibility for their mistake, not only by compensating the victim, but also by working with the victim to find alternative means to overcome the damage that has been inflicted.

For similar reasons, the use of other much cited hospital studies such as the University of Michigan Health System\textsuperscript{112} must also be used with caution as proof that apology legislation will reduce rates of settlement. While the University of Michigan, and other hospitals like it may have drastically reduced their rates of litigation and allegedly saved “millions in malpractice fees,”\textsuperscript{113} like the Lexington VA hospital, the University of Michigan did so using a policy of not just apologizing, but of being proactive and making full disclosure of medical errors. That is, the hospital informed patients in a forthright manner that a medical error had occurred, even if victims would not have otherwise been aware of it.\textsuperscript{114} Such a scenario is very different from what is offered by apology legislation, which only mandates that a wrongdoer can say something without legal penalty, and places no obligations on the apologizer to act in a certain manner towards his victim.

The reality is that there are a number of different factors that can influence a victim’s decision to sue or settle. These include such things as the cost of litigating, likelihood of success, other relationships involved, motivations, cultural norms,\textsuperscript{115} severity of the injury,\textsuperscript{116} the cost of

\textsuperscript{112} See B.C. Discussion paper, supra note 11 at 2.
\textsuperscript{114} Ibid.
treating the injury, whether there are long-term or permanent consequences caused by the wrongful act, \(^\text{117}\) and in Canada, the risk of having costs awarded against them. Decisions regarding litigation are not only about attributing blame or seeking revenge but rather, involve a balancing of different factors. \(^\text{118}\) A fully recovered patient is less likely to sue than one who is injured permanently. Similarly, the parent or spouse of a person killed may be more likely to launch a lawsuit even if an apology is rendered since they may be less swayed by a doctor’s remorse “than by the enormity of the loss suffered.” \(^\text{119}\) It also cannot be forgotten that even a person who has forgiven an offender may still need to sue to recover financial costs they incurred as a result of their injuries. \(^\text{120}\)

This is not to deny that an apology may be one of the factors a victim may take into account when making decisions regarding litigation. However, apologies, particularly those given under apology legislation, may not be the magical solution that legislators are hoping that they will be. In fact, it appears, based on what we know of apologies and how they work, that current apology legislation may be particularly ineffective in achieving the desired effect, \(^\text{121}\) as it may not encourage the types of apologies that are likely to positively influence victims to accept offers of settlement, and may lead to apologies that do the exact opposite.

b) Does Apology Legislation Encourage the “Right” Types of Apologies for Settlement?

Apology legislation may persuade wrongdoers to apologize to their victims, however, it may not encourage “good” apologies. Apologies are not all created equal. There are “good”

\(^{117}\) Baker, supra note 92 at 1188.


\(^{119}\) Baker, supra note 92 at 1188.

\(^{120}\) Vines, supra note 20 at 15.

\(^{121}\) Ibid. at 22.
apologies and “bad” apologies, and while the difference may not seem great to the apologizer, it can be of vital importance in the mind of the victim, and thereby, how they react to an apology.

This is an important factor that legislators often do not seem to consider. An apology, it has been said, is not a soliloquy. An offender may offer an apology, but most of the benefits, including whether it has a chance of positively influencing settlement, largely depend on whether the apology is accepted by the victim. Therefore, the nature and wording of an apology is vital. To understand what types of apologies are more likely to be accepted we must consider how apologies work and psychologically impact victims.

Research indicates that the benefits of apologies largely stem from victims experiencing feelings of empowerment, in part because they have a choice to either accept or refuse the apology. A wrongdoer is therefore placed in a humbling position, while the victim takes a position of power over the perpetrator as it is up to the victim to either accept or reject the apology. This in turn causes a rebalancing of power between victims and offenders. In effect, offenders and victims are exchanging power and shame, with apologizers taking the shame from victims and directing it towards themselves. It is believed that this rebalancing of power helps to initiate healing, forgiveness and hopefully allows victims to move on with their lives.

However, for this rebalancing to occur and these benefits to be fully realized, an apology must be of sufficient quality for the victim to accept it. The quality of the apologies being

123 Vines, supra note 20 at 10.
125 Sones, supra note 36 at 4.
generated by apology legislation is therefore very important,\textsuperscript{126} as they must be of the type that victims will believe to be a full apology and accept. While this can be very subjective as each victim has different standards of what they expect and require, an apology is more likely to be accepted if it is genuine, sincere, timely, made to the correct person,\textsuperscript{127} meaningful,\textsuperscript{128} and contains an acknowledgement of fault. This last factor is particularly important since, as perviously noted, many consider the acceptance of taking responsibility to be the most important element of an apology.\textsuperscript{129} An apology that does not acknowledge fault costs an apologizer much less, putting the rebalancing of the parties in jeopardy.\textsuperscript{130} Therefore, to be effective, an apology must often express some sort of responsibility.\textsuperscript{131}

Michael Marrus gave the example of a particularly ineffective or “bad” apology” as “I’m sorry that you misunderstood me.”\textsuperscript{132} This may appear to be an apology but in reality it not only fails to acknowledge fault but places the blame on the victim. Such “apologies” can cause victims to suffer further harm as it suggests that they are not smart enough to understand the offenders’ true meaning, thereby leading victims to feel insulted and re-victimized.\textsuperscript{133}

As can be seen, there are ramifications for making a bad apology. In fact, missing the mark with an apology can often do more harm than good, both to the victim and the apologizing party. Botched apologies run a greater risk of not only being rejected, but of angering or re-

\textsuperscript{126} Ibid. at 5.
\textsuperscript{128} Alter, \textit{supra} note 21.
\textsuperscript{129} Ibid.
\textsuperscript{130} Vines, \textit{supra} note 20 at 12.
\textsuperscript{131} Marrus, \textit{supra} note 25 at 80.
\textsuperscript{132} Ibid. at 79.
\textsuperscript{133} Ibid. at 79.
victimizing the victim and causing them further harm. In addition, a lackluster apology can place victims in a difficult situation, as they must then decide if the apology, despite not meeting their expectations, is enough for their purposes and should be accepted. Where a victim has been put through a great deal of pain and suffering due to the acts of the offender, being placed into such a circumstance can be overwhelming.  

Apologies that are viewed as insincere by victims could also negatively impact offenders. Such “apologies” may lead to further aggression by victims, further strain relationships or even “fuel bitter vengeance.” The raising of such emotions hardly puts victims in a forgiving frame of mind, and therefore could decrease the likelihood that they will be willing to settle.

Unfortunately, to date many legislators have failed to take these consideritations into account when drafting apology legislation. While generally aimed at increasing apologies, little thought seems to have gone into whether the legislation will generate and encourage “good” and effective apologies. For example, it would seem to go without saying that for an apology to be successful it must actually be made to the right person, that usually being the victim and/or persons otherwise impacted by the wrongful act such as the victim’s family members. This important factor appears to have been taken into account in the original apology legislation enacted in Massachusetts, which limited its protection to apologies made to victims and/or their families. Yet, despite being such a basic element to encouraging real and meaningful apologies that could benefit those who have been harmed, Canadian jurisdictions have not included such a requirement in their apology legislation. An offender could theoretically therefore make an

134 Sones, supra note 36 at 5.
135 Vines, supra note 20 at 12.
137 Rainey, supra note 127 at 115-116.
apology to an unrelated third party, such as a police officer or even a passerby, and have that apology protected from being used as evidence to prove liability.

The popularity of apology legislation that does not protect apologetic statements of fault is an even stronger example of how legislators may not be fully considering whether the legislation they are enacting will generate the right types of apologies. Under such so-called partial apology legislation, it is unlikely that offenders will admit responsibility since such admissions could still be used against them. As a result, victims often only receive expressions of sympathy in jurisdictions that only protect partial apologies.\(^\text{138}\) Yet, partial apologies do not always positively impact victims to the same degree as full apologies, and they could be harmful to victims who have been severely injured.\(^\text{139}\) There may even be evidence that partial apologies are particularly good at enraging victims and actually increase the chances that victims will sue or continue a legal action.\(^\text{140}\) This again seems to especially be the case where a wrongdoer has caused significant harm to their victim.\(^\text{141}\)

As partial apologies are more likely to be rejected or even anger victims, they are also unlikely to persuade victims to settle. Bestowing protection only to partial apologies therefore is unlikely to positively influence rates of settlement, and could even have a negative impact on fostering settlements and reducing litigation.

If partial apologies are unlikely to produce apologies that are beneficial to victims or help lead to settlement, what of apology legislation that does protects statements of fault? Unfortunately, while full apology legislation may encourage apologizers to make statements of fault, it may still not generate apologies that victims are likely to accept as genuine. This is due

\(^{138}\) Kleefeld, \textit{supra} note 1 at para 32.

\(^{139}\) Vines, \textit{supra} note 20 at 17.

\(^{140}\) Robbennolt, “Apologies and Legal Settlement”, \textit{supra} note 84 at 508.

\(^{141}\) Sones, \textit{supra} note 36 at 3.
to the fact that apology legislation that protects statements of fault, conceivably removes the need for an apologizer to take real responsibility and/or make reparations even after they have apologized.

Accepting true responsibility is more than just saying a few words. It is an action that requires something more from the apologizer, whether that be compensation, humiliation or some other cost for apologizing. An offender who verbally acknowledges their fault, but then hides this fault in court behind apology legislation is in effect failing to take full responsibility for their actions, and the damage they may have caused. Apology legislation could be seen as an easy means for offenders to avoid responsibility for a wrong they have committed and in the end offer nothing to their victims. Notice for example that while people are free to give apologies under apology legislation, there is no corresponding need for offenders to actually do anything for their victims, such as offer compensation. To apologize, in other words, costs an offender nothing.

Such knowledge on the part of victims may have a detrimental impact on their willingness to accept even sincere apologies given under apology legislation. As with partial apologies, seemingly full apologies given under apology legislation could be seen by victims as insufficient since they do not subject the apologizer to any high cost or risk. As such, even a “full” apology may not have the same impact on the victim, and may lead the victim to question the sincerity of the apology or ask if it was genuinely given. By creating such uncertainty, apology legislation makes it less likely that an apology, even a genuine one, will positively influence a victim to accept an offer of settlement. Therefore, apology legislation

142 Govier, supra note 33 at para 25.
143 Rainey, supra note 127 at 118.
may taint all apologies to such a degree that it destroys what little impact apologies could have on rates of settlement.

The key to an effective apology is not what is said, but the actions that are undertaken as a result of it. By failing to back-up an apology with actions and/or compensation, the apologizing party runs the risk of devaluing that apology in the eyes of the intended recipient. I myself have seen how an apology can be devalued in this manner, and that a plaintiff can be incensed by an apologizing defendant who does not take fiscal responsibility for their perceived wrongful actions. As a former Human Rights Officer at the Ontario Human Rights Commission I have mediated a number of disputes between Complainants and Respondents. I found that Complainants, when considering settlement offers, would often question whether the amount offered would make Respondents realize that they had acted inappropriately. This was true even if an apology had also been offered. One of my cases in particular showcases the need for an offending party to pay an adequate “cost” in the eyes of a victim. In the beginning of our settlement discussions the Complainant was willing to settle the dispute for an apology and some moderate compensation. When I communicated the offer to the Respondent he readily agreed to provide the apology, but was only willing to give a pittance in compensation in the form of vouchers. The Complainant was insulted. To him the offer showed that, despite the apology, the Respondent just “did not get it” and it increased the Complainant’s anger. The apology had little value since the Respondent had attached little monetary value to the Complainant’s complaint. By offering so little in compensation, the Respondent’s apology could not be taken seriously by the Complainant. The Respondent had devalued his own apology. The Complainant turned the offer down, raised his own financial offer substantially, and sought to take the matter to the Human Rights Tribunal, even more convinced that he was right to push the matter to a hearing.
This example also showcases how an apology can have unintended consequences. Instead of helping, the Respondent’s bad apology did him more harm than good.

c) The Dangers Using Apology Legislation to Encourage Settlement

There may be ways to draft apology legislation so that it is more likely to encourage the types of apologies that are accepted by victims, and thereby stand a greater chance of positively influencing victims to settle. For example, legislators could only provide protection for full apologies that include promises of compensation that apologizing parties would be legally obligated to fulfill. They could also mandate that only apologies made by offenders (unless it is a corporate body), directly to the parties that they injured will be protected. However, when considering how apology legislation could be drafted to encourage victims to settle, it must also be asked whether legislators should be trying to use apologies for this purpose in the first place. The existence of a positive correlation between a victim’s decision to settle and receiving an apology has been disputed in this thesis. However, what if such a relationship did exist? The full implications of encouraging victims to settle through apology legislation are rarely examined closely. While there are many benefits to settling disputes, there are also potential risks and downsides, particularly with settlements generated through apology legislation.

i) Victims and Settlement

While there is always a danger that parties will settle their claims for seemingly inappropriate amounts and/or consideration, apology legislation in particular lays the groundwork for such abuses as it plays on people’s emotions. If proponents of apology legislation are right, then there is a real risk that victims, in particular those who are emotionally
vulnerable, could be swayed easily by apologies, and therefore accept inappropriately low settlements. By saying that apologies increase rates of settlement by making victims less punitive, proponents of apology legislation are in effect expecting victims who receive apologies to agree to less compensation for their injuries. This in turn means that there is a real potential for abuse by defendants, who may be tempted to make an apology strategically for the sole purpose of reducing their settlement payouts. An unsuspecting victim may believe that a strategic apology is meaningful and real, and therefore end up being a victim of manipulation by the “apologizing” party, the implications of which can be far more serious than just hurting a victim’s feelings.

Victims of wrongdoing can suffer more than just emotional pain. Many are afflicted with real physical injuries, particularly under the areas of the law that apology legislation is often targeted towards, such as medical malpractice and personal injury. While apologies may emotionally heal these victims, what of their real physical injuries? What of families who have lost their primary income earner through injury or death? Suing for wrongdoing is more than about seeking revenge or trying to “get back” at a perpetrator. Monetary damage awards, with the exception of punitive damages, are intended to reflect actual, concrete damages suffered by the plaintiff. The money paid in damages is meant to not only compensate victims, but also to assist them with their lives that have been made more difficult as a result of the actions of the defendant. Compensation is a means to help victims rehabilitate themselves and hopefully return them to leading productive lives. Who truly suffers when a victim accepts a lower settlement than they are entitled to or fails to launch a lawsuit? Who really benefits?

144 B.C. Discussion Paper, supra note 11 at 4.
145 Cohen, supra note 39 at 856.
There is no question that apologies have a place in settlement. They can be considered a form of compensation for the emotional or moral pain that a victim has suffered. However, with emotional compensation there must also be practical compensation. The goal of settlement should not be settlement at any cost, especially when that cost is potentially being borne by those who have already been injured and/or are emotionally vulnerable. Instead of only focusing on how apology legislation increases the chances of settlement, consideration must be given to the types of settlements being made, and whether they provide fair compensation for what victims have suffered. Otherwise, we run the risk that apologies will be used as a means of manipulating victims and causing them further harm, instead of benefiting them.

ii) The Cost of Settlement to the State

The cost of inappropriately low settlements is borne by more than just victims themselves. Injured victims who are damaged to the point that they cannot work or function without assistance must either pay for this assistance themselves or seek help from the state. Monetary settlement awards help victims to pay their living and treatment costs. Without such settlement monies, victims are more likely to turn to the state for assistance. Therefore, when a victim accepts a lower settlement amount or even fails to seek compensation from the perpetrator, there may be a cost to the state that we all pay for. In this way, society as whole may bear a significant burden as a result of the “benefits” offered by apology legislation.

We also must ask if we as a society want to encourage apologies from offenders who fail to make some commitment to practical amends. An apology that is not accompanied by help or compensation to address the wrong that has been committed, rings hollow, and may in fact be

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147 Vines, supra note 20 at 15.
148 Kleefeld, supra note 1 at para 49.
worse than no apology.\textsuperscript{149} By fostering lower settlements, apology legislation could create a means for offenders to avoid taking fiscal responsibility for their actions or paying for their mistakes.\textsuperscript{150} The downside risk for such “bad settlements” is borne by all of us.

In addition, lawsuits are often only seen in negative terms: they cost money, time and energy. Yet, lawsuits do serve a positive purpose in that they act as a deterrent to offenders and would be offenders alike. Members of a society who are aware that offenders are held responsible for acting inappropriately or without the proper standard of care, are less likely to repeat a mistake if they are successfully sued.\textsuperscript{151} Ironically, taking steps to not repeat an error is an element of a true apology. By encouraging settlement at any cost, legislators may be doing away with this important component of apologies, and thereby inadvertently create more victims and greater harm.

This is not at all to say that settlement in of itself is a bad thing. Victims who are spared a long, drawn out court battle can also benefit. However, much depends on the nature of the settlements themselves, and whether they are fair and the needs of victims are being met. While these are issues that are unlikely to ever disappear completely when it comes to settlement, these are elements of apology legislation that legislators should consider and attempt to address. Finding solutions to these problems is difficult since the source may be the very act of enacting apology legislation. Apology legislation aimed at increasing rates of settlement makes apologies a type of tool, a means to an end. A tool, however, can be misused, and given the high stakes at play in litigation, there is little question that there will be those who will try to turn apology legislation to their own advantage.

\textsuperscript{149} Govier, supra note 33 at para 8.
\textsuperscript{150} \textit{Ibid.} at para 25.
\textsuperscript{151} Christie, supra note 146 at 764.
iii) The Encouragement of Insincere and Fake Apologies

One of the greatest dangers of apology legislation is that it may protect or even encourage the ultimate “bad” apology, that being the false or insincere apology. The actual or perceived “positive benefits” of lowering litigation costs and increasing the chances of settlement create an incentive for unremorseful defendants to offer an insincere apology for the sake of a monetary gain. These incentives may just be too tempting for unscrupulous defendants who are not at all sorry, but are willing to say so for their own benefit.

Such strategic apologies are not only worthless, and morally questionable, but could potentially damage victims. They can create hope in victims, followed by greater despair when this hope is dashed by offenders who recant their remorse or fail to follow through on their implied commitments. Imagine accepting an apology and agreeing to a lower settlement, only to learn that the apology was insincere and given as part of a legal strategy, or even worse that the offender had committed the wrong again. It is likely that such duplicity would cause additional harm to a victim, including greater anger and aggression. In this way, apology legislation could be creating a means for wrongdoers to manipulate victims, particularly those who place a high value on healing and forgiveness.

Trying to protect individuals from accepting insincere apologies and/or entering into harmful settlements can be difficult since it is often hard to know an individual’s motivations for apologizing. All that legislators can do is try to draft apology legislation and put in safeguards

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152 “Apology' legislation gives wrongdoers a safe haven” Trial 41.7 (July 2005) 10(1) [Safe Haven].
153 Govier, supra note 33 at para 53.
154 Ibid. at para 53.
155 Vines, supra note 20 at 12.
156 Kleefeld, supra note at para 49.
that help counteract possible abuses. Given the wide use and very nature of apologies, this may prove difficult to do. What is needed are safeguards, such as making it a requirement that anyone who enters into a settlement involving an apology must obtain independent legal advice. Without such advice the settlement would be considered unenforceable. Ensuring that victims must talk to a lawyer before agreeing to a settlement would make it less likely that victims would unknowingly sign away their legal rights. However, for such a system to work, legislators would likely have to limit the application of apology legislation to such regulated areas as medical malpractice and/or insurance claims. Otherwise the rule could prove unenforceable, as it may be impossible to know if a settlement between private individuals involved an apology, unless it was written into the actual agreement.

Limiting the application of apology legislation to medical malpractice claims, could be particularly helpful at curbing the abuse of apology legislation, as the largely controllable environment of apologies given by medical staff makes it an ideal candidate for enacting protective measures. Legislators could enact legislation that is similar to the Lexington VA hospital policy of not only disclosing and apologizing for medical errors, but assisting the victim after the fact. This last step is crucial; victims must be left with more than just words. There must be some positive action by the apologizer to back-up and follow through on the apology. That is, apologizers must take some sort of responsibility for their error, and must take steps to make, or at least attempt to make victims whole. Unfortunately, it is unlikely that such a requirement could be applied to a wider application of apology legislation beyond medical malpractice claims.

Limiting the protection of apologies to one or two areas of the civil law, as is currently done in several American jurisdictions, is not a perfect solution. For one, it seems rather
disingenuous to protect only one category of people (for example doctors) from their apologies. Protecting only some people from their apologies leads to questions as to why and which groups should be protected. Is a health care provider more deserving of apology protection than a cab driver or lawyer?\textsuperscript{157} Another danger is that applying apology legislation to only certain areas of the law could be confusing for the general public. Making apology legislation overly complicated and legalistic by limiting it to only certain areas of the law reduces the likelihood that people will make apologies, particularly without seeking legal advice. This in turn could delay the giving of an apology, which may increase the chances that it will end up being formalistic and ineffective.

Obviously, there are no easy solutions to these difficult issues. If apology legislation is to be applied widely and to so many different areas of the law, then the solutions will need to be similarly as large and all encompassing. The only real solution to lessen the chances of abuse is to even the playing field and ensure that recipients of apologies have access to the same level of legal assistance as apologizers. Even then there are no guarantees that abuses will not happen. However, that is the nature of the legal system. The tools are used, and sometimes abused; the most legislators can do is set the up system so that it can be as fair as possible.

\textbf{VII. The Wider Impact of Apology Legislation on Victims, the Legal System, and Society}

Apology legislation does not exist in a vacuum. Not allowing or limiting the use of apologies in court to prove fault can and likely will have a wide impact on victims, the legal system, and even society. This wider impact of apology legislation is an important consideration for legislators who are contemplating the enactment of apology legislation, as there could be

\textsuperscript{157} Taft, “Opportunity or Foil”, \textit{supra} note 58 at 80.
negative effects that in the end outweigh the actual or even anticipated benefits of protecting apologies.

a) Inadmissible Evidence

The protection of apologies, particularly those containing an admission of fault, may have very wide legal consequences that could prove detrimental to victims. Depending on what is specifically said, an apology, especially an admission of fault, can be a valuable piece of evidence in a civil trial. Admissions, such as apologies, have long been allowed under the common law. Under apology legislation, however, vital admissions of fault by a wrongdoer, or other equally important information, could be rendered inadmissible if the offender happens to also offer some form of sympathy towards the victim.158 Excluding such evidence from being heard by a judge or jury would obviously benefit the offender.159 Conceivably, a civil wrongdoer who admits his guilt could end up escaping liability by merely tacking on an “I’m sorry” at the end or even simply voicing a few words of sympathy.160 This concern was raised by Peter Kormos in the Ontario Legislature when debating the adoption of apology legislation in Ontario. Specifically he noted that:

you’re denying them [victims] the single, most valuable piece of evidence, if it happens to be part of the case, a first-party admission of liability. It could be detailed, it could be sentences long: relevant, highly relevant, probative, highly probative evidence being denied an innocent injured victim.161

The implications of excluding such evidence are potentially serious, prompting some to question whether the introduction of apology legislation is not so much about encouraging apologies, but

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158 Christie, supra note 146 at 766.
159 Cohen, supra note 39 at 856.
160 Christie, supra note 146 at 766.
161 Hansard, supra note 86 at 1630.
rather is a means of limiting liability for defendants, in particular for certain types of defendants, such as doctors. Mr. Kormos spoke of this as well in the Ontario Legislature, stating that the Apology Act was really about protecting insurance companies and saving them money.

This issue is particularly concerning in jurisdictions with broad apology legislation that applies to all civil law matters and all types of “apologies.” For example, in Canadian jurisdictions the definition of apology has been widely cast to include expressions of regret, sympathy, contrition or commiseration. In addition, legislators have not placed limits on who the apology is made to, the content of the apology, or the area of civil law to which the apology applies. Under such legislation, an offender could conceivably purposely harm an individual, make a full confession to an unrelated third party that contains the word “sorry,” and have the entire content excluded from evidence.

It is questionable whether victims are being helped by having such information excluded, particularly, since there is nothing to stop a defendant from stating one thing in an apology and then saying the exact opposite while testifying in court. Allowing such incidents to occur could be seen as a form of re-victimization and it is hard to explain how victims are better off if they are unable to use information that may be vital to proving their case. There is also the additional question of whether we as a society want to allow someone to make an apology, and then counteract it by saying the exact opposite in court. In effect, this could be seen as allowing or even encouraging perjury.

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162 Cohen, supra note 39 at 856.
163 Supra note 9.
164 Hansard, supra note 86 at 1710.
165 Ontario Apology Act, supra note 9.
166 An extreme example might be the offender saying to an unrelated third party “sorry I was late but I caused a car accident”.
Arguably, the exclusion of such evidence is actually the point of apology legislation. Victims receive apologies because wrongdoers are able to apologize without fear of having it count against them in court. However, allowing a wrongdoer to avoid liability due to apology legislation is unlikely to be seen in a positive light by a victim or society in general, especially if a victim is initially fooled into believing that an apology was sincere. Where a wrongdoer has admitted that they did something wrong, it is difficult to understand how the courts can turn a blind eye to such vital evidence. An apology would likely be cold comfort to a victim that believes a person who caused them harm escaped responsibility on what could be viewed as a technicality. Not only could victims be further victimized, but such conduct could also be seen as undermining the legal system, and perhaps even damaging to society.\textsuperscript{167} Not allowing such evidence could lead to a lack of public confidence in the courts if a defendant who has admitted liability is not found liable.\textsuperscript{168}

This is not to say that apology legislation should be completely done away with on the grounds that it allows for the exclusion of important evidence. What is really needed is balance between allowing evidence and protecting legitimate apologies. One way this could be achieved would be to follow the lead of South Dakota which excludes statements of apology except for statements against interest that are admitted for the purposes of impeachment.\textsuperscript{169} That is, an apology could only be admitted into evidence if the apologizer, while testifying in court, makes a statement that is inconsistent with the original apology. Under such legislation, if the defendant said one thing in an apology and then made a contradictory statement in court, then the apology could only be used for the sole reason of impeachment.

\textsuperscript{167} Vines, \textit{supra} note 20 at 2.
\textsuperscript{168} B.C. Discussion Paper, \textit{supra} note 11 at 4.
\textsuperscript{169} S.D. Codified Laws \textsection{} 19-12-14(2008).
Canadian jurisdictions could already provide for such a loophole, as our apology legislation only disallows the use of apologies to prove liability of fault. Since impeachment is not the same as fault, it could be argued that apologies could be entered into evidence to show that the testifier has made inconsistent statements. However, while no Canadian court has ruled on such a situation, an American court has rejected this argument. In *McKinlay v. Novak*\(^{170}\) a Georgia court dismissed the proposition that a doctor’s apology, which was protected by apology legislation, could be entered into evidence as a prior inconsistent statement. The court noted that to allow such admissions would render the apology legislation virtually meaningless, which could not have been the intention of legislators.

The Court’s reasoning does have some merit, as such an exception could have a chilling effect on apologies, particularly those that include admissions of fault. Arguably this would negate the entire point of apology legislation. However, it seems disingenuous to allow a defendant to effectively lie either within court or in an apology. Defendants should not be able to say one thing in an apology and then claim the opposite while testifying. This goes against the entire moral concept of apologizing. In addition, giving apologizers carte blanche to provide differing accounts is not justice, and apology legislation should not be used as a means of offering contradictory accounts of what occurred in the interests of avoiding responsibility. Therefore, I would argue that apology legislation should allow an apology to be used as evidence for the purposes of impeachment where an apologizer testifies in a manner that contradicts their apology. Under such legislation it would really be the apologizing party that decides whether the apology remains protected or not, as it would only be admissible when the apologizer has made the choice to take the stand and testify in a manner that contradicts the apology.

b) The Use of Apologies to Lower Damage Awards

In many jurisdictions, including those in Canada, apology legislation does not completely ban apologies from being entered as evidence in Court. In many cases the legislation is specific in saying that apologies cannot be used to prove fault or liability, however, it is silent on the use of apologies for other purposes. Given these circumstances, it appears that apologies could be admitted into evidence for the purpose of assessing damages.\footnote{Kleefeld, supra note 1 at para 7.}

Allowing apologies to be entered as evidence to help determine damages could prove detrimental to victims. As has been previously noted, courts like apologies as they are frequently seen as sincere signs of remorse.\footnote{Rehm, supra note 43 at 125.} Courts often take a defendant’s remorse, or a lack of it, into consideration when determining monetary damage awards. Apologies are especially taken into account in particular types of lawsuits such as those involving child abuse where the decision to award punitive damages can largely depend on whether the defendant shows remorse and/or apologized.\footnote{Alter, supra note 21.}

Punitive damages in general are particularly impacted by whether an apology is offered or not. Under Canadian law, punitive damages may be awarded where “the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency.”\footnote{Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para 196 [Hill].} Punitive damages are not meant to compensate the victim, but rather are aimed at achieving the objectives of retribution, deterrence and denunciation,\footnote{Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595 at para 43.} and they have been described by the Supreme Court of Canada as being “the means by which the jury or judge
expresses its outrage at the egregious conduct of the defendant.” 176 Given the moral element to punitive damages, it is perhaps unsurprising that a defendant’s failure to apologize is a factor that can be taken into account when assessing them. 177

The end result is that an apology can mitigate a defendant’s financial damages since those who show remorse and make a sincere apology in civil cases are judged more favourably than those who give no apology. 178 Therefore, even a defendant who is found liable could reap an economic benefit by apologizing. 179

Allowing defendants both to hide their apologies during the liability stage of a trial, and showcase them once found liable, further increases the likelihood that defendants will make false and/or insincere apologies. There is no downside for a defendant in such a scenario as the apology cannot be used against him in a negative way, in fact it can only really be used to a defendant’s advantage. Such a situation seems patently unfair and would likely penalize victims. Added to this is the possibility that the victim may be well aware that the apology was insincere and only given as part of the defendant’s litigation strategy. Such a scenario could be viewed by victims as a mockery of the concept of justice.

It may be that courts will take the protection afforded by apology legislation into account when determining damages, thereby lowering the value given to the apology. There is some indication that an apology loses its positive impact if the judge believes that the apology is insincere and only being offered because the defendant believes they are going to be found

176 Hill, supra note 174 at para 196.
guilty anyway. Such “apologies” may anger the judge and result in a harsher punishment, although this is not always the case as judges sometimes seem to turn a blind eye to what is really motivating an apology and whether it is sincere.

In the Missouri case of *Re Coe* for example, several members of the state’s Supreme Court noted that they were willing to reduce the punishment of a lawyer found guilty of professional misconduct if the lawyer in question publicly apologized. The lawyer had previously been found in contempt four times, and been ordered into custody as a result. Perhaps unsurprisingly, after such prompting by the Court the lawyer apologized. A dissenting judge viewed the apology with some disgust, stating that “questions regarding the sincerity of the respondent’s apology compound the injury to the process.” What is interesting in this case is that despite such strong indications that the lawyer’s apology was self-motivated (she had refused to apologize for four years), and her history of refusing to apologize for similar wrongful behaviour unless she was under duress, the majority of the Supreme Court still decided to lower the lawyer’s punishment. Instead of being suspended from the practice of law, she was only publicly reprimanded, all because she “apologized.”

If an apology cannot be used to prove fault, then it should not be allowed to show remorse. Such a double standard not only raises the risks that a victim will be further victimized, but increases the likelihood that defendants will be tempted to offer apologies for the wrong reasons, or make false apologies as a form of insurance in case they lose their court case. It also seems morally questionable to create a system in which defendants can hide their remorse (which is supposed to benefit a victim), but then allow the person who has committed the wrong

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181 *In re Coe* (1995), 903 S.W.2d 916 (Sup. Ct. Missouri) at 920.
to use this same remorse for their own benefit. An apology is supposed to be about making amends and taking responsibility. Under apology legislation an apology could be used to do the exact opposite.

There are two possible solutions to resolve this problem. First, apologies could be excluded as evidence for the purposes of determining any and all damages. Such a wide encompassing bar to apologies while tempting, is likely not the best solution since it would do a disservice to defendants who are truly remorseful, have made a full apology, and taken real responsibility for their wrongful behaviour. Instead, legislators may want to consider not allowing apologies to be admitted for the purpose of assessing damages unless the defendant has also allowed their apology to be entered as evidence for the purpose of determining fault. Such a system would allow defendants to protect their apologies if they wish to do so, however, they could not turn around and use an apology to their sole benefit.

c) The Depreciation of Apologies

To give a full apology and completely accept the legal consequences of making that apology often takes courage and is a truly moral act. Apologies offered under these circumstances are valued highly by victims precisely because they are difficult and risky for the apologizer to make. We are more likely to believe that apologizing offenders are truly sorry because they are willing to pay the “cost” of their wrongdoing.

As previously noted, to disrupt this process, as apology legislation does, is to in effect reduce the value of the apology, and perhaps raise suspicions that the apology was improperly motivated. Apology legislation increases the chances that an apology will be used as an
“exchangeable good,” or bargaining chip. While it could be argued that apologies have always been a form of moral exchange, apology legislation goes one step further, turning a once largely moral process into a marketable commodity. Yet, to turn apologies into pawns of litigation strategy further devalues apologies in general, making them mere words with little meaning.

Under apology legislation, therefore, the apologist faces no risk in apologizing, does not have to take any real responsibility for the harm they have caused, and could be offering an apology for purely strategic reasons. As such, there is a real danger that apology legislation could potentially destroy the moral integrity of apologies given in the course of litigation. This would not only render apologies of little use in litigation, but could do away with the power of apologies and their ability to help victims, even in situations where the apology is truly genuine.

This situation can be compared to the perception towards court ordered apologies. Such apologies, which are in effect the fulfillment of legal orders that parties must show remorse even if it is not truly felt, are often dismissed as having little worth. Such expressions are “not only fruitless when mandated by the court,” but diminish “the very real mitigating effect on a genuine expression of remorse by an accused person.” By ordering an apology, the motivations of the apologist are brought into question. It becomes impossible to know if the apologizing party is truly remorseful, or only fulfilling the Order. This in turn can negate the benefits of an apology. By ordering a party to apologize, a court may in fact be causing the victim more harm than good.

183 Taft, “Apology Subverted” supra note 35 at 1149.
184 Ibid. at 1146-1147.
185 Ibid. at 1156.
186 Ibid. at 1153-1154.
187 Ibid. at 1157.
188 Kleefeld, supra note 1 at para 33.
Similarly, by making apologies a strategic tool through apology legislation, the motivations of an offender who makes an apology can never be truly known. As such, even apologies that are made without strategic motivations and for purely for moral reasons can be called into question by victims. Therefore, apologies given under apology legislation are potentially not as powerful or valuable to victims as those given without such protective measures in place. In this way, apology legislation could potentially destroy the potential benefits of apologies given in the course of litigation.

While the devaluing of apologies by individual victims is problematic in of itself, there is a real danger that the loss of this moral integrity within the legal sphere could lead to cynicism towards apologies in general and their eventual depreciation. The law has a very real impact on society’s morals, and it can even be considered a type of codification of our society’s view on what constitutes a truly immoral act. As such, refashioning apologies under the law may alter how they are viewed in the “real world.”

The danger is that apology legislation, by fostering apologies without real responsibility or even encouraging false apologies that benefit wrongdoers, may create cynicism towards apologies in general, thereby destroying their value in society. Even truly remorseful apologizers could lose as a result. This could have very wide implications. As previously noted, apologies are powerful vehicles not only for restoring and vindicating victims, but for teaching, affirming and reinforcing societal and moral norms. Through apology legislation, apologies could lose some of their perceived value within society. Taken to the extreme, such negation could lead to the loss of a powerful tool of resolving conflict in our everyday lives. For these reasons we must not be cavalier about the encouragement and use of apologies. They are a powerful moral instrument and their integrity should be protected.

189 Vines, supra note 20 at 7.
VIII. Conclusion

Sincere and full apologies offer a vast number of different benefits for victims, offenders, the legal system and society as a whole. Given these benefits, and the perception that apologies help to lower rates of litigation, it is hardly surprising that legislators across North America and Australia have sought to encourage apologies by disallowing their use as evidence to prove fault. However, the particulars of the apology legislation that has been enacted thus far raise a number of questions and concerns, including whether such legislation is truly needed in the first place.

Legislators are often motivated to enact apology legislation due to the perception that apologies induce victims to settle or forgo legal action, thereby lowering rates of litigation. While an apology may play a role in victims’ decision to settle, it has yet to be proven that it is the main or even a major factor taken into consideration. Apology legislation may also dilute the power of apologies to such a degree that they not only fail to positively influence victims to settle, but encourage them to continue or even launch litigation. In addition, the use of apologies to induce settlement should be carefully considered by legislators. The benefits of settlement are many, but victims could be further victimized and society could end up paying a high cost.

There is a need for legislators to look carefully at apology legislation and consider what impact it will have, and whether it will yield positive results. Apology legislation as it stands now will likely encourage apologies, however, whether it will generate “good” apologies that will truly benefit victims is questionable. Such legislation removes the need for an apologizer to take real responsibility for their actions, which is an important, and some would argue essential component of a true apology. By removing the element of responsibility, apology legislation may lead to the devaluation of apologies, and cause greater harm to victims. It may even
encourage offenders to give false or insincere apologies for the sake of their own monetary gain. Further, apology legislation could have a large, and perhaps negative impact on victims, our legal system and society itself, particularly if victims are barred from using evidence to prove their case, only to have this same evidence used against them.

Instead of enacting a one-size-fits-all apology legislation, legislators must carefully draft apology legislation so that it encourages the types of apologies that will actually benefit victims, but will not cause further harm or a miscarriage of justice to occur. Apologies and apology legislation have a place in our judicial system but as with all powerful tools, they must be managed with care, treated with respect, and handled in the firm understanding that they can both help and harm.
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