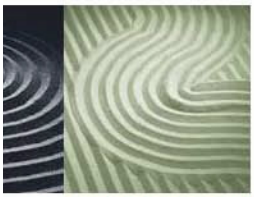

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THE PROPOSED ONTARIO APOLOGY ACT, 2008

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Introduced into the Ontario legislature on October 7, 2008, Bill 108, the proposed *Apology Act, 2008*, appears on its face to be aimed at changing the laws of evidence. In truth, what legislators actually seek to change is the communication between potential litigants before a statement of claim is even contemplated. The motivation is to reduce the cost of litigation and the price of settlement.

History: U.S. and Canada

The first apology legislation was passed in Massachusetts in 1986 with Texas and California following suit in 1999 and 2000 respectively. Today, more than 20 states have passed apology legislation that varies in terms of the kind of apology excluded from evidence, the type of cases in which the legislation applies and the period of time in which the 'offender' can make a 'free' apology.

In Canada, British Columbia was the first province to enact apology legislation. Unlike the first legislation in the U.S. it defines 'apology' and does so broadly:

> "Apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault in connection with the matter to which the words or actions relate.

With the above definition, the B.C. legislature adopted the broadest form of protection for apologetic statements from among the models available to it. It also provided that protection in the broadest of contexts in that the legislation applies to both negligent and intentional torts and in civil, administrative and criminal proceedings.

After the B.C. act was passed in May 2006, Saskatchewan and Manitoba followed suit with legislation modeled on the B.C. precedent. Saskatchewan elected to amend its *Evidence Act* rather than pass stand alone legislation.

Ontario Bill 108: An Act respecting apologies

The Ontario bill is similar to the B.C. act in that it defines 'apology' in the same broad manner. It also explicitly states that a party's rights under an insurance contract are not affected by their apology.

An important difference in the proposed Ontario bill is its application to civil and administrative proceedings only. The bill explicitly states that it does not affect the admissibility of any evidence in criminal proceedings or any proceeding under the *Provincial Offences Act*.

It should be noted that despite some recent headlines to the contrary, there is nothing in the proposed legislation that would prevent someone from commencing a claim after they receive an apology. The legal effect is only relevant to whether the evidence is admissible in court.

The Purpose and Effect of Apology Legislation

Direct effect: a change in the laws of evidence

As noted above, the literal effect of the bill is a change to the laws of evidence; its provisions are most obviously aimed at limiting what is admissible as evidence for the purpose of proving liability.

Generally, the hearsay rule prevents out of court statements from being admitted into evidence for the purpose of proving the truth of the statement. However, there is an exception in Canadian law that allows for the prior statements of parties to the proceeding to be admitted and used as evidence for the truth of the contents of the statement.

For example, a statement by a health professional to a patient that he or she administered the wrong medication shortly after the incident may, under the current law, be entered into evidence at trial for the purpose of proving that the wrong medication was in fact administered.

With the passing of Bill 108, such a statement will become inadmissible if it is made as part of an apology. For example, “I am so sorry that I provided you with the wrong medication.” Though, to be clear, only the above statement would be inadmissible, nothing in the proposed Act prevents the facts (i.e., that the wrong medication was administered) from being proven in some other manner.

Another way in which the proposed bill will change the laws of evidence at trial is by eliminating the ability to cross-examine a defendant on their previous statements. Thus, this may prevent an attack on the credibility of the witness in cases where they had previously admitted an error which they now deny.

This latter change may be viewed in particular as a potential disservice to plaintiffs who receive an apology but are not satisfied or would have commenced a claim in any event. It has led some to criticize the legislation, stating that it has the potential to erode public confidence in the courts if a person admits fault but is subsequently found not liable in a proceeding.

Indirect purpose: encouraging apologies and discouraging lawsuits

Ironically, the above changes to the admissibility of evidence during the last stage of litigation, the trial, are actually made for the purpose of affecting the communication between parties before litigation is even started. It is anticipated that apology legislation will help parties communicate openly and honestly about what has happened and thereafter move quickly towards a resolution. The real goal is that litigation will be avoided altogether, either because the wronged party is satisfied entirely by a sincere apology or because the offender will, having apologized, be in a position to reach a settlement that is fair and reasonable.

There is some evidence in the U.S. that apology legislation will be successful in achieving these goals, particularly from the Veterans Affairs Medical Center in Lexington, Kentucky. The hospital is often cited as an example of the success of apologies in reducing both the quantity and cost of medical malpractice litigation. After 1987, when the hospital implemented a policy of full disclosure and apology for medical errors, only three cases reportedly went to trial in 17 years, the average settlement rate was lowered to US$16,000 compared to the U.S. average for veterans hospitals of $98,000 and cases closed in an average of two to four months, rather than the national average of two to four years.

Despite these reported results, critics of apology legislation worry that potential plaintiffs, having received an apology, may be deterred from commencing a claim during an emotionally difficult period, despite their need and right to recover damages from another party. It is also a concern that the disclosure of information may be strategically embedded in an apology so as to maintain some control over its use in the future.

To date, the above criticisms, and the success of the legislation, remain theoretical in Canada as the acts have yet to be considered by a court and there have been no studies released regarding the effect on litigation or settlement.

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