

Apology Legislation: Should it be Safe to Apologize in Manitoba?

An Assessment of Bill 202

L E A N D R O Z Y L B E R M A N

On 12 April 2007, Liberal Leader Dr. Jon Gerrard introduced Bill 217 at the 5th Session of Manitoba's 38th Legislature.¹ The bill—also known as *the Apology Act*—allows a person to make an apology without it constituting an admission of legal liability. The following will assess Dr. Gerrard's bill, later re-introduced as Bill 202, to determine its merit and possible effects if passed. Prior to doing so however, a brief discussion of the various forms of apologies and their importance will ensue. It is necessary to first understand this to properly assess the bill's value. This paper will also present a survey of apology legislation in the United States, Australia, and Canada, including policy considerations throughout. Finally, a discussion of Manitoba's bill will follow, contemplating its benefits and disadvantages, to determine its merit and, consequently, whether it ought to be introduced in the province.

I. INTRODUCTION: THE IMPORTANCE OF APOLOGIZING

Prior to embarking upon a discussion of apology legislation, it is necessary to understand a few basic principles. Doing so will bring the significance and requirements of such legislation to light. First, it is imperative to analyze the different types of apologies and their importance as, depending on what form an apology takes, its effect will vary. Second, analyzing the substance of apologies is necessary to understanding their effectiveness.

There are two types of apologies, public and private. Government apologies are a good example of the former, since they are made in public for public purposes. The latter primarily encompass apologies for tortious wrongs,

¹ Bill 207, *The Apology Act*, 5th Sess., 38th Leg., Manitoba, 2007.

particularly negligence.² It is important to note that regardless of its type, an apology will not be effective unless it includes an acknowledgement of fault. An apology has no meaning or force unless the person who is expressing regret is also taking responsibility for a wrong committed.³ In other words, the effectiveness of an apology depends directly on its substance.

A person who admits regret and takes full responsibility for their wrongs qualifies as having submitted a “full apology.” In contrast, a mere expression of regret is called a “partial apology.” In the context of civil liability, partial apologies are also called “safe apologies.” This is primarily because an apology that does not acknowledge fault is not incriminating and thus runs no risk of legal liability.⁴ In discussing apologies, Prue Vines states,

Is saying ‘I’m sorry’ an apology? Many people would say that it is not. That is a mere expression of regret, which might operate as a soothing device for small hurts or where the person speaking has no responsibility. An apology does not exist unless the person who is expressing regret is also taking responsibility for a wrong which they have committed. This definition appears to apply whether we are considering an apology from a moral theory point of view or from a psychological point of view. This kind of apology is called a ‘full’ apology. A mere expression of regret is called a ‘partial’ apology.⁵

An example of a full apology would be a person saying, “I am sorry your car was damaged, it was my fault.” In contrast, a partial apology would have no acknowledgement of fault, so that the person would only say, “I am sorry your car was damaged.” Full apologies have great power because, when issued, they have the power to correct whatever harm has been inflicted because the apologizer takes responsibility for the harm done. The apology therefore forces the apologizer into a humbling position that rebalances the relationship by rebuilding the victim’s self-esteem and social status,⁶ thus allowing the healing process to begin. This is why full apologies are valuable to society. Unfortunately, due to a fear of legal liability, many people have come to avoid full apologies.

Overall, a full apology is important because, *inter alia*, it has the power to heal; it can restore self-respect and dignity; and it acknowledges that a mistake has been made and that the offending party will not repeat the action in

² Prue Vines, “The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?” (2007) Vol. 1 The Journal of Law and Social Justice 1 at 5-6; online: <<http://epress.lib.uts.edu.au/ojs/index.php/publicspace/article/viewFile/535/482>>.

³ *Ibid.* at 7.

⁴ *Ibid.* at 8.

⁵ *Ibid.* at 7

⁶ *Ibid.* at 14.

question.⁷ The importance of an apology has been summarized as follows by Howard Kushner in *The Power of an Apology: Removing Legal Barriers*:⁸

Apology is more than an acknowledgement of an offence together with an expression of remorse. It is an ongoing commitment by the offending party to change his or her behaviour. It is a particular way of resolving conflicts other than arguing over who is bigger and better. It is a powerful and constructive form of conflict resolution, embedded, in modified form, in religion and in the judicial system. It is a method of social healing that has grown in importance as our way of living together on our planet undergoes radical change. It is a social act in which the person, group, or nation apologizing has historically been viewed as weak, but more than ever is now regarded as strong. It is a behaviour that requires of both parties attitudes of honesty, generosity, humility, commitment, and courage.⁸

Due to the importance of full apologies, which primarily derives from their power to heal, the need for apology legislation to ensure they are issued ought to be considered. In assessing the need for apology legislation, the British Columbia Ministry of Attorney General paid close attention to the effects of such legislation in the United States. For instance, in 1994 researchers conducted a study of a group of patients and their families who had filed medical malpractice suits. It revealed that 37% of those interviewed might not have commenced litigation if they had been given a complete explanation and an apology. The positive effects of issuing apologies have been noticed in hospitals in the University of Michigan's Health System as well, where, since 2002, doctors have been encouraged to apologize for their mistakes. Malpractice lawsuits and notices of intent to sue have since fallen from 262 in 2001 to about 130 a year.⁹ In addition, Howard Kushner, the acting Ombudsman for British Columbia, noted that recent research in the United States indicates that 30% of medical malpractice lawsuits would not have gone to court if the doctors had apologized to the plaintiffs.¹⁰

It may also be useful to consider Australia's experience with apology legislation to determine if its effects support its adoption in Manitoba. An Australian study of medical complaints showed that 97% of complaints that resulted in an explanation and/or apology had not proceeded to litigation. However, some caution is urged by a more recent study rejecting the idea that

⁷ Howard Kushner, *The Power of an Apology: Removing Legal Barriers*, (Special Report No. 27 presented to the Legislative Assembly of British Columbia, February 2006) online: Special Reports <http://www.ombudsman.bc.ca/reports/Special_Reports/Special%20Report%20No%20-%2027.pdf> at 14.

⁸ *Ibid.* at 15.

⁹ British Columbia Ministry of Attorney General, *supra* note 7 at 2.

¹⁰ Howard Kushner (British Columbia Ombudsman), *ibid* at 13.

there is a simple relationship between disclosure and reduced litigation, particularly in the medical context.¹¹

Overall, the experience of the United States and Australia indicates that if apology legislation is introduced in Manitoba, a likely result will be a decrease in lawsuits following medical malpractice situations. This may be applied to all sorts of situations, and not just medical malpractice suits. Thus, if Manitoba were to experience the same effect as these two countries, many Manitobans are likely to receive an apology from the wrongdoer and forego the trouble and expense of litigation. In other words, such legislation will allow Manitobans who are satisfied with an apology to heal sooner, rather than upon embarking on a lawsuit.

Analyzing apology legislation not only requires understanding the different types of apologies but also the importance of a properly executed apology. Since full apologies promote and facilitate healing, the aim of apology legislation should be to protect such apologies instead of partial apologies. In addition, they should be statutorily protected to ensure that wrongdoers feel comfortable and safe issuing them. Finally, apology legislation may result in a decrease in lawsuits.

II. DEVELOPMENT OF APOLOGY LEGISLATION AROUND THE WORLD

A. United States of America

The earliest apology provisions arose in the United States in 1986 in Massachusetts.¹² By 2007, over 30 states had adopted apology-type legislation. Although approximately 20 of these have incorporated legislation to provide full protection for apologies, in each case this is limited to apologies given in the context of the provision of health care. A further eight have legislated to provide partial protection for apologies made by any person. However, this was limited to apologies that do not include any admission of responsibility or fault. Four states have legislated to provide partial protection only in the context of the provision of health care.¹³

California's *Evidence Code* falls in the group of eight states that address the issue by providing partial protection for apologies made by any person. Section 1160 of the Evidence Code states:

¹¹ Prue Vines, *supra* note 2 at 27.

¹² Prue Vines, *supra* note 2 at 35; Mass Gen Laws ch. 233, § 23D.

¹³ Chris Wheeler, *Apologies: A Practical Guide*, online: Quick links – Apologies <<http://www.nswombudsman.nsw.gov.au/publication/PDF/guidelines/Apologies%20guidelines%20complete.PDF>> at 34.

(a) The portion of 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 that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.¹⁴

It is important to note that the word “accident” means an occurrence resulting in injury or death to one or more persons, which is not the result of wilful action by a party.¹⁵ This is crucial because it limits protection of an apology only to unintentional harm caused by one party to another. In other words, the section only grants protection to an apology related to unintentional harm.

Most importantly, the section only extends protection to “partial apologies,” as the Evidence Code does not protect admissions of fault. This is unfortunate because, as stated previously, partial apologies do not have the same healing effect as full apologies. It could be argued that Evidence Code fails to protect meaningful apologies, only granting limited protection to apologies that do not demonstrate that the wrongdoer is taking responsibility for the act complained of. Thus, in order to achieve the full healing potential of an apology, the Evidence Code would have to be expanded to protect admissions of fault.

Having conducted a 22 state survey, Megan E. Bisk explains that it is possible that the rationale behind restricting protection to partial apologies only is that apology legislation has a limited impact on the manner in which defendants act prior to consulting with an attorney. In other words, since many will not be aware of the legislation until they consult an attorney, such legislation will have no bearing on their actions immediately following an incident.¹⁶ However, this is only a theory, as there seems to be no clear or official explanation for the variation in apology protection.

Utah Senator David Thomas introduced apology legislation at the 2006 General Session, titled *Restrictions on Use of Physician Disclosures* (“Restrictions”). This piece of legislation pertains to the abovementioned group of 20 American states that have introduced apology provisions only dealing with health care. The bill passed third reading on 27 February 2006 and was signed by

¹⁴ California Evidence Code, Div. 9, Ch. 3, §1160; online: <<http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20>>.

¹⁵ *Ibid.* at §1160(b)(1).

¹⁶ Megan E. Bisk, “Apology Statutes: A 22 State Survey,” online: <http://72.14.205.104/search?q=cache:pUW6d_8QF2UJ:web.wm.edu/law/institutesprograms/lawtcp/documents/megan_e_bisk.doc+protection+%2B+partial+apologies&hl=en&ct=clnk&cd=7&gl=ca> at 5.

the governor on 17 March 2006.¹⁷ The law provides admissibility standards for disclosures by health care providers in malpractice actions.

Section 78-14-18 states:

[I]n any civil action brought by a patient as an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, *fault*, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which relate to discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care *shall be inadmissible as evidence* of the admission of liability or as evidence of an admission against interest.¹⁸ [emphasis added.]

Two aspects of this legislation are noteworthy. First, the Restrictions are limited by the fact that they only grant protection to apologies issued by health care providers. Consequently, victims of wrongs committed by any other person may not receive full and proper apologies due to a fear of incurring civil liability. Second, the Restrictions allow for expressions of fault. Therefore, health care providers will be able to issue full apologies, not only asking for forgiveness but also acknowledging their wrongdoing. This is a key factor that distinguishes the section from California's law and allows victims of medical malpractice to receive a full apology.

B. Australia

1. Legislation

New South Wales (N.S.W.) was the first common law jurisdiction to legislate legal protection to the general public for a full apology. That is, one that includes an admission or acceptance of fault or responsibility. It did so by introducing a broad statutory protection through amendments to the *Civil Liability Act 2002* that came into effect on 6 December 2002.¹⁹

Part 10, s. 69 of the *Civil Liability Act 2002*, states that an apology made by or on behalf of a person in connection with any matter alleged to have been caused by that person (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and (b) is not relevant to the determination of fault or liability in connection with that matter.

¹⁷ Utah Legislature, S.B. 41 Substitute Restrictions on Use of Physician Disclosures (Thomas, D.), online: Bill Status <<http://www.le.state.ut.us/~2006/status/sbillsta/sb0041s01.htm>>.

¹⁸ U.S., S.B.41, *Restrictions on Use of Physician Disclosures*, 2006 Gen. Sess., Utah, 2006, § 78-14-18 (enacted).

¹⁹ Chris Wheeler, *supra* note 13 at 33.

Furthermore, evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.²⁰

The apology provisions of the Act mean that an apology does not constitute an admission of liability, and will not be relevant to the determination of fault or liability in connection with civil liability of any kind. Further, due to the definition of “apology” in s. 68 as an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not the apology admits or implies an admission of fault in connection with the matter,²¹ an apology is not admissible in court as evidence of fault.²² However, there are some instances where issuing an apology in N.S.W. might still be problematic.

Section 3B of the *Civil Liability Act 2002* limits the protection for apologies established in Part 10. For instance, the provisions of the Act do not apply to civil liability in respect of an intentional act that is done with intent to cause injury or death. In addition, the Act does not apply to sexual assault or other sexual misconduct or civil liability in proceedings relating to an award of personal injury damages where the injury or death concerned resulted from smoking or other use of tobacco products.²³

Since the incorporation of apology provisions into the N.S.W. *Civil Liability Act 2002*, every other state and territory in Australia has followed the N.S.W. lead and brought in legislation that provides varying levels of protection for apologies or expressions of regret in relation to civil liability.²⁴ An indication that the protections of the N.S.W. Act are working well is that statutory protections largely equivalent to it were incorporated into all Australian defamation laws when they were reviewed in 2005.²⁵

2. Policy

In recent years, the number of Australians that have come to value the importance of apologies has grown significantly. An excellent example of the country’s appreciation of apologies is Australia’s “Sorry Day.” The first National Sorry Day was held on 26 May 1998, offering the community a chance to

²⁰ *Civil Liability Act 2002*, (N.S.W.), s. 69.

²¹ *Ibid.* at s. 68.

²² Chris Wheeler, *supra* note 13 at 33.

²³ *Civil Liability Act*, *supra* note 20 at s. 3B.

²⁴ Chris Wheeler, *supra* note 13 at 34.

²⁵ *Ibid.* at 35.

apologize to Australia's indigenous peoples for the removal of children from their families. One such day saw 250 000 people walking across the Sydney Harbour Bridge in support of the cause. Sorry Day was held between 1998 and 2004, when it was renamed as a National Day of Healing for all Australians.²⁶

These events demonstrate the value that the Australian people place on an apology; showing that an apology is not only important to those receiving it but also to those issuing it. Otherwise, Australia's Sorry Day would not have been as successful. Consequently, apology legislation, by contributing a safe environment in which to issue an apology, fulfills an important social function: that of allowing people to issue and receive apologies.

C. Canada

Unlike Australia and the United States, apology legislation has yet to become widespread in Canada. To date, the only provinces that have adopted apology legislation are British Columbia and Saskatchewan. The former did so in 2006 with the introduction of *The Apology Act*, making British Columbia the first Canadian jurisdiction to introduce such legislation. The latter did so in 2007, when Saskatchewan amended its *Evidence Act* to include apology provisions. Other provinces have considered the adoption of such legislation. For instance, Mr. Don Inverarity, the MLA for Porter Creek South, unsuccessfully introduced an apology bill in the Yukon in 2007.

1. British Columbia

Mr. Lorne Mayencourt, the MLA for Vancouver-Burrard, introduced apology legislation (Bill M202) on 27 February 2006 in British Columbia as a private member's bill. Mr. Mayencourt described the purpose of the bill as specifying that an apology is not an admission of liability and is not admissible in legal proceedings. In addition, he argued that it would remove the current disincentive to apologize for one's behaviour, which often hinders the resolution of disputes. Finally, Mr. Mayencourt stated that the Act allows individuals to apologize to one another, promoting forgiveness and the re-establishment of relationships.²⁷ He stated:

A simple, sincere apology is often the key to avoiding a long and bitter and costly dispute. Apologies help to build public confidence in the administration of justice, and they build stronger communities by allowing people to be civil, to address and to move on with their

²⁶ Australian Government, Culture and Recreation Portal, "Sorry Day," online: Australian Stories <<http://www.culture.gov.au/articles/indigenous/sorry/>>.

²⁷ British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, Vol. 6, No. 13 (27 February 2006) at 2495 (Hon. Bill Barisoff).

lives. The Apology Act encourages the humane way of apologizing for wrongdoings and promotes open and direct dialogue between persons in conflict.²⁸

However, the bill was not passed—probably because private members' bills are rarely passed—and had to be re-introduced at a later session.

Attorney General Wally Oppal introduced a second incarnation of *The Apology Act* on 28 March 2006—this time as Bill 16.²⁹ Upon introducing the bill, Mr. Oppal explained that it is a necessary piece of legislation because British Columbia's current laws discourage people from apologizing. The Act, he suggested, would eliminate concerns that an apology amounts to an admission of liability and would consequently encourage natural, open, and direct dialogue between aggrieved parties.³⁰ Mr. Oppal shared a few stories with the Assembly proving that, oftentimes, what an injured person wants is an explanation and an apology as to what happened. For example, Mr. Oppal recounted an instance where two women were arrested when two cars came to a grinding halt in front of them and a number of undercover police officers jumped out of the cars, pointing guns at them, and told them to get on the ground. This was a case of mistaken identity. In conversing with the victims, Mr. Oppal discovered that had the police apologized and explained their error, nothing else would have been done. Moreover, had the legislation been in place, allowing the officers to apologize, the incident would have ended that night. Instead, the victims lodged formal complaints that damaged the officer's reputations.³¹

Although the bill received much support on its second reading, with Mr. Mayencourt, Ms. McIntyre (MLA for West Vancouver-Garibaldi), Mr. Hawes (MLA for Maple-Ridge Mission), Mr. Farnworth (MLA for Port Coquitlam-Burke Mountain) and Mr. Black (MLA for Port Moody-Westwood) endorsing it, it is important to note that there are potential drawbacks to its coming into force. In weighing the benefits and negative factors of apology legislation in its report on such legislation, the British Columbia Ministry of Attorney General points to three key issues. First, public confidence in the courts could be adversely affected if a person who has admitted responsibility in an apology is found not liable. Second, insincere and strategic apologies could be encouraged. Third, apologies encouraged by such legislation might create an emotional vulnerability in some plaintiffs who may accept settlements that are

²⁸ *Ibid.* at 2496.

²⁹ British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, Vol. 8, No. 5 (28 March 2006) at 3359 (Hon. Bill Barisoff).

³⁰ *Ibid.*

³¹ British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, Vol. 8, No. 7 (29 March 2006) at 3457 (Hon. Bill Barisoff).

inappropriately low.³² Therefore, when assessing whether to introduce such legislation, a jurisdiction should consider both its benefits and drawbacks to determine if the former outweigh the latter.

British Columbia's *Apology Act*³³ came into force in 2006 and provides extensive protection to apologies. The Act accomplishes this by incorporating a broad definition of "apology" that includes an implicit or explicit admission of fault in connection with the matter. It does not limit its protection to medical malpractice, unlike some of the American legislation previously discussed. Section 2(1) of the Act establishes that an apology made by or on behalf of a person in connection with any matter (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; (b) does not constitute a confirmation of a cause of action in relation to that matter for the purposes of s. 5 of the *Limitation Act*; (c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter; and (d) must not be taken into account in any determination of fault or liability in connection with that matter.³⁴ Lastly, s. 2(2) establishes that despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.³⁵

The general effect of s. 2(1) of *The Apology Act* is that it allows people to apologize, either for themselves or on someone else's behalf, in connection with any matter. This apology cannot be interpreted as an expression of fault or liability and is not a confirmation of a cause of action. What separates the Act from other apology legislation in the world is that it extends the protection of an apology to insurance matters. The Act allows a person to apologize without affecting their insurance coverage. This provision is clearly designed to address the standard policy term that an insured person must not assume any obligations with respect to an accident or occurrence for which liability coverage is sought.³⁶ Section 2(2) supersedes any other enactment to ensure that evidence of a full

³² British Columbia Ministry of Attorney General, *Discussion Paper on Apology Legislation*, online: Dispute Resolution Office, Research and Publications—Consultation Papers <http://www.ag.gov.bc.ca/dro/publications/other/Discussion_Apology_Legislation.pdf> at 4.

³³ S.B.C. 2006, c. 19.

³⁴ *Ibid.* at s.2.

³⁵ *Ibid.* at s.2(2).

³⁶ Clark Wilson LLP Insurance Bulletin, *Apology Accepted*, online: Insurance, Case Law Review Archive <<http://www.cwilson.com/insurance/reviews/insrev112.shtml>>.

apology is not admissible in court. In addition, unlike other apology legislation, the British Columbia Act does not limit protection of apologies only to situations of unintentional wrongdoing. This means that British Columbia's Act provides the widest protection available for apologies and, in doing so, increases the circumstances in which people may issue a full apology.

Analyzing the success of British Columbia's Act is difficult because it is still a fairly new piece of legislation. However, it seems that the goal of allowing people to apologize without fear of incurring civil liability will be accomplished due to the Act's wide scope. Restricting protection to only partial apologies or limited circumstances would not allow everyone to apologize, only permitting certain victims to enjoy the benefit of receiving an apology. Therefore, since the purpose of such apology legislation is to encourage every wrongdoer to apologize, such legislation will only achieve its full potential if its scope is unlimited.

2. Saskatchewan

Saskatchewan is Canada's second province to statutorily remove apologies from being admissible in court. However, unlike British Columbia, Saskatchewan did not introduce an apology act. Instead, it amended its current *Evidence Act* by adopting an apology provision. The Honourable Frank Quennell, the MLA for Saskatoon Meewasin, first introduced Bill 21, *An Act to Amend the Evidence Act*, on 6 November 2006. The bill was referred to the Standing Committee on Intergovernmental Affairs and Infrastructure on 12 March 2007. A motion for return followed shortly after, and amendments to the bill received first and second reading, together with an overall third reading of the bill on 9 May 2007. The bill received Royal Assent on 17 May 2007 and was incorporated into *The Evidence Act* as s. 23.1.³⁷

On 13 November 2006, Mr. Quennell addressed the Assembly in support of Bill 21. He stated that introducing such reform to *The Evidence Act* was necessary to allow people to apologize in circumstances where they have wronged someone or in the case where insurance coverage is at issue. Without such legislation, Mr. Quennell argued, people and institutions will not apologize because they have received legal advice that these statements could be used in a future or ongoing lawsuit.³⁸

Speaking at a different session, Mr. Randy Weekes, the MLA for Biggar, while supporting the cause, expressed that caution ought to be employed in accepting the bill. He was primarily concerned with the possible legal

³⁷ S.S. 2006, c. E-11.2.

³⁸ Saskatchewan, Legislative Assembly, *Saskatchewan Hansard*, No. 11A (12 November 2006) at 358 (Hon. P. Myron Kowalsky).

complications of protecting apologies in “very serious instances.”³⁹ In other words, it may not be advantageous to protect apologies in circumstances where, for instance, harm was inflicted intentionally. Taking such concerns into consideration and following several Assembly meetings, the bill received Royal Assent on 17 May 2007 and became part of *The Evidence Act* under s. 23.1.⁴⁰

Section 23.1 of Saskatchewan’s *Evidence Act* has been drafted to resemble British Columbia’s legislation. Therefore, its effect is to protect full apologies in connection with any event, regardless of the wrongdoer’s intent, and extends protection to insurance matters.

3. Yukon

Mr. Inverarity, the MLA for Porter Creek South, introduced Bill 103, *Apology Act*, in the Legislative Assembly of Yukon on 24 April 2007; it was negatived on 30 April 2008.⁴¹ Prior to Mr. Inverarity’s introduction of the bill, the Yukon Ombudsman recommended that apology legislation be adopted in the Territory in its *2006 Annual Report*.⁴²

In expressing support for apology legislation, the 2006 Report draws from the arguments laid out by British Columbia’s Ombudsman, Howard Kushner. After stressing the importance of an apology and the current legal impediments experienced by those residing in jurisdictions that are not legislated, Mr. Kushner is quoted as making reference to the fact that there was evidence emerging in the United States in the area of medical malpractice litigation supporting the view that apologies can reduce litigation and promote the early resolution of disputes.⁴³ In addition, the *2006 Annual Report* points to the fact that drafting of apology legislation is not a taxing exercise, and should be pursued, since it is often composed of few sections. For instance, British Columbia’s Act only has two sections.⁴⁴ The *2006 Annual Report* concludes with Yukon’s Ombudsman recommending the adoption of such legislation. It states:

[P]ositive change can take place when there is institutional support for admitting an error, explaining why it happened and what is being done to prevent a recurrence, and to

³⁹ Saskatchewan, Legislative Assembly, *Saskatchewan Hansard*, No. 17A (22 November 2006) at 555 (Hon. P. Myron Kowalsky).

⁴⁰ Saskatchewan, Legislative Assembly, *Saskatchewan Hansard*, No. 64A (17 May 2007) at 1675 (Hon. P. Myron Kowalsky).

⁴¹ Yukon Legislative Assembly, Online: *House Business—Progress of Bills* <<http://www.legassembly.gov.yk.ca/progressofbills.html>>.

⁴² Office of the Ombudsman & Information and Privacy Commissioner, *2006 Annual Report*, online: Reports <<http://www.ombudsman.yk.ca/pdf/OIPC%20AR06%20E.pdf>> at 9.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

make a sincere apology. Providing a legislative base for doing so through an Apology Act is an important step in that direction.⁴⁵

Mr. Inverarity's Bill 103 emulates British Columbia's Act with one exception: the bill does not mention that an apology does not constitute a confirmation of a cause of action in relation to that matter for the purpose of the *Limitation of Actions Act*.⁴⁶ This means that, potentially, an apology could be used in the Yukon as evidence of confirmation of a cause of action. However, this only amounts to a minor difference because it is difficult to believe that a person will be reluctant to apologize for fear of confirming a cause of action.

Policy arguments for adopting such legislation are similar to those stated previously in British Columbia's and Saskatchewan's legislatures. Mr. Inverarity hoped that the adoption of this bill would clarify the role of apologies from a legal standpoint, lead to earlier and less costly resolution of some disputes, and allow corporations, governments, and individuals to offer an apology without fear of legal liability.⁴⁷

D. The Manitoba Experience

1. Legislative Assembly Discussions

The Honourable Dr. Jon Gerrard, the MLA for River Heights, first introduced *The Apology Act* in Manitoba as Bill 217⁴⁸ during the 1st Session of the 38th Legislature on 12 April 2007. At first reading, Dr. Gerrard explained the purpose of the bill was to allow health-care providers to apologize when a medical error occurs without exposing them to legal liability.⁴⁹ It would also apply in areas covered by insurance.⁵⁰ Dr. Gerrard requested support from Manitoba's Minister of Health, the Honourable Theresa Oswald, as a way of helping all within the health care system to get past, what he described as, "[T]he persistent culture of sealed lips and closed circumstances that characterize the system and be able to apologize."⁵¹ Ms. Oswald then promised to seriously consider the bill due to its potential effect on victims of the health care system, who (having received an apology) would be able to heal. More interestingly, Ms. Oswald stated, "Perhaps

⁴⁵ *Ibid.* at 10.

⁴⁶ R.S.Y. 2002, c. 139.

⁴⁷ Yukon Liberal Party, Arthur Mitchell, *Inverarity Will Table Apology Legislation*, online: Press Releases – 12 April 2007 <<http://www.ylp.ca/content.php?cb=PRESS%20CENTRE>>.

⁴⁸ *Supra*, at note 1.

⁴⁹ Manitoba, Legislative Assembly, *Debates and Proceedings, Official Report (Hansard)*, No. 26 (12 April 2007) at 789 (Hon. George Hickes).

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 797.

I'm the singular person in this House who has not made a wisecrack about this bill today."⁵² After receiving such poor treatment, it is not surprising that Bill 217 did not advance past its first reading.

Displaying great tenacity, Dr. Gerrard re-introduced an apology bill during the 1st Session of the 39th Legislature, this time as Bill 202, on 12 June 2007.⁵³ Dr. Gerrard once again requested support from the Minister of Health, Ms. Oswald. However, rather than stating her position, Ms. Oswald avoided the issue by focusing on other matters. For instance, Ms. Oswald stated that, "I'm glad today is one of the days when the member of the Liberal Party is interested in conducting House business rather than obstructionism."⁵⁴

On 27 September 2007, Dr. Gerrard moved that the bill be read a second time and referred to committee. In doing so, he pointed out that the effect of *The Apology Act* (in conjunction with other bills requiring accountability from health care practitioners) would be to improve Manitoba's health care system. It would not only allow health-care professionals to apologize, it would also help families and patients deal with the fact that there has been an error or medical mistake made.⁵⁵ Once again, the bill was not taken seriously in the House. Kevin Lemoureux, the MLA for Inkster, inquired why the Premier would not acknowledge the value of, *inter alia*, Bill 202 and allow it to go to committee where the public could provide input. In response, the Honourable Gary Doer, Premier of Manitoba, replied, "There's lots of good sales going on, but I would also like to point out to the member opposite, he does not need legislation to apologize to this Chamber."⁵⁶ It is reactions such as Mr. Doer's that prompted Dr. Gerrard—while requesting second reading of Bill 204, *The Personal Health Information Amendment Act* (a complementary bill to Bill 202)—to state the following:

Sadly last week, the NDP blocked and adjourned bill after bill after bill. They are the blocking and adjournment party. This is a sad testament to what has happened to the NDP in this legislature last week.⁵⁷

⁵² *Ibid.* at 798.

⁵³ Bill 202, *The Apology Act*, 1st Sess., 39th Leg., Manitoba, 2007, (assented to 8 November 2007).

⁵⁴ Manitoba, Legislative Assembly, *Debates and Proceedings, Official Report (Hansard)*, No. 5 (12 June 2007) at 123 (Hon. George Hickey).

⁵⁵ Manitoba, Legislative Assembly, *Debates and Proceedings, Official Report (Hansard)*, No. 11A (27 September 2007) at 440 (Hon. George Hickey).

⁵⁶ Manitoba, Legislative Assembly, *Debates and Proceedings, Official Report (Hansard)*, No. 11B (27 September 2007) at 470 (Hon. George Hickey).

⁵⁷ Manitoba, Legislative Assembly, *Debates and Proceedings, Official Report (Hansard)*, No. 13A (2 October 2007) at 636 (Hon. George Hickey).

In addition, Dr. Gerrard stated on the Manitoba Liberal Party's official website that the NDP government decided to purposely stonewall liberal legislation based solely on the fact that the bills were not their idea.⁵⁸ As of 6 October 2007, Bill 202 has yet to receive a second reading.

2. Merit of Bill 202

Prior to discussing the bill's value, it is necessary to note that Bill 202 incorporates all of the provisions in British Columbia's *Apology Act* but one. Thus, like Saskatchewan's *Evidence Act*, Manitoba's bill, if passed, would not protect apologies from being used as a confirmation of a cause of action in relation to the matter for which the apology was issued. This is important because, due to such resemblance, the experience and research conducted in British Columbia, Saskatchewan, and the Yukon could be applied to Manitoba. In doing so, it will be easier to assess whether the bill ought to be passed. It is interesting to note that although Dr. Gerrard continuously mentioned in Assembly meetings that the bill is intended to allow health-care workers to apologize, the application of Bill 202 is not limited to such workers, but extends its protection to all persons.

In addition, s. 2(1)(b) of Bill 202 extends protection of apologies to insurance matters by stating that an apology made by or on behalf of a person in connection with a matter does not void, impair, or otherwise affect insurance coverage that is either available or would, but for the apology, be available, to the person in connection with the matter.⁵⁹ In other words, the legislation is structured to ensure that an apology cannot be taken to be an expression of liability for the purposes of voiding an insurance contract. Such a provision is necessary because, oftentimes, insurance policies contain provisions that void the contract if an admission of liability is made.⁶⁰ Therefore, if introduced as law, Bill 202 would prevent insurance companies from cancelling an insurance contract following an apology. Furthermore, the apology will be deemed to have no bearing on the renewal of the insurance policy because the bill specifically mentions that an apology does not affect insurance protection in instances where, but for the apology, coverage would be available to the wrongdoer. However, it is important to note that if the wrongdoer is found liable through other means, insurance coverage may be altered.

Yet another issue arising under such legislation pertains to the interpretation of an apology. The question is whether an adjoining explanation

⁵⁸ The Manitoba Liberal Party, *NDP Puts up Brick Wall to Stop Hot Liberal Legislation*, online: Archive, September 2007 <<http://mlp.manitobaliberals.ca/?p=345>>.

⁵⁹ *Supra* note 52 at 2(1)(b).

⁶⁰ British Columbia Ministry of Attorney General, *supra* note 32 at 6.

to an apology of the wrong committed may be used as evidence or, if deemed to be part of the apology, is also protected. Although this is not specifically addressed in the legislation, a careful study of the definition of “apology” reveals that adjoining explanations may indeed be protected. The word “apology” is defined in s. 1 of Bill 202 to include a “statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words admit or imply an admission of fault in connection with the matter.”⁶¹ It is possible that adjoining explanations will be characterized as “any other words indicating contrition or commiseration” since such statements do not have to contain admissions of fault. Such an interpretation is supported by Mr. Oppal’s recounting of an arrest conducted on the basis of mistaken identity, where he discussed the incident by characterizing the apology and adjoining explanation as one.⁶² Thus, if such an interpretation of explanations is correct, they may be protected as well.

Allowing people to apologize without a fear of civil liability inevitably means that more people will receive apologies from their wrongdoer. In addition, since Manitoba would protect full apologies, introducing such legislation will help people heal sooner, having received an admission of fault. Sometimes, this is what victims want: to receive an apology and be allowed to forgive the wrongdoer. As stated earlier, some of the functions of an apology include healing—a re-balancing for both the victim and wrongdoer.⁶³ Thus, introducing such legislation will be of great service to both victims and wrongdoers.

With regard to the negative factors of apology legislation mentioned earlier,⁶⁴ it is likely that the positive effects of such legislation will outweigh the negatives. For instance, if public confidence in the courts were to be adversely affected if a person who has admitted responsibility in an apology is not found liable, the courts could issue a statement explaining their decision and how, perhaps due to a lack of evidence or high standard of liability required by the particular charge, the person could not be found guilty. In the case where a wrongdoer would issue a full apology while secretly not feeling remorse, it is important to remember that the goal of protecting apologies is to allow victims to receive one and commence the healing process. Thus, if someone receives a

⁶¹ *Supra* note 52 at s.1.

⁶² British Columbia, Legislative Assembly, *supra* note 31.

⁶³ *Ibid.* at 18.

⁶⁴ Namely, that (i) the public confidence in the courts could be adversely affected if a person who has admitted liability in an apology is not found liable; (ii) insincere and strategic apologies could be encouraged; and (iii) apologies encouraged by such litigation might create an emotional vulnerability to some plaintiffs who may accept settlements that are inappropriately low.

full apology in such a circumstance, the victim will heal and the wrongdoer's lie will have no adverse effect on society. Since these negatives can be addressed on a case-by-case basis, the overall benefit of protecting apologies will outweigh any possible drawbacks. Therefore, Manitoba should follow British Columbia and Saskatchewan and adopt such legislation.

III. CONCLUSION

After considering the different types of apologies and different types of apology legislation, the following conclusions may be drawn. First, apologies have great power. When a person apologizes and acknowledges fault, they accept responsibility for a wrong done, allowing the victim to begin the healing process. Therefore, the effect of apology legislation will depend, *inter alia*, on the type of apologies it protects: protecting full apologies will be more beneficial to wrongdoers and victims. Second, having considered apology legislation in the United States, Australia, and Canada, it is clear that all persons advocating for such a law have the same argument: many people fear apologizing due to the potential of incurring legal liability. Introducing such legislation will allow wrongdoers to apologize and, in turn, allow victims to commence the healing process. Third, studies conducted in the United States and Australia reveal that the effect of such legislation is to reduce litigation, since oftentimes what victims want is an apology and only consider litigation after not receiving one. Fourth, Dr. Gerrard's bill, emulating British Columbia's Act, would provide very broad protection, extending to full apologies issued in connection with any matter.

Bill 202 was eventually passed into force by Manitoba's Legislative Assembly on 8 November 2007. On that day, Dr. Gerrard, seconded by Ms. Oswald, moved for third reading. Bill 202 not only received third reading, but also Royal Assent there and then. At that time, Dr. Gerrard described the event as not only a win for health-care providers who are now able to apologize without having to worry about accompanying legal liability but also for families and those affected by medical errors, who will now be able to deal with such instances in a less accusatory and more enlightened manner.⁶⁵ Consequently, Manitoba has joined some of the most progressive jurisdictions by protecting all sorts of apologies, regardless of who is the apologizer.

⁶⁵ Manitoba, Legislative Assembly, *Debates and Proceedings, Official Reports (Hansard)*, No. 34B (8 November 2007) at 2082-2083 (Hon. George Hickey).

