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Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere

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Abstract

In recent years many common law jurisdictions in the United States, Australia and Canada have passed legislation protecting apologies from civil liability (mostly negligence). §2 of the Compensation Act 2006 (UK) is one of the more recent provisions. It applies in England and Wales but not to Scotland. It also differs significantly from other such provisions. This article explores what lessons can be learned about the likely impact of §2 from the experience in other countries and the literature on apology, whether the legislation is likely to have an effect on the propensity to sue and whether the fact that it does not apply in Scotland will create a significant difference between that jurisdiction and England and Wales in respect of approaches to civil liability.

APOLOGIES AND CIVIL LIABILITY IN ENGLAND, WALES AND SCOTLAND: THE VIEW FROM ELSEWHERE

Prue Vines[*]

INTRODUCTION

In recent years many common law jurisdictions have passed legislation protecting apologies from amounting to admissions of liability or being admitted to court as evidence in civil liability cases. In this context the relevant form of civil liability is the law of negligence, the dominant form of tort applied to cases of personal injury. The UK Compensation Act 2006 contains one of the most recent of these provisions. It applies to England and Wales but not to Scotland,[1] and I understand that the Scottish Law Commission has decided not to investigate the issue of having such a provision at present. It provides by s 2:

> An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.

This provision differs from most of the other apology provisions in the common law world in its brevity, in that it does not define apology and that it makes no provision about admissibility or insurance. It is also striking in that the only remark made about it in the explanatory note for the Act states 'This provision is intended to reflect the existing law.' One might then ask why it is necessary. Does this mean that there is no difference in the treatment of apologies in Scotland where the Act does not apply compared with England and Wales where it does apply? In this article I consider why other jurisdictions have passed legislation protecting apologies and how such legislation has impacted or is likely to impact on the law of civil liability as it operates in the current social context. In short, what lessons can be learned about the likely impact of s 2 of the Compensation Act from the literature and the so far relatively brief experience of other jurisdictions?

THE PERCEIVED NEED FOR PROTECTIVE LEGISLATION

(1)The legislation

In 1986, Massachusetts USA enacted the first legislative protection of apologies designed to prevent the admissibility into court of an expression of regret for the purpose of determining liability in tort. That provision was relatively short. It stated,

> '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]

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[1] Section 17 (1), except for the provisions on mesothelioma (s 3) which apply to England, Wales, Scotland and Northern Ireland: s 17(2).

[2] Massachusetts General Laws Tit II Ch 233, s 23D.

Since then many such provisions have appeared in common law jurisdictions. The majority appeared after 2000, following the various 'tort liability crises'[3] which were perceived in the various jurisdictions during the 1990s and early 2000s. In the United States such a perceived torts crisis also arose in the 1970s and various responses to that were enacted then; however the vast majority of the legislation in all these jurisdictions has appeared since 1999.

Characteristics of the provisions vary. The definition of apology used is either the 'statement of regret or benevolent gesture' which stops short of admitting fault (a 'partial' apology) or the 'full' apology which includes an admission of fault. Most of the provisions protect only partial apologies. Some provisions deem the apology not to be an admission of liability while others only limit admissibility in court. Some provisions directly prevent an apology from affecting insurance contracts. The Canadian provisions also prevent apologies from making time run under limitation acts. The scope of matters where the protection applies also varies. Many provisions in the United States restrict apologies to certain aspects of medical practice or some other aspect of personal injury. In Australia some jurisdictions restrict them to certain areas of tort law. The following table outlines some of the characteristics of the provisions:

TABLE: Apology-protecting legislation by jurisdiction[4]

Jurisdiction	Apology defined to include fault	Scope of matter	Apology deemed not to be admission	Apology not admissible as admission of liability	Apology not admissible as admission against interest	Apology not to be taken into account /not relevant in determination of fault or liability	Apology does not make time run	Apology does not void insurance contract
AUSTRALIA								
ACT (2002)	Yes	All civil actions except defamation and actions under certain statutes.	Yes	Yes	-	Yes	-	-
NSW (2002)	Yes	All civil actions except defamation, intentional torts, sexual assaults/misconduct, injury from dust diseases or from use of	Yes	Yes	-	Yes	-	-

[3] See for example S Sugarman, 'United States tort reform wars' and Bruce Feldthusen 'Posturing, tinkering and reforming the law of negligence – a Canadian perspective?' both in (2002) 8(2) *UNSWLJ Forum : Reform of the Law of Negligence: balancing costs and community expectations* at 27 and 30, respectively. There is a large literature on this in the United States in particular. For example, see T Koenig and M Rustad , *In Defense of Tort Law* (2001) ; D R Hensler et al *Compensation for Accidental Injuries in the United States*, Rand Institute for Civil Justice, Santa Monica, (1991); F Furedi, *Courting Mistrust: the hidden growth of a culture of litigation in Britain* (1999). In Australia , see Chief Justice of NSW, the Hon JJ Spigelman's article, 'Negligence: the last outpost of the welfare state' (2002) *Australian Law Journal* 432 .

[4] See the Appendix for the list of legislative titles.

		tobacco or actions under certain statutes.						
NT (2002)	No	All civil actions for personal injury except damages for dust diseases or actions under certain statutes.	-	Yes	Yes (not admissible for any purpose)	-	-	-
Qld (2002)	No	All civil actions for personal injury except damages for dust diseases or actions under certain statutes..	-	Yes	Yes (not admissible in the proceeding for any purpose)	Yes	-	-
SA (2002)	No	Any matter in tort	Yes	-	-	-	-	-
Tas (2002)	No	All civil actions except defamation, intentional torts, sexual assaults/miscon duct, injury from use of tobacco or actions under certain statutes.	Yes	Yes	-	Yes	-	-
Vic (2002)	No	Any matter	Yes	-	-	-	-	-
WA (2002)	No	All civil actions except defamation, intentional torts, sexual assaults/miscon duct, injury from dust diseases or from use of tobacco or actions under certain statutes.	Yes	Yes	-	Yes	-	-
CANADA								
British Columbia (2006)	Yes	Any matter	Yes	Yes	-	Yes	Yes	Yes
Saskatchewa n (2006)	Yes	Any event or occurrence	Yes	Yes	-	Yes	Yes	Yes
UNITED KINGDOM (2006)	No definitio n	Negligence or breach of statutory duty	No	No	No (not of itself an admission)	No	No	No
UNITED STATES								
Arizona (2005)	Yes	Unanticipated outcome in healthcare	-	Yes		-	-	-
California (2000)	No	Accidents (not wilful action)	-	Yes	-	-	-	-
Colorado (2003)	Yes	Unanticipated outcome in healthcare	-	Yes	Yes	-	-	-
Connecticut (2005)	Yes	Unanticipated outcome in healthcare	-	Yes	Yes	-	-	-
Delaware (2006)	No	Unanticipated outcome in healthcare	-	Yes (inadmissi ble for any purpose)	Yes (inadmissi ble for any purpose)	-	-	-
District of	No, can	Any civil	-	Yes	Yes	-	-	-

Columbia (2007)	only be "an expression of sympathy or regret"	action or administrative proceeding alleging medical malpractice						
Florida (2001)	No	Accidents	-	Yes	-	-	-	-
Georgia (2006)	Yes ("error")	Unanticipated outcome in healthcare	Yes	Yes	Yes	-	-	-
Hawaii (2007)	No	Any matter	-	Yes	Potentially, statute says "inadmissa to establish civil liability"	-	-	-
Idaho (2006)	No	Unanticipated outcome in healthcare	-	Yes	Yes			
Illinois (2005)	Fault not discussed in definition – unclear	Unanticipated outcome in healthcare	-	Yes (inadmissible for any purpose)	Yes (inadmissible for any purpose)			
Indiana (2006)	No	Any action in tort for loss, injury, pain suffering, death or damage to property	-	Yes (inadmissible for any purpose)	Yes (inadmissible for any purpose)	-	-	-
Louisiana (2005)	No	Actions against healthcare providers	Yes	Yes	Yes	-	-	-
Maine (2005)	No	Unanticipated outcome in healthcare	-	Yes	Yes	-	-	-
Maryland (2004)	No	Civil action against a health care provider	-	Yes	Yes			
Massachusetts (2007)	Fault not discussed in definition – unclear but probably not	Accidents	-	Yes	-	-	-	-
Missouri (2005)	No	Civil action	-	Yes	-	-	-	-
Montana (2005)	Fault not discussed in definition - unclear	Medical malpractice	-	Yes (inadmissible for any purpose)	Yes (inadmissible for any purpose)	-	-	-
New Hampshire (2006)	No	Medical injury action	-	Yes	-	-	-	-
North Carolina (2004)	Fault not discussed in definition - unclear	Actions vs healthcare providers for negligence or culpable conduct	-	Yes	Inadmissible to prove negligence /culpable conduct	-	-	-
Ohio (2004)	Fault not	Unanticipated	-	Yes	Yes	-	-	-

	discussed in definitio n – unclear	healthcare outcome						
Oklahoma (2004)	Fault not discussed in definitio n - unclear	Unanticipated healthcare outcome discomfort, pain, suffering, injury, or death	-	Yes	Yes	-	-	-
Oregon (2003)	Fault not discussed in definitio n - unclear	Civil action against person licensed by Board of Medical examiners	-	Yes	Yes (‘for any purpose’)	-	-	-
Sth Carolina (2006)	Yes - “error”	See next columns	For all civil actions, yes	For actions involving unanticipat ed healthcare outcomes, yes	For actions involving unanticipat ed healthcare outcomes, yes (“inadmiss ible as evidence”)	-	-	-
Sth Dakota (2005)	Fault not discussed in definitio n - unclear	Actions against health care providers for adverse outcomes	-	Yes (not “admissibl e to prove negligence ”)	No	-	-	-
Tennessee (2003)	No	Accidentrs	-	Yes	-	-	-	-
Texas (1999)	No	Accidents	-	Yes	Yes (inadmissi ble if offered to prove liability)	-	-	-
Utah (2006)	Fault not discussed in definitio n - unclear	Unanticipated medical outcomes	-	Yes	Yes	-	-	-
Vermont (2006)	Fault not discussed in definitio n - unclear	Any civil or admin. proceedings against a health care provider for medical errors	Yes	Yes	Yes (inadmissi ble for any purpose)	-	-	-
Virginia (2005)	No	Unanticipated medical outcomes	-	Yes	Yes	-	-	-
Washington (2002)	No	Accident	-	Yes	Yes (“inadmiss ible as evidence” for any purpose)	-	-	-
Washington (2006)	Yes	Civil action against a heath care providers for discomfort, pain, suffering injury or death as the result of professional negligence	-	Yes	Yes (“inadmiss ible as evidence” for any purpose)	-	-	-
Washington (2005)	Fault not discussed in	Any civil action. This section deals	Yes	Yes, it can;’t be Introduced	Yes, it can;’t be introduced	-	-	-

	definitio n - unclear	with a notification of unanticipated outcomes and an apology etc. by hospitals.		as evidence	as evidence			
West Virginia (2005)	Fault not discussed in definitio n - unclear	Actions for medical professional liability for discomfort, pain, suffering, injury or death	-	Yes	Yes	-	-	-
Wyoming (2005)	Fault not discussed in definitio n - unclear	Unanticipated medical outcomes	-	Yes	Yes	-	-	-

The table shows that the range of provisions protecting apologies is very wide, but there is a core which focuses on preventing the apology from being regarded as creating liability either of itself or by preventing it from being admitted into evidence.

The Apology Act 2006 of British Columbia, Canada is the broadest provision in existence so far. It appears to have been modelled on the New South Wales provision,[5] but goes further, adding a provision on limitation of actions. It provides:

> 2(1) 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 section 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.
>
> 2(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any proceeding and must not be referred to or disclosed to a court in any proceeding as evidence of the fault or liability of the person in connection with that matter.

Section 1 defines 'apology' as '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'. This provision protects an apology from constituting an admission of fault, from making insurance contracts void, from being taken into account in determination of fault and from constituting a confirmation of a cause of action for the purposes of limitations provisions. It also prevents the evidence of an apology from being admitted into court or referred to or disclosed to the court. It is a very broad provision, and is made even

[5] H Kushner in *The Power of an Apology: removing the legal barriers, a special report by the Ombudsman of the Province of British Columbia;* Special Report No 27 to the Legislative Assembly of British Columbia, February 2006, argued that the NSW provision was the most effective one. The British Columbia legislation was passed in April 2006. Note that the Law Commission of Canada had previously reported on this topic: S Alter, *Apologising for Serious Wrongdoing: social, psychological and legal consideration,* Law Commission of Canada Reports, (1999).

broader by the fact that the kind of apology protected is defined to include an acknowledgement of fault .

By comparison, the Compensation Act 2006 (UK) simply protects an apology from constituting an admission of negligence or breach of statutory duty. It does not define 'apology'. Thus, presumably the courts would turn first to the dictionary to find what the provision applies to. The Oxford English Dictionary defines 'apology' as:

> The pleading off from a charge or imputation, whether expressed, implied or only conceived as possible; defence of a person, or vindication of an institution, etc., from accusation or aspersion…
>
> 1. Less formally: Justification, explanation, or excuse, of an incident or course of action…
> 2. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgement of the offence with expression of regret for it, by way of reparation…

This definition includes a range of factors including a mere expression of regret which does not include any acknowledgement of fault, a vindication (which excuses the act or omission) or an acknowledgement of fault with regret. This definition suggests that the broadest definition of apology is what is meant by the Act. However this article will show that because of the way the law currently operates this may not be how the provision ultimately operates.

How an apology is defined is important for the question of whether an apology has an impact on liability in negligence (or breach of statutory duty).[6] As the table above shows, most jurisdictions which have enacted apology provisions for civil liability purposes provide a definition of an apology which falls into one of two groups. The most common definition of an apology is to define an apology as 'an expression of regret' which falls short of an admission of fault. That is, only expressions of regret get whatever legislative protection is available. A few jurisdictions have defined apology to include an admission of fault. These jurisdictions include New South Wales and the Australian Capital Territory in Australia[7], and British Columbia in Canada.[8] Psychological and philosophical literature makes it clear that there is a significant difference in the impact of these different kinds of apology[9]. A full apology is regarded as one which includes an admission of fault. So, for example, a full apology would be one where after an incident, person A says to person B 'I'm so sorry, that was all my fault'. An expression of regret or partial apology arises where person A says to person B 'I'm sorry that you have been hurt' in the same sort of way that one says at a funeral 'I'm sorry your grandmother died.' There are also apologies which are probably 'full' but do not specifically use the word 'fault' or 'blame'. For example, 'I'm sorry, I wasn't looking where I was going' impliedly rather than expressly acknowledges fault. The literature about how people respond to apologies shows that they respond differently to each of these kinds of apology, and

[6] For the purposes of this article the term 'negligence' will be taken to include the separate tort of breach of statutory duty (as it is in the United Kingdom and in Australia, although it is not regarded as a separate tort in the United States). The Compensation Act 2006 (UK) specifically applies to both negligence and breach of statutory duty.

[7] Civil Liability Act 2002 (NSW) s 68; Civil Law (Wrongs) Act 2002 (ACT)

[8] Apology Act 2006 (British Columbia)

[9] See especially N Tavuchis *Mea Culpa*; *a sociology of apology and reconciliation*, (1991) and A Lazare *On Apology*, (2004).

that their responses differ according to other factors as well, such as how serious an injury is.

(2)The targeted mischief

Underlying the various legislative provisions are a number of assumptions:

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

(2) (a)That apologies may amount to admissions which will be deemed to create liability by the courts which means that insurers will have to pay claims

(b) That apologies may amount to admissions which will breach an admission or compromise clause in an insurance contract, making it void, so that insurers don't have to pay claims but leaving the defendant liable

(3) That apologies are so prejudicial that they automatically create a tendency to hold people liable if anyone hears them

(4) That these factors lead to lawyers advising people not to apologise for accidents and that this advice has a significant chilling factor on ordinary civil society.

These matters are the target of apology protecting legislation. In turn the legislation is based on a further assumption that any expression of regret is better than nothing and that this will reduce litigation, and that making an apology inadmissible into evidence will reduce its prejudicial effect and therefore reduce liability and costs to both defendants and insurers.

This is the context within which most provisions creating protections for apologies have been made. The aims of these provisions as seen in Second Reading speeches in the various legislatures is to reduce the propensity of victims of accidents to sue. This is generally based on anecdotal evidence of the 'The plaintiff said " if he/she had apologised I never would have sued" ' variety. For example, in the Australian legislatures the second reading speeches are peppered with statements like the following:

> Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue.[10]

> I do not know how many times each of us here have heard stories where people wanted to say sorry but were constrained by fear that saying sorry might mean some liability. The same goes for all the times people have stated all they wanted to hear was the person who caused the accident to say sorry so that closure could be effected. I believe this clause alone will have a significant effect on the frequency of claims .[11]

The assumptions underlying this view are clear, but it is not clear that they are valid. These include the view that apologies have an important social role and that if people

[10] Mr Bob Carr, Premier of NSW.
[11] Mr Kiely, Member Legislative Assembly, Northern Territory

will apologise this will reduce the likelihood that others will sue them. There is psychological, sociological and other evidence about the role and importance of apologies. There is also evidence about the propensity of people to sue; but assuming that there is a direct causal connection between the two is far too simple a conclusion to draw. The social evidence and the legal context are both extremely complex. The remainder of this paper will attempt to draw out some of these threads and consider how these provisions affect the role and functions of apology. In particular it is interesting to consider how the United Kingdom provisions differ from those elsewhere, and whether the fact that the Compensation Act does not apply to Scotland makes a difference.

THE SOCIAL ROLE OF APOLOGY

The legislative protection of apologies in the civil context arises out of recognition of the significance of apologies as a social mechanism in our society. However most of the legislatures have failed to deal coherently with the evidence about the real nature of an effective apology in the context of personal injury litigation and are therefore unlikely to achieve the desired result. The aim of the legislation according to the second reading speeches in many jurisdictions is to reduce litigation, but, with the exception of British Columbia, there is little evidence that the legislatures have paid attention to the empirical evidence which is available and, as argued above, most of the provisions are based on anecdotal evidence that protecting some form of apology will have the desired effect.

The social role of apology is complex and needs to be seen as pluralistic. Apologies have many roles: the psychological, sociological, philosophical and anthropological literature shows that apologies can have a healing and re-balancing function for both victim and relationship, and often for the offender as well.[12] They may also have a moral, meaning-creating and educative function of reinforcing the sense of the norms of right, wrong and responsibility in the community and between victim and offender[13] and possibly an underlying function of reducing aggression [14]which has biological/evolutionary roots.[15] Most of these functions require an apology to acknowledge fault rather than merely to express regret in order to be effective; that is in order to elicit the next stage in a reconciliation process. The communicative and balancing dynamic between the parties requires the acknowledgement of fault,

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[12] The social role of apology in this context is discussed in detail in P Vines, 'The power of apology: mercy, forgiveness or corrective justice in the civil liability arena?' (2007) *1(1) Journal of Public Space* 1-51 (E-journal : http://epress.lib.uts.edu.au/ojs/index.php/publicspace/home); See also N Tavuchis, *Mea Culpa: a sociology of apology and reconciliation*, (1991); A Lazare *On Apology*, (2004); E Goffman, *Relations in Public: microstudies of the public order,* (1971); K Ohbuchi, M Kameda and N Agarie 'Apology as aggression control: its role in mediating the appraisal of and response to harm' (1998) 56(2) *Journal of Personality and Social Psychology* 219; H Strang, *Repair or revenge: victims and restorative justice*, 2002; E Walster and GW Walster 'Equity and social justice' 31 *J of Social Issues* 21 and A Allan, 'Apology in civil law: a psycho-legal perspective' (2007) 14 (1) *Psychiatry, Psychology and Law* 5-15.

[13] N Smith, 'The categorical apology' (2005) 36(4) *J of Social Philosophy* 473; K Gill 'The moral functions of an apology' (2000) XXXI (1) *Philosophical Forum* 11.

[14] K Ohbuchi, M Kameda and N Agarie, 'Apology as aggression control: its role in mediating the appraisal of and response to harm' (1998) 56(2) *Journal of Personality and Social Psychology* 219; SP Garvey, 'Can shaming punishments educate?' (1998) *65 University of Chicago Law Review* 733.

[15] K Lorenz, *On Aggression*,(1967); F de Waal, *Peacemaking among Primates* (1989); E O'Hara and D Yarn ,'On apology and consilience' (2002) *77 Washington Law Review* 1121.

because a mere expression of regret does not require anything from the other party – it does not recognise the same level of imbalance between the parties that an acknowledgement of fault does, and therefore it does not begin the healing or re-balancing process. Apologies, since they are mediated by language, are extremely complex, highly nuanced processes. There appear to be significant risks in giving apologies which are perceived as insincere. We know that such an apology may actually unleash further aggression, and that the credibility of an apology depends on many factors, one of which appears to be its cost to the apologiser.[16] On the other hand a forced apology may shame the apologiser in such a way that the community's norms are reinforced, the offender is effectively sanctioned and the community educated.[17] While defamation is not the core concern of this article, the fact that in defamation an apology is seen as a remedy or at least as a mitigator of damages[18] is a strong example of the use of apology within one section of the legal system. It is worth noting that defamation's roots in the ecclesiastical tradition (so that in Scots law,[19] for example, the Church could be used to enforce the palinode or recantation as a remedy) shows the long-term understanding of the importance of an apology including an acknowledgement of fault in this area.

In a previous paper I have argued that the best way to think about apology in the civil liability arena is as a form of corrective justice.[20] I hasten to add that I am not arguing that an apology is likely to be the whole redress used to achieve corrective justice. The essential argument is that where a proper apology is made it can operate as a form of redress which equalises (at least to some extent) the relationship between the parties. The reason for this is that one of the effects of one person harming another is humiliation, and an effective apology transfers this humiliation to the apologiser. This does not mean that there will not still be a need for compensation, but it does mean that the corrective justice aspect of compensation becomes a less important attribute, and that it is more meaningful to simply deal with compensatory damages as a simple matter of need. Another way to put this is to suggest that an apology may operate to reduce the desire for vindication. In practical terms this may mean, where injury is slight, that a victim is less likely to sue; and where an injury is serious that a victim is more likely to settle earlier in negotiations than they might otherwise. The evidence for these propositions exists, but much of it turns first on what amounts to an effective apology. Thus, the definition of apology is crucial to the effectiveness of the legislation.

HOW VALID ARE THE CONCERNS AND CAN APOLOGY-PROTECTING LEGISLATION ACHIEVE ITS AIMS?

[16] S Scher and J Darley, 'How effective are the things people say to Apologize? Effects of the realization of the apology speech act' (1997) 26 *J Psycholinguistic Research* 127

[17] M Bennett and D Earwaker, 'Victims' responses to apologies: the effects of offender responsibility and offense severity' (1994) 134 *J Soc Psychol* 457; A Lazare *On Apology* (2004) at 43; D R Karp, 'The judicial and judicious use of shame penalties' (1998) 44 *Crime & Delinq* 277.

[18] Defamation Act 2005 (Australian uniform legislation) s 38(1); Defamation Act 1996 (UK) ss 2-4 (applies to England, Wales and Scotland). See, for example, *Moore v Scottish Daily Record and Sunday Mail* (2007) SLT 217; [2007] ScotCS CSOH 24.

[19] See J Blackie, 'Defamation' in K Reid and R Zimmerman (eds), *A History of Private Law in Scotland*, Vol 2, (2000), p 676.

[20] P Vines, 'Apologising to avoid liability: cynical civility or practical morality?' (2005) 27 (3) *Sydney Law Review* 483.

(1)Litigation Rates and the 'compensation culture'

Apology provisions since approximately 2000 have largely appeared in a climate of concern about 'compensation culture', ' a culture of blame' and 'a lack of personal responsibility'. This applies to all the jurisdictions where such legislation has appeared. This climate of concern may or may not reflect reality about the level of litigation in each of the jurisdictions,[21] but it has certainly galvanised governments into passing legislation which constrains the common law torts process by capping damages, creating thresholds for liability, changing the tests for liability, increasing the power of defences and various other means all aimed at reducing both the incidence and the cost of litigation. In the United Kingdom Clause 2 of the Bill was introduced into the Compensation Act by Lord Hunt of Wirren, of the Opposition. There appears to have been no dissent and very little discussion about this clause, in comparison with clause 1 requiring judges to consider the deterrent effect of liability in the House of Commons and House of Lords. However, concern about the 'compensation culture' could clearly be discerned in the debates in both Houses.[22] In Australia, Canada and the United Kingdom concern that a 'United States-style litigiousness' is developing has existed for some time. In Britain the Better Regulation Task Force considered this in its report *Better Routes to Redress* in 2004, and the Government responded to it with a paper entitled 'Tackling the "Compensation Culture " ' in which it recognised that the compensation culture is a myth, but argued that the perception that it exists creates real costs which must be addressed.[23]

In all jurisdictions, connected to the concern about the compensation culture was concern about a rise in insurance premiums. In Australia, one of the driving forces behind the tort reform process which was carried out in 2002 – 2004 was a massive rise in insurance premiums for public liability and medical indemnity insurance. The argument was that premiums for both rose so massively because there was an increasingly litigious culture which was creating unforeseeable costs in the insurance industry. [24]

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[21] Arguments that the compensation culture and increasing culture of blame exists can be seen in F Furedi, *Courting Mistrust: the hidden growth of a culture of litigation in Britain*, (1999). See further literature at note 24 ff.

[22] Hansard text 27 Mar 2006 Col 576 (Lords) 'The Bill is an important contribution to a much wider programme of work. The Government are taking forward many other important initiative, on which I am proud to lead, to tackle perceptions of a compensation culture…'(Baroness Ashton of Upholland); Hansard 8 Jun 2006 col 419 (Commons) '…although a compensation culture does not exist in this country, the perception that it does can have a real and damaging effect on people's behaviour' (Bridget Prentice).

[23] 'Tackling the "Compensation Culture" ' Government Response to the Better Regulation Task Force Report: 'Better routes to Redress' , 10 Nov 2004. See also K Williams, 'State of Fear: Britain's "Compensation Culture" reviewed' (2005) 25 *Legal Stud* 499.

[24] In fact, when research was finally done to consider the actual rates of litigation in Australia and the United Kingdom this did not appear to be true: See E Wright, 'National trends in personal injury litigation: before and after "Ipp" ' (2006) 14(3) *Torts Law Journal* 233 and R Lewis, A Morris and K Oliphant, ' Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom'? (2006) 14(2) *Torts Law Journal* 158. Both these articles acknowledge an increase in litigation rates in the thirty years to the 1990s, but little increase per capita after that. However, the cost of claims, particularly the biggest damages awards for catastrophic injury has increased dramatically partly because of wage rises for nursing and similar professions and because of increased life expectancy as medical advances have been made.

Despite the fact that there is still no consistent evidence that litigation is increasing on a per capita basis, and recognition that there may even be a decrease per medical service in the litigation rate,[25] the view that an increasingly blaming society is massively increasing its litigation rate remains prevalent and this fear has been particularly prevalent in the medical arena. The increases in medical indemnity insurance in Australia made doctors a potent lobby in the tort reform process. Similar problems arose with the NHS in the United Kingdom and gave rise to the NHS Redress Act of 2006. In the United States in the 1970s a 'crisis' in medical indemnity insurance occurred which led to some tort law reforms but another such crisis occurred again in the 1980s[26] and again in the late 1990s.[27] No wave of tort reforms seemed to assuage the anxiety of medical practitioners.[28] In Australia at the same time as the general tort reform process was being carried out by the Heads of Treasury of all the governments in the Australian federation, the Health Ministers of all those governments commissioned a report on the medical indemnity and medical litigation which was carried out by the AHMAC Legal Process Reform Group led by Professor Marcia Neave. [29] This report observed that they had been asked 'to consider legal changes which will help to reduce rising medical indemnity premiums.'[30] They noted that the size of medical indemnity premiums had risen dramatically from the end of the 1980s.[31] The major Australian medical insurer went into liquidation in 2002 and this was regarded as so significant politically that the Commonwealth government guaranteed the insurer in order to stop a major pull-out of medical practitioners from practice. The AHMAC Report therefore aimed to reduce litigation as a major way of reducing premiums. They were interested in apologies as part of a process of open disclosure which might reduce litigation. This would include …..'in an effective initial disclosure of an adverse event to a patient (or where relevant and appropriate, their family) include:

- Factual information about what happened;
- Factual information about the immediate effect on the patient;
- An apology or expression of regret to the patient;

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[25] 'It seems likely that there has been an increase in claims numbers over the past 10-15 years – possibly doubling over that period in some jurisdictions. However, this is not simply explained by a theory of more litigious patients. Over that same period the number of Medicare services provided has increased by 66% and the number of hospital admissions has increased by 76% so a significant proportion of that increase will have arisen from greater exposure to risk': Australian Health Ministers Advisory Council (AHMAC) Legal Process Reform Group, chaired by Professor Marcia Neave, *Responding to the Medical Indemnity Crisis: an integrated reform package,*(2002) (hereafter 'AHMAC Report') at [3.25].

[26] See *Report of the Tort Policy Working Group on the Cause, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, Washington DC, (1986).

[27] See, amongst a voluminous literature, L Mulcahey, M Selwood and A Netten, *Mediating medical negligence claims: an option for the future,* University of London, (1999); W Wadlington, 'Law Reform and Damages for Medical Injury in the United States' in S A M McLean, *Law Reform and Medical Injury Litigation*, (1995); T Baker *The Medical Malpractice Myth*, (2005); W Haltom and M McCann, *Distorting the Law: politics, media the Litigation Crisis* (2004).

[28] KS Abraham 'Making sense of the liability insurance crisis' (1987) 48 *Ohio St L J* 399; PM Danzon, 'The effects of tort reforms on the frequency and severity of medical malpractice claims,' (1987) 48 *Ohio St L J* 413; DM Studdert and T Brennan, 'Towards a workable model of 'No-Fault' compensation for medical injury in the United States *(2001) Am JLM* 225; T Gallagher, D Studdert and W Levinson 'Disclosing harmful medical errors to patients' (2007) 356 *New England Journal of Medicine*, 2713-9.

[29] AHMAC Report at 2.

[30] AHMAC Report at 1.

[31] AHMAC Report Ch 3.

- Discussion of the possible consequences for the patient;
- Factual information about options to ameliorate harm done to the patient;
- A brief outline of what will be done to ensure that lessons are learned from the adverse event to prevent recurrence; and
- The identification of someone who will be able to answer any questions which the patient or family may have once they have had some time to think about it.'[32]

The United Kingdom has also recently moved to a policy of increasing open disclosure[33] which is paralleled by the NHS Redress Act 2006 (which applies only to England and Wales). Under s 3(2), redress is 'ordinarily to comprise-

(a) the making of an offer of compensation in satisfaction of any right to bring civil proceedings in respect of the liability concerned,
(b) the giving of an explanation,
(c) the giving of an apology and
(d) the giving of a report on the action…taken to prevent similar cases arising'

The scheme enables 'redress' to be provided 'without recourse to civil proceedings' where tortious liability might arise in relation to health services.[34] 'Apology' is undefined. However, it is interesting to note that the National Patient Safety Agency's *Safer Practice Notice* advises

> 'Acknowledge what happened and apologise on behalf of the team and the organisation. *Expression of regret is not an admission of liability'*. (Emphasis added).

If the Compensation Act legislation affects the rate of apology in England and Wales rather than in Scotland it will largely be because of the rhetorical or educational effect of having a piece of legislation which establishes clearly what the law is: that is, that an apology of itself does not amount to liability. As will be seen, in the next section it becomes clear that the law on that question as it stands is very complex , and that very complexity is likely to defeat the chances of encouraging lawyers to advise their clients to apologise. However, if they do advise their clients to apologise, whether that in turn will affect the propensity to sue will depend on how people respond to apologies generally. The literature suggests[35] that propensity to sue for personal injury is affected by

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[32] AHMAC Report at 48.
[33] National Patient Safety Agency, 'Safer Practice Notice: being open when patients are harmed.' London, 2005 (http://www.npsa.nhs.uk/site/media/documents/1314_SaferPracticeNotice.pdf) accessed 4th Sept 2007.
[34] Section 1.
[35] M Galanter, 'Reading the landscape of disputes: what we know and don't know (and think we know) about our allegedly contentious and litigious society' (1983) 31 UCLA L Rev 4; H Kritzer, 'Propensity to sue in England and the United States of America: blaming and claiming in tort cases' (1991) 18 J *Law & Soc.* 400; H Kritzer, W Bogart and N Vidmar, *The Aftermath of Injury: compensation seeking in Canada and the united States*, *(* 1990); T Brennan, H Burstin, Orav, D Studdert, Thomas and Zbar, 'Negligent care and malpractice claiming behaviour in Utah and Colorado' (2000) 38 *Med Care* 250; J Fitzgerald, 'Grievances, disputes and outcomes: a comparison of Australia and the United States' (1983) *1 Law in Cont* 15; D R Hensler et al *Compensation for Accidental Injuries in the United States*, (1991); HR Burstin, WG Johnson, SR Lipsitz and TA Brennan, 'Do the poor sue more? A case control study of malpractice claims and socioeconomic status' (1993) 270 (14) *Journal of the American*

- the status of the plaintiff,
- the costs rules (favourable to plaintiff = more likely to sue),
- the existence of jury trials and
- the cultural view of risk and blame.

Apology has rarely been considered. Hazel Genn and Alan Paterson's survey *Paths to Justice in Scotland* mentions apologies when considering the objectives of people who sue for personal injury claims. When people were asked what their main objectives were in taking action, 'not a single respondent experiencing accidental injury said that their primary motive in taking action was to receive an apology from the other side, despite the fact that this is often cited as a motivation for litigating. About eleven percent, however, said that their main objective in taking action was to prevent the same thing from happening to someone else.'[36] However, thinking of apology as a motive for litigating is not the same as litigating because someone has failed to apologise. The survey did not involve direct questioning about apologies and responses to them and it was actually undertaken as a way of focussing on people who had litigated rather than those who had not.

If apology does affect propensity to sue it will probably because of its role in cultural views of risk and blame. Literature on this issue has rarely discussed apology directly, but the corrective justice literature sees the attribution of fault and blame as a fundamental attribute of tort law.[37] How people attribute fault and blame is likely to be extremely important in how they respond to apologies (which, at bottom, are regarded by most people as about moral fault) and how likely they are to sue if they are apologised to. Contrary to this view, in their study, Harris et al found that 'the attribution of fault is a justification rather than a motive for seeking damages'[38] and that this could sometimes be seen as a hindsight justification for a decision to sue or not to sue which was actually based on weighing up all the costs, inconvenience, who has contact with him or her and all the circumstances in which they find themselves. Again in this study they did not consider apologies specifically, rather they considered the extent to which the attribution of moral fault affected the pursuit of a claim. The other difficulty with this study is that, as many are, they are hindsight driven, in that they were studies were people talked about past motivation which had to be reconstructed from memory. In section (3) below I will consider some further evidence about the likely reaction to apologies which does not suffer from this defect.

(2)Apologies as admissions of liability

There is legitimate concern that an apology may amount to an admission and therefore directly or indirectly create liability. The concern that an admission might

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Medical Association 1697-16701; D Harris et al, *Compensation and Support for Illness and Injury*, (1984); F Sabry *The Propensity to Sue: why do people seek legal action?* (2004).

[36] H Genn and A Paterson, *Paths to Justice in Scotland* Hart Publishing, (2001) at 186.

[37] See, for example, E Weinrib , 'Correlativity, personality, and the emerging consensus on Corrective Justice' (2001) *2 Theoretical Enquiries in Law* 107; S Perry 'The moral foundation of tort law' (1992) 77 *Iowa Law Review* 449; L Alexander 'Causation and Corrective Justice; does tort law make sense?' (1987) 6 *Law and Philosophy* 1-23; L Schwartz 'Apportionment of loss under modern comparative fault; the significance of causation and blameworthiness' *(1991) 23 U Toledo Law Review* 141; C Schroeder 'Corrective Justice and Liability for increasing risk' (1990) 37 *UCLA Law Review* 439 .

[38] D Harris et al *Compensation and Support* at 151

also make void an insurance contract by breaching it is real and the table of legislation shows that many legislatures consider this a significant issue to be addressed. The UK legislation has not done this. Admissions and compromise clauses are common in insurance contracts all over the world. They are particularly common in medical indemnity contracts which is one of the reasons why apologies and disclosure is a big issue in the world of medical law. Such clauses normally say that if a person makes an admission or a compromise on a claim the insurance contract will be terminated and the insured may be left unprotected, [39] (but if the liability would have existed regardless of the admission or compromise the exclusion does not apply.)[40]

The possibility that an apology might be regarded as an admission leads to the common legal advice to people not to apologise after an accident because that will amount to an admission of liability and therefore lead to liability and/or breach of an insurance contract. The legislatures providing apology protection regard such advice as having a significant chilling effect on ordinary social discourse which would and should include apologies.

The explanatory note to the Compensation Act suggests that the answer to the question whether an apology is an admission of liability is no since they regard section 2 as stating the existing law. However, it is not simply the case that any kind of apologetic utterance will not amount to an admission creating or going to liability. It seems in England and Wales and in Scotland that it is already true that an apology 'of itself will not amount to an admission of liability', particularly in relation to negligence law as liability is a legal conclusion which courts will always have to draw themselves. There is appellate authority which has refused to hold people liable in negligence where they have apologised[41] and where they have stated in court that they should have acted differently.[42] However, there cannot be complete confidence about this position because there are isolated negligence cases where a court has treated an apology as creating liability or possibly creating liability[43] and the appellate authority in some of those cases is specifically overruling a decision by a lower court judge that an apology does constitute a legal admission of liability and therefore creates liability. As a matter of principle such decisions must be wrong – negligence is always a determination for the court to make – but the fact that courts are quite often swayed to consider an apology as an admission of liability or as extremely persuasive evidence going to liability should ring the alarm bells.

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[39] *Terry v Trafalgar Insurance* (1970) 1 Lloyds Rep 524 is the classic case where a motorist hit another motorist, apologised, wrote and admitted liability in the hope that the insurer could be avoided (presumably so his excess would not be engaged) but when it later went to court his admissions were held to have voided the insurance contract. The contract is breached whether or not this prejudices the insurer.

[40] *Broadlands Properties Ltd v Guardian Assurance Co Ltd* (1983) 3 ANZ Ins Cas 60-552 at 708,304 . In Australia the Insurance Contracts Act 1984 (Cth) prevents the termination of the contract, instead allowing the insurer to reduce the claim by the amount the insurer has been affected by the admission or compromise. Of course, this could be the whole sum in some circumstances.

[41] *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317*; Rhone-Poulenc Agrochimie SA v UIM Chemical Services P L* (1986) 12 FLR 477; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385.

[42] *Muir v Glasgow Corporation* [1943] AC 448

[43] Lower courts in *Muir v Glasgow Corporation* [1943] AC 448 and in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317.

In *Muir v Glasgow Corporation* [44] the defender's employee, when in the witness box, had expressed regret at what had happened. In that case Lord Thankerton said,

> 'The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, ex post facto, that they did not take some step, which it is now realized would definitely have prevented the accident. In my opinion, the learned judges of the majority have made far too much of that which Lord Moncrieff regarded as an admission by Mrs. Alexander. It is not an admission in the sense that it can bind the appellants, though it may be of some evidential value as to what the ordinary person would regard as a reasonable standard of care.'

Lord Macmillan agreed that it could not be a binding admission. The other judges did not discuss the issue, deciding that there was no liability. Here the court distinguished between an apology which was an expression of regret and an admission which *could* be binding on the appellant.

There are cases which appear to treat admissions of fault as admissions of liability despite arguments about the difference. An example is *Hogg v Carrigan*[45] where an interim damages award was made on the basis that the defender had admitted fault which amounted to an admission of liability, (although this turned to some extent on the construction of Rule 43.9). Other cases which consider the ability of a defender to withdraw an admission of liability made before the action are also pertinent. In those cases the real issue is whether the person having made a statement on which the other party relied should be able to withdraw it. In *Sowerby v Charlton*[46] where the defendant solicitors admitted in a letter 'the Defendant is prepared to admit a breach of duty' then sought to withdraw it. The court held that their discretion to allow the withdrawal had to consider the balance of prejudice including the public interest in reducing litigation. In *Gale v Superdrug*[47] the Court of Appeal said that it had a general discretion to determine whether the defendant should be able to determine this and that the plaintiff had to prove any prejudice. A similar decision was made after some argument in *Stoke on Trent City Council v Walley*[48] In *Young v Charles Church (Southern) Ltd,*[49] a nervous shock case, the defendant's solicitors wrote to the plaintiffs:

> 'for the purpose of these proceedings and for no other, we confirm that the issue of liability for this accident will not be in dispute. For the avoidance of any doubt please note it will still be the Defendants contention that your client does not come within the class of persons entitled to make a claim for nervous shock, and the issues of causation and quantum remain live'.

The Court of Appeal held that 'it is sufficient for present purposes to accept their admission of liability for "the accident" ' which the court held to mean they had accepted that they had breached their duty if a duty was determined to exist. While

[44] [1943] AC 448.
[45] [2001] ScotCS 2
[46] [2005] EWCA Civ 1610.
[47] [1996] 1 WLR 1089.
[48] [2006] EWCA Civ 1137.
[49] [1997] EWCA Civ 1523.

none of these cases used words of apology or regret, these cases show why one would be concerned to use an apology which included an admission of fault. There seems to be no reason to think that the Compensation Act s 2 would alter the outcome of any of these cases, since the 'of itself' part of the clause might sever the expression of regret from the admission leaving the admission in play.

There are also many cases where an apology has not been treated as an admission of liability. In a Scottish personal injury case in which the defender had apologised after running over the pursuer's foot,[50] the evidence which the judge accepted was that the defender said 'I'm sorry…really sorry' after the accident. A witness said that he 'thought the apology was in the nature of an expression of concern'. The judge says at one stage,

> [The defender]said that he thought it was possible that he might have apologised to the pursuer, but he *would not have used words which indicated an acceptance of legal responsibility for the accident* (my italics).

This seems to suggest that an apology (depending on how it is framed) might amount to an admission of liability, but the judge did not discuss it in any way at all. He confined his determination of liability to what happened before and during the accident and decided the defender had not driven with reasonable care. The apology appears to have been ignored in that determination.

The High Court of Australia directly addressed the question of liability created by apologetic statements in 2003 in *Dovuro Pty Ltd v Wilkins.* [51] In that case contaminated canola seed had been released to growers and caused them pure economic loss. The Dovuro Company who had released the seed to the growers made written statements and apologies. The first was a media release which said:

> "We apologise to canola growers and industry personnel. This situation should not have occurred but due to strong interest in Karoo the unusual step was made of undertaking contract seed production in New Zealand to assist rapid multiplication; whilst the urgency to process and distribute the seed of Karoo in time for planting caused additional time pressures."

The second statement was in a letter:

> "I'd like to stress at this stage that this does not excuse Dovuro in failing in its duty of care to inform growers as to the presence of these weed seeds. We got it wrong in this case, and new varieties will not be brought on the market again in this manner. Dovuro will not be producing seed in New Zealand again. The company will continue in bulking up its varieties (as it does every year) in Western Australia."

Both these statements are what the literature calls 'full ' apologies. That is, they not only express regret but admit fault and even go so far as to say what will be done to remedy the situation in future. Indeed they actually use the terminology of negligence law when they refer to failing the duty of care. In Australia they would not be protected under the legislation in any jurisdiction except that of New South Wales and

[50] *Bryson v BT Rolatruc Ltd* [1998] Scot CS 22.
[51] (2003) 201 ALR 139.

the Australian Capital Territory. The Californian legislation would not protect them. The British Columbia legislation would also protect them but it is unclear whether the UK legislation would protect them. The UK Act would clearly cover both statements, since they include both apologies and offers of redress. The question is whether it would make any difference to the common law position surrounding apologies, in particular with reference to the law of negligence and breach of statutory duty. It is important that the word 'admission' does not appear in the UK Act. There appear to be two classes of admission which the cases are concerned with which an apology might or might not belong to – these are admissions which amount to acceptance of legal responsibility (admission of liability) and admissions of fact. The latter are nearly always admissible as adverse to interest in nearly all jurisdictions and there appears to be nothing in the UK Act which changes this, since the words 'of itself' would seem to allow a court to sever the apologetic words from those which might otherwise amount to an admission.

In *Dovuro's* case the judges generally agreed with the proposition that where such admissions include a matter which is a conclusion about the legal standard required, the admissions could have no effect and could not amount to a basis for a finding of negligence**.** The importance here is, as Gleeson CJ said, the

> '…[C]are that needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made…The statement that the appellant "failed in its duty of care " cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct.'(at [25]).

Thus, an apology could not amount to an admission of liability in negligence because it is for the court to determine that. This is consistent with a line of previous cases in diverse jurisdictions which have held that a statement as to a legal conclusion by a party cannot be relied on to establish that conclusion, because that is the role of the court.[52] However, it is pertinent to note that Kirby J said in that case,

> 'The various apologies, statements of regret… do not, as such, establish the claim of negligence against Dovuro…However, they are, indisputably evidence relevant to the conclusion that the primary judge was called upon to make in harmony with all of the other testimony in the trial. They lent support to the Wilkins' allegation of breach of the duty of care. That was the way in which the primary judge treated them . He was correct to do so'.

In the light of the evidence of how prejudicial apologies can be compared with their probative effect, this is a statement which is of concern.

The courts recognise in negligence law at least that the existence of an apology may reflect other matters than the liability of the apologiser. Legal fault remains to be proved and that determination is for the court not for the parties to make. However, admissions of fact may well go to the question of liability at common law. Thus an

[52] *Rhone-Poulenc Agrochimie SA v UIM Chemical Services P L* (1986) 12 FLR 477 (in the context of s 52 Trade Practices Act (Cth); *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385; *Senesac v Associates in Obstetrics and Gynecology* 449 A 2d 900 (Vt 1982); *Phinney v Vinson* 605 A 2d 849 (Vt 1992).

apology which is an admission of law will not amount to a determination of negligence and by implication it should not void an insurance contract (but that is a matter of interpretation). However an apology which includes in it an admission of fact may very well be problematic because the courts will consider it as evidence relevant to the determination of liability. Such an admission probably would void an insurance contract. Thus it is misconceived to argue that the UK Compensation Act s 2 simply clarifies the law by stating an existing position, because the current position is extremely complex, and indeed far too complex to allow solicitors to breezily say to their clients 'Yes, by all means, apologise. That is the right thing to do and it won't affect your legal liability.' Is the provision enough to prevent an apology from being regarded as a breach of an admissions or compromise clause? What does the 'of itself' refer to? Suppose that a car accident occurs where car A has run into car B. The driver of car A hops out and says, 'I'm so sorry, It was all my fault. I was looking at my mobile phone instead of at the road'. Presumably the Act would say that the apology, including 'it was all my fault' does not create liability 'of itself'. However, presumably the statement about the mobile phone could go to liability or at least would be likely to be held to be relevant to liability. This would probably all be admissible in evidence in the United Kingdom and it might be regarded as an admission that should be regarded as relevant to the determination of liability even though it cannot amount to an admission of negligence. Thus what the Act really says is that an apologetic admission cannot determinatively decide liability by itself.

Thus it can be argued that in relation to apologies the common law is simply restated by the new legislative provisions. But unfortunately the common law is complex and it is unlikely that reinforcing it like this could increase the prevalence of apologetic behaviour. The fact that the provision applies to England and Wales but not to Scotland will not alter the comparative status of the apology in relation to liability in the jurisdictions.

(3)How apologies affect those that hear them – admissibility and will just any apology do?

One reason for giving special protection to apologies in civil liability is that, as with confessions, the existence of an apology may have a highly prejudicial effect on a person who is determining liability. In the same way that in the criminal law the fact that someone confesses voluntarily does not necessarily mean they are guilty, in the civil domain an apology is not necessarily to be construed as an admission of liability, and this applies even to an apology which admits some sort of fault. As is now well recognised,[53] false confessions occur voluntarily as well as as a product of coercion. In the same way an apology which is made voluntarily may or may not be evidence of legal liability or guilt. It may be made by a person who feels morally guilty; or just by a person who wishes the accident hadn't happened and is inclined to feel responsible in general: it is extremely common, for example, for a parent to feel that the death or injury of a child is their fault ('If only I had not let him go to that party') when there is no question of fault at all. The problem is that there is evidence that a

[53] S M Kassin and K L Keichel, 'The social psychology of false confessions: compliance, internalization and confabulation, *7 Psychological Science* 125; N Soree 'When the innocent speak: false confessions, constitutional safeguards, and the role of expert testimony' (2004-5) 32 *American J Crim L* 191.

fact-finder who hears that a person has confessed or apologised finds this extremely comforting and that it makes it much easier to decide the apologiser is guilty or liable.[54] Thus apologies can be extremely prejudicial while not necessarily being probative of legal fault at all.

The Compensation Act 2006 (UK) has no provision preventing an apology from being admitted into evidence. This is unusual amongst apology-protecting legislation. The United Kingdom is in the remarkable position compared with other common law jurisdictions of having abolished almost completely the law of hearsay in civil actions.[55] From the perspective of other jurisdictions this is remarkable in that the exceptional admissibility of admissions adverse to the interests of a person becomes unexceptional in the United Kingdom, and all such evidence is simply weighed up. The judge in a civil case may decide what weight to attach to the evidence, if any weight at all. Thus the evidence about an apology would not be excluded simply because of its hearsay status, but the judge will decide on its importance. If an apology has been given under a 'without prejudice' statement or as part of negotiations aimed at settlement, however, it could be inadmissible on that basis, unless there seemed to be some abuse of privilege associated with its inadmissibility.[56]

Preventing the apology from being admitted aims to prevent a jury drawing a wrong conclusion about liability from the fact that an apology has been uttered, and this may be more effective than a judicial direction that an apology does not amount to an admission of liability. This is important given the extent to which juries are thought to be swayed by the existence of an apology or a confession. In jurisdictions where there are few juries in civil cases, such as in Australia and the United Kingdom, there is some sense (although no specific evidence that I am aware of) that judges are less swayed by prejudicial evidence such as this and that therefore less protection is needed.

The abolition of the hearsay rule in the United Kingdom jurisdictions creates a situation where it is not possible to make a meaningful statement about the admissibility of apologies. Although in many other jurisdictions the rules of evidence are administered relatively weakly in the civil jurisdictions compared with the criminal jurisdiction, it is probably useful to be able to say that apologies will not be admissible where the aim is to increase their prevalence. The fact that the prejudicial effect of apologies may greatly outweigh their probative effect may lead to their exclusion in some cases, but the level of discretion given to the judiciary in the United Kingdom is extreme , approaching an inquisitorial level.

The question of how to deal with the extent to which an apology should be admitted will begin with relevance, of course. In the absence of an apology provision preventing admissibility, an apology would be admitted into evidence (if it were) in most jurisdictions as an exception to the hearsay rule on the basis that it was a

[54] R Conti, 'The psychology of false confessions' (1999) *2 Journal of Credibility Assessment and Witness Psychology* 14: 'A confession relieves doubts in the minds of judges and jurors more than any other evidence' at 14.

[55] Civil Evidence Act 1995 (UK) s 4(1); Civil Evidence Act 2005 s 4(1) provides that the judge is to decide 'the weight(if any)' to give to hearsay evidence.; Civil Evidence (Scotland) Act 1988 s 2.

[56] *Berry Trade Ltd v Moussavi (No3)* [2002] EWCA Civ 715

statement going against the interests of the person. Apologies might also be admissible as exceptions to the hearsay rule on the basis that they are admissions of facts and evidence of the truth of their contents. So, if the legislation excludes an apology 'as evidence of fault or liability' as the New South Wales and British Columbia provisions do, does the legislation exclude an apology completely or only as an admission of liability so that it can be admitted for some other purpose. The broader provisions therefore, do not completely solve all these problems, but they do go far further towards creating a regime which might make people feel that they can apologise than provisions like s 2. There is empirical evidence that supports this proposition.

Studies focusing on apology as an element in reducing litigation or changing behaviour in relation to settlement offers are rare. One set of experimental studies based on simulated accidents between a bicycle and pedestrian was carried out by JK Rebbennolt.[57] Participants in the studies reviewed the scenario and then, standing in the shoes of the injured party, evaluated a settlement offer. In one study the only variable which changed was the nature of the apology offered (partial apology (expression of regret), no apology or full apology (acknowledging fault)). Another study examined how respondents reacted to an apology in the light of their knowledge of the evidentiary rules which admitted or did not admit the apology, and did or did not protect it. The results of the studies suggested that respondents were far more inclined to accept a settlement offer where a full apology was offered, less so for partial apologies and many fewer where no apology was offered. The study also noted that respondents saw the offender as more moral, more forgiveable and as more likely to be careful in the future if they offered a full rather than a partial or no apology. The partial apology appeared to create uncertainty in participants as to whether to accept the offer. The results suggested that where an injury was severe a partial apology might actually be detrimental and make the respondents more inclined to reject a settlement offer. This effect was not seen where injury was slight. This suggests that the apology most likely to reduce the desire of a person to sue is the apology that includes an admission of fault.

A great deal of the literature on apology has also been developed in relation to medical negligence[58] and it tends to support these conclusions. A German study of handling of errors found that while severity of injury was the major factor affecting patients' choice of action to be taken, where there was a severe injury, 'Most patients accept that errors are not entirely preventable, but they expect accountability and clear words. These clear words should include the acknowledgment that something wrong has happened, that measures will be taken to prevent future events…and an expression of sincere regret.'[59]

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[57] 'Apologies and legal settlement: an empirical examination' (2003) 102 *Michigan Law Review* 460. These findings were reinforced in later work: J Robbenolt, 'Apologies and settlement levers' (2006) 3 *J of Emp Leg Studs* 333.

[58] For example, R Lamb, 'Open disclosure: the only approach to medical error ' (2004) 13 (1) *Quality and Safety in Health Care*. 3-5; JR Cohen 'Apology and organisations: exploring an example from medical practice' (2000) 27 *Fordham Urban Law Journal* 1447; D Schwappach and C M Koeck, 'What makes an error unacceptable? A factorial survey on the disclosure of medical errors' (2004) 16(4) *International Journal for Quality in Health Care* 317-326.

[59] D Schwappach and C M Koeck, 'What makes an error unacceptable? A factorial survey on the disclosure of medical errors' (2004) 16(4) *International Journal for Quality in Health Care* 317-326.

An Australian study of medical complaints showed that where 97% of complaints had resulted in an explanation and/or apology, none had proceeded to litigation.[60] However, another Australian study showed that only 16% of complainants to the New South Wales Health Care Complaints Commission said they would have been satisfied by an apology.[61] It should be noted that only 6.4% of the complaints considered in this study were about clinical care (as opposed to issues such as morally wrong personal behaviour) so it is difficult to evaluate the force of this study with respect to apologies and propensity to sue.

The practice adopted at the Lexington Veteran Affairs Medical Centre in the USA after they lost two major medical malpractice cases has often been cited. The Lexington Centre, in a practice that appeared to be totally counter to legal advice, began to notify patients of adverse events even where patients were not aware of them. They also admitted fault verbally (and in writing if the patient so desired). This was done to ensure that there was evidence of a process of dealing with adverse events in case of future litigation, but it had 'unanticipated financial benefits'[62] in that many more settlements were made and the hospital's costs for malpractice claims dropped markedly. Care has to be taken in relying on the Lexington experience in some respects. The doctors there were federal employees who had some sort of personal immunity from suit even though the hospital didn't, and it was a veterans' hospital so the patients may have differed from those in an ordinary hospital. However, the fact remains that the malpractice budget was markedly reduced. A large part of this drop occurred because of early settlements rather than having to go to full litigation. While the legislators have referred to people refraining from suing because of apologies, an increased willingness to settle is financially valuable to the defendant as it reduces costs considerably. It is also unrealistic to think that badly injured people will be satisfied with a mere form of words when they know they face a lifetime of having to deal with the injury. In most jurisdictions people who are very badly injured simply have to sue in order to get sufficient compensation to continue to live a reasonable life. Social security is simply not enough to support the badly brain-injured, the quadriplegics and paraplegics in a reasonable way. However, the Lexington situation suggests that even in these catastrophic injury situations, apologies set the scene for negotiations for settlement which may save a lot of money in legal costs. What is interesting here is that all this happened in the absence of apology-protecting legislation.

The evidence makes it clear that the most effective apologies are those which include an admission of fault and indeed those that include an undertaking not to make the same mistake again. The restricted or partial apology does not seem to be very effective, and indeed at times it seems counter-productive.

CONCLUSION

[60] K Anderson, D Allan and P Finucane, ' A 30-month study of patient complaints at a major Australian Hospital' (2001) 21 (4) *Journal of Quality in Clinical Practice* 109.
[61] A Daniel, R Burn and S Horarik, 'Patients' complaints about medical practice' (1999) 170 *Medical Journal of Australia* 598-602.
[62] AHMAC Report, at 49; the Lexington Centre's experience is also discussed in S Kraman and G Hamm, 'Risk management: extreme honesty may be the best policy' (1999) 131 (12) *Annals of Internal Medicine* 963-967 and in JR Cohen , 'Apology and organisations: exploring an example from medical practice' (2000) 27 *Fordham Urban Law Journal* 1447.

There is some risk that protecting the apology with legislation may lead to a situation where people perceive apologies as of no value because the legislation protects it – the cynical apology. However, this depends on people knowing the law and being unable to detect the difference between a sincere apology and an insincere apology. The empirical evidence suggests that people really do look for the difference and that they do not regard an apology as real unless it includes an admission of fault. This therefore creates a situation where if a legislature attempts to increase apologies by protecting only expressions of regret or partial apologies may actually exacerbate the problems and possibly increase litigation. On the other hand if they protect apologies and include in those protected apologies admissions of liability and fault, some evidence which could go to liability will no longer be allowed to be considered. In the light of the evidence, if apologies are to be protected for the purpose of increasing them it is preferable to have legislation making it clear that an apology can include an admission of fault and that that is also protected. The New South Wales, Australian Capital Territory and British Columbia legislation make this clear as do some of the United States medical provisions. The UK Compensation Act does not make it clear.

The Compensation Act s 2 ostensibly simply restates the law as it stands already. Although the Act applies only to England and Wales, it appears that the law is the same in Scotland as well, certainly in regard to negligence. However, although it is true that an apology of itself does not amount to liability or does not create liability the cases show that where the apology includes an admission of fact that may be used to go towards liability.

The Act's aims of reinforcing the norms of a civil society and reducing litigation must be met by publicity, rhetoric and by both lawyers who advise clients and the general public being aware that there is legislation which protects apologies from creating liability. However the protection which the Act gives is not enough to create such confidence. For insurance lawyers, the provision clearly does not prevent an apology from being regarded as a breach of an admissions or compromise clause. A prudent negligence lawyer would not rely on section 2 as a basis for advising clients that it is safe to apologise. There is far too much danger of the apology being attached to an admission which could go to liability. Unfortunately this creates a situation where it is unlikely that the UK provision will have as much effect on people's behaviour, particularly legal advice, as provisions such as that of New South Wales or British Columbia.

Apologies are important to civil society. The House of Lords was right to think that protecting apologies was important as a way of increasing civil behaviour. However, the provision seems to have been drafted on the run, without detailed consideration of its likely effect. Unfortunately its aims may have been defeated by this failure to consider all the ramifications of the relationship between apologies and admissions and the educational and rhetorical value of the provision is likely to be lost along with any substantial protection of the only kind of apology which most people regard as real, the apology acknowledging fault. Section2 achieves only a kind of nullity or sad paradox , leaving England and Wales and Scotland no different in the legal consequences of apologetic behaviour, despite a legislative provision in England and Wales, and no equivalent provision in Scotland. A sad paradox indeed.

APPENDIX

LEGISLATIVE PROVISIONS PROTECTING APOLOGIES FROM CIVIL LIABILITY

AUSTRALIA

Civil Law (Wrongs) Act 2002 (ACT) ss 12-14
Civil Liability Act 2002 (NSW) ss 67-69; s3B
Personal Injuries (Liabilities and Damages) Act 2003 (NT) ss 12-13; s 4
Civil Liability Act 2003 (Qld) ss 68-72; s 5
Civil Liability Act 1936 (SA) s 75
Civil Liability Act 2002 (Tas) ss 6A-7; s3B
Wrongs Act 1958 (Vic) s 14I-J
Civil Liability Act 2002 (WA) ss 5AF-5AH; 3A

CANADA

Apology Act 2006 (British Columbia)
Evidence Act 2006 s 23.1 (Saskatchewan)

UNITED KINGDOM

Compensation Act 2006 (s2)

UNITED STATES OF AMERICA

Arizona 12-561
California Evidence Code §1160; Government Code §11440.45
Colorado Rev Stat 13-25-135 (2003)
Connecticut General Statute Ch 899 tit 52,§184d
Delaware Code Ann Tit 10 Ch 43 §4318
District of Columbia Code tit 16 Ch 28 Subchapter III § 16-2841 (2007)
Florida Stat tit 7 Ch 90 §4026 (2001)
Georgia Code Ann tit 24 ch 3 § 37.1 (2005)
Hawaii Rev Stat §626-1 (2007)
Idaho Code tit 9 Ch 2 § 9-207 (2006)
Illinois 735 III Comp Stat 5/8 1901 (2005)
Indiana Inc Code tit 34 §§ 43-5-1-1 – 45-5-1-5] (2006)
Louisiana Rev Stat Ann §3715.5 (2005)
Maine Rev Stat Ann tit 24 §2907 (2005)
Maryland Code Ann [Cts and Jud Proc] tit 10(9) §920 (2004)
Massachusetts General Laws tit 2 ch 233, §23D (2007)
Missouri tit 36 ch 538 §229 (2005)
Montana Code Ann tit 26 ch 1 §814 (2005)
New Hampshire Rev Stat Ann tit 52 §507 E:4 (2006)
North CarolinaGen Stat ch 8C-1 §413 (2004)
Ohio Rev Code Ann 2317.43 (2004)
Oklahoma Stat §63-1-1708.1H (2004)
Oregon Rev Stat §677.082 (2003)
South Carolina Code tit 19 ch 1 §190 (2006)
South Dakota Codified Laws tit 19 ch 12 §14 (2005)
Tennessee Ct. R. 409.1 (2003)
Texas Civ Prac and Rem Code Ann §18.061 (1999)
Utah Code Ann tit 78 § 14-18 (2006)
Vermont Stat Ann tit 12 ch 81 §1912 (2006)
Virginia Code Ann tit 8.01 §581.20.1 (2005)
Washington Rev Code §5.66.010 (2002); §5.64.010 (2006); § 70.41.380 (2005)
West Virginia Code §55-7-11A(b)(1) (2005)
Wyoming Stat tit 1 ch 1 § 130 (2005)