



Voice of Academia

Academic Series of Universiti Teknologi MARA Kedah

VoA
2023
Volume 19 Issue 1

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Academic Series of Universiti Teknologi MARA Kedah Branch

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e-ISSN: 2682-7840



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COMPARATIVE ANALYSIS ON DEFINITIONS AND TYPES OF APOLOGIES IN APOLOGY LEGISLATION IN THE UK, REPUBLIC OF IRELAND, AUSTRALIA, CANADA, THE USA AND HONG KONG

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ARTICLE INFO

Article history:

Received July 2022
Accepted Nov 2022
Published Jan 2023

Keywords:

Definition of apology; types of
apology; apology law;
admission; apologetic
discourse

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ABSTRACT

This study compares the definitions and types of apologies adopted by apology legislation in selected Common Law jurisdictions i.e., England and Wales in the UK, Republic of Ireland, the states of New South Wales, Victoria and Queensland in Australia, Canada, the USA and Hong Kong. The apology legislative reform undertaken by these jurisdictions provides a solution to the long-standing problem of adverse legal effects of apology. A similar problem is reported in Malaysia due to similarities in evidentiary rules, insurance contract clauses and statutory limitation law attributed to the Common Law system. The objective of this paper is to comparatively analyses two scopes of the apology legislation, i.e., the definition and the type of apology adopted in the apology legislation by the selected Common Law jurisdictions. Based on the comparative analysis, this paper finds that there are three categories of the definition i.e., apology definition that includes acknowledgement of fault, apology which excludes acknowledgement of fault, and no definition of apology in the legislation. This paper also finds that there are two categories of types of apologies in the apology legislation in the analysed jurisdictions, i.e. full apology and partial apology. The findings of this paper help towards the development of the law that protects admission by apologetic discourse in Malaysia.

1. Introduction

The second decade of the 21st century had witnessed a worldwide movement towards apology legislative reform amongst Common Law countries (McMichael et al, 2019; Hübenthal, 2016; Robyn & Vines, 2017; Runnels, 2009). The legislative reform provides a legal solution to the long-standing problem of adverse legal effects of an apology. A similar problem is reported in Malaysia due to the similarity in evidentiary rules, insurance contract clauses and statutory limitation law between Commonwealth and Common Law countries. Under the current legal regime, an apology shall become an admission to negligence and misconduct in Malaysian courts (see, *Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital & Anor* [2013] 1 CLJ 699 HC; *Norizan bt Abd Rahman v Dr Arthur Samuel* [2013] 9 MLJ 385; *Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd* [2017] 1 MLJ 453). As a result, tortfeasors and wrongdoers evade from offering apology, despite the plethora of the benefits of apology (Eaves-Leanos, 2012; Johnsen, 2016; Ma et al, 2019; McCullough et al, 1998; Shuman, 2000; Tavuchis, 1991; Vines, 2007). Hence, it is high time for Malaysia to follow the footsteps of its Common Law counterparts that have undertaken the legislative reform on apology law. The selected jurisdictions for comparison in this paper are the United Kingdom, Republic of Ireland, Australia, Canada, the USA, and Hong Kong. These Common Law jurisdictions have successfully undertaken the legislative reform of apology law (Barr, 2009; Ginn & Boyle, 2016; Studdert & Richardson, 2010; Vines & Carroll, 2018; Vines, 2008).

Apology is the statement uttered by wrongdoers to the victims with the intention that they be understood as apologies, or at least as expressions of remorse or regret over something the speaker did. It is often made following an injury, regardless of whether the harmful conduct was intentional or not (Macleod, 2008). Apology also refers to admissions of blameworthiness and regret for any undesirable event which includes transgression, harmful act and embarrassing incident (Darby & Schlenker, 1982). It occurs when one person who has done something wrong expresses remorse for what he or she has done, takes responsibility for the action, and expresses that he or she is sorry. The wrongdoer may also acknowledge the harm done to others by his or her actions and those actions' impact on others' lives (Daicoff, 2013).

From the sociological perspective, an act of apology must fulfil two fundamental requirements i.e. the offender is sorry and he or she communicates his or her apology to the one who has been offended (Tavuchis, 1991). The establishing elements of apology are the acknowledgement of the offence, communication of remorse, providing explanation and making reparations (Lazare, 2008). According to Lazare, the offence refers to violation of any rule, ethical principle or careless behaviour that results in injury or discomfort towards another in the form of hurt feelings, degradation or humiliation.

Psychologists identify the main components of apology comprising of admission of responsibility, expression of remorse, promise of forbearance, and offer to repair, and found that each one contributes to the apology's effectiveness (Heimreich, 2012). In addition, apology should at least include an admission of responsibility and whatever statement that follows the admission must express sorrow on the part of the wrongdoer (Macleod, 2008). For an apology to be treated as authentic and genuine, the expression of sorrow and admission of wrongdoing must be unequivocal (Taft, 2000).

In the context of apology, apologetic discourse may be defined as the whole acts of apologising, admitting wrongs and expressing regrets (Allan, 2007; Arizavi & Choubasaz, 2018; Finlay et al. 2013; Kassim, Mohammad, & Saleh, 2017; Lin, 2015; Macleod, 2008; Parker, 2012; Smith, 2013). Apologetic discourse is also regarded as ethical, social and professional conduct that has become a norm in many societies. It serves as a remedial behaviour that reduces the

negative consequences of the wrongful act and simultaneously restores the wrongdoer's damaged reputation. During apologetic discourse, a person will recognise that a rule has been broken, reaffirm the value of the rule, and at the same time control as well as regulating social conduct by acknowledging interpersonal obligations between the parties (Kassim & Saleh, 2017a).

2. Literature Review

Literature on legislative reform of admission by apologetic discourse started to intensify in the first decade of the 21st century. Literature on apology law denotes the legislative reform of admission by apologetic discourse that spreads throughout common law jurisdictions i.e., the US (Taft, 2013), Australia (Studdert & Richardson, 2010), Canada (Kleefeld, 2007), Hong Kong (Carroll, 2014), the UK (Vines, 2008), and Republic of Ireland (Corbett, 2014). In Scotland, the legislative reform of admission by apologetic discourse represents a concerted Scottish effort to encourage a culture of apologising (Agapiou & Cheung, 2017). Literature investigates the effect of legislative reform on admission by apologetic discourse on the law of evidence (Runnels, 2009), insurance contracts (Barr, 2009), and dispute resolution (Carroll et al., 2015). Literature compares models of apology laws that cover types of apologies, limit of protection and scope of protection, types of claim, and types of injury that may have potential impact of the laws (Macleod, 2008).

Literature observes that despite their common aims, legislative reform of admission by apologetic discourse varies between jurisdictions (Saitta & Jr. Hodge, 2012). Literature classifies the legislative reform either as a patchwork reform through an amendment to the Evidence Act, or as a *sui generis* legal reform-through a stand-alone piece of legislation (Barr, 2009). Literature further classifies the legislative reform into two broad approaches i.e., a narrow approach and a broad approach, with the former restricted to protection of admission of apologetic discourse in a specific field (Ginn & Boyle, 2016). specific types of proceedings (Carroll et al., 2015), or specific act of negligence (McDonnell & Guenther, 2008).

Literature lauded legislative reform of admission by apologetic discourse as the most widespread tort reforms in common law countries (McMichael et al., 2019). In this light, literature acknowledges the legislative reform in Hong Kong incorporates new features (Vines & Carroll, 2018), is wide ranging and the most comprehensive apology protection to date. Despite widespread support for legislative reform of admission by apologetic discourse, Helmreich's 2011 study finds the drawbacks of apology laws i.e., they only protect expressions of benevolence and sympathy, and exclude full apologies. In his later work, Helmreich (2012) proposed means of protecting full, self-critical apologies from evidentiary use, modelled on the US Federal Rules of Evidence. Helmreich's finding is supported by Mastroianni et al. (2010), who underscore the need to overcome the shortcomings of apology laws by improving statutory design, legal requirements and protections of the apology laws.

Khouri (2014) whose work examines the overseas experiences of apology legislation, argues for the enactment of similar legislation in New Zealand. Khouri provides a set of recommendations about the optimal form of apology legislation for New Zealand. Vandenbussche (2018) points out that apology legislation has not been enacted in continental Europe and other non-common law countries. On this note, Vandenbussche explains that the lack of reform in non-common law system is due to differences in tort law and rules of evidence between common law systems and civil law systems.

Review of local literature finds that legislative reform of admission by apologetic discourse receives strong support from Kassim & Saleh (2017a). In their later work, Kassim & Saleh reiterate their calls for legislative reform of admission by apologetic discourse in Malaysia. Nonetheless their

recommendations are made in the light of negligent acts by medical practitioners. The most recent work by Hashim et al. (2020), provides a set of recommendations to exclude medical apology from being governed by strict evidentiary regime under the Evidence Act 1950. Similar to Kassim & Saleh, their recommendations are also focused on legislative reform in cases involving medical negligence. Hence, this study responds to the urge for a legislative reform of apology by comparing the definition and type of apology in certain Common Law jurisdictions. The comparison is pertinent to propose a viable legislative reform for apology in Malaysia.

3. Methodology

This paper aimed to answer the research question: How do other jurisdictions protect apology through legislative reform? To answer the question, this study collected primary legal sources in the form of statutes and secondary legal sources from law textbooks, law journals and law committee reports. The unit of analysis was the legislation amended and/or enacted by the selected countries to give effect to legislative reform of apology. Table 1 depicts the legislation that have been identified for comparative analysis. The pieces of legislation that have been identified for comparative legal analysis are:

*Table 1
Selected Common Law legislation for comparison*

Jurisdiction	Legislation
1. UK	Compensation Act 2006 (England) Apologies (Scotland) Act 2016
2. Republic of Ireland	Civil Liability (Amendment) Act 2017 (Ireland)
3. Australia	Civil Liability Act 2002 No 22 (New South Wales) Wrongs Act 1958 (Victoria) Civil Liability Act 2003 (Queensland)
4. Canada	Uniform Apology Act 2007 Apology Act SBC 2006 (British Columbia) Evidence Act, 2007, c.24, s.2. (Saskatchewan)
5. USA	Colorado Revised Statutes Title 13 Revised Code of Washington Federal Rule of Evidence
6. HKSAR	Apology Ordinance (Cap.631) 2017

The legislation from Common Law jurisdictions were selected for comparative analysis due to the similarities in evidentiary rules, insurance contract clauses and statutory limitation law with Malaysia. These similarities have resulted in a legal problem that is unique to the Common Law system. As the selected jurisdictions have put in place legislative reform in the form of apology law, their legislation is deemed suitable for comparative analysis. This paper employed doctrinal analysis of relevant statutory provisions to determine the definition of apology and type of

apology in legislative reform. A comparative analysis was then conducted to find similarities, differences, and special/unique feature of the legislative reform in each selected jurisdiction.

4. Findings

This section compares apology law from the selected Common Law jurisdictions, to identify the most appropriate definition and type of apology. While there are over 50 jurisdictions which have legislated apology law, these jurisdictions are most suitable for comparative analysis as they adopt Common Law legal system. The findings of this paper are depicted in the table below.

*Table 2
Definition and type of apology adopted in the selected legislation*

Jurisdictions	Legislation	Definition of apology includes acknowledgment of fault	Definition of apology excludes acknowledgment of fault	Apology not defined	Full apology	Partial apology
1. UK	Compensation Act 2006 (England)			/		/
	Apologies Act 2016 (Scotland)		/			/
2. Republic of Ireland	Civil Liability (Amendment) Act 2017 (Ireland)		/			/
3. Australia	Civil Liability Act 2002 No 22 (New South Wales)	/			/	
	Wrongs Act 1958 (Victoria)		/			/
	Civil Liability Act 2003 (Queensland)	/			/	
4. Canada	Uniform Apology Act 2007	/			/	
	Apology Act SBC 2006 (British Columbia)	/			/	
	Evidence Act, 2007, c.24, s.2. (Saskatchewan)	/			/	
5. USA	Colorado Revised Statutes Title 13	/			/	
	Revised Code of Washington	/			/	

	Federal	Rule	of	/	/
	Evidence				
6. Hong Kong	Apology	Ordinance	/	/	
	(Cap.631)	2017			

5. Discussion

The definition of apology in the analysed legislation can be segregated into three categories. The first category is the legislation that defines apology to include acknowledgement of fault. The second category is the legislation that excludes acknowledgement of fault in the definition of apology. The third category is where there is no definition of apology in the legislation. Meanwhile, there are two types of apologies that are protected in the apology law of the analysed jurisdictions. The two types of apologies are full apology i.e. an apology that incorporates both an expression of regret or sympathy and an admission of fault, and partial apology i.e., an expression of regret or sympathy but does not incorporate an admission of fault.

5.1 Definition of apology that includes acknowledgement of fault and full apology

Comparative analysis shows that there are eight pieces of legislation that include acknowledgement of fault in their definition of apology. The legislation are the Civil Liability Act 2002 No 22 (New South Wales), Civil Liability Act 2003 (Queensland), Apology Act SBC 2006 (British Columbia), Evidence Act, 2007, c.24, s.2. (Saskatchewan), Uniform Apology Act 2007, Colorado Revised Statutes Title 13, Revised Code of Washington, and Apology Ordinance (Cap.631) 2017.

In the Civil Liability Act 2002 No 22 (New South Wales), there are four significant elements of apology. The first element is that apology is defined to include an admission of fault, rather than merely as an expression of regret. Secondly, the apology does not constitute a legal admission of fault or liability. The third element is that the apology is not relevant to the determination of fault or liability. Finally, the apology is not admissible in civil proceedings as evidence of fault or liability. The constitution of the elements in the Civil Liability Act 2002 No 22 (New South Wales) are complete to constitute protection of full apology.

Secondly, the Civil Liability Act 2003 (Queensland) defines apology to include an expression of sympathy, regret, a general sense of benevolence or compassion, whether or not it admits or implies an admission of fault in relation to the matter. Similar to the Civil Liability Act 2002 No 22 (New South Wales), the Civil Liability Act 2003 (Queensland) adopts full apology as its definition includes admission of fault as a type of apology.

Thirdly, the Canadian apology legislation i.e., the Apology Act SBC 2006 (British Columbia), Evidence Act, 2007, c.24, s.2. (Saskatchewan) and the Uniform Apology Act 2007 define apology as an expression of sympathy, 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. The definition in the three Canadian pieces of legislation implies the constitution of elements of full apology. In the case of *Robinson v. Cragg, 2010 ABQB 743 (CanLII)*, the Canadian court considered whether a formal apology letter should be excluded as evidence in its entirety or redacted so that the expression of sympathy or regret and coinciding admission of fault did not remain. The court allowed the other facts from the letter to be admitted as evidence, but excluded the apology along with the admission of fault. Similarly, in the cases of *Dupre v Patterson, 2013 BCSC 1561* and *Cormack v Chalmers, 2015 ONSC 5599*, the court

rejected apologetic statements from being tendered as evidence and held that it is clear that an apology made by or on behalf of a person in connection with any matter does not constitute an express or implied admission or acknowledgment of fault or liability. The court's decisions in these Canadian cases imply the protection of apologetic discourse in its entirety.

Fourthly, the Colorado Revised Statutes Title includes the element of fault in its definition of apology. Under this provision, apologetic discourse is protected whereby it shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. A definition of apology that includes both statements of regret and fault is a full apology. Accordingly, the Colorado Revised Statutes Title accords protection to full apology.

Fifthly, subsection 2(b) of the Revised Code of Washington extends the protection of apology to any statement, affirmation, gesture, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence, or any statement or affirmation regarding remedial actions that may be taken to address the act or omission that is the basis for the allegation of negligence. From the provision, it is inherent that the provision excludes admissibility of any statement, affirmation, gesture, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence, as well as any statement or affirmation regarding remedial actions to address the basis for the allegation of negligence. The inclusion of any statement, affirmation, gesture, or conduct expressing apology, fault and sympathy signifies protection of full apology.

Lastly, the Apology Ordinance (Cap.631) 2017 in its provision outlines that apology means an expression of regret, sympathy or benevolence and includes, an expression that the person is sorry about the matter. These expressions may be oral, written or by conduct. The provision goes further to provide that the apology includes any part of the expression that is an express or implied admission of the person's fault or liability in connection with the matter or a statement of fact in connection with the matter. The definition of apology in the Apology Ordinance (Cap.631) 2017 implies the protection of full apology accorded by the statute.

The common characteristic in defining apology in the eight pieces of legislation under the first category is the assertion of the elements of apology. The elements of an apology in the pieces of legislation include expression of sympathy or regret, general sense of benevolence or compassion, whether or not the apology admits or implies an admission of fault in connection with the matter. Of all the aforementioned legislation, the Apology Ordinance (Cap.631) 2017 is unique whereby it went further to exclude the statements of fact from being admissible as evidence for liability. It provides protection to the statements of fact in connection with a matter in respect of which an apology has been made. The legislation enshrines that the statements of fact should be treated as part of the apology and should be protected. By far, the exclusion of statements of fact in Apology Ordinance (Cap.631) 2017 is the most extensive definition and best promote the objective of an apology legislation. The inclusion of statements of fact under the definition of apology provision is seen to encourage defendants to make meaningful and sincere apologies, rather than making a bare minimum and insincere apology. A study by Fields et al. (2020) enumerates that a broad apology law that includes statements of fault and explanations of the wrongdoings may better serve its goals.

With regard to the type of apology protected in the eight pieces of legislation, the inclusion of both an expression of regret or sympathy and an admission of fault in the definition of apology deem the legislation to protect full apology. The protection accorded by these pieces of legislation is applicable to expression of regret, statements of sympathy, and extended to statements that admit liability or fault. Among the eight legislation, the Apology Act SBC 2006

(British Columbia), Evidence Act, 2007, c.24, s.2. (Saskatchewan), and Uniform Apology Act 2007 went further to include contrition in the element of apology. Contrition or remorse involves admitting one's own mistakes and taking responsibility for one's actions. Contrition creates a sense of guilt and sorrow for hurting someone else and leads to confession and true apology (Fjelstad, 2015).

5.2 Definition of apology that excludes acknowledgment of fault and partial apology

With regard to the second category of apology definition, i.e., the exclusion of acknowledgment of fault in the definition of apology, there are three pieces of legislation under this category. The legislation are the Apologies (Scotland) Act 2016, Civil Liability (Amendment) Act 2017 (Ireland) and Wrongs Act 1958 (Victoria). Firstly, the Apologies (Scotland) Act 2016 defines apology as any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence. The definition of an apology in the Apologies (Scotland) Act 2016 means a statement indicating that a person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence. Essentially, the definition of apology in the Apologies (Scotland) Act 2016 is confined to the expression of regret and excludes an admission of fault that could give rise to liability.

In comparison to the Apologies (Scotland) Act 2016, the Civil Liability (Amendment) Act 2017 (Ireland) defines apology in relation to an open disclosure of a patient safety incident to mean an expression of sympathy or regret. This definition expressly excludes acknowledgment of fault. Similarly, the Wrongs Act 1958 (Victoria) defines apology as an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault. The common characteristic shared by the Apologies (Scotland) Act 2016, Civil Liability (Amendment) Act 2017 (Ireland) and Wrongs Act 1958 (Victoria) is the exclusion of acknowledgement of fault in the definition of apology. This exclusion deems the three pieces of legislation to merely protect partial apology. The protection is confined to an expression of sorrow, regret or sympathy. Further admission or acknowledgement of fault is excluded from the protection.

5.3 Apology not defined and partial apology

The last category of apology definition is where the legislation did not define apology at all. There are two legislation under this category, i.e. the Compensation Act 2006 (England) and Federal Rule of Evidence. There is no specific provision that defines the term apology in the Compensation Act 2006 (England). The omission of the definition has attracted significant commentary suggesting that the Compensation Act 2006 (England) only protect partial apology that is regarded as damaging, and not conducive to dispute resolution success (Agapiou & Cheung 2017). Since the Compensation Act 2006 (England) does not provide statutory definition of apology, presumably the court would adopt the ordinary meaning of apology (Vines, 2008). The ordinary meaning of apology is an expression of regret which does not include acknowledgement of fault. An apology that does not admit fault is a partial apology.

Meanwhile, the second sentence of Rule 407 of the Federal Rule of Evidence directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect, the provision rejects the suggested inference that fault is admitted.

While there is no definition of apology found in the Compensation Act 2006 (England) and Federal Rule of Evidence, the adoption of ordinary meaning of apology is necessary. The ordinary meaning of apology is an expression of regret which does not include acknowledgement of fault. An apology that does not admit fault is a partial apology. Thus, it is safe to conclude that the type of apology protected by the Compensation Act 2006 (England) and Federal Rule of Evidence is partial apology.

6. Conclusion

This paper has answered the research question and has achieved its objective to compare the definitions and types of apologies in the apology law in the UK, Republic of Ireland, Australia, Canada, USA and Hong Kong. This paper summarises that of all the analysed legislation, the legislation that include acknowledgement of fault in the definition and protect full apology provide the most extensive protection to apology. The extensive protection of apology accorded by the Civil Liability Act 2002 No 22 (New South Wales), Civil Liability Act 2003 (Queensland), Apology Act SBC 2006 (British Columbia), Evidence Act, 2007, c.24, s.2. (Saskatchewan), Uniform Apology Act 2007, Colorado Revised Statutes Title 13, Revised Code of Washington, and Apology Ordinance (Cap.631) 2017 best promotes the objective of an apology legislation i.e., to remove the legal ramifications of apology. The findings of this paper are supported by the studies conducted by Ross et al. (2021) and Fields et al. (2020). The study by Nina et al. highlights that well formulated apology i.e., full apology can mitigate communication barriers and disarm emotional responses that may prompt lawsuits. Similarly, Fields et al. in their study enumerate that the application of apology law may better serve its goals if it is ensured that apology is broad enough to include statements of fault and explanations of the wrongdoings. Their studies also vividly call for a broad and extensive apology law.

The findings from the comparative analysis in this paper can be used to propose a viable definition and type of apology in the legislative reform of admission by apologetic discourse in Malaysia. A proposal for the legislative reform of admission by apologetic discourse in Malaysia is significant to solve the long-standing problem of adverse legal effects of apology in evidentiary rules, insurance contract clauses and statutory limitation law. It is hereby recommended for the legislative reform in Malaysia to adopt the approach undertaken by the Civil Liability Act 2002 No 22 (New South Wales), Civil Liability Act 2003 (Queensland), Apology Act SBC 2006 (British Columbia), Evidence Act, 2007, c.24, s.2. (Saskatchewan), Uniform Apology Act 2007, Colorado Revised Statutes Title 13, Revised Code of Washington, and Apology Ordinance (Cap.631) 2017. In these pieces of legislation, the definition of apology includes acknowledgement of fault and protects full apology. The Apology Ordinance (Cap.631) 2017 of Hong Kong even goes further to protect statements of fact in connection with a matter in respect of which an apology has been made.

In terms of limitation, this study is limited to the analysis of the apology legislation in Common Law jurisdictions. Future research should attempt to analyse similar legislative reform in non-Common Law countries to enable a more holistic approach of the definition and type of apology.

Acknowledgments

The authors are grateful for the constructive comments and guidance of the Editor and anonymous reviewers.

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ISSN: : 1985-5079