ABSTRACT

Apologies have proven dramatically effective at resolving conflict and preventing litigation. Still, many injurers, particularly physicians, withhold apologies because they have long been used as evidence of liability. Recently, a majority of states in the U.S. have passed “Apology Laws” designed to lift this disincentive, by shielding apologies from evidentiary use. However, most of the new laws protect only expressions of benevolence and sympathy (such as “I feel bad about what happened to you”). They exclude full apologies, which express regret, remorse or self-criticism (“I should have prevented it,” for example). The laws thereby reinforce a prevailing legal construal of apologies as partial proof of liability. This paper argues that the new laws and the prevailing legal practice thereby misread apologetic discourse in a crucial way. Drawing on developments in ethical theory, I argue that full, self-critical apologies do not imply culpability or liability, because they are equally appropriate for innocent, non-negligent injurers. Neither the statement nor the act of an apology is probative of liability, each for separate reasons, and that suggests their admission up to now has been premised on a mistake. The paper closes with a proposed means of protecting apologies from evidentiary use, beyond the “Apology Laws,” which is modeled on Rule 409 of the Federal Rules of Evidence.