Legislating the Role of Apologies in Litigation

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The Ontario provincial government may soon be getting into the business of regulating apologies.

It started with a recommendation by the Uniform Law Conference of Canada to the Ontario Bar Association to urge the Ontario government to enact apology legislation. At the time of writing, a private member's bill, "Bill 59 – An Act Respecting Apologies," had received second reading and had been sent to the Standing Committee on Social Policy. The proposed legislation would effectively stipulate that an apology:

- cannot be admissible in court for the purpose of proving liability or as an admission of liability;
- cannot be used as confirmation of a cause of action to extend a limitation period; and
- cannot be regarded as an admission of liability for the purpose of voiding an insurance policy.

Similar legislation already exists in British Columbia, Manitoba and Saskatchewan. The objective of such legislation is to encourage early and cost-effective resolution of disputes and/or prevent the commencement of lawsuits where apologies are offered. This article examines the traditional role of apologies in the legal context and questions whether the intended legislation will accomplish its objectives.

In the absence of apology legislation, an apology would be considered a key admission in the course of a legal dispute. In particular instances, apologies can take on a significant role. For example, in defamation cases the plaintiff will inevitably request an apology from the defendant who committed the defamation to redeem his or her reputation. And, assuming the plaintiff is successful at the end of the day, the plaintiff could win increased damages if the defendant refuses to apologize.

Apologies are also relevant in the civil litigation context where, for example, there has been a finding of contempt of court and the offending party wishes to purge the contempt, and in the criminal context during sentencing.

If the recommended apology legislation is enacted in its proposed form, apologies could potentially play a very significant role in a variety of commercial disputes. Even though commercial disputes typically involve a dispute over money (or some form of property or business interest, which ultimately boils down to a monetary loss), invariably these disputes arise from a decision made or an action taken by a person. The person may have acted through or on behalf of a corporation, or may have acted as an individual, but that person's decision or action ultimately caused monetary loss to another person. Typically in such cases, there is also some feeling of injustice or damaged pride by the innocent "victim" which, from a litigator's perspective, often translates into the all-too-common desire by a client to litigate "out of principle" even when the economics do not justify it.

In many of these disputes, an apology could help facilitate a settlement more quickly and for less money because, while a monetary payment would compensate for pecuniary loss, it would not compensate for the intangible losses described above. There is data from 1994, for example, which shows that, in the case of medical malpractice suits, a significant percentage of patients said that they might not have filed suits had they been given an explanation and apology.

The danger, however, in enacting the proposed apology legislation is that it would eliminate the court's discretion to make a finding of liability in any way based on a clear admission of fault by the defendant. As it is presently worded, the draft *Uniform Apology Act* defines "apology" very broadly, such that it means "an expression of sympathy or regret…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." In some cases, the strongest (or only) evidence

that a plaintiff may have to prove its case are admissions of fault spoken or written by the defendant. This proposed legislation would, therefore, tie the court's hands and disallow any consideration of such an admission of fault in determining liability.

This danger could be addressed by limiting the scope of the legislation to apply only to apologies or admission of fault that are given *after* the commencement of litigation. In other words, any such statements made by a defendant prior to the commencement of litigation could still be used as evidence of fault, whereas any such statements made after the lawsuit is commenced could not. Such a change to the proposed legislation would, theoretically, still satisfy the objective of encouraging early, non-litigious dispute resolution, but at the same time avoid the danger of disallowing important admissions of fault made at material times during the dispute.

Another concern is that apologies can become trivialized and meaningless if the defendant knows that they will not be admissible and the mere act of apologizing could either prevent a lawsuit from being commenced or reduce the amount of potential damages for which the defendant is liable.

The answer to this concern is that human nature being what it is, if the defendant truly believes he has done nothing wrong, he is unlikely to apologize; and conversely, if the plaintiff believes the apology is insincere, he is unlikely to accept it.

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At the time this article was being prepared for inclusion in this publication, as noted, the private member's Bill had received second reading and had been sent to committee, but it was difficult to predict when or if it would become law.

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