

Apologies, Non-Apologies and Dispute Resolution

"Love means never having to say you're sorry," was Ali McGraw's line in the 1970 movie *Love Story*. How things have changed! Now we regularly hear about public apologies, as well as books and articles to help us apologize. In an Associated Press story, 2006 was called the "year of apology" with the quip "Apologizing means never having to say you're sorry".

Let's look at some examples of apologies in the news in 2006 and so far in 2007:

- The government of Ghana apologized for its role in the slave trade.
- Although he did not apologize specifically, the Pope "expressed regret" for offending Muslims and said his speech "did not reflect his personal views".
- Mel Gibson apologized for his anti-Semitic comments when he was pulled over for impaired driving. His statement soon after the incident was, "Please know in my heart that I am not an anti-Semite. I am not a bigot."
- "There's a part of my life that is so repulsive and dark that I have been warring against it for all of my adult life," wrote Rev Ted Haggard to his congregation after allegations that he consorted with a gay prostitute and snorted meth.
- Canadian environmental groups apologized for making a "thoughtless and insensitive" mistake by suggesting that then-Environment Minister Rona Ambrose spent more time on her hair than on the job.
- TV show *Grey's Anatomy* actor, Isaiah Washington apologized, focusing mainly on his use of the word "faggot" in relation to another member of the cast. "I welcome the chance to meet with leaders of the gay and lesbian community to apologize in person and to talk about what I can do to heal the wounds I've opened."
- In January, 2007, Canadian Prime Minister Stephen Harper apologized to Maher Arar. "On behalf of the government of Canada, I wish to apologize to you, Monia Mazigh and your family for any role Canadian officials may have played in the terrible ordeal that all of you experienced in 2002 and 2003." In 2006, an inquiry found that although the RCMP was implicated, Mr Arar himself was not at fault concerning his deportation by the U.S. government to Syria where he was tortured.

"One of the most profound human interactions is the offering and accepting of apologies," is Dr. Lazare's opening sentence in his book *On Apology*. Apologies range from this end of the spectrum to the insincere public statements that illustrate "never having to say you're sorry" by saying so little about the wrongdoing that precipitated the statement. According to the Associated Press story, Ken Sunshine, an American publicist explained the apology phenomenon in this way, "Everybody loves a story of redemption....When in doubt, go to rehab or find God."

What is an Apology?

According to Dr. Lazare, "Apology refers to an encounter between two parties in which one party, the offender, acknowledges responsibility or grievance and expresses regret or remorse to a second party, the aggrieved." The earlier English meaning of apology is based on the Greek word *apologia*, meaning justification or excuse.

A classic example of the excuse or defensive form of apology is former American President Richard Nixon's statement at the time he resigned, "I regret deeply any injuries that may have been done in the course of events that may have led to this decision. I would say only that if some of my judgments were wrong, and some were wrong, they were made in what I believed at the time to be in the best interests of the nation."

B.C. Apology Act

In 2006 the province of British Columbia passed its Apology Act in order to allow, and even encourage, individuals, governments and corporations to offer an apology as part of their resolution of disputes without fear of the apology being interpreted as an admission of legal liability. B.C. was the first government in Canada to enact such legislation.

Why would they do that? According to British Columbia Attorney General Wally Opat, "There

are times when an apology is very important and appropriate but the legal implications have long been uncertain. ... The Apology Act is designed to promote the early and mutually beneficial resolution of disputes by allowing parties to express honest regret or remorse by removing concerns that an apology amounts to an admission of liability or could void the provisions of an insurance policy."

According to the researchers, being Canadian or female may also increase the number of times you say "I'm sorry".

When you say "I'm sorry your mother is ill," it is not an apology but an expression of compassion. Similarly when a sign is posted in a public building during renovations, "We apologize for the inconvenience," it is an expression of concern or sympathy for the inconvenience but not an apology.

Dr Lazare suggests a test if you are not sure whether "I apologize" is meant in the sense of acknowledging an offence. Ask the person making the statement: Would you do the same thing again if the situation arose?

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(Apology Act full text - next page)

The U.S. experience

In the United States, seventeen states have enacted apology or "safe harbour" laws. U.S. experience has shown that an apology can work as a "vaccination" for physicians against medical malpractice lawsuits. One example is the Lexington, Kentucky Veterans Administration Medical Center which launched an apology policy in 1987. By 2000 it had settled with 17 patients and only went to trial 3 times. Its average payment across all claims was \$16,000 compared with the VA system's average of \$98,000 in 2000. The incidence of malpractice did not decrease but the cost of claims went down substantially.

An Ontario Apology Act - should we or not?

For insurance companies and other people defending a past action, an apology can be useful to de-escalate emotions. An apology law recognizes honest acceptance of responsibility. At the very least, an apology law clarifies what statements can be used to determine legal liability. An insured person would not be risking a denial of insurance coverage if they were to tell an injured party that they were sorry for what happened in a car accident or a professional mistake situation. In the 1990's the Canadian Red Cross refused to apologize to victims of the tainted blood scandal because it would have made the agency's insurance policy ineffective. The apology to Mahrer Arar might have been given much sooner if apology laws existed in Canada.

Opponents to such legislation argue that apology can be done now in an "off-the-record" context, for example in mediation. The cynical perspective is that spin-doctored apologies may be offered insincerely if such legislation is enacted - and apologies would become almost mandatory. Another criticism of such an Act is that it twice penalizes the injured party in that first they are injured and then secondly are in

the negative position both of owing forgiveness to the wrongdoer who has apologized and of having the wrongdoer's payment of damages potentially decreased because of the apology.

There have been concerns expressed about the wording of the B.C. Act. For example is an apology totally inadmissible or only inadmissible in relation to the question of liability? This kind of concern could be addressed in the wording of an Ontario Act.

Yes, apologize

In my view apology is very powerful to soothe injured feelings. If you are at fault, apologize and take responsibility for your role in what happened. In an environment where there is no Apology Act, concerns about legal liability can be addressed by making such apologies during mediation or otherwise off-the-record. It is as important for politicians to apologize effectively as it is for each of us to do so in our personal lives.

See the next issue of Common Ground for more about the power of apology.

Munn-thly Memo will return in the next issue of Common Ground.

British Columbia Apology Act, 2006

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions

1 In this Act: "**apology**" means 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;

"**court**" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2 (1) An apology made by or on behalf of a person in connection with any matter

- does not constitute an express or implied admission of fault or liability by the person in connection with that matter,
- 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,
- 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
- must not be taken into account in any determination of fault or liability in connection with that matter.

(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 court as evidence of the fault or liability of the person in connection with that matter.

Commencement

3 This Act comes into force on the date of Royal Assent.

Mark Your Calendar

Upcoming Training Events Presented by Kathryn Munn

Dealing with Difficult People

February 28, 2007

9:00 AM to 11:45 AM

Canadian Association of Family Enterprise
Windsor, Ontario

Contact CAFÉ at 519-642-4349 or email
cafeswo@rogers.com for more
information.

Fundamentals of Mediation

Intensive 40 hour program

April 16, 17, 18, 23, 24, 2007

9:00 AM to 5:30 PM each day

Course location: London, Ontario

This course is approved by the ADR Institute
of Ontario.

Please call 519-660-1242

(toll-free 1-888-216-3202) or email

kmunn@munnrcs.com for more information.

If you are interested in this course if it is
offered on later dates, please contact us.

I am pleased to fill requests for presentations
about mediation and negotiation at meetings
of professional and business groups. Call or
email to make the arrangements.

Electronic Common Ground

If you prefer to be on our e-mailing list
please send us an email.

Kathryn Munn, LL.B., Cert.ConRes., C. Med.,
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Through her firm Munn Conflict Resolution Services
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