

The Apology Act 2009:

A new dispute resolution tool



As lawyers, we tend not to think of apologizing as a method of dispute resolution. Thanks to new legislation recently passed by the Ontario government, and to borrow from Elton John, saying sorry no longer has to be the hardest word.

The *Apology Act* came into force on April 23, 2009. The legislation was introduced by David Oraziatti, an MPP from Sault Ste. Marie, as a private member's bill. The Act allows the communication of expressions of sorrow or regret without worrying that the comments can later be used adversely in a civil court.

The original proponents of the legislation came from the health care field. Historically health care professionals have avoided apologizing to patients for mistakes out of fear the apology would be considered an admission of guilt in civil proceedings.

Thinking changed. Doctors, nurses and other health care providers felt that apologizing would initiate the healing process by acknowledging to a patient that a harm had been done and by promoting open communication and accountability between patient and health care provider.

In Ontario, the initiative gained traction. The *Apology Act* has received support from various groups including the Ontario Bar Association, the Ontario

Medical Association and the Registered Nurses Association of Ontario.

Proponents of the *Apology Act* suggest the legislation will

- enhance the dispute resolution process;
- promote accountability; and
- enhance the affordability and speed of justice by shortening or avoiding litigation.

Ontario is the fourth Canadian province to enact apology legislation. British Columbia, Saskatchewan and Manitoba are the others. Most Australian states and more than 30 states in the U.S.A. have similar legislation in place.

According to MPP David Oraziatti, one in three plaintiffs in the United States would not have sued if he or she had received a simple apology. In tabling this legislation, Mr. Oraziatti advocated the position that apology laws have reduced lawsuits and claims in the court system because people were able to have a discussion about what took place and bring closure to a particular issue.

About the Act

The Act provides that an apology, made by or on behalf of a person:

- does not constitute an admission of fault or liability by the person;

Under the Act an "apology" means:

"an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate."

- does not affect any insurance coverage or indemnity available despite any wording to the contrary in the contract of insurance or an act or law;
- shall not be taken into account in determining fault or liability in the matter; and
- is not admissible in any civil proceeding, administrative proceeding or arbitration as evidence of fault or liability in the matter.

Where the Act does not apply

As with all good legislation, there are situations in which the Act does not apply.

If the apology is given while testifying at a civil proceeding, including an out-of-court examination, or while testifying at an administrative proceeding or arbitration, then the apology is admissible. No doubt the legislation was intended to encourage the early resolution of disputes

by providing the protection of the Act if the apology is given before reaching costly out-of-court examinations such as discovery, or matters escalate to an arbitration or trial.

The Act also does not affect the admissibility of evidence in a criminal proceeding, including a prosecution for perjury. Finally, the Act does not apply to proceedings under the *Provincial Offences Act* or to the use in a civil or administrative proceeding or arbitration of a conviction for a criminal or provincial offence.

It is probably fair to say that, like doctors, lawyers have been reluctant to apologize to their clients, as the statement could be interpreted as an admission of liability.

Insurance and practice issues

LAWPRO's policy of insurance does not specifically prohibit apologies or

expressions of sympathy or regret. It does, however, provide that an insured shall not voluntarily assume any liability. The Act assists lawyers in dealing with this issue and makes it easier for lawyers to apologize to their clients. We encourage you to explore this option in consultation with LAWPRO. Ultimately the legislation should help lawyers achieve the same goal as health care professionals of enhanced accountability and open communication between the lawyer and the client.

Apologizing is not something we traditionally think of as a dispute resolution mechanism. However, not too long ago mediation was a new concept that was met with a degree of skepticism. Mediation has proven to be an effective method of dispute resolution.

We encourage you to think of the *Apology Act* as another dispute resolution mechanism. In handling matters on behalf of your clients, reflect on whether you might be able to use this new legislation to shorten or perhaps avoid litigation. If you are on the receiving end of a solicitor's negligence claim, think about whether an apology is something that might assist in the resolution of the matter. Consult with your LAWPRO claims representative or defence counsel to formulate a strategy in this regard.

Instead of thinking of it as a blunt tool, an apology can be looked at as a subtle instrument that can have a big impact in resolving disputes. Take a chance and don't be afraid to start practising those key words: "I'm sorry."

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