

Civil Litigation

The power of an apology in mediation

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(March 31, 2023, 1:20 PM EDT) -- "Sorry" always seems to be the hardest word, but it can also be remarkably effective in assisting parties to resolve disputes. Apologies given and received during mediation or litigation can have measurable impacts on conflict resolution and can lead to durable settlements.

Apologies have been formally protected by legislation and are widely encouraged as a societal good. We are taught from early childhood to say that we are sorry if we have acted in a bad way. Despite all of this, however, many mediators are reluctant to raise or consider the issues of apology and forgiveness at mediation, despite the benefits that an apology can bring.

The *Apology Act, 2009* of Ontario was introduced to encourage apologies and to protect litigants who make them. The Act defines an apology broadly as "an expression of sympathy or regret" and provides that no apology made by a person in connection with any matter can be taken to constitute an admission of fault or liability in a legal proceeding. The Act further provides that evidence of an apology is not admissible as evidence of fault in litigation.

Despite this broad protection, the natural reaction of a civil defendant accused of a wrongdoing that has caused physical or economic harm is to deny liability, rationalize past hurtful actions and to deflect blame. Hearing a defendant fail to take ownership of his or her harmful behaviour can embitter a plaintiff and can make settlement all the more difficult.

A study detailed in the *University of Michigan Law Review* in 2003 demonstrated significant increases in the rate of settlement after a full apology was extended. In the study, 145 participants were given an identical fact scenario where they were asked to play the injured party in a motor vehicle/bicycle accident scenario.

One-third of the participants were given no apology, one-third were given a partial apology in which the defendant expressed sympathy but did not acknowledge fault and one-third were extended a full apology in which the defendant also took responsibility for causing the injury and expressed regret.

All participants were then offered an identical settlement.

The study found that 52 per cent of the participants who received no apology accepted the settlement but that 43 per cent stated they would definitely or probably reject the offer. Of those who were offered a full apology, however, 73 per cent of the participants were inclined to accept the offer while only 13 per cent were inclined to reject it, an increase of over 20 per cent who would settle.

Those who were offered only a partial apology without admission of fault were actually less inclined to accept the offer (35 per cent) than those who received no apology, although more of this group

were uncertain as to what they would do.

The study further analyzed whether the success rate for those receiving an apology was lowered when the participants were told that the apology they had received was protected by privilege or legislation and so could not be used in the lawsuit. This factor was not significant. Those participants who had received a full apology were still more inclined to settle, as the defendants who apologized were viewed to be more regretful, moral and more likely to be careful in the future than those who had made a partial or no apology.

The benefits of an apology and the expression of remorse have long been well known in criminal litigation. A criminal defendant who accepts responsibility, expresses remorse and pledges to change will always receive a more lenient sentence than one who denies responsibility.

It is generally accepted that a true apology should consist of heartfelt regret and remorse for what has happened, sympathy for the victim and an acknowledgment of wrongdoing or transgression. It is extremely rare, however, that a true apology will be extended in the litigation context, even with the protection of the *Apology Act*, and despite the demonstrated benefits of an apology, as seen repeatedly in the criminal courts.

Within the civil litigation mediation process, however, a mediator may explore the interests of each participant and may frequently find that the parties' interests do not always overlap with results that can be expected at trial. No court can order a defendant to apologize, and no court can order the plaintiff to accept an apology. Yet frequently this is something of considerable value to the parties and can lead to resolution and sometimes healing.

There can be important psychological benefits to both receiving and extending an apology. Those benefits can be explored within the mediation context but would never be realized in a trial. The confidentiality protections that the mediation process offers can be used as a shield to properly explore whether receiving an apology as part of an overall settlement could satisfy the needs of a plaintiff, and whether a defendant might be inclined to offer one within the safety of the mediation process.

Solicitors will find that it is not only within family law disputes or employment relationships where the psychological benefit of an apology can be influential. Any person who has been lessened economically as a result of the actions of another over which he or she has no control suffers from the inequity in that relationship and the perceived injustice and may feel distress as a result.

An acknowledgement of the harm, expression of regret and an extension of sympathy can go a long way to promoting resolution; whether the dispute is over an estate, a failed business or even a personal injury matter, to use three examples.

A mediator's basic role is to assist in settling the lawsuit. To get there, a mediator needs to probe and understand what interests need to be satisfied to resolve the underlying conflict. A resolution that helps individuals recover and heal from the disruption of litigation is even more valuable and a skillful mediator may assist in determining whether a genuine apology can be part of a satisfying settlement.

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