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Legal Net

Is an Apology an Admission of Fault?

For Landlubbers No, for Mariners Perhaps.

In February of 2001, while conducting a demonstration for civilian observers nine miles off the Hawaiian island of Oahu, the U.S. nuclear submarine *Greeneville* performed an emergency ballast blow and surfaced directly beneath the Japanese fisheries training vessel *Ehime Maru*, slicing its hull port to starboard. The 191 foot *Ehime Maru* sank in less than 7 minutes with the loss nine crewmembers. The captain of the *Greeneville* asked to travel to Japan to apologize in person to the families of the victims, but the U.S. Navy declined his request until nearly two years later, after a court of inquiry was convened and found him guilty of dereliction of duty. The Japanese government and the families of victims expressed outrage at the perceived lack of remorse of the captain.

In July of 2012 the captain of the wrecked cruise ship *Costa Concordia* was interviewed on Italian television and was reported to have said “*when there’s an accident, it’s not just the ship that’s identified or the company. The captain is identified and so it’s normal that I should apologize as a representative of this system*”. In this statement, the captain appears to skirt an outright personal apology for the grounding that is believed to have killed 32 people, presumably concerned that such an apology would be construed as an admission of personal fault, and rather apologized “*as a representative of this system*”.

These tragic incidents are important to this article because they demonstrate how different cultures, and laws, perceive the meaning of an apology. Japanese culture, for example, sees an apology as a sign of remorse and an intention to repair a relationship, but not as an admission of fault. On the other hand, North Americans and Europeans typically see an apology to be an acknowledgment of wrongdoing, and an admission of guilt. “Why should I apologize, it wasn’t my fault”, or “how can it not be his fault, he apologized” are common statements reflecting this perspective.

Concern that an apology is an admission of fault has led to many governments enacting laws that say our apologies cannot be used against us in a court of law. After such laws appeared in the United States and Australia years prior, B.C. was the first Canadian province (in 2006) to enact legislation that prevents such statements from being relied on in court as evidence that the person making the statement was at fault. In 2012, the only Canadian provinces or territories not to have enacted such legislation are New Brunswick and Quebec. The federal government also has not enacted an apology law.

Importantly, while these provincial laws (sometimes called “safe harbour” laws because they *protect* the person making the apology) may be effective for non-marine accidents and resulting apologies, it is unlikely that these provincial laws offer the same protection to mariners.

Why Apology Laws?

Lawyers generally advise their clients not to apologize for the very reason that many cultures interpret such apologies as admissions of fault and may expose their client to legal action and financial harm. However, there are other concerns that motivate this advice. Many insurance policies include terms which void the policy if fault is admitted by the insured. As well, an insured has a duty to the insurer not to prejudice the insurer’s ability to defend a claim against the insured, and an apology may be viewed as a breach of this duty, jeopardizing the insurance coverage.

However, there are several studies, mostly conducted by the medical profession and their insurers that show a simple apology can reduce litigation, promote the early resolution of disputes, and even lower the amount disputes are settled for. In 1994, a U.S. study found that 37% of those interviewed would not have started medical malpractice suits had they received an apology. In 1987, after losing two medical malpractice cases that cost a total of US\$1.5 million, the Veterans Affairs Medical Center adopted an apology policy, which was later credited with preventing all but three cases from going to trial over 17 years, and reducing average settlements from a national average of \$98,000 to only \$16,000. In Canada, the government has a keen interest in reducing the number of cases that require court time, so the effect of protecting people who chose to apologize has been given significant attention in recent years.

The B.C. *Apology Act*:

In 2006, the B.C. government passed the *Apology Act*, which provides:

- an apology does not constitute an express or implied admission of fault or liability by the person in connection with that matter;
- an apology does not void, impair or otherwise affect any insurance coverage that is available;
- an apology must not be taken into account in any determination of fault or liability in connection with that matter; and
- 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.

Why B.C.'s *Apology Act* does not Apply to Marine Accidents:

While no court case has yet considered this point, it is this lawyer's opinion that provincial apology law cannot protect mariners from the effect of an apology given for a marine accident in the same way it protects apologies made for non-marine accidents. For example, the master of a vessel apologizes to the crew of another vessel following a collision while tying-up, he then gets in his car and drives home, rear-ending another motorist at a red light. As if his day did not go badly enough, the master gets sued by both the owner of the vessel he struck, and the motorist he rear-ended. The B.C. *Apology Act* would mean the apology made to the motorist could not be used against the mariner in court, but the apology made to the crew of the vessel could be.

The reason apology laws cannot protect mariners from their apologies relates to the federal government's exclusive jurisdiction over navigation and shipping under the Canadian *Constitution*. In recent years Canadian constitutional law has developed to say a provincial law can apply in areas of federal jurisdiction, such as maritime law, but only if the provincial law does not directly conflict with federal law. In a law suit involving a collision or other maritime accident, Canadian maritime law includes the right to rely on an apology at trial, but the provincial law directly conflicts with this right by saying the apology cannot be relied on. This direct conflict means the provincial law would likely not apply to marine accidents. Because the federal government has not enacted an apology law of its own, mariners can expect their apologies to be raised as evidence of their fault for a marine accident. This is not to say mariners should never apologize, but in cases where legal action is possible, it is best to seek legal advice as to the best way to make that apology and what effect that apology might have.

Darren Williams is marine lawyer with the Merchant Law Group office in Victoria B.C. and can be reached for question or comment at dw@MarineLaw.ca, toll-free at 1-866-765-7777 or by emergency phone at 250-888-0002.