

Apology and the Law

Does Retaining a Lawyer Mean
Never Having to Say You Are Sorry?

Structural Legal Issues

- The Legal Tension:
- Admissibility of Evidence
- Settlement of Cases

The Criminal-Civil Distinction

- Criminal:
 - The Offender Must Deny Responsibility
 - The State Must Prove the Offense
 - The “Remedy” is Punishment
- Civil:
 - The Offender Must Deny Responsibility
 - The Victim Must Prove the Offense
 - The Victim Obtains “Civil” Remedies

The Basic Remedial Principle

- The Rightful Position Standard
- Value as the Measure of Rightful Position
- Limitations on the Principle

Civil Remedies

- Substitutionary—Money Damages
- Equitable—Injunctions
- Declaratory — Declaration of Rights
- Restitutionary — Disgorge the Benefit Conferred

How the Law of Evidence Works

- Evidence Rules Govern Information Flow to Jury
- People and Documents
- Relevancy, Credibility, Fairness, Public Policy

Relevancy and Apology

- The Importance of Relevancy
- Does an Apology Tend to Prove or Disprove a Fact in Dispute?
- Does the Apology Contain an Admission of Legal Fault?

The Hearsay Rule

- An out of court statement offered for the truth of the matter asserted
- Inadmissible, unless excepted
- Rationale: No right to cross-examination

Admissions

- Any statement by an adverse party is admissible by the other party
- The plaintiff may admit any statement of the defendant
- The defendant may not offer his or her own statement

Declarations Against Interest

- Applies to Non-Party Witnesses
- Applies to Statements Against Interest
- Witness Must be Unavailable

Apology and the Hearsay Rule

- Apology is Hearsay
- Admissible as an Admission, if Made by a Party
- Admissible as a Declaration Against Interest

Other Evidentiary Issues

- Impeachment
- Use by Third Parties
- Use in Proceedings Other Than Trial

Some Judicial Views on Apology

- U-Drive-Apology Not an Admission
- Acevedo-Court Cannot Compel Apology
- Phinney-Apology Not an Admission
- Senesac-Apology Not an Admission
- Carney-Third Party Apology is Admissible

Does Mediation Protect Apology?

- California Evidence Code Section 703.5
- California Evidence Code Section 1119
- The Olam Case

Is Apology Protected as a Settlement Negotiation?

- Federal Rules of Evidence Rule 408
- California Evidence Code section 1152
- Problems

• A Statutory Safe Haven

- Mass. Gen. Laws ch. 233, 23D (1992) states:
- Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.

The Problems of Apology and Insurance

- The Duty to Cooperate
- Assumption of Liability Voids Coverage
- Apology, Claims Representatives, and Settlement

Attorneys and Apology

- The Adversary Ideology
- Apology Is Not a Right or a Remedy
- Loss Aversion
- Fear of Malpractice
- Reputation and Roles
- Divergent Financial Interests

Conclusions

- Apology Is Not Favored Within Our Legal Structure
- Statutory Protection Is Required
- Attorney Re-Education Is Required
- Peacemakers Must Still Be Alert to Apology