



GUIDE TO THE APOLOGY ACT (2009)

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Introduction

Rarely is apologizing seen as a method of dispute resolution. However, the *Apology Act* (2009) that came into force on April 23, 2009, allows individuals and public organizations (regulated health professionals, hospitals, rehabilitation centres, etc.) to apologize for a mistake or wrongdoing without fear that the apology will be used adversely against them in civil court proceedings.

According to the Act,

“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 in connection with the matter to which the words or Actions relate.

This new dispute resolution tool provides that an apology made by or on behalf of a person in relation to any matter, does not constitute an admission of fault or liability by the person. Such an apology is therefore not admissible in any civil, administrative proceeding or arbitration as evidence of the fault or liability of any person in relation to that matter.

The original proponents of this legislation came from the health care field. Historically, health care professionals have avoided apologizing to patients and clients for mistakes made out of fear the apology would be considered an admission of guilt in civil proceedings. This Act not only addresses those concerns, but is also seen as part of a growing movement towards accountability and transparency in the Canadian health care system, which will improve interaction between health care providers and patients or clients. The Act sets a legal framework giving health care providers the ability to apologize for an accident or wrongdoing, without it being considered an admission of guilt in civil proceedings.

Ontario is the fourth Canadian province to enact apology legislation, following British Columbia, Saskatchewan and Manitoba. Most Australian states and more than 30 U.S. states have enacted similar laws.

Overview of the *Apology Act* (2009)

The *Apology Act* (2009) provides that an apology is not admissible in any civil, administrative proceeding or arbitration, as evidence of fault or liability of any person in relation to that matter. However, if a person apologizes while testifying at a civil, administrative proceeding or arbitration, the provision of the Bill does not apply for the purpose of that proceeding or arbitration.

The Bill does not affect the admissibility of any evidence in a criminal proceeding or in a proceeding under the Provincial Offences Act, or the use that may be made of a conviction for a criminal or provincial offence.

What are the benefits of apologizing?

Supporters of this legislation, including health care professionals, believe that offering a sincere apology or expression of regret is simply the right thing to do. It is a sign of caring, compassion and empathy and should not be seen as a blame or guilt. Removing the threat of litigation from an apology will help improve communication between occupational therapists and their clients, resulting in clients being better informed and allowing occupational therapists to worry less about legal issues and focus on their client's health and well being.

In addition, genuinely and sincerely given apologies can:

- reduce the emotional impact of the harm;
- are regarded as an appropriate ethical response;
- have positive therapeutic effects on the person injured;
- facilitate the healing and reconciliation process;
- improves the system by adding an accountability mechanism;
- put a human face to the issue and may make those concerned feel better;
- have been shown to reduce lawsuits, settlement and defense costs by encouraging out of court dispute resolution; and
- may reduce costs in the public sector.

What are the effects of an apology on liability?

An apology made by or on behalf of a person in connection with any matter:

- does not, in law, constitute an express or implied admission of fault or liability by the person in connection with the matter;
- does not, despite any wording to the contrary in any contract or insurance or indemnity and despite any other Act or law, void, impair or otherwise affect any insurance or indemnity coverage for any person in connection with that matter;
- shall not be taken into account in any determination of fault or liability in connection with that matter;
- is not admissible in any civil or administrative proceeding or arbitration as evidence of fault or liability in the matter.

When and how should you apologize?

The effectiveness of an apology depends on the sincerity and authenticity of the apology. Thus, it is important that you:

- apologize in a timely manner, the earlier the apology the better;
- use the right words to express your feelings (e.g. I am sorry, we apologize, etc);
- give the right description of what happened (e.g. made a mistake, error, wrong or substandard care);
- give the right description of impact of what happened on the person (e.g. harm, pain that they suffered or may suffer in future, etc);
- explain the corrective measures that are being taking; people want to know that something good may have come from their pain;
- follow-up where appropriate to see how they are doing; this may be an opportunity to give an update on corrective action you are taking.

Why fear apologizing?

Until now, many health care providers were hesitant to apologize to their clients for fear of litigation before the *Apology Act* (2009) because:

- an apology could be taken as an admission of legal fault or liability;
- an apology could be used to determine fault or liability;
- the apologizer could assume a disproportional share of the blame since responsibility is often multi-faceted;

- professional organizations and associations would counsel their members not to recognize errors made for fear of liability; or
- human nature is such that it is difficult to admit to a mistake because it may be seen to lower an individual's respect or status among colleagues.

The *Apology Act* (2009) has effectively removed or reduced the effects of these concerns making it easier to apologize when one errs.

When or where does the Apology Act (2009) not apply?

- The Act only applies to civil not criminal proceedings;
- If a person makes an apology while testifying at a civil, administrative proceeding including an out-of-court examination or at an arbitration, the Act does not apply; and
- The Act does not apply where one admits owing money or in the recovery of personal property.

Can one still be sued after apologizing?

It is important to note that the *Apology Act* (2009) does not prevent anyone from suing or deprive one of a legal remedy. If the victim does not believe that the wrong-doer is sincere, this may provoke them, instead of reducing litigation. An apology that appears to be dishonest, insincere, and strategically meant to avoid litigation may work against the OT offering it. An honest disclosure and apology that shows commitment to change and improvement to avoid a repeat of the mistake (e.g. changed behavior, practice or policy could lead to a better outcome for both the client and the OT). Bear in mind that many people value the need to restore human relationships and to feel whole again more than any financial or material gain.

Since you cannot control people's reaction when you apologize, you should focus on doing your part. Some negative reaction may change over time to respect and appreciation.

Conclusion

While we have yet to see how deep an impact this legislation will have in Ontario, there is a lot of potential for positive results. When they make mistakes, occupational therapists should reflect on whether using the *Apology Act*, 2009 as another dispute resolution mechanism is the right thing to do and whether this promotes the client's best interest while adhering to appropriate ethical practice.

EXAMPLES OF SCENARIOS THAT MAY WARRANT AN APOLOGY

General Physical Health

Following a burn, the application of external pressure for scar management is common. A pressure garment is often used for this purpose. The application of external pressure, using a pressure garment, together with other treatment promotes optimal function and also flattens the scar, thereby improving its aesthetics. It is essential for the occupational therapist to ensure early application of pressure as soon as it is safe to do so in order to achieve the optimal outcome.

Consider a scenario in which, a child burned the back of his hand when he inadvertently grabbed an iron that his parent had left on. The parent took the child to the hospital and the acute phase of the burn was treated by the emergency department. No damage to the tendons on the back of the hand occurred and therefore functional use of the hand was felt to have been preserved. Nonetheless, an occupational therapy referral was made.

After examining the boy, the OT made an error in judgement when she failed to apply pressure garment. She did not feel that hand function would be affected and therefore discharged the child, recommending that the parents re-contact her if concerns arose. A year later, the parents learned that the ugly scar that remained on their child's hand could have

been treated if he had been fitted with an external pressure garment. The OT did not provide this information to the parents as a treatment option. As well, it was now too late for this treatment option to be applied, as the scar had completed the healing process and therefore this treatment modality would no longer be effective. Evidently, the occupational therapist delayed or did not give this treatment to the client either because she didn't know about it or it was just an oversight. The occupational therapist should not have waited for the client to discover that there was a better treatment that would have eliminated the scar but should apologize upfront and explain why he or she did not to do it. Alternatively, if the occupational therapist is confronted by the client's parents after learning about this treatment option, he or she should apologize and explain why she did not offer that treatment option.

Auto Sector

Occupational therapists working in the insurance industry often have to identify temporary wheelchair accessible housing for their clients. Since short-term rental wheelchair accessible housing is difficult to come by, some clients opt for universal design accommodations. These accommodations could be further modified with assistive devices, however, permanent changes to the dwelling are usually not permitted. Due to the restrictive timelines and limited options, it is possible that after assisting the client in securing funding to rent a dwelling, and upon the client moving in, the OT determines that there were important accessibility issues that were overlooked but are necessary to assist the client to function independently and safely.

Since the housing has already been funded and a lease signed, it may be too late to opt for an alternate dwelling. However, it can never be too late to apologize to the client and take steps to increase their safety and independence, as well as possibly take steps to move them to a more appropriate dwelling once the lease expires.

OT retained by an insurance company to conduct an Independent Examination to determine whether a treatment plan (by the treating OT) is reasonable to justify funding. When completing the examination, the OT will be provided with a limited amount of information which may influence his or her decision to render an opinion that does not support further treatment. Upon rendering this opinion, the treating OT may submit a "Rebuttal Report", pointing out information (e.g. a diagnosis, etc.) that the OT conducting the examination did not have, but that really should be considered when rendering an opinion. Without proper consideration of this information and taking the steps to amend her original opinion, the client's access to benefits and or treatment can be delayed or even withheld indefinitely, resulting in a significant hardship to the client. In such a scenario the OT conducting the examination may apologize to the patient and the treating OT for misleading the adjudication process.

Mental Health

There is often an incorrect assumption that people with serious mental health conditions cannot consent or make decisions concerning their health or well being. Instead, it may be assumed that a family member or caregiver "knows best." This can at times lead to an infringement on the client's rights.

For example, an OT treating an individual with mental health issues may seek information, aimed at facilitating treatment, from the client's family member. The problem is that this family member, while seemingly helpful, may be someone that the client does not share information with and furthermore, the client may feel strongly that this family member not be made privy to their business. In other words, despite the client's mental health issues they have the right to consent to who information is to be shared with. The OT, with good intentions may inadvertently breach this confidentiality thereby causing an uncomfortable dynamic between the client and the family member. If this happens, the OT should apologize for breaching consent, explain how it happened and take steps to ensure that it does not happen again. These steps may include giving the client a choice of who should speak on his or her behalf.