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Apology Excepted: Does Ontario's Apology Act protect apologies offered abroad?

In Ontario, if a product harms consumers, a manufacturer may apologize without risk of the apology being used as an admission of liability in subsequent civil proceedings. Indeed, Ontario's *Apology Act* expressly protects defendants from their apology being used in a determination of fault or liability.

But what if that apology is uttered while abroad?

Justice Paul Perell of Ontario's Superior Court of Justice recently considered this issue in the *Coles v Takata Corporation* case.

TK Holdings Inc., an automobile airbag manufacturer, is a co-Defendant in five proposed product liability class proceedings. In each of the five Statements of Claim, the Plaintiffs refer to apologies made by two TK Holdings executives. The apologies were directed towards U.S. and Canadian consumers, and were offered at a shareholders' meeting in Japan and at a Senate Committee proceeding in Washington, D.C. Neither Japan nor the District of Columbia have legislation equivalent to Ontario's *Apology Act*.

TK Holdings brought a motion pursuant to rule 21.01(1) of the *Rules of Civil Procedure* to strike the paragraphs referencing these apologies, on the basis that they contravened the *Apology Act*. In response, the Plaintiffs argued that Ontario's legislation should not be applied extra-territorially to apologies uttered in foreign jurisdictions. The Plaintiffs also argued that the motion to strike was premature because a contextual analysis of the TK Holdings executives' statements—with the assistance of a full record at trial—was necessary.

In his decision, Justice Perell offered a number of instructive reminders about the role of pleadings as well as the proper application of a court's procedural rules. Before turning to the parties' submissions, Justice Perell noted that the TK Holdings executives' statements of apology constituted evidence and, as such, were improperly included in Plaintiffs' pleadings, which must be confined to a concise statement of material facts. Accordingly, the impugned paragraphs were struck from the Statement of Claim for offending Rule 25.06(1) of the *Rules of Civil Procedure*.

Despite disposing of the motion on this basis, however, Justice Perell went on to consider the conflict of laws argument and whether the *Apology Act* properly applies to apologies uttered abroad. In rejecting the Plaintiffs' framing of the issue, Justice Perell noted that the question before the Court was not whether the *Apology Act* should be applied on an extra-territorial basis. Rather, the issue was what procedural rules should govern the proceedings before a court in Ontario? He observed that the *Apology Act* concerns the law of evidence, which is a procedural, rather than substantive, matter. As the law of the forum governs the admissibility of evidence, Ontario's *Apology Act* properly applied in these circumstances. As a result, the apologies offered abroad by TK Holdings executives would be protected from being used as an admission of liability.

Justice Perell further observed that, even if the *Apology Act* was substantive law, the proper law to be applied is that of the jurisdiction where the alleged tort occurred. As the airbag malfunctioning was alleged to have occurred across Canada in this proposed class proceeding, the apologies would similarly be protected, as all other Canadian provinces (apart from Quebec) have corresponding legislation.

A word of caution is in order for anyone who may now be tempted to offer broad words of contrition after reading this decision. Justice Perell correctly observed that, despite the outcome in this particular matter, a statement of apology may indeed be used in an examination for discovery in order to extract an admission from a deponent. Similarly, while an apology itself is protected in Ontario from being used as an admission of liability, other portions of any such statement or utterance may be otherwise admissible as a statement of fact. Consequently, parties must be very careful before making statements that could be seen as admissions, even if they appear to be framed as apologies.

With notes from Kate Costin