

APOLOGIES IN NEGOTIATION: A CONSIDERATION OF GENDER

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OVERVIEW

Conflict between parties in family negotiations is an aggravating factor that can act as a severe impediment to reaching an efficient and complete settlement. However, an apology can mitigate this problem as it can serve to defuse the conflict and unpack the highly emotional issues from the tangible problems that need resolution. In essence, by its capacity to subtract the insult from the injury, apologies can help generate fast and fair settlements.¹ However, historically, the potential legal consequences of apologies have discouraged offenders from tendering an apology. The concern has been that an apology will be misconstrued as an admission of fault or wrongdoing, which could be later used as evidence of fault against the offender in litigation or other proceedings. Ontario's recently proposed Bill 108, *An Act Respecting Apologies*, has addressed this issue.² The proposed legislation removes any potential legal consequences from the act of an apology. It is anticipated that the introduction of this legal distinction will increase the likelihood of apologies in family negotiations, as individuals will no longer fear that an apology will lead to jeopardy in a subsequent proceeding. Given the potential of apologies to reduce conflict, it follows then that apologies should become more prevalent in family negotiations and they should proceed in a more efficient and cordial manner.

¹ Jonathan R. Cohen, "Advising Clients to Apologize" (1999) 72 Southern California Law Review 1009 at 1019.

² Bill 108, *An Act Respecting Apologies*, 1st Sess., 39th Leg., Ontario, 2008 (date of first reading: 7 October 2008).

However, notwithstanding the introduction of Bill 108, there remain other reasons why apologies may not regularly be part of the family negotiation process, or why their efficacy may be tempered. This paper will focus on gender as a limiting factor to the usefulness of an apology and in particular, will examine the influence that gender has on a party's willingness to offer and accept an apology. It will consider how theories of gender differences relating to conceptions of relationships and power may impact the significance and value of an apology in family negotiations. This nexus between gender and an apology will suggest that regardless of the significance of Bill 108, the influence of gender on an apology may nonetheless at times be a barrier to the use of apologies in family negotiations.

CONFLICT AS A BARRIER TO NEGOTIATION

In situations of high conflict, it can be extremely difficult for two parties in a family breakdown to come to a negotiated agreement. In fact, statistics show that the antagonism and discord commonly found between divorcing couples is a barrier to reaching an agreement about 15% to 20% of the time.³ Often conflict can function as a way to deflect the anguish that the parties are suffering. In other words, arguing can be a product of, and mask, the pain and loss that the parties are experiencing.⁴

³ Hanna McDonough & Christina Bartha, *Putting Children First* (Toronto: University of Toronto Press, 1999) at 91.

⁴ *Ibid.* at 92.

Given the obstacles that a conflict can present, it is beneficial if the parties first attempt to resolve existing conflicts before they commence negotiating. Once the conflict is identified and settled, the parties are then better able to focus on and negotiate the actual problems they face, such as support obligations, property division and issues of custody and access.

There are clearly countless factors at the root of personal conflict, and accordingly, it is often very challenging to isolate or identify a source of conflict. This is particularly the case in family negotiations, where conflict may flow from the parties' different values; poor communication throughout the relationship; external factors which impact a party's mood or attitude; misinformation; incompatibility or imbalance of resources.⁵ Regardless of the source of the conflict, it negatively impacts the process of resolution, as it blocks the parties from working co-operatively and negotiating in an effective and productive manner. In essence, the parties will not be able to reach agreement until the resentment that stems from the conflict is removed.⁶

APOLOGIES - A TOOL IN CONFLICT REDUCTION

Apologizing can be, at times, an effective means of lessening or removing a conflict.⁷ On its own, an apology is rarely the sole solution; however, its potential to remove the impediments to agreement caused by conflict can be an

⁵ Class notes: *Family Law Dispute Resolution*, H. Linton, 2009.

⁶ *Supra* note 1 at 1020.

⁷ Barbara Benoliel, "Apologies in Mediation: Who's Sorry Now?" (2008) 17 Canadian Arbitration and Mediation Journal 26 at 26.

important factor in the success of a negotiation. While an apology will not solve the tangible issues between parties, it does have the potential and the power to separate the insult from the injury, thereby allowing parties to negotiate more effectively.⁸ When the intangible issues are isolated and addressed, it becomes somewhat easier for the parties to approach negotiation in a more cordial and forthright manner.⁹ As Goldberg, Green and Sander recognize, "...at times, an apology alone is insufficient to resolve a dispute, but will so reduce tension and ease the relationship between the parties that the issues separating them are resolved..."¹⁰

An apology can be worthwhile as the admission inherent in an apology tends to defuse negative feelings between the parties and enhance their expectations about their future interactions.¹¹ The 'confessional' piece of an apology is grounded in trust and renewed faith that the parties can once again believe in each other, a requirement that is essential to a healthy relationship. Overall, the apology "mediates between frustration and aggression and can ameliorate an injured person's hostility toward the wrongdoing."¹² Given the restorative power of an apology, it removes much of the negative emotion that can cloud a negotiation, thereby allowing the negotiation to proceed in a more

⁸ *Supra* note 6 at 1019.

⁹ *Ibid.* at 1019-1020.

¹⁰ Stephen B. Goldberg, Eric D. Green, & Frank E.A. Sander, "Saying You're Sorry" (1987) 3 *Negotiation Journal* 221.

¹¹ Carl D. Schneider, "I'm Sorry': The Power of Apology in Mediation" *Mediate.com Resolution Solutions* (October 1999), online: *Mediate.com Resolution Solutions* <http://www.mediate.com/articles/apology.cfm>.

¹² Hiroshi Wagatsuma & Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20 *Law and Society Review* 461 at 477.

rational, realistic and candid way. In essence, the power of forgiveness that is embedded in an apology is one of the factors that can have a transformative impact on the victim, and help to heal much of the hurt that is at the root of the parties' problems.¹³ As such, the restorative aspect of an apology can help inform the negotiation in a very positive manner.

REDRESSING POWER IMBALANCES

The significance of an apology to conflict reduction in the process of negotiation is rooted in the capacity of an apology to restore the power balance between the parties.¹⁴ When a person apologizes, he or she acknowledges to the other party that he or she has acted in an unworthy manner that has hurt the other person.¹⁵ The apologizer is sorry for what has happened, and regrets any harm that has been caused. In doing so, the offending party is restoring value to the injured party - because the apology carries an acknowledgment of the other person's feelings and inherent value.¹⁶ The apologizer is accepting responsibility for having done something that offends the standard or norms of expected conduct, and the consequences that stem therefrom. In conjunction with this acknowledgement that he or she has acted in an improper way, the offender generally feels embarrassment and shame.¹⁷ In this regard, studies have shown

¹³ William L.F. Felstiner, Richard L. Abel & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming" (1981) *Law and Society Review* 42 at 51.

¹⁴ Donna L. Pavlick, "Apology and Mediation: the Horse and Carriage of the Twenty-First Century" (2003) *18 Ohio State Journal on Dispute Resolution* 830 at 843.

¹⁵ *Supra* note 7.

¹⁶ *Supra* note 14 at 845.

¹⁷ *Supra* note 7 at 27.

that shame leads one to experience inferiority and low self-esteem.¹⁸ Given these personal consequences, it is not surprising that apologizing is often a disturbing and transformative experience for the offender. As well, there is often a nexus or similarity between the emotions felt by the offender upon apologizing and those that the victim experienced at the time he or she was originally hurt.¹⁹ Further, as the offender begins to feel less powerful and secure, the formerly aggrieved party tends to experience an opposite reaction; he or she often develops personal strength and increased confidence, and begins to feel less personally responsible for any harm that occurred.²⁰

In essence, as the offending party apologizes to the injured party, a shift in the balance of power is triggered.²¹ It is as though there is an exchange of emotion and strength, with the original offender transferring power and self-worth to the originally hurt party, and the originally hurt party, in turn, transferring his or her earlier feelings of hurt and humiliation back to the one who first inflicted the harm. In this regard, an apology has been described as "...a form of non-coercive power-balancing enacted by parties in which the powerful offer their vulnerability and through recognition, the injured/humiliated are empowered."²² It is this realignment of power which reduces blame and tension between the parties. As a result, the parties move to

¹⁸ *Ibid.*

¹⁹ *Supra* note 14.

²⁰ K. Ohbuchi, M. Kameda & N. Agarie, "Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm" (1989) 56 *Journal of Personality and Social Psychology* 219.

²¹ *Supra* note 14.

²² *Supra* note 11.

a more level playing field, where they can negotiate with each other more equitably. Given this new alignment of power, the parties tend to be more positive in their approach to negotiation and the settlement of the tangible issues they face.²³

BILL 108 - *AN ACT RESPECTING APOLOGIES*

While it is clear that an apology has the facility to minimize conflict, often parties embroiled in disagreement are reluctant to offer an apology because they are apprehensive that it may subsequently be used to establish fault or liability in litigation or other administrative proceedings.²⁴ This concern stems from the reasoning that a person would not apologize unless he or she had done something wrong or improper. In Ontario, however, this concern may dissipate, given the terms of Ontario's new Bill 108, *An Act Respecting Apologies*, also known as the *Apology Act*.²⁵

Bill 108 is similar to legislation that already exists in other Canadian provinces, namely British Columbia, Saskatchewan and Manitoba.²⁶ It legally separates the apology from any admission of fault or liability for the actions to which the apology relates.²⁷ As such, Bill 108 lets one express regret or seek

²³ *Supra* note 14.

²⁴ "Apology Act Referred to Standing Committee on Justice Policy" *Osler Health Industry Review* (November 2008), online: Osler <http://www.osler.com/resources.aspx?id=16204>.

²⁵ *Supra* note 2.

²⁶ Lee Greenberg, "Apology Act introduced by Ontario Liberals" *The Ottawa Citizen* (8 October 2008), online: The Ottawa Citizen <http://www.canada.com/ottawacitizen/news/story.html?id=f14b6844-5bae-48b9-9cec-0a578aaf57ec>.

²⁷ *Supra* note 7.

forgiveness without the worry that his or her apology will become evidence in a later legal proceeding.²⁸

The impetus behind the Bill is that the elimination of the possibility of legal consequences will encourage individuals to admit mistakes that they made, and that this admission will encourage resolution of disputes.²⁹ In light of this theory, it is arguable that Bill 108 will play a significant role in the family context. If there is no apprehension about liability, individuals will tend to be more natural and candid about apologies.³⁰ However, this likelihood is often moderated by the gender implications inherent in an apology.

THE IMPACT OF GENDER

Men and women bring different gendered personalities to all aspects of daily life, and this naturally includes their approach to negotiation and their comfort with an apology.³¹ In this regard, it should be noted that there is a wide range of conflicting theoretical and empirical research on the different personalities of men and women, for which there is no definitive answer.³² However, there are perspectives that suggest that men and women differ, among other ways, in how they view relationships and how they conceive of power. The

²⁸ Jessica Mcdiarmid, "Ontario to make it easier to say 'sorry'" *The Globe and Mail* (7 October 2008), online: The Globe and Mail <http://www.theglobeandmail.com/servlet/story/RTGAM.20081007.wapology1007/BNStory/National/home>.

²⁹ *Ibid.*

³⁰ *Supra* note 7.

³¹ Deborah M. Kolb, "Her Place at the Table: Gender and Negotiation" in Lavinia Hall, ed., *Negotiation: Strategies for Mutual Gain* (Sage Publication, 1993) 138 at 140.

³² Carrie Menkel-Meadow, "Teaching about Gender and Negotiation: Sex, Truths, and Videotape" (2000) *Negotiation Journal* 357 at 357.

different ways that men and women approach negotiations, and in particular, the different value that they place on apologies in negotiations may be analyzed in terms of these two factors.

Some studies on gender differences indicate that women tend to attach more importance to fostering and keeping relationships, while men ordinarily place more value on individual accomplishments.³³ As a result, it appears that women may be more often concerned about the relationship between the parties than the actual outcome of the negotiation.³⁴ In particular, women tend to be more inclusive of, and sensitive to, the positions of others in their attempt to resolve personal problems.³⁵ Overall, women seek to cultivate and cherish relationships and connections with others, an orientation that has been described as more relational than that of men.³⁶ As well, research indicates that women often focus on how their behaviour impacts others. In contrast, some of the relevant research shows that men value, among other things, success, influence and authority. Men tend to focus on, and recognize, personal accomplishments, and well defined responsibilities, an approach described as a self-contained concept of agency.³⁷ Further, some research shows that

³³ *Supra* note 31.

³⁴ Delee Fromm, "Negotiation for Women: the Dual Aspects of Outcome and Relationship" *The Negotiator Magazine* (June 2007) online: http://www.negotiormagazine.com/fromm_june2007.doc.

³⁵ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).

³⁶ *Supra* note 31 at 141.

³⁷ *Ibid.*

competition and status tend to strongly inspire and provoke men, more so than they affect women.³⁸

Also integral to the different approach that men and women bring to negotiation is how the different genders discern power. When power is understood as dominance over another person, it creates a divide or disconnect between those who have the power and those who do not.³⁹ However, it is arguable that this type of power is incompatible with the female persona. In other words, dominance over others is inconsistent with the significance that women assign to connections with others and positive personal interactions.⁴⁰ While males tend to be at ease and familiar with the notions of power and authority in relationships, it appears that women would rather seek their strength from positive interpersonal conduct. Women are more likely to garner strength when they help the other party also feel content and satisfied; they do not need to surpass or dominate the other party to trigger power for themselves. Indeed, it may be just the opposite—women feel stronger and more powerful when they cater to, and ensure that, the needs of others are met, thereby enhancing the power of both parties.⁴¹ Further, women tend to be ill at ease with asserting power over others since this can disturb connection and affiliation. Studies show that women would rather acquire control through mutual empowerment whereas men are more self-focused, seek individual power and are

³⁸ Alice F. Stuhlmacher & Amy E. Walters, “Gender Differences in Negotiation Outcome: a Meta Analysis” (1999) 52 *Personnel Psychology* 653 at 655.

³⁹ *Supra* note 31 at 142.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

more natural in competitive enterprises.⁴² This premise can be seen in recent popular literature which discusses gender differences, such as John Grey's Men are from Mars, Women are from Venus⁴³ or Deborah Tannen's You Just Don't Understand: Women and Men in Conversation.⁴⁴ These books explore the notion that women value emotional bonding and common life experiences more than men do, and they examine, among other issues, how these gendered perspectives influence communication techniques and strategies between men and women.

These different gendered approaches to relationships and power are representative of the differences in the male and female identity, and translate into divergent expectations from negotiations.

LINKING GENDER AND APOLOGIES

These gender-related perceptions and sensitivities with respect to relationships and power impact the significance that men and women place on apologies.⁴⁵ In light of the import of an apology in negotiations, the gendered approach will influence whether an apology is likely to be offered and whether it will be successful in reducing conflict in negotiation.

⁴² *Ibid.*

⁴³ John Gray, *Men are From Mars, Women are From Venus* (New York: HarperCollins, 1992).

⁴⁴ Deborah Tannen, *You Just Don't Understand: Women and Men in Conversation* (William Morrow, 1990).

⁴⁵ *Supra* note 38 at 653.

Given the importance that personal associations play in a woman's self-concept, women tend to consider an apology as a means to strengthen personal and relationship bonds.⁴⁶ An apology conveys elements of remorse, caring and empathy, and these sentiments are all tools which go to repair a broken personal affiliation or bond. It has been argued that "apologies can have a significant, even magical, property in resolving conflict and restoring relationships."⁴⁷ As a woman's identity is often rooted in her personal relationships and connections with others, it follows that women will want to rebuild severed relationships, as this will strengthen her own character.⁴⁸ Accordingly, pursuant to this theory of how women view relationships, it is arguable that women will see the significance of apologies and use them with more frequency. In her article The Role of Apology in Mediation, Deborah Levi recognizes the sensitivity that women bring to relationship issues and how they allow the other party's conduct to profoundly affect them.⁴⁹ It follows then that women put great stake in an apology, which is a more subtle and personal overture to mending a relationship.⁵⁰ The literature also suggests that men, on the other hand, have more of a self-contained concept of themselves.⁵¹ In other words, they do not draw as much of their self-worth from personal relationships as women do. In this regard, Levi posits that men tend to approach apologies more strategically.⁵²

⁴⁶ *Supra* note 14 at 851.

⁴⁷ *Supra* note 7.

⁴⁸ *Supra* note 14 at 852.

⁴⁹ Deborah L. Levi, "The Role of Apology in Mediation" (1997) 72 *New York University Law Review* 1165 at 1183.

⁵⁰ *Ibid.*

⁵¹ *Supra* note 31 at 141.

⁵² *Supra* note 49 at 1186.

On this theory, men will generally assess how an apology can help them to obtain their desired end result before they will offer an apology. It is because of their arguably more autonomous or independent nature that men measure an apology more in terms of how it will advantage them, than how it will affect their relationships. Consequently, often men do not understand the impetus that drives a genuine and heartfelt apology. This lack of insight into the importance of an apology on an interpersonal level stands in sharp contrast to the approach of women.⁵³ Accordingly, the theory that supports the tendency of women to be more relationship focused than men suggests that women view apologies as critical to repairing the relationships that ground their sense of self. Similarly, as this theory claims that it is less common for men to derive their personal strength from relationships, it follows that apologies are less significant to their personal identity. Consequently, in light of these perceptions, apologies are likely to be offered less frequently by men than they are by women, and to be considered less meaningful when they are indeed offered by men.

The manner in which men and women perceive power also shapes their approach to apologies. Given that an apology carries an acknowledgment of wrongdoing, it is not surprising that individuals are often reluctant to apologize and openly reveal their flaws.⁵⁴ It is instead much easier to conceal one's personal foibles and weaknesses, rather than jeopardize one's self-image.⁵⁵ As such, an apology can generate a transfer of power as the apologizer has divulged

⁵³ *Ibid.*

⁵⁴ *Supra* note 7.

⁵⁵ *Supra* note 49.

his or her personal frailty to the other party. In this regard, research indicates that a confession of shame for one's conduct generates feelings of worthlessness and vulnerability.⁵⁶ Given the strong personal jeopardy inherent in an apology, it is arguably a stance with which men are not comfortable, as it is incompatible with what some research claims are common notions of gendered roles in society. Men perceive that an apology openly diminishes their power, as it displays their flaws and provokes a sense of degradation and defeat.⁵⁷ Similarly, as recipients of an apology, women continue to be somewhat ill at ease with the concept of personal power. Indeed, as Deborah Kolb argues in her article Her Place at the Table: Gender and Negotiation, the power that flows to women when an apology is offered may make many women uncomfortable and unnerved.⁵⁸ In other words, the shift of power to women that may flow from an apology does not accord with what some studies submit is the typical female approach to relationships.⁵⁹ Accordingly, the combination of male reluctance to accept a decrease in power, and the accompanying female reluctance to acquire power, suggests that apologies may not be as readily offered by men to women in the negotiation process.

CONCLUSION

It is clear that conflict plays a role in family negotiations. Family disputes can be permeated with highly charged feelings and anger, and the

⁵⁶ *Supra* note 7.

⁵⁷ *Ibid.*

⁵⁸ *Supra* note 31 at 142.

⁵⁹ *Ibid.*

conflict that flows from these emotions can consume the parties and distract them from dealing with the hard issues they must resolve. Often, however, an apology can help to defuse the conflict and enable the parties to better focus on the tangible problems they need to resolve in order to move on with their lives. An apology offered by the offending party can serve to alleviate some of the hurt experienced by the offended party, and serve to redirect the parties towards a more productive negotiation process. The value of an apology is acknowledged by Ontario's proposed Bill 108 which removes the risk that an apology can be used in a later proceeding to establish guilt of the offending party. It is anticipated that the thrust of this legislation will encourage apologies in dispute resolution, and ultimately lead to faster and more efficient settlements—a positive societal result. However, apologies cannot be assessed simply in terms of an offering and acceptance of an expression of contrition and regret. Apologies are more nuanced exchanges that have inherent gender implications. Apologies serve as a means to rebuild personal relationships, which are often seen to matter more to women than to men. Further, apologies tend to generate a shift in power from the offender to the offended. A male offender may not want to trigger such a transfer of personal strength, and an offended female may not be comfortable in accepting this new personal leverage. While the research in this area is not definitive, it should serve as a caution to those engaged in family negotiation that apologies, while constructive, may not always serve to neutralize the conflict in a dispute, and that the complexities of gender differences must also be recognized and considered.