

2ND ROUND CONSULTATION FORUM ENACTMENT OF APOLOGY LEGISLATION IN HONG KONG

- Topic: A more in-depth examination of the proposed options to deal with statements of fact in the proposed apology legislation and an update on the recent development of the Apologies (Scotland) Act 2016
- Venue: Function Hall, Department of Justice, 1/F Justice Place, Hong Kong
- Date: 21 March 2016
- Speaker: Mrs. Wong Ng Kit Wah Cecilia
Vice chairperson, the Regulatory Framework sub-committee
Member, the Steering Committee on Mediation
Council member, the Law Society of Hong Kong

STATEMENT OF FACT & APOLOGY

- Statement of fact
 - Admission of a particular fact in relation to the incident
 - Factual information contained in an apology
- Mixed statement
- Robinson v Cragg, 2010 ABQB 743
 - Part of letter contained expression of sympathy/ regret and admission of fault -> inadmissible
 - Remaining part of letter contains facts not combined with apology -> admissible
 - Expression of sympathy combined with admission of fault is "unfairly prejudicial" & should be "keep away from the trier of fact"
- Should statement of fact be statutorily protected?

ARGUMENTS IN RELATION TO PROTECTING STATEMENT OF FACT

- Arguments for-
 - People will offer bare apology without facts -> maybe meaningless and ineffective
 - Bare apology may be viewed as insincere
 - Very difficult to separate facts and apology
- Arguments against:
 - Statement of facts by its nature is directly related to liability issue -> should be admitted
 - If statement of facts is protected, may deny victims seeking justice
 - Extra burden on plaintiff
 - Overseas legislations which do not expressly protect statement of facts seem working well

PROPOSED OPTIONS -1ST APPROACH

- Statements of fact in connection with the matter in respect of which an apology has been made should be **treated as part of the apology and should be protected**. The Court **does not have any discretion to admit** the apology containing statements of fact as evidence against the maker of the apology.

THE 1ST APPROACH

- Clarity, certainty
- The one who intends to make an apology can clearly foresee his legal consequence / have legal protection before doing so -> encourage apology
- Arguable that in some cases no apology whatsoever would be given but for the proposed apology legislation -> will not impair victim's rights to justice

PROPOSED OPTIONS – 2ND APPROACH

- The wordings regarding statements of fact **are to be omitted from the apology legislation** and whether the statements of fact should constitute part of the apology would be **determined by the Court on a case by case basis.**
- In cases where the statement of fact is held by the Court as **forming part of the apology**, the **Court does not have any discretion to admit** the statement of fact as evidence against the maker of the apology.

2ND APPROACH

- Whether a statement is part of apology is decided by Court, depending on circumstances
- If the nexus between the apology and statement of fact is too close, may form part of the apology -> protected
- There is difficulty in drawing a line between "apology" and "fact" in legislation
- Flexible but uncertain
- Once the Court ruled that the whole statement is an apology, Court cannot have the discretion to admit the statement

PROPOSED OPTIONS - 3RD APPROACH

- Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and be protected.
- However, the Court **retains the discretion to admit such statements of fact as evidence** against the maker of the apology in appropriate circumstances.

3RD APPROACH

- Generally, the statement of fact is considered a part of the apology -> inadmissible
- Court has discretion to allow claimant to adduce the “fact part” in some circumstances
 - E.g. the admission is the only evidence available
- Flexibility -> legislative uncertainty
- May discourage apology

HONG KONG BILL OF RIGHTS

- Article 10 - Equality before courts and right to fair and public hearing (Art. 14 ICCPR), Article 39 of the Basic Law
- When statement of facts included in an Apology is the only way to establish liability -> exclusion will stifle claim
-> may interfere claimant's right to fair hearing
- Issues to be considered:
 1. whether the infringement or interference pursues a legitimate societal aim;
 2. whether the infringement or interference is rationally connected with that legitimate aim; and
 3. whether the infringement or interference is no more than is necessary to accomplish that legitimate aim.

APOLOGIES (SCOTLAND) ACT 2016

- The Apologies (Scotland) Bill (before amendments) proposed by Ms Margaret Mitchell
 - > expressly protect statement of facts
- Called for public view in May 2015

SCOTTISH GOVERNMENT'S VIEW

- “That injustice could arise in cases where an admission of fault or statement of fact is the only means of demonstrating liability for the harm caused but that admission is protected and so cannot be led in evidence because it is part of the statutory apology. If there is no other evidence available on liability, a pursuer would be unable to succeed in an action for damages for compensation”
- Annex to the letter from the Minister for Community Safety and Legal Affairs to the Convener of the Justice Committee, 17 June 2015

Available at:

http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150617_MfCSLA_to_CG.pdf

SCOTTISH PARLIAMENT DEBATE

- “We cannot ignore the rights of claimants or pursuers who might need to draw upon an apology in their evidence base simply because such cases are likely to be few in number. Surely protecting the rights of minorities is at the heart of good law making.”
 - Mr. Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, Scotland, 27 October 2015
 - Available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10157>
- The Apologies (Scotland) Bill was passed on 19 January 2016 with no reference to statement of facts



Question:

Should factual information in an apology be protected by statute?

Thank You