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BCAK Updates

Welcome to the summer issue of Kinnected. In this edition we will provide updates on the work of the association, along with information on the BC Ministry of Health service plan released in February of this year. We also provide further information on the recently completed *Scope of Practice* survey conducted by the BCAK that incorporated both members and industry consumers, as well as an article by David Wallin-LLB on the "Apology Act" and the potential legal concerns if you make an apology during the course of your work.

Marketing and Promotions

The BCAK attended the Royal Columbian Hospital Foundation's golf tournament in June 2015. The focus of attending was to promote kinesiology and kinesiologists to the doctors, nurses, and others attending this event. BCAK was well received and there were numerous inquiries as to what role kinesiologists play in the health care system. The focus was to inform on the value kinesiologists provide in the treatment of orthopaedic, traumatic brain injury (TBI) and lifestyle related diseases.

Recent Judicial Commentary on the Legal Implications of Making an Apology:

Are their Legal Implications for Kinesiologists?

David J. Wallin
Barrister & Solicitor
Director of Whitelaw Twining Law Corporation

The Issue

Deserving or not, Canadians have somewhat of an international reputation as being the people of a polite, peace-loving nation that tend to apologize for everything. But what exactly is an apology? Is an apology a gesture of taking responsibility for an action, or is it simply an expression of polite sentiment?

Individual opinions and supporting examples abound that may lend support for arguments for either of these two ends of the "apology spectrum". But what are the potential legal implications of a person apologizing, or saying they are "sorry" after the experience of an unfortunate event?

Of particular practical significance, as a treating kinesiologist (or any other treating professional), are you potentially putting yourself at risk for an adverse outcome simply because you apologize to a client after a treatment session? This can occur in a number of contexts, but perhaps the most obvious examples are where the client experiences either an unexpected outcome or significant elevation in subjective symptom complaints.

More to the point, from a legal perspective, is there a potential risk that such expressed sentiment, politeness, or empathic understanding can come back to negatively implicate the treating kinesiologist in a professional malpractice claim?

The Act

In the spring of 2006, British Columbia became the first province in Canada to promulgate a law reform initiated act simply known as the *Apology Act,* SBC 2006, Ch. 19.

The British Columbia *Apology Act* is perhaps one of British Columbia's briefest statutory authorities – a legislative act weighing in with only three brief sections (s. 1 being the definition section and s. 3 being the legislative commencement provision). In light of such legislative brevity, it easily bears reproduction below for this brief discussion.

Firstly, how does the *Apology Act* define an "apology"? In s. 1, an "apology" is ***defined*** as meaning:

"… an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate."

With respect to the ***effect*** of apology on liability, s. 2 of the *Apology Act* provides as follows:

2(1) An apology made by or on behalf of a person in connection with any matter:

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter;

(b) does not constitute an acknowledgment of liability in relation to that matter for the purposes of section 24 of the *Limitation Act*;

(c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available to the person in connection with that matter, and;

(d) must not be taken into account in any determination of fault or liability in connection with that matter.

(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

Although British Columbia was the first province in Canada to enact such "apology legislation", several U.S. states and several other countries had enacted variations of the legislation dating back to nearly 30 years ago.

It is fairly clear that the legislators' desire was to have apologies ***reduce*** the occurrence of litigation, and thus part of a broader tort reform initiative. This was on the basis of the generally held belief that an apology is what many people really want and thus the common legal advice (and possible requirement by liability insurers) to mandate that one never apologize, was considered by many to actually be very bad for society in general and may actually serve to ***increase*** the occurrence of litigation, rather than having the desired effect of ***decreasing*** or reducing such an occurrence.

The Law

Perhaps it is not all that surprising that there is not much in the way of judicial authority on the legal implications of making an apology. There are a few cases that have considered the legal effect of an apology, however these cases have tended to be in the context of a motorist's

"roadside apology" after a collision (see e.g.: Koshman v. Brodis, 2013 BCSC 656 and Dupre v. Patterson, 2013 BCSC 156).

I am not aware of a British Columbia Supreme Court case that has considered the legal implications of an "apology" issue outside the scope of a motor vehicle / roadside apology context.

However, notwithstanding the apparent lack of judicial consideration of this issue and the corresponding legal consequence by British Columbia courts, in one fairly recent and notable *Supreme Court of British Columbia* case of Dupre v. Patterson, the trial Judge (The Honourable Madam Justice Adair) provides some interesting judicial commentary on this issue which may provide some possible guidance as to how this issue may be looked at by the court in contexts beyond the particular context of the case upon which this issue was raised (i.e. a motor vehicle collision case).

In Dupre, one of the issues that the Court was asked to decide upon was: what are the legal implications of a "spontaneous" post-accident "road side apology" made by a cyclist that was involved in a collision with a motor vehicle, where the issue of liability for the accident was in dispute. After the collision the cyclist was alleged to have apologized to the motorist. Nevertheless, the trial judge found the motorist solely at fault for the accident and before reaching this conclusion had the following comments about the application of the *Apology Act* to the cyclists' roadside comments:

[40] Defence counsel pointed to some statements made by [the Plaintiff] to [the Defendant] after the accident, when [the Plaintiff] apologized. In view of my conclusion that [the Defendant's] negligence caused the accident, I will address this point only very briefly.

[41] First, it was unclear, based on the submissions, how I was being asked to use [the Plaintiff's] statements and whether they were admissible for the purpose for which they were being tendered. Secondly, it is clear that an apology made by or on behalf of a person in connection with any matter does not constitute an express or implied admission or acknowledgment of fault or liability: see the *Apology Act*.

[42] [The Plaintiff] explained that when she spoke to [the Defendant] after the accident, she was upset and in considerable pain from falling and injuring her shoulder, and she felt embarrassed by the attention the accident had caused. She did not remember saying anything about having over-extended or pushed herself too far on the bike ride. Roadside admissions at accident scenes are unreliable, since people tend to be shaken and disorganized. This describes [the Plaintiff's] situation. Her statements do not affect my conclusion that [the Defendant's] negligence caused the accident.

The learned trial judge clearly was not swayed by what the Plaintiff cyclist had to say at the accident scene that may be considered to be inculpatory or adverse to interest in relation to the issue of liability. One of the express considerations for this appears to be the Judge's views on the unreliability of such statements due to the person uttering the statement's emotional state. One is left to wonder if notwithstanding an argument that the *Apology Act* ought to apply in the circumstances, that a different outcome would have resulted if there was no concern in relation

to the party's "considerable pain", being "embarrassed", or concern that the party making the statement was "shaken and disorganized".

The Court of Appeal also recently had an opportunity to consider this issue in the recent case of *Vance v. Cartwright, 2014 BCCA 362.* In the Vance case, the Plaintiff motorcyclist apologized to the Defendant motorist immediately following the collision. The trial judge allowed evidence to be adduced at trial in relation to the Plaintiff's post-accident apology. The trial judge ultimately found the Plaintiff at fault for the accident and dismissed the Plaintiff's claim. The Plaintiff subsequently appealed the decision on the basis that the trial judge erred by allowing the evidence of the Plaintiff's apology at trial. The Court of Appeal reviewed the substantive provisions of the Apology Act, but ultimately concluded that the trial judge did not place any weight on the Plaintiff's post-accident apology in determining liability for the accident in dismissing the Plaintiff's claim.

Summary

Despite the *Apology Act*'s legislative existence for almost an entire decade in BC, it remains somewhat of a legal enigma in relation to its appropriate legal scope and practical application.

The *Apology Act* arguably provides protection during day-to-day life and the occurrence of unintentional mishaps. For kinesiologists and other professionals, the *Apology Act* can potentially provide some protection when providing professional services. However, this has not been tested in court in the capacity of delivering a professional service and there is no known BC legal precedent regarding the making of an apology related to the delivery of a professional service when adverse or unexpected negative results occur in relation to the service delivery.

As a result, kinesiologists should be cautious and carefully consider their circumstances prior to the issuing of an apology related to delivery of a professional service. As professionals, kinesiologists should endeavour to utilize comprehensive informed consent practices (both documented and verbal) throughout the course of providing services to ensure clients are aware of the potential risks and side effects of receiving and taking part in any assessment or treatment service.

By: David J. Wallin, Director

Whitelaw Twining Law Corporation
2400 – 200 Granville Street
Vancouver, British Columbia, V6C 1S4
Website: www.WTinjury.com

Direct Phone: (604) 891-7211
E-mail Address: DWallin@wt.ca