Kluwer Mediation Blog

Do we need laws to help us say sorry?

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy) · Wednesday, December 31st, 2014

On the last day of the year, like many of you, I find myself reflecting on the events of the past 12 months, the highs and lows, the tensions and the takeaways. Here is one of the takeaways.

In January this year I spent a day hiking through some spectacular scenery in Hong Kong. We were six adults, including one couple and their five year old son, Max.

The trail we had selected was long and the hike would take a good part of the day. We had set out early with sunscreen, water and food provisions. After several hours of glorious weather, and good humour, one of our merry band, Mike, strained a leg muscle. He could still walk but only with a limp and it was painful. As we were half way along the trail, we decided to continue as the terrain would be easier on the second part of the trail. So we found Mike a couple of fallen tree branches to function as crutches and he put on a brave face as we continued at a much slower pace. Several hours later we had almost reached civilization and were taking a refreshment break. As Mike was resting on one of his tree-crutches, little Max thought it would be really funny to sneak up behind him and push the tree-crutches out from under him. This he did. The tree-crutches fell to the ground and Mike with them. Ouch!

Little Max was stunned. Mike too. Max's Mum jumped up, "Max, say sorry to Mike. You caused him to fall and he has hurt himself. Say sorry." Max squirmed uncomfortably and looked in every direction he could; just not at Mike.

"Maaax", warned his mother, "Say sorry."
More squirming backed up with vocals suggesting a strong reluctance to comply with Mum's request.

"Max!" This was Mum's ultimatum. "We are not going one step further until you say sorry to Mike." And with that she took off her backpack and sat down, prepared for a long wait.

This seemed to have some effect on Max. He watched his Mum for a short while, then looked over to Mike, who, meanwhile, had been helped to his feet.

After some reflection, Max opened his little mouth, sighed, squirmed again, looked away and then seemed to utter something that could conceivably be interpreted as a "sorry".

With that, Mike quickly accepted the apology (which was probably more important to Max's Mum

than to Mike) and everyone breathed a sigh of relief and got on with the walk home.

Despite the happy ending, I can't help but ask, as Sabine Walsh has done in a previous post, why was it so hard for Max to say sorry? Sabine asks herself the same question and suggests some possible reasons: "Is it the perceived loss of face, the admission of guilt or error, the feeling of vulnerability? Is it the fear of a loss of control or bargaining power in a dispute? I would challenge anyone to think about the last time they apologised, in a genuine and heartfelt way albeit, and not to admit they felt at least a little bit better afterwards. Is carrying around the burden of guilt or regret really easier than saying sorry?"

An apology is not a static event. It is an intensely relational process between two people. An authentic apology can be incredibly powerful with potential benefits for the aggrieved person, the apology-maker, and the community affected by the event which triggers the apology. Apologies restore and build relationships and communities, and offer insights and learning to everyone involved.

The important role of apology in human relations and social structures is not a new discovery. It has a long history in traditional social-legal systems as part of restorative justice processes. A beautiful example can be seen in The Orator, the first ever Samoan feature film, entirely shot in Samoa, in the Samoan language, with a Samoan cast and story. Here the realistic ritualised apology goes on for a number of days and nights until finally – and much to everyone's relief — the aggrieved Saili accepts the apology.

So back to the story of Max. By the time little Max is a teenager, he will have learned from his Mum about the importance of a sincere apology in appropriate circumstances. Like most of us, Max will intuitively know when he should say sorry. But will he always do it?

Fast forward a number of years. Imagine that Max is 21 years old. He is driving his Dad's car with a good friend in the front passenger seat. This friend happens to be a law graduate. They are involved in a car accident. As Max instinctively moves to get out of the car to see if the passengers in the other car are okay, his lawyer friend grabs Max by the arm and warns him: "Whatever you do, Max, don't say sorry".

What should Max do? He is torn between his intuitive impulse to apologise and the legal advice from his friend that saying sorry could have serious legal consequences for him.

There are many examples of situations where apologies appear to have been withheld or delayed due to uncertainty about legal repercussions. One Hong Kong illustration is offered by the tragic Lamma Island ferry collision in 2012, in which 39 people lost their lives. When a government representative finally offered a public apology many months later, families of victims retorted that it was too little too late.

How can we manage the tension between the social and emotional needs associated with saying sorry and the legal risks in doing so?

One policy approach has been to introduce "apology legislation". What is apology legislation?

Apology legislation originated in the United States in 1986. The then senator of Massachusetts, William Saltontall, had lost his daughter in a car accident. The injurious driver never expressed regret because he feared that an apology would be used against him as evidence. When the Senator

retired, he and his successor introduced a State Apology law to encourage apologies by removing the fear of being incriminated. Massachusetts became the first State to adopt a law providing that apologies (defined as expressions of sympathy) could not be used as evidence in civil litigation related to motor vehicle accidents. Subsequently, other American States such as California and Texas enacted similar apology legislations. Since then all Australian States and a number of Canadian States such as British Colombia and Saskatchewan have enacted apology laws. Scotland and Hong Kong are currently exploring the possibility of developing apology legislation.

Next month, in 2015, I'll write about the different types of apology legislation and the relationship between apology legislation and mediation.

Happy New Year!

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