

**A TIME FOR APOLOGIES:
THE LEGAL AND ETHICAL IMPLICATIONS OF
APOLOGIES IN CIVIL CASES**

**CORNWALL PUBLIC INQUIRY
PHASE 2 RESEARCH AND POLICY PAPER**

**Final Paper
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EXECUTIVE SUMMARY

Lynn Johnston, the insightful Canadian cartoonist and creator of *For Better or for Worse*, wrote metaphorically that: “An apology is the superglue of life. It can repair just about anything.”

If we follow Johnston’s metaphor, we are reminded that even though an apology can be a powerful life tool, things can go wrong. If the ingredients of the glue are not properly measured and mixed it doesn’t stick; and even if it does set, often the pieces don’t always fit together.

G. K. Chesterton, the influential British writer, cautioned that a poorly formulated apology can do harm and that a good apology has the power to heal, when he wrote that: “A stiff apology is a second insult.... The injured party does not want to be compensated because he has been wronged; he wants to be healed because he has been hurt.”

This paper examines what makes a good apology, how to use apology as a tool for healing and reconciliation and how to avoid the pitfalls of a poorly crafted apology.

During the preparation of this paper scarcely a day has gone by without the subject of apologies figuring prominently in the Canadian media and involving high profile individuals such as the torture victim Maher Arar, the falsely convicted Steven Truscott, the errant Ontario coroner Dr. Charles Smith, and the Polish immigrant Robert Dziekanski. In every case, not only the apology but also the adequacy of the apology, was the subject of the news.

It is evident that although apologies have always been a part of social discourse, over the past two decades apologies have gained prominence. World leaders, corporations, and politicians offer apologies for various wrongs. In criminal proceedings and civil dispute resolution apologies have emerged as effective tools. Not only do we live in a time of apologies but, increasingly, we live in a time for apologies.

Apologies are provided for a wide variety of wrongs from minor infractions for which there is no legal remedy; to torts or breaches of contract to which civil damages may apply; and to serious harm, such as physical or sexual abuse, which may attract both civil and criminal actions. This Paper explores the legal and ethical implications of apologies in civil cases and how apologies could be used more effectively and focuses on apologies that address serious harms.

In particular, the purpose of this Paper is to provide support to all interested parties involved in the Cornwall Public Inquiry which is investigating events surrounding allegations of historical sexual abuse of children and youth in Cornwall, Ontario. The ultimate goal of this Paper is to provide ideas and options that the Commissioner, The Honourable Justice G. Normand Glaude, can consider as he finalizes his recommendations to Government.

This Paper explores the legal and ethical implications of apologies in civil cases and how apologies could be used more effectively. This is a discussion paper that presents ideas, not a position paper that prescribes answers. The key objectives of this Paper are to:

- explore the needs and motivations of recipients and givers of apologies;
- identify the benefits and risks of apologies in civil cases at various points in the conflict resolution process;
- investigate the link between apologies and forgiveness, healing, and reconciliation;
- highlight legal and ethical considerations;
- examine circumstances that influence the effectiveness of apologies;
- canvas factors that encourage and discourage apologies;
- engage lay readers, academics, and policy-makers in a discussion about options; and
- contribute to further thinking about apologies and their role in effecting positive outcomes.

In order to ensure that an apology satisfies both the needs of victims and wrongdoers, this Paper proposes that parties engage in an “apology process” that involves four fundamental steps:

- determine the needs and expectations of the victim in relation to an apology;
- determine the needs and expectations of the apologizer;
- mediate the apology between the parties; and
- support the delivery of the apology.

It is evident that apologies involve more than the words “I apologize.” In simple terms, an apology is a form of oral communication from one party to another designed to carry out several specific simultaneous communicative and moral functions. Commentators differ in their views about the minimum requirements of a meaningful apology. Professor Nicholas Tavuchis, a Canadian sociologist, reduces an authentic apology to two fundamentals: being sorry for harm done to another and saying so. Law Professor Daniel Shuman, drawing on the work of others, concludes: “Minimally, to be meaningful, an apology must express regret for the occurrence of a harmful event and acknowledge responsibility for it.” Others add a third necessary component – that of acknowledging “that a legitimate rule, moral norm, or social relationship was broken.” Dr. Aaron Lazare, a psychiatrist and author of the influential book *On Apology*, cites four principal components of apology: acknowledging the offence, communicating remorse, providing explanations, and making reparations.

In order to formulate an effective and authentic apology, it is useful to identify the core elements of apology which emerge from the literature. Apologies require a combination of these core elements. The seven core elements of an apology are: **recognition** which involves identification of the wrong, acknowledgement of the violation of a norm, and appreciation of the extent of the harm done to the victim; **remorse** which includes genuine expressions relating to regret for the harm that occurred; **responsibility** which acknowledges that the wrongdoer did harm to the victim; **repentance** which includes attitudes and behaviours including regret, shame, humility, and sincerity and which affirms that the wrongdoer understands and acknowledges the moral wrong that has been committed; **reasons** which are explanations to the victim including the circumstances that led to the wrongdoer’s actions and/or why victims were harmed; **reparation** or restitution that is often offered as part of the apology to make the victim whole and/or restore the relationship; and **reform** which

includes personal promises by the transgressor to change behaviour and actions by an individual, organization, or government to prevent future harm or to commemorate the harm. An effective apology will include some or all of these core elements depending upon the circumstances.

Deborah Levi, a Professor of Law, postulates that there are four different types of apology. In a *tactical apology* the suffering of the victim is acknowledged to gain credibility and influence bargaining during negotiations. In an *explanation apology* the apologizer excuses behaviour without accepting any wrongdoing. A *formalistic apology* is offered without remorse under the demand and pressure of an authority figure. In a *happy-ending apology* the apologizer accepts responsibility and expresses remorse for their actions.

There are also *interpersonal apologies* between the parties which express sorrow; and *political or collective apologies* which are more concerned with getting a statement on the record.

In addition to the core elements of an apology, the “*Responses to Harm*” Continuum is a practical tool which can be used to explore the needs and expectations of the parties in relation to harm done. The continuum transcends the act of apology with expressions or actions that a wrongdoer, another person or organization, a Government, or a justice system might offer in response to alleged harm. The response categories suggested are ordered along a continuum from lower to higher levels of taking responsibility. Some response categories coincide with core elements of an apology while others supplement apologies.

The Response to Harm Continuum comprises the following responses: *validation* in which the speaker acknowledges/confirms the victim’s experience but offers no judgment about the legitimacy of the feeling or cause of harm; *expression of benevolence* which is an empathetic expression to the victim about the harm; *expression of sympathy* by which the speaker is affected by feelings consistent with the victim’s or shows compassion; *statement of belief* in which the speaker expresses belief in the victim’s story and confirms the victim’s integrity; *acknowledgement of fact* that includes both acceptance of what a victim has

described as well as acceptance of information from other sources; an *explanation* in which the speaker responds to the information needs of the victim and, by doing so, may reduce anxiety and/or lead to reconciliation; an *expression of regret* which conveys that the speaker feels some sense of distress, but does not imply any sense of responsibility; *sorry statement* which is similar to an expression of regret and conveys a sense of unhappiness about the situation and may convey remorse or repentance; *commemoration* which is most usually undertaken by governments and may be seen as a way in which to institutionalize regret relating to harm; an *undertaking* by which the speaker promises to take actions that are relevant to the harm done, including reparation and personal reform or systemic reform; an *acknowledgement of responsibility* where the speaker assumes some form of accountability, blame or fault and an *admission of liability* which is prejudicial to the speaker's interests and may be used to prove legal liability in an adjudicative setting.

The debate over what constitutes a real apology has generated significant controversy. Deficient apologies are often viewed as insincere, conditional, grudging, self-serving or argumentative; and are labeled as non-apologies or pseudo-apologies. Some take the position that an acceptable apology must include all of the seven core elements. However, the importance of each core element – even the necessity of each part – varies from apology to apology depending on the situation. It is fair to say that, while something less than a fulsome apology might be considered adequate in certain circumstances, the chance of an apology “falling short” increases with each missing element.

At the *subjective level*, people respond to apologies within a context that is influenced by personal and cultural considerations. Indeed, even an apology that meets a particular definition of apology at the *objective level* may be rejected at the subjective level by the recipient. This is not an uncommon result.

Much discussion about apology centres on what an apology is or what it should be – the definitional issues. What is more important, perhaps, than whether a statement meets a definition, is the effect that an apology has on the audience for which it is intended.

It is time to stand this issue on its head and to evaluate an apology less by what it is and more by what it does. The starting point, then, would be “what do victims need and expect?” An apology could then be evaluated by determining the degree to which the apology meets those needs and expectations. Currently, apologies are often crafted without that kind of understanding and their prospect for success is diminished.

What emerges from the literature and the experiences of adult survivors of abuse is this: for apologies to have potential therapeutic value for them, apologies must contain what is important to them personally - to their specific and unique needs.

The following questions should be asked when formulating an apology:

Who are the givers and receivers of apologies? Apologies have the greatest potential impact if they are delivered by the actual wrongdoer or wrongdoers.

What are actual circumstances surrounding the harm? The apology must articulate these clearly.

Why is the apology being offered? The reasons must be clearly articulated.

When is the best time to apologize? Apologies offered within a reasonable time have the best chance of meaningful impact.

Where should an apology be offered - in private or in a public forum? Survivors usually call for two kinds of apologies: a personal, private apology, and/or an official, public apology.

How should an apology be offered? Whether it is oral or a written statement should be determined by the needs of the victim.

Apologies do not stand alone. Their purpose is to heal and foster reconciliation. There are important linkages between an apology and the acts of forgiveness, healing and reconciliation.

Definitions of *forgiveness* generally include the notion of victims abandoning resentment and providing the wrongdoer with some form of pardon. Wrongdoers often seek forgiveness to assuage feelings of responsibility or guilt. Victims often forgive because it is

expected or because it is justified. Academic studies find that offenders who apologize are more likely to be forgiven than those who do not; and apologies result in forgiveness when offenders acknowledge wrongdoing or take responsibility. Victims who believe that the wrongdoer is truly sorry are more forgiving than those who doubt the wrongdoer. Forgiveness is not a necessary or predictable outcome of apology.

Forgiveness may have distinct benefits for survivors. It may relieve negative feelings and, without minimizing the past, allow them to move forward. Forgiveness does not mean excusing, condoning, ceasing to blame, losing respect for the victims, or forgetting that wrong-doing occurred. It diminishes feelings of hatred and resentment and accepts that the wrongdoer has repented and reformed. When freely given, forgiveness may promote healing and reconciliation.

An apology is often considered to be the key to *healing*. An apology may restore dignity but cannot undo what has been done or change the past. However, it can affect the perception of the past or the harm and be able to heal wounds and allow the healing process to continue. Healing involves restoring a person to health. In the context of serious physical, emotional, and sexual abuse, the healing process may be long and complex.

A 1999 Report for the Law Commission of Canada found that survivors of abuse are driven more by the need to heal than the need to obtain compensation. For a victim, an apology is often considered to be the key that will unlock the door to healing.

The concepts of apology, healing and *reconciliation* are closely linked. Survivors and other victims may engage in a process of reconciliation with their past, with what happened to them, and with their experience – whether or not they ultimately reconcile with the wrongdoer or an organization associated with the wrongdoer. This kind of personal reconciliation supports healing. Given that apologies also play a role in healing and reconciliation, the circularity connecting these three processes is apparent.

Private *interpersonal apologies* in the context of physical, emotional, and sexual abuse have the potential to have positive effects but are rare. *Public apologies* do play a prominent role in institutional abuse cases, particularly those that stem from abuse in residential settings. A number of examples drawn from Canadian and Australian jurisdictions are examined in the Paper. In Canada, public apologies by the Government of British Columbia related to the Jericho Hill School, and the Doukhobor Children are examined; as well as apologies and responses by the Government of Canada related to the Indian Residential Schools.

The Canadian Government's response to abuse in Indian Residential Schools has generated considerable controversy because it did not include an apology. The apologies offered by the British Columbia Government were also considered inadequate by the recipients.

In Australia, thousands of indigenous children, the "stolen generations", were forcibly removed from their parents from 1910 to 1970. Apologies by State Governments, Churches, and Police Forces were provided. However, the Federal Government resisted giving the kind of apology that was recommended. Instead, it settled on a "Motion of Reconciliation" which was widely criticized as being inadequate.

In the United States, *medical malpractice* cases are prevalent and often result in extremely high damages. Apologies have been promoted and supported in many jurisdictions as a way to reduce the suffering of patients and to facilitate conflict resolution. Studies have shown that a significant portion of actions would not have gone to court if the physicians had apologized.

It is clear that apologies have a number of *benefits* – for individuals, for the justice system, and for society in general. The single most important potential benefit of apologies is their capacity to respond to the psychological needs of injured parties. Ideally, an apology which reflects the needs of the victim will contribute to healing and, depending on the circumstances, to reconciliation as well. Apologies also address the legal and strategic

motivations of victims and influence their propensity to pursue litigation and dispute resolution. Apologies have the potential to diminish the wrongdoer's psychological pain. However, some wrongdoers use apologies to serve legal and strategic motives and to secure forgiveness, to avoid punishment, to influence public opinion and to mitigate damages. Apology is an important component of conflict resolution in the Justice system and plays a role in early resolution. Often, if apologies are offered before litigation is commenced and resolution is reached, there is the added benefit of avoiding expensive proceedings. If a civil justice system does not support apologies, it discourages moral behaviour and acts in opposition to community norms.

There is a general societal expectation that those who are harmed deserve, at a minimum, an apology from the wrongdoer. Authentic apologies clearly offer the most potential for benefits at the societal level. However, even *pro forma* apologies and expressions of forgiveness may play important educative functions by reinforcing the rituals of apology and forgiveness in society. When played out, the rituals remind wrongdoers of the importance of taking responsibility for their actions and encourage victims to accept apologies and offer forgiveness.

There are a number of *risks* associated with apologies. If a wrongdoer fails to issue an apology in circumstances that call for one, there is a risk that the victim will further resent the wrongdoer and this reduces the prospect of the victim offering forgiveness. When apologies are deficient, they often do more harm than good. Once the decision is made to apologize, it is important to deliver an apology that is adequate, sincere, and will be accepted. If an apology is rejected, the consequences for the apologizer are dire. There is a risk that an apology may be insincere and have a particularly negative effect on the dynamic of the conflict. Offenders may hesitate to offer an apology on the basis that it is a sign of weakness or guilt and it will damage the apologizer's reputation. There is a relatively small risk that an apologizer may provide an apology and later regret it. This may occur when an apology is not accepted by the victim. There is also a risk that an apology will have negative legal consequences such as voiding an insurance policy or being taken as evidence of liability.

Apologies are open to manipulation and may be employed to avoid penalties or reduce liability.

The issue of how apologies should be handled within the *legal system* in the context of civil cases has been discussed and debated in many countries. It is recognized that apologies may break an impasse in negotiations, allow settlements to occur more quickly, or result in more favourable terms of settlement. The absence of an apology is one of the factors that leads injured parties to file lawsuits, to actively pursue them, and to claim higher damages.

The concern that apologies are withheld because of concerns about *legal liability* has prompted the passage of apology legislation in various jurisdictions around the world. In the United States alone, more than thirty states have enacted apology legislation over the last decade. Australia has also passed apology legislation. And Canada has witnessed a significant amount of activity on the legislative front in the last couple of years. Apology legislation has resulted, generally, from the conclusion that apologies have a positive effect on the settlement of cases and that, without legislation to protect them, apologies will be curtailed.

Traditionally, lawyers for both plaintiffs and defendants in civil cases have been resistant to apologies because they perceive that apologies may result in monetary settlements unfavourable to their clients. Furthermore, lawyers tend to focus on economic and legal issues rather than emotional and intangible ones.

However, as the advantages of apologies – to both parties – have become more apparent in recent years, lawyers have recognized the need to work with apologies in appropriate cases and have supported legislation which encourages apologies and limits liability. There is reason to expect that lawyers' receptivity to apologies will increase.

Apologies have significant potential in civil cases that involve unintentional torts such as negligence and intentional torts such as torts of assault, battery, and intentional infliction of nervous shock. The monetary damages that are awarded in civil cases are compensatory in

nature and designed to restore plaintiffs and are meant to “undo” the harm. Money cannot “undo” the losses associated with physical, emotional, or psychological harm. Apologies have the potential to address the personal pain of victims.

Apologies are currently taken into account in assessing damages in defamation cases and may be relevant in assessing punitive damages. It has been argued that apologies should be taken into account in assessing damages in all civil cases.

In most common law jurisdictions in North America, the basic *rule of evidence* is that apologies may be used as admissions against interest and may be used as evidence to establish liability on the part of the wrongdoer. Although there is some protection for an apology, apologizers are less inclined to provide the kind of spontaneous apologies that might be of greatest psychological or emotional benefit to them.

Concerned about the dampening effect that rules of evidence and common law jurisprudence have on apologies, many jurisdictions have passed or are considering apology legislation. The general intent of apology legislation is to encourage apologies by widening the protection for them.

The literature reveals that *spontaneous apologies* have the greatest prospect of being accepted as sincere and being therapeutic. Spontaneous apologies are generally provided in the absence of legal advice and in circumstances for which no legal privilege exist and are vulnerable to being used by victims against the wrongdoer. Victims typically look favourably upon spontaneous apologies and do not take undue advantage of wrongdoers who offer them.

Mediation is an alternative to adjudication in which a neutral third party intervenes in negotiations to assist resolution of conflict. In terms of using apologies to facilitate resolution, mediation offers a number of advantages over litigation. Firstly, apologies are typically protected from being used as an admission of liability. Secondly, apologies may direct parties to innovative remedies that a court would not order. Thirdly, parties are at the centre of mediation and are encouraged to interact in a non-adversarial way. Fourthly,

mediators can assist the parties in crafting apologies and statements of forgiveness that are responsive to the needs and expectations of the parties. Lastly, mediation is a flexible process that can be tailored to give sufficient time and attention to the potential of apologies

Over the last few years, research indicates that apologies make settlement more likely. They do so by altering perceptions of the dispute and the disputants, by reducing negative emotion, improving expectations about future conduct, and affecting judgments as to what is fair.

There are several factors which encourage and discourage apologies: interpersonal orientation; relationship between the parties; characteristics of disputes; ethical implications; cultural norms; and legal implications.

Individuals with a high *Interpersonal Orientation* who are sensitive to the actions of others offer apologies more readily than persons with low interpersonal orientation who view apologies as strategic devices.

Relationships between the parties influence the propensity to give apologies. Some writers suggest that women tend to apologize more than men because women develop their sense of identity based on relationships to others while men develop their sense of identity by distinguishing themselves from others. Accordingly, women use apologies to reinforce personal connections and men view apologies as a sign of weakness and defeat and avoid them.

The *characteristics of disputes* make some offences more appropriate for apology than others. Some researchers suggest that more severe cases are less amenable to apology although severe cases involving psychological injury benefit from apologies. It appears that apologies are less likely to play a significant role in commercial matters and more likely to have a positive effect in employment, family, and tort cases.

Apologies have *ethical implications* because to apologize in a way consistent with societal norms is to act morally; and to refuse a deserved apology is to act immorally. The willingness to apologize reflects an individual's societal commitment to established norms.

The act of apology can be considered a *cultural norm* that reflects societal and cultural values. In some societies apologizing is considered a virtue and in others a sign of weakness. Individualistic cultures (such as the United States and Canada) put great value on individual autonomy and the assertion of individual rights through litigation. They place less emphasis on apology than collectivist cultures (such as Japan) where relationships amongst group members are more highly valued than individual rights. Individualist cultures tend to be rights-based and they rely on adjudication as a form of dispute resolution. Adjudicative processes such as arbitration and litigation are adversarial by nature. In collectivist cultures, accessing adjudicative processes are viewed as a failure to achieve harmony.

The *legal implications* of the adversarial process make parties focus primarily on the legal rights of parties and not on psychological and moral interests. Apologies have not traditionally played a leading role in adjudicative processes. It is feared that apologies and other statements of regret will be treated as admissions of liability in Court. The conventional wisdom is that any statement that expresses or implies responsibility may be treated in litigation as an admission of liability. Although statutes may protect apologies in one situation, it is not clear the extent to which apologies could be used by the parties for other purposes in civil litigation, by other parties in civil litigation, or could be used by the state in the criminal law context.

There are some important trends occurring in regard to apologies. Apologizing appears to be a *growth phenomenon*. Research on the subject demonstrates that apology is no longer limited to academic journals and conferences. Apology is the topic of newspapers, magazines, television and radio shows, cartoons, self-help books and other commonly available sources of information. More and more people are exposed to thinking on the subject. Sports heroes, actors, and other celebrities regularly take to the media to offer public apologies for their own wrongdoing.

There appears to be an increasing trend for *public apologies* to be communicated through broadcast media. High profile individuals, commercial ventures, religious institutions and other organizations offer apologies for actions that may be perceived to damage their reputations. Government apologies are provided by politicians and prominent public figures for a wide variety of circumstances.

Truth and Reconciliation Commissions are also being used in countries around the world, including Canada – for the residential schools issue.

Governments apologize because it is the correct response to wrongdoing, to maintain and enhance their reputation, because of external pressure, and to secure legal, strategic or tactical advantage.

Government public apologies often fall short. Such apologies are rarely spontaneous, are too formal and insincere and are often too generic. Governments tend to resist apologies for the actions of past governments and distant historical injustices and are concerned about the legal implications.

The apologies of the Government of Canada to Mr. Maher Arar, to Japanese Canadians incarcerated during WWII and to Chinese Canadian for the “head tax” exemplify the types of formal public apologies offered by governments.

The civil legal system has significant impediments to apologies. The current trend in many jurisdictions is to enact *apology legislation* primarily to address concerns about apologies leading to liability. There are many compelling arguments in support of apology legislation and many against apology legislation. The evident trend towards the enactment of apology legislation demonstrates that the arguments in favour of such legislation outweigh the arguments against. Legislatures throughout the world have embraced the potential for apology legislation to support moral, social and legal justifications for apologies.

Apology legislation has been passed in many jurisdictions around the world. The general intent of apology legislation is to shield apologizers from having their apologies used against them in civil lawsuits. A limited form of apology legislation provides that an expression of sympathy or regret is not admissible to establish liability; however, that part of an apology that contains an admission of fault or liability is either not specifically protected or is specifically excluded. This type legislation is in place in a number of U.S. States (such as California, Massachusetts, Florida, and Texas) and in several Australian states, including Victoria and Queensland. A more robust broad form of apology legislation protects both an expression of sympathy or regret and apologies that contain admissions of fault or liability. For example, the U.S. States of Colorado and Oregon have enacted this kind of legislation as has the Australian State of New South Wales.

The majority of apology legislation in the United States is limited to civil actions related to medical care although at least five states extend protection to all kinds of accidents and one state covers all civil actions. Apology statutes in Australia are limited to personal injury claims, negligence, or torts generally.

The trend towards enactment of apology legislations raises a number of questions. For example: Are the legislative definitions of “apology” appropriate? Does the liability shield diminish the power of the apology? Is there an inconsistency inherent in allowing a party to admit liability as part of an apology and allow that party to argue “no liability” at trial? To what extent will legislation remove the barriers to offering apology? Do statutes that exclude admissions of fault or liability truly change the status quo? To what degree will apology statutes change the behaviour of people involved in wrongdoing? Should apology legislation be an “all or nothing approach”?

A number of jurisdictions in Canada have enacted apology legislation. British Columbia, drawing primarily on the legislation enacted in New South Wales, Australia was the first to pass apology legislation in Canada. The other Provinces and Territories are beginning to follow suit.

British Columbia was the first Canadian Province to enact apology legislation. The *Apology Act*, that took effect on May 18, 2006, is a stand-alone statute which defines an “apology” and provides that an apology made by or on behalf of a person in “connection with any matter” does not constitute an express or implied admission of fault or liability, does not confirm a cause of action for purposes of the *Limitation Act*, does not void insurance coverage, and must not be taken into account in determining fault or liability. Evidence of an apology having been made by or on behalf of a person are inadmissible in any “court”.

Saskatchewan enacted legislation almost identical to British Columbia’s, through passage of the *Evidence Amendment Act, 2007* which came into force on May 17, 2007.

The Yukon introduced an *Apology Act* in April of 2007. Bill 103 departs from the British Columbia legislation in that it does not specify that an apology does not constitute confirmation of a cause of action for the purposes of the *Limitations Act*.

On November 8, 2007 the *Apology Act* of Manitoba came into force. The language and coverage is virtually identical to British Columbia’s except that, like the Yukon legislation, there is no mention of the effect of apologies on limitation periods.

The passage of British Columbia’s apology legislation prompted the Uniform Law Conference of Canada (ULCC) to appoint a working group to prepare a draft *Uniform Apology Act* for presentation at the September, 2007 ULCC Annual Meeting. The language proposed in the *Uniform Apology Act* is, again, virtually identical to British Columbia’s.

The author offers a number of policy options for the Commissioner of the Cornwall Public Inquiry to consider as he develops his recommendations. The ideas proposed relate to ***general education and information-sharing*** for disputants, their supporters and others; ***education and training of lawyers and alternative dispute resolution professionals*** to enhance their capacity to work with apologies in the civil justice system; promoting ***apologies in the medical field*** in relation to medical errors; increasing the ***effectiveness of apologies*** through further research, advisory services, and novel forums; considering ***apology legislation***

that would protect apologies from being used to establish liability; and opportunities for *commemoration* in cases of widespread harm.

The Paper concludes by reinforcing the value of a *four-step process* that focuses on the needs and expectations of the parties in relation to apologies, so as to secure maximum benefit from this vitally important form of human interaction.

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**CORNWALL PUBLIC INQUIRY
PHASE 2 RESEARCH AND POLICY PAPER
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FINAL PAPER
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Abstract:

This Paper investigates the use of apologies (and other expressions and actions made in response to harm) in civil cases. It examines the benefits and risks of apologies and demonstrates how apologies can meet the needs of aggrieved parties, those who may have caused harm or organizations where harm has occurred, the justice system, and society in general. The paper discusses factors that influence the effectiveness of an apology, identifies trends in the area of apology, and offers policy options for consideration by the Cornwall Public Inquiry.

Note:

This Paper was prepared for the Cornwall Public Inquiry. The views expressed are those of the author and do not represent the views of the Inquiry. The author would like to express appreciation for the useful comments received on an earlier version of this Paper that was posted on the Inquiry's website and for the input of those who attended a Workshop on apologies that was sponsored by the Inquiry and held in Cornwall on January 17, 2008.

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PART ONE: INTRODUCTION

1.1 Apologies in Our World

During the course of writing this Paper, scarcely a day has gone by without the subject of apologies figuring prominently in the Canadian media. Just a sampling of some of the more high profile examples demonstrates what an important role apologies play. Torture victim Mr. Maher Arar received an apology from the Canadian Government after a Public Inquiry was critical of Canada's role in allowing him to be sent to Syria. Mr. Steven Truscott, who was convicted of murder at the age of fourteen and originally sentenced to hang, finally got vindication from the Courts and an apology from the Attorney General of Ontario. Through his lawyer, pediatric pathologist Dr. Charles Smith expressed his regret for his mistakes, many of which are currently under review by a Public Inquiry. Responding to public outrage at the death of Polish immigrant Mr. Robert Dziekanski, the President of the Canada Border Services Agency said he was "very, very sorry" and he offered a personal apology to the victim's mother. In all of these cases, not only the apology but also the adequacy of the apology, was the subject of the news.

It is not only high profile cases, however, that are candidates for apologies. In legal disputes, it has become de rigueur for victims of harm, their families, their lawyers, and/or the public to seek apologies, amongst other remedies. Sometimes parties want nothing more than an apology and it is the refusal to provide an adequate one that spurs them on to litigation. At other times, the provision of a satisfactory apology may not prevent a lawsuit, but it dampens monetary or other demands. Apologies do not necessarily come quickly or easily from those in a position to provide them. Those that are provided are subject to scrutiny and are often found wanting. In this Paper, the links between harm and apologies are canvassed, as are those between apologies, forgiveness, healing and reconciliation. There are lessons to be learned from the literature, from various legislative initiatives, and from case studies. This Paper brings those lessons to the fore and offers options for further consideration.

While we can presume that apologies have always been a part of social discourse, apologies appear to have gained particular prominence over the last two decades. We are currently living in a time of apologies. World leaders are offering apologies for historical wrongs. Corporations are using the media to proffer apologies for their products gone bad. Politicians are providing public *mea culpas* for their personal transgressions. Apologies are surfacing in criminal courts. And in civil dispute resolution, the utility of apologies is increasingly being recognized. This Paper posits that not only do we live in a time of apologies but also a time for apologies. Apologies have significant potential value in all cases of wrongdoing. There are, however, impediments to the use of apologies in civil cases, and they need to be examined so as to reduce their impact. This Paper explores the legal and ethical implications of apologies in civil cases and how apologies could be used more effectively.

1.2 Focus of Paper

Early in life, most of us learned to say “I’m sorry” when we did wrong. Our parents and teachers expected us to apologize when we hurt someone physically or we hurt someone’s feelings. If we did not apologize immediately, we knew that we might later be ordered to apologize and we could be scolded for not apologizing earlier. Generally, when we apologized, feelings were smoothed over and friendships were restored. We also learned, early in life, that we deserved an apology when someone else caused harm to us. Many of us were told that we should accept apologies and forgive the person who hurt us, so we did or we tried to. If an apology was withheld from us, we felt a sense of unfairness. Sometimes we held on to that resentment silently; other times we demanded: “Say you’re sorry!”

In the world of adults, apologies are used in a broad range of situations. Apologies are provided for a wide variety of wrongs – on a spectrum from minor infractions for which there is no legal remedy; to torts or breaches of contract to which civil damages may apply; and to serious harm, such as physical or sexual abuse, which may attract both civil and criminal actions. Apologies are also made in the context of a variety of systems – including legal, social, political, and religious – and the norms that operate within those systems. The focus of

this Paper is on apologies which address serious harms. Apologies for other types of cases will be used for purposes of comparison.

What are apologies? Why are they used? Do apologies have the potential to promote healing and reconciliation in cases of childhood sexual abuse and other types of serious cases? If so, how can they be used in an effective way? What stands in the way of using apologies more effectively and how can those barriers be addressed? These questions and others will be explored in this Paper, which has been commissioned by the Cornwall Public Inquiry (“CPI” or “Inquiry” or “Commission”) as one of its Phase 2 research projects. Before delving into the issues, however, it may be helpful to set out some background information on the Inquiry and its mandate.

1.3 Mandate of the Cornwall Public Inquiry

The Cornwall Public Inquiry was established on April 14, 2005 under the *Public Inquiries Act* of the Province of Ontario. The Honourable Justice G. Normand Glaude was appointed as the Commissioner on April 18, 2005. The Inquiry’s mandate is to inquire into and report on the events surrounding allegations of historical sexual abuse of children and youth in Cornwall, Ontario by examining the response of the justice system and other public institutions to the allegations. The Inquiry was set up after police investigations and criminal prosecutions of the Cornwall cases had concluded, at the urging of community members who felt that a public inquiry would encourage individual and community healing. In performing its duties, the Commission is not to express any conclusion or recommendation regarding the civil or criminal liability of any person or organization. The Commission is not involved with any on-going legal proceedings relating to these matters.

Phase 1 of the CPI involves formal hearings relating to the allegations of historical abuse of children and youth in the Cornwall area. The Inquiry has heard testimony from the Complainants as well as from experts in the area of sexual abuse. During the final phase of evidence, the Inquiry will hear responses from institutions in relation to allegations of abuse. Policies and practices that were in place in the past, as well as those developed more recently,

will also be examined as part of Phase 1. It is expected that Phase 1 will result in findings of fact and conclusions relating to the allegations, and will make recommendations for further improvements in the way responses are made to situations of this kind.

The focus of Phase 2 is on processes, services, and programs that would promote healing and reconciliation in the Cornwall community – and beyond. Phase 2 involves practical research and activities and workshops that will allow a wide variety of viewpoints to be shared and further options to be developed. The Inquiry’s Advisory Panel has been instrumental in the development of the agenda for this Phase. Outreach activities thus far have included town halls, community and neighbourhood meetings, and consultations. Counselling support and witness support are also offered through Phase 2 of the Inquiry. Phase 1 and Phase 2 activities have overlapped, and Phase 2 will extend beyond the completion of Phase 1.¹

The issue of apologies (and other statements of regret) is one of the research projects identified by the Inquiry as having particular relevance to cases of childhood sexual abuse and the potential for community healing and reconciliation. The author was selected by the Inquiry to review the legal and ethical implications of apologies. The ultimate goal of this Paper is to provide ideas and options that the Commissioner can consider as he finalizes his recommendations to Government. To accomplish that goal, the author surveyed the various issues raised by apologies, examined how apologies have affected civil cases elsewhere, and reviewed trends around the world.

¹ For further information on the CPI and its mandate, see the Commission’s website at <<http://www.cornwallinquiry.ca>>. See also Parrish, Colleen, *Press Briefing Notes*, December 13, 2006; CPI, *Press Release*, March 29, 2007; CPI *Media Advisory*, November 26, 2007; CPI *Media Advisory*, November 27, 2007; and CPI *Media Advisory*, November 28, 2007.

1.4 Purpose and Scope of Paper

This Paper summarizes the results of the research conducted by the author and presents various perspectives and policy options. It is meant to be a discussion paper that presents ideas, not a position paper that prescribes answers. It includes concrete examples, theoretical models, and practical frameworks. It results from a review of the literature on apology, an analysis of legislation in various jurisdictions, a survey of the case law, a critique of public apologies, and an assessment of trends. This Paper formed the basis of a Workshop organized by the Commission and held in Cornwall on January 17, 2008. The author invited and received comments on the Paper from survivors and their families, counselors and others involved in the field; from lawyers and other professionals; and from interested community members. It is hoped that this Paper, and the discussion generated by it, will both assist the Commission and contribute to public education on this very important subject.

The key objectives of this Paper are to:

- explore the needs and motivations of recipients and givers of apologies;
- identify the benefits and risks of apologies in civil cases at various points in the conflict resolution process;
- investigate the link between apologies and forgiveness, healing, and reconciliation;
- highlight legal and ethical considerations;
- examine circumstances that influence the effectiveness of apologies;
- canvas factors that encourage and discourage apologies;
- engage lay readers, academics, and policy-makers in a discussion about options; and
- contribute to further thinking about apologies and their role in effecting positive outcomes.

At this early stage in the Paper, it may be helpful to set out a central proposition that evolved from the author's research and reflection on the subject of apologies; namely, that the way in which apologies are typically crafted and delivered should be critically examined. All too often, apologies are given without any prior input from victims. This tendency to

apologize in a vacuum lessens the prospect of the apology having the desired positive effects. In this time of apologies, it is critical that people put time into apologies. By so doing, apologies stand a much improved chance of success. If the starting point was “What does the victim need and expect to hear by way of apology?” rather than “What am I prepared to say by way of apology?” there would be many more apologies that serve victims’ needs and many fewer that disappoint them.

This Paper proposes that, at least in complex or sensitive cases, parties engage in an “apology process” that involves four fundamental steps:

- determine the needs and expectations of the victim in relation to an apology;
- determine the needs and expectations of the apologizer;
- mediate the apology between the parties; and
- support the delivery of the apology.

Apologies are vitally important as they can contribute significantly to the resolution of conflict and to the realization of healing and reconciliation. By using the kind of apology process suggested above, the positive potential of apologies will be more likely realized.

PART TWO: AN APOLOGY FRAMEWORK

While the title of this paper refers to apologies alone, it is apparent that apologies involve more than the words “I apologize.” Even a simple definition of apology is likely to contain notions such as acknowledgement, regret, and fault. It is also the case that there are many other actions that a wrongdoer, another person or organization, a Government, or the justice system can offer in response to alleged harm. In this part of the Paper, the nature of apology is explored by identifying its core elements, identifying several prominent models of apology, and by developing a continuum that identifies various responses to harm.

2.1 Core Elements of an Apology

The word “apology” is derived from the Greek root “*logos*”, meaning “speech” or “word.” The Greek word “*apologia*” meant an argument made in defense of one’s actions.² Originally, apologies were made in an effort to achieve vindication in the face of accusation. In Plato’s *Apologia*, for example, Socrates mounted a vigorous defense of his philosophy. Later, the word “apology” also acquired the meaning of excuse or justification for one’s actions. When used in that sense, “apology” did not connote any recognition of harm or any remorse. Under both of these early definitions, it was the apologizer that stood to benefit from the apology.³

As noted by Professor Nicholas Tavuchis, a Canadian sociologist, “[apology’s] modern meaning and usage have shifted so that *now* an apology begins where these former rhetorical and essentially self-serving forms leave off.”⁴ An apology now refers to statements made following an injury – whether the harmful conduct was intentional or not. Dictionaries today often include the early definitions, but they tend to give prominence to the more recent

² Donna L. Pavlick, “Apology and Mediation: The Horse and Carriage of the Twenty-first Century” (2003) 18:3 *Ohio St. J. Disp. Resol.* 830 at 834.

³ See, for example, Jonathan R. Cohen, “Advising Clients to Apologize” (May 1999) 72:4 *S. Cal. L. Rev.* 1009 at 1014.

⁴ Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1993) at 22.

notion of a regretful acknowledgement of fault⁵ from which both victim and apologizer can benefit. It is that genre of definition that is most consistent with the kind of authentic or full apology that is discussed in this Paper. Perhaps the definitional evolution of apology has added to modern-day confusion as to what a full apology means. For instance, wrongdoers who “apologize” by providing excuses for their behaviour may find that their apologies are rejected on the basis that they do not accord with the more current understanding of apologies.

The field of social psychology provides distinctions which are conceptually helpful. Apologies are viewed as a form of remedial behaviour that attempts to explain a harmful act so that it becomes acceptable. Other forms of remedial behaviour are denials (assertions of innocence); excuses (minimization of responsibility); justifications (legitimization of actions); and admissions of guilt (responsibility without excuses). It should be noted that these distinctions are not mutually exclusive and that the “other forms” of remedial behaviour often form part of an apology.⁶

In simple terms, “an apology is a speech act, a form of oral communication from one party to another designed to carry out several specific simultaneous communicative and moral functions.”⁷ Commentators differ in their views about the minimum requirements of a meaningful apology. Tavuchis reduces an authentic apology to two fundamentals: being sorry for harm done to another and saying so.⁸ Law Professor Daniel Shuman, drawing on the work of others, concludes: “Minimally, to be meaningful, an apology must express regret for the occurrence of a harmful event and acknowledge responsibility for it.”⁹ Others add a third necessary component – that of acknowledging “that a legitimate rule, moral norm, or social relationship was broken.”¹⁰ Dr. Aaron Lazare, a psychiatrist and author of the

⁵ The *Canadian Oxford Dictionary* (2nd ed.) (Don Mills: Oxford University Press, 2004) defines “apology” as “a regretful acknowledgement of an offence or failure; an assurance that no offence was intended; an explanation or defence.”

⁶ See Alfred Allan, Maria M. Allan, Debra Kaminer, and Dan J. Stein, “Exploration of the Association between Apology and forgiveness amongst Victims of Human Rights Violations” (2006) 24 *Behav. Sci. Law* 87 at 90.

⁷ Neil Funk-Unrau, “Potentials and Problems of Public Apologies to Canadian Aboriginal Peoples,” Paper presented at the Academic Institute of Interaction 2004, Conflict Resolution Network Canada, Kitchener, Ontario, June 2-4, 2004 at 3. Paper available at <http://www.crnetwork.ca/research/index.asp>.

⁸ Tavuchis, *supra* note 4 at 22.

⁹ Daniel W. Shuman, “The Role of Apology in Tort Law” (January-February 2000) 83:4 *Judicature* 180 at 185.

¹⁰ See for example, the summary provided in Pavlick, *supra* note 2 at 835.

influential book *On Apology*, cites four principal components of apology: acknowledging the offence, communicating remorse, providing explanations, and making reparations.¹¹

To encourage and support the effective use of apologies, it is not necessary to select a single definition of apology. It is more useful to identify the core elements of apology which emerge from the literature. The elements can then be used for the purpose of exploring the subjective needs and expectations of the parties. In addition, they provide an objective basis upon which to determine the comprehensiveness of a particular purported apology. The following seven “Rs” represent the core elements of apology: recognition, remorse, responsibility, repentance, reasons, reparation, and reform.¹² Authentic apologies require a combination of these elements. Each of the elements is described later in this section.

As Professors of Law Erin Ann O’Hara and Douglas Yarn aptly note, “[a]pology is a nuanced phenomenon.”¹³ Successful apologies depend on making the right choice of words and delivering the words in ways that are appropriate for the context. The seven core elements presented in this section provide a useful list that could be used to engage victims in a discussion of what is important to them. The list could also be used with apologizers to probe what they might be prepared to offer, particularly after receiving information on the needs and expectations of victims.

(i) *Recognition*

Recognition involves identification of the wrong, acknowledgement of the violation of a norm, and appreciation of the extent of the harm done to the victim. “Vague reference to possible wrongdoing simply won’t do.”¹⁴ Statements of the ilk, “If I did anything wrong, I’m sorry” or “I deeply regret any injuries you might have sustained” do not reflect the requisite degree of recognition.

¹¹ Aaron Lazare, *On Apology* (New York: Oxford University Press, 2004) [hereinafter *On Apology*].

¹² See, for example, Nicholas Tavuchis, *supra* note 4 at 22; Aaron Lazare, *On Apology*, *supra* note 11 at 74, 107; and Marty Price, “The Mediation of a Drunk Driving Death: A Case Development Study,” *Journal of Peace and Conflict Resolution* [http://www.trinstitute.org/ojpcr/1_2price3.htm].

¹³ Erin Ann O’Hara and Douglas Yarn, “On Apology and Consilience” (2002) 777 *Wash. L. Rev.* 1122 at 1139.

¹⁴ *Ibid.* at 1133.

(ii) *Remorse*

Remorse includes genuine expressions relating to regret for the harm that occurred. When face-to-face apologies are delivered, “remorse and its accompanying sorrow are often conveyed with body language and facial expression...”¹⁵ When apologies are delivered by other means, the language of remorse must be even more explicit. Apologies of the “I’m sorry I was caught” variety fail to qualify as expressions of remorse.

(iii) *Responsibility*

The more “unambiguously and emphatically”¹⁶ that a wrongdoer assumes responsibility or blame, the more likely it is that the apology will be found adequate and will lead to reconciliation.¹⁷ Statements such as “I’m sorry, but...” are often rejected on the basis that the speaker seeks to offer an excuse or explanation rather than assume responsibility.

(iv) *Repentance*

Repentance includes attitudes and behaviours including regret, shame, humility, and sincerity. It affirms that the wrongdoer understands and acknowledges the moral wrong that has been committed. It may be accompanied by a request for forgiveness.

(v) *Reasons*

Many victims seek an explanation relating to the harm – including the circumstances that led to the wrongdoer’s actions and/or why they were victimized. This may be especially important where injuries were caused by a person in a position of trust vis-à-vis the victim.

(vi) *Reparation*

An offer of reparation or restitution may form part of the original statement of apology or an apology may “pave the way for constructive discussions about reparations.”¹⁸ Forms of reparations include direct compensation (to the victim), indirect compensation (to other than

¹⁵ *Ibid.* at 1135.

¹⁶ *Ibid.* at 1137.

¹⁷ In her research, Professor of Law and Psychology Deborah Robbennolt found that “full, responsibility accepting apologies appear to have the strongest effects on participants, suggesting the importance of offenders taking responsibility for having caused injury: Jennifer K. Robbennolt, “Apologies and Settlement Levers” (July 2006) 3:2 *J. of Empirical Legal Stud.* 333 at 368.

¹⁸ O’Hara and Yarn, *supra* note 13 at 1135.

the victim), and specific actions that attempt, as best as can be achieved, to make the victim whole and/or to restore the relationship.

(vii) *Reform*

This element captures both personal promises by a transgressor to learn from the incident and move forward; and specific actions that an individual, organization, or government commits to that are designed to prevent future harm or to commemorate the harm.

2.2 Apology Models

This section of the Paper introduces models that have been developed to differentiate between types of apologies as well as models that have been used to describe how apologies work. These models provide conceptual tools that are helpful when examining the effectiveness and impact of particular apologies.

(i) *Types of Apologies*

Many who write on the subject of apology distinguish between apologies of defence (when we think we are right) and apologies of regret (when we think we are wrong).¹⁹ It is the former that are most likely to be found wanting and the latter that hold the most promise for healing and reconciliation.

Professor of Law Deborah Levi developed a typology that goes beyond the defense/regret dichotomy. She describes four types of apologies:

- tactical apology
 - victim's suffering is acknowledged so as to gain credibility and influence victim's bargaining during negotiations;
- explanation apology
 - the apologizer excuses his or her behaviour without accepting any wrongdoing;
- formalistic apology

¹⁹ See, for example, Philip Vassallo, "The Art of Apology" (July 2005) *et Cetera* 329 at 331.

- apology is offered without remorse under the demand of an authority figure to restore harmony without remorse and under pressure; and
- happy-ending apology
 - apologizer accepts responsibility and expresses remorse for his or her actions.²⁰

Distinctions have also been drawn between interpersonal apologies (between the parties) and political or collective apologies (delivered to a group of victims). Interpersonal apologies depend upon an expression of sorrow, while political or collective apologies may be more concerned with getting a statement on the record. Public apologies may be subdivided into substantive apologies and rhetorical apologies. Rhetorical apologies are sometimes referred to as “spun sorrow” and they are designed to rehabilitate offenders and resurrect their careers.²¹

(ii) *How Apologies Work*

Levi also developed two accounts relating to how apology works: one based on the exchange model and one based on a ritual model. She suggests that the exchange model is “... descriptively useful... but tends to collapse apology into quantitative terms.”²² The “ritual prism on the other hand, refracts layers of qualitative complexity that explain why apology is easily destabilized.”²³

Under the exchange model the value of an apology is equal to the apologizer’s savings in damages or transaction costs. As Levi identifies, the exchange model has several shortcomings. Firstly, it is not clear how either party can predict in advance how the apology will be reacted to and valued. Secondly, even if there is a sense that the apology contributed to resolution, there is no way to measure the cost savings. Thirdly, the model does not explain why the apology was valued.²⁴

²⁰ Deborah L. Levi, “The Role of Apology in Mediation” (1997) 72 *N.Y.U. L. Rev.* 1165 at 1172-1175.

²¹ For a discussion of these distinctions, see Yonat Shimron, “In one week’s news, ‘I’m sorry’ is put to the test,” [<http://www.newsobserver.com/689/story/564466.html>].

²² Levi, *supra* note 20 at 1175.

²³ *Ibid.* at 1175-1176.

²⁴ *Ibid.* at 1177.

In contrast to the exchange model, apology may be viewed as "... a corrective ritual performed by two subjects in order to redress a moral power imbalance between them."²⁵ Unlike other rituals, the speech acts of apologies are worthless unless performed with meaning. According to Levi, effective apologies (that *do* something, not just *say* something), depend on the participation of both parties. The apologizer acknowledges his or her "diminutive moral stature," the importance of the "moral register" and asks for forgiveness. When the victim acknowledges that meaning, a new "moral equilibrium" is established." Authentic apologies can be achieved through this "reconciliatory rite." But as Levi cautions, "Like other important rituals, apology requires not only the right symbolic act but also the right people, the right time, and the right place."²⁶

2.3 "Responses to Harm" Continuum

Section 2.1 canvassed the core elements of an apology and section 2.2 offered some models by which to conceptualize apologies. This section goes beyond the vehicle of apology to examine expressions or actions that a wrongdoer, another person or organization, a Government, or a justice system might offer in response to alleged harm. The response categories suggested are ordered along a continuum from lower to higher levels of taking responsibility. It will be noted that some of the response categories coincide with the seven core elements of apology discussed earlier. Many, however, do not and could be considered additional responses to use in conjunction with apologies.

The continuum is intended to be a practical tool. For example, it could be used, along with the list of the seven core elements of apology, to explore the needs and expectations of the parties in relation to harm done. The "Responses to Harm" Continuum provides a set of expressions and actions that are, if worded and implemented with care, appropriate responses to situations in which harm is caused. All of the responses could be used by wrongdoers and many are also open to use by others who may help victims of harm or who may offer apologies to them.

²⁵ *Ibid.*

²⁶ *Ibid.* at 1178, 1180.

(i) *Validation (I understand you are feeling hurt)*

The speaker acknowledges or confirms the victim's experience, but offers no opinion or judgment about the legitimacy of the feeling or the cause of the harm.

(ii) *Expression of benevolence (How terrible to be hurt in the way you describe)*

A benevolent or empathetic expression is not an apology in and of itself, but if offered by a wrongdoer, it is consistent with the sentiments inherent in apologies.

(iii) *Expression of sympathy (I sympathize with your situation)*

The speaker is affected by feelings consistent with the victim's or the speaker shows compassion to the victim.

(iv) *Statement of belief (I believe you were hurt as you describe)*

By expressing faith in the victim's story, the speaker confirms the integrity of the victim – something that is especially important to those whose stories were originally disbelieved.

(v) *Acknowledgement of fact (I recognize that you were hurt in this situation)*

An acknowledgement may include both acceptance of what a victim has described as well as acceptance of information from other sources.

(vi) *Explanation (You were hurt in this way because....)*

The speaker responds to the information needs of the victim and, by doing so, may reduce anxiety and/or lead to reconciliation.

(vii) *Expression of regret (I regret that you were hurt)*

An expression of regret conveys that the speaker feels some sense of distress, but does not imply any sense of responsibility.

- (viii) *“Sorry” Statement (I am sorry for hurting you or I am sorry that “X” hurt you...)*

Similar to an expression of regret, a “sorry” statement conveys a sense of unhappiness about the situation, and it may include remorse or repentance.

- (ix) *Commemoration (Your hurt will be recognized in this way)*

Commemoration, most usually undertaken by governments, may be seen as a way in which to institutionalize regret relating to harm.

- (x) *Undertaking (In light of your hurt, in the future, I will....)*

The speaker promises to take a particular action or actions that are relevant to the harm done, including reparation and personal reform or systemic reform.

- (xi) *Acknowledgement of responsibility (I take responsibility for the harm done to you)*

By acknowledging responsibility, the speaker assumes some form of accountability, blame or fault.

- (xii) *Admission of liability (I am liable for harming you in this way)*

Admissions of liability are prejudicial to the speaker’s interests and may be used to prove legal liability in an adjudicative setting.

PART THREE: THE EFFECTIVENESS OF APOLOGIES

The literature on apologies emphasizes that one cannot examine apologies in a vacuum. They are, by their very nature, context specific. An assessment of their effectiveness depends upon an examination of all the circumstances surrounding them. There are some general observations and caveats that can be drawn from the literature and other sources as to what tends to make apologies effective or ineffective. This Part uses the classic journalistic questions (who, what, why, when, where, and how) to examine various factors that impact on the effectiveness of apologies. But before turning to the journalistic questions, the first section of Part Three makes the point that both objective and subjective standards are used in determining whether an apology is acceptable.

3.1 Objective and Subjective Standards

The debate over what constitutes a real apology has generated a significant debate as to whether an apology is “acceptable,” “adequate,” “appropriate,” “authentic,” “effective,” “genuine,” “sufficient,” “complete” and so on. When apologies are viewed as deficient, they are variously described through the use of adjectives such as “insincere,” “conditional,” “grudging,” “self-serving,” or “argumentative.” Those found lacking may be labeled “non-apologies,” “near apologies,” “partial apologies,” “pseudo apologies,” and the like. By what standards are apologies judged?

At an objective level, there can be legitimate differences of opinion as to whether a certain statement constitutes an acceptable apology. Some might take the position that an acceptable apology must include all of the seven core elements. However, as Lazare notes, “the importance of each part [of his model] – even the necessity of each part – varies from apology to apology depending on the situation.”²⁷ It is fair to say that, while something less than a fulsome apology might be considered adequate in certain circumstances, the chance of an apology “falling short” increases with each missing element.

²⁷ Lazare, *On Apology*, *supra* note 11 at 35.

At the subjective level, people respond to apologies within a context that is influenced by personal and cultural considerations. Indeed, even an apology that meets a particular definition of apology at the objective level may be rejected at the subjective level by the recipient. This is not an uncommon result. Given the potential for dissonance between objective and subjective perspectives, what can be done to bring the two into closer proximity? The answer is that people embroiled in disputes, and those assisting them, need to pay close attention to the factors noted in this part of the Paper.

Let us assume that a public apology is given to someone who had suffered at the hands of the state, and that the victim finds the apology acceptable. At the same time, members of the community denounce the apology as being motivated by political concerns. Would we conclude that the apology is effective or ineffective? As Law Professor Bilder noted: "... even interpersonal apologies may in some cases be insincere, pro forma or ritualistic, solely for public relations purposes, or designed only to avoid retribution or liability – yet still be effective in creating a context in which the parties can dispose of the issue, achieve reconciliation, and move on."²⁸

Some apologies are so inadequate that any reasonable objective person unrelated to the situation would be likely to dismiss the apology as a "non-apology." The "I'm sorry that you found my innocent actions to be offensive" kind of statement might fall into the category of "non-apology." Other apologies may be adequate on their face, but fail to appease the recipients, because they are not sufficiently responsive to the unique requirements of the situation or because they are delivered inappropriately. Both of these impediments to effectiveness could be cured through prior discussion between the parties – by use of the apology process proposed in section 1.4 of this Paper.

Much of the discussion relating to apologies centres on what an apology is or what it should be – the definitional issues. There is a continuing debate as to what an apology must

²⁸ Richard B. Bilder, "The Role of Apology in International Law and Diplomacy" (2005-2006) 46:3 *Va. J. Int'l Law* 443 at 463.

contain before it can be considered an apology. What is more important, perhaps, than whether a statement meets a definition, is the effect that an apology has on the audience for which it is intended. In other words, if a particular statement meets the needs and expectations of a person or group, does it matter that the statement does not fulfill all the requirements of a strictly defined apology?

Perhaps it is time to stand this issue on its head – to look at the “output” rather than the “input” – to evaluate an apology less by what it is and more by what it does. The starting point, then, would be “what do victims need and expect?” An apology could then be evaluated by determining the degree to which the apology meets those needs and expectations. If this is to happen, apologizers will have to gain a clear understanding of victims’ needs and expectations and assess their own. Currently, apologies are often crafted without that kind of understanding and their prospect for success is diminished.

What emerges from the literature and the experiences of adult survivors of abuse is this: for apologies to have potential therapeutic value for them, apologies must contain what is important to them personally. In other words, apologies must be delivered in a way that is sensitive to their specific and unique needs. Statements that fall short of full apologies may satisfy some of the needs of the parties but, if not all are satisfied, the prospect of healing and reconciliation will be thwarted. There is also the risk that an inadequate apology will be received as worse than no apology at all.

3.2 Factors that Influence Effectiveness

The journalistic questions (who, what, why, when, where, and how) that are posed below provide a structure within which to examine the factors that influence the effectiveness of apologies.

(i) *Who?*

The dynamics of apologies are greatly influenced by the people who participate in the interaction – the receivers and givers of apologies. Noted Canadian sociologist and author Nicholas Tavuchis has proposed the following typology regarding who participates in apologies:

- (1) interpersonal (“One to One”);
- (2) individual to collective (“One to Many”);
- (3) collective to individual (“Many to One”); and
- (4) collective to collective (“Many to Many”).²⁹

As a general proposition, apologies have the greatest potential impact if they are delivered by the actual wrongdoer or wrongdoers. The wrongdoer will presumably be in the best position to provide an explanation and the other elements of an apology. If apologies are delegated, they are necessarily weakened and, sometimes, negated. Where the wrong was due to an institutional failure, someone in a position of appropriate authority should extend the apology.

In some circumstances, it may not be feasible or possible to have the actual wrongdoer apologize. In cases of historic wrongs, for example, the perpetrators may be dead or infirm. Where the actions of past Governments are in question, the elected officials or bureaucrats involved in the impugned conduct may no longer be in office. In addition, it may be that the responsible person is not identifiable or is unable or unwilling to apologize. This raises the question of whether someone else can “stand in” for the wrongdoer and make an effective apology.

There are obvious shortcomings associated with people other than the perpetrator issuing apologies. The person in authority may not have been in power at the time of the wrongdoing and may have no or little connection to the events in question. There may also be

²⁹ Tavuchis, *supra* note 4 at 48.

questions about whether the spokesperson has the requisite authority to speak for the group or whether he or she truly represents the views of the group on whose behalf he or she is apologizing. The reputation of the apologizer and the way in which he or she conveys the message are also important considerations. An apology delivered from someone who is remote from the events may be more susceptible to a poor reaction. Expressions of sympathy or regret, for example, may be viewed as being strategic rather than sincere. As Tavuchis suggests, “the principal function of ... all collective apologizing ... has little to do with sorrow or sincerity but rather with putting things on the public record.”³⁰

It is important to consider as well who should receive the apology. Clearly, the victim should be the primary focus. The victim should be given the opportunity to be accompanied by others when the apology is received. Family, friend(s), and a legal representative are amongst those that a victim might choose to have close by. If the victim is no longer alive, the apology would generally be offered to the family of the victim.

(ii) *What?*

The content of apologies must be reflective of the actual circumstances surrounding the harm. The constituent core elements, more fully described in section 2.1 of this Paper, are: recognition, remorse, responsibility, repentance, reasons, reparation, and reform. In cases of serious harm, the more that the statement of apology contains those elements, the more likely it is that the apology will be deemed acceptable.

(iii) *Why?*

Why do victims want apologies? Why do wrongdoers offer them? Elsewhere in the Paper, the general motivations of the parties in relation to apologies are explored. A conclusion that can be drawn from the literature is that if victims request or expect an apology of regret (and all that infers) but they receive an apology of defence, they are likely to be disappointed – if not angered. In other words, if there is a mismatch between “why” the

³⁰ *Ibid.* at 117.

victim wants an apology and “why” a wrongdoer is offering one, the apology will lose its effectiveness.

Typically, apology-givers do not explicitly express why they are giving an apology. It is left to the recipient to determine the reason why. It appears that recipients of apologies are inclined to implicitly figure out the “why” by assessing the sincerity of the apology. They tend, then, to equate their perception as to the sincerity of an apology with the adequacy of the apology. This sub-section of the Paper focuses on the issue of sincerity as a factor in influencing the effectiveness of apologies.

Parties often express confidence in their ability to detect whether an apology is sincere or not. Interestingly, studies indicate that lay people are significantly better than chance at detecting deception.... The more intricate the components of an apology, the better able the victim is to discern the sincerity of the transgressor’s communicated remorse.³¹ A question that arises is how do victims determine whether or not an apology is sincere?

Consider the apology that the government of Ontario offered to Mr. Steven Truscott after the Ontario Court of Appeal acquitted him on August 28, 2007 of the 1959 murder of Lynne Harper. Attorney General Michael Bryant issued the following statement:

The court has found in this case, in light of fresh evidence, that a miscarriage of justice has occurred. And for that miscarriage of justice, on behalf of the government, I am truly sorry.... The miscarriage of justice, this story not told, and now in the eyes of the law finally told, has ailed our nation, and it is now over. The story gets told today in this historic judgment and yet we all feel great loss; the loss of [a] 12-year-old girl, loss for the Harper family and for this miscarriage of justice that took place a lifetime ago.”³²

The Attorney General also announced in his apology that the Crown would not appeal the decision and that the Government of Ontario was prepared to offer compensation to Mr. Truscott. It was reported that Mr. Truscott was critical of the apology. He said, “I know [the

³¹ O’Hara and Yarn, *supra* note 13 at 1160.

³² Ministry of the Attorney General, “A Statement by the Attorney General on R. v. Steven Murray Truscott,” August 28, 2007 [<http://www.attorneygeneral.jus.gov.on.ca>].

Attorney General] apologized on behalf to the government, but I don't really feel that apology was sincere."³³ Mr. Truscott did not elaborate on what it was that led him to that conclusion.

If the parties have a long shared history with the offender, they may be able to gauge sincerity based on the words and body language used by the offender. Lazare suggests that an offender has to "communicate guilt, anxiety, and shame" before the victim can accept the apology as sincere.³⁴ As a general matter, it may be that conclusions about sincerity are linked to the adequacy of the apology. In other words, if the apology does not include all or most of the seven core elements, it will be perceived as insincere. For example, if an apology expresses regret but does not promise change in the future, it may be viewed as insincere. O'Hara and Yarn stress the importance of body language in determining sincerity: "[R]egardless of culture, victims pay careful attention to non-verbal cues.... consciously or unconsciously, victims pay attention to just about everything: eye contact, breath, body posture, facial expressions, tone of voice, pace of speech, and even order of words."³⁵

(iv) *When?*

So long as they are otherwise adequate, apologies offered within a reasonable time following the harm have the best chance of meaningful impact. A lot turns on what is "reasonable" in the circumstances. If apologies are offered before the facts are known or the victim is ready to receive them, they may be ineffective. In cases of serious harm, immediate apologies may not imply sufficient remorse or suffering on the part of the wrongdoer. Those offered long after the harm run the risk of being rejected as "too little, too late." By that point, the aggrieved party may have added the failure to issue a timely apology as an adjunct to the original harm. With the passage of time, there is also an increasing risk that an apology will be perceived as something less than genuine. The aggrieved party may be more likely to view the apology as being motivated by strategic, as opposed to empathic, purposes.

³³ See, for example, Jane Sims, "Steven Truscott Acquitted: 'It's a dream come true,'" *The London Free Press*, (August 29, 2007).

³⁴ Lazare, Aaron, "Go Ahead, Say You're Sorry," (January/February 1995) *Psychology Today* 40 [hereinafter "Go Ahead"] at 40-41 [Also available at <<http://www.psychologytoday.com/articles/1995html>>].

³⁵ O'Hara and Yarn, *supra* note 13 at 1140.

Early apologies are a “means to reduce the occurrence of litigation.”³⁶ Once litigation has commenced, however, plaintiffs may be persuaded by their lawyers to focus on monetary damages and to ignore or devalue the potential benefits of an apology or the merits of an apology that is proffered. Ms. Megan Bisk has this to say about apologies in the litigation context: “An apology made at any time during a legal proceeding may have some sort of positive effect, but it would seem that the closer in time to the accident that the apology is made, the greater the probability that it would assist in avoiding litigation and encouraging settlement.”³⁷

Apologies may be offered too early. Researchers Cynthia McPherson Frantz and Courtney Bennisson conducted two studies using personal narratives and hypothetical scenarios to test their hypotheses about the timing of apologies. Their research suggests that “delaying an apology until after the victim has a chance to feel heard and understood may be the most effective way to right wrongs. Feeling heard and understood apparently fosters ripeness, a readiness to de-escalate conflict.”³⁸ If an apology is offered prematurely, the aggrieved person may still be in the “I’m not done being mad at you”³⁹ phase and be unable to integrate the apology. These findings support the need for an apology process which forestalls apologies until the needs and expectations of the victim have been taken into account.

The likelihood of a successful apology being given is also influenced by the duration of the conflict. It is difficult to determine when and if an apology is timely if the disputing behaviour has occurred over an extended period. As Levi observes, “... long-term side effects such as adversarial habits and irreversible harm inhibit communication.”⁴⁰

Time is also a consideration to take into account when evaluating the sufficiency of an apology. It is possible for an incomplete apology to be supplemented over time so as to

³⁶ Carrie J. Petrucci, “Apology in the Criminal Justice Setting” (2002) 20 *Behav. Sci. Law* 337 at 353.

³⁷ Megan E. Bisk, “Apology Statutes: A 22 State Survey” [http://www.wm.edu/law/institutesprograms/lawtcp/documents/megan_e_bisk.doc].

³⁸ Cynthia McPherson Frantz and Courtney Bennisson, “Better late than never: The influence of timing on apology effectiveness” (2005) 41 *Journal of Experimental Social Psychology* 201 at 206.

³⁹ *Ibid.* at 202.

⁴⁰ Levi, *supra* note 20 at 1168.

become a full apology. For example, a Government might provide a written public apology at a given point in time that includes an acknowledgement of harm and regret, later set up a system for compensation, and later still institute measures of reform. In that context, although the original “apology” may not contain all of the requisite elements, the series of events may eventually satisfy the victims. Accordingly, it is important to look at all the pertinent actions of a wrongdoer or apologizer before coming to a conclusion as to whether or not an “apology” is sufficient.

(vi) *Where?*

The major distinction in terms of “where” is between offering apologies in private or in public. The benefits of providing apologies in a private face-to-face interaction are many. It is often the most expedient way to deliver an apology. The “interpersonal orientation”⁴¹ shows respect for the relationship and encourages dialogue. As well, it is only through a face-to-face meeting that a victim can assess the emotions displayed by a wrongdoer.

Prue Vines distinguishes the purposes of private and public apologies:

Public purposes could include political purposes, the prevention of disorder; reconciliation of two major social groups, and, more cynically, the manipulation of a large group of people into behaving in a particular way. In the private domain, people often want a relationship restored and feel emotional – angry, hurt or vengeful – if an apology is not forthcoming.⁴²

Survivors usually call for two kinds of apologies: a personal, private apology, and/or an official, public apology. The wrongdoer may provide a personal, private apology directly to the survivor. It is usually an interaction that reflects the unique circumstances of the individual’s case. A personal apology may be delivered orally and/or in writing. The official, public apology is typically delivered in a public forum and recorded in some fashion. It typically addresses the harm done to the individual or group; as well, it often addresses the societal issues raised by the wrongdoing. The official, public apology may be delivered by

⁴¹ Petrucci, *supra* note 36 at 343.

⁴² Prue Vines, “The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?” [2007] *UNSWLRS* at 2.

the wrongdoer, but more often, it is delivered by a spokesperson for the organization associated with the harm.

Both private and public apologies have utility. A private apology can address the specific harm that was done, without exposing the details to public view. The private nature of the setting may encourage a dialogue between the wrongdoer and the injured party which may further the possibility of healing and reconciliation. A public apology “sets the record straight” and serves to raise the awareness of the public. This may have an ultimately positive effect on reform initiatives.

(vii) *How?*

As noted above, apologies that are offered one-on-one need to be responsive to the particular needs and preferences of the victim. Those that are offered publicly need to address the concerns of a much broader audience. As well, decisions will have to be made as to whether the apology is oral and/or written, formal or informal in tone, limited to a “script” or not, and whether discussion will be permitted or encouraged. Body language, including tone of voice, should be consistent with the content of the apology. Defensiveness should be avoided.

Another crucial factor is culture. Cultural considerations at the personal, group, organizational, national, and international levels may all have an impact, depending on the dynamics of the dispute in question. Cultural factors may be subtle and, therefore, overlooked. They may be obvious, but be overlooked. The impact of culture is further explored in Part Seven of the Paper.

PART FOUR: APOLOGIES, FORGIVENESS, HEALING, AND RECONCILIATION

4.1 Connection to Forgiveness

What is the essence of forgiveness? Authors Robert Enright and Richard Fitzgibbon state that “forgiveness is a willingness to abandon one’s right to resentment, negative judgment, and indifferent behavior toward one who unjustly injured us, while fostering the undeserved qualities of compassion, generosity and even love toward him or her.”⁴³ Definitions of forgiveness generally include the notion of victims letting go of resentment and providing the wrongdoer with some form of pardon. Wrongdoers may seek forgiveness to assuage their feelings of responsibility or guilt, in accordance with ethical or cultural norms. They may also sense that forgiveness is a necessary precondition to re-establishing a relationship after harm has been done. Victims may be motivated to forgive because they feel it is expected of them or because it is justified. If they feel that forgiveness is justified, they may anticipate the positive effect it will have on them, on the wrongdoer, and/or on the relationship between them. With forgiveness, power resides in the victim as to whether to forgive or not.

Implicit and explicit requests for forgiveness are often delivered through apologies. In fact, an apologizer is often motivated to apologize by the desire to receive forgiveness. Interestingly, in one of the languages spoken in Nigeria, Ibo, “to apologize is to ask for a pardon.”⁴⁴ However, in the Canadian cultural context, the two concepts are not necessarily twinned. Recipients of both implicit and explicit requests for forgiveness may choose to accept, acknowledge, consider, or reject such requests. Further, a victim may wish to forgive an offender in the absence of an apology or a request for forgiveness.

⁴³ Robert D. Enright and Richard P. Fitzgibbon, *Helping Clients Forgive: An Empirical Guide for Resolving Anger and Restoring Hope* (Washington, D.C.: American Psychological Association, 2000) at 1.

⁴⁴ Marina Warner, “Sorry”, *Open Democracy* (November 7, 2007): 1-17 as quoted in British Columbia, Office of the Ombudsman, *The Power of an Apology: Removing the Legal Barriers (Special Report No. 27)*, February 2006, to the Legislative Assembly of British Columbia [hereinafter *The Power of an Apology*], at 6.

There are a number of complex links between apologies and forgiveness. On the academic front, numerous studies have found that offenders who apologize are more likely to be forgiven than those who do not.⁴⁵ Research has also shown that apologies are more likely to result in forgiveness when offenders acknowledge wrongdoing or take responsibility.⁴⁶ The empirical literature further demonstrates that a lack of forgiveness may discourage apologies.⁴⁷

Researcher Alfred Allan and his colleagues conducted an empirical study of the relationship between apology and forgiveness within the context of the Truth and Reconciliation Commission (TRC) in South Africa. They found that participants who believed that the wrongdoer was truly sorry were significantly more forgiving than those who doubted the wrongdoer. Approximately half of the victims who received an apology did not believe the wrongdoers were truly sorry; ninety-two per cent of the participants who believed that the wrongdoers were truly sorry did not receive an apology. It was speculated that victims were looking for a demonstration of remorse as an indicator that the wrongdoers were truly sorry.⁴⁸ Also intriguing was the result, contrary to other theories, that women were less forgiving than men. It was hypothesized that this may have resulted from the fact that, at the South African TRC, men responded to harms done to them personally and women responded to harms done to their families, for which it may have been more difficult to forgive.

Forgiveness, if given freely, may have distinct benefits for survivors. It may relieve negative feelings and, without minimizing the past, allow them to move forward. As Trudy Govier explains: “Forgiveness does not mean excusing, condoning, ceasing to blame, losing respect for the victims, or forgetting that wrong-doing occurred. What happens in forgiving is that we relinquish our feeling of hatred and resentment and accept that the wrongdoer has

⁴⁵ Julie Juola Exline, Lise Deshea, and Virginia Todd Holeman, “Is Apology Worth the Risk? Predictors, Outcomes, and Ways to Avoid Regret” (April 2007) 26:4 *Journal of Social and Clinical Psychology* 497 at 497.

⁴⁶ See Hershey H. Friedman, “The Power of Remorse and Apology” (January 2006) 7:1 *Journal of College & Character* at 8.

⁴⁷ Exline, Deshea, and Todd Holeman, *supra* note 45 at 499

⁴⁸ Alfred Allan, Maria M. Allan, Debra Kaminer, and Dan J. Stein, “Exploration of the Association between Apology and forgiveness amongst Victims of Human Rights Violations” (2006) 24 *Behav. Sci. Law* 87 at 96.

repented and reformed.”⁴⁹ When freely given, forgiveness may promote healing and reconciliation.

Furthermore, if a victim has witnessed the offender’s anguish, the victim may feel empathy, be less motivated to seek retaliation, and be more willing to consider reconciliation. The victim, then, may choose to forgive. But what if the victim is not prepared to forgive? In cases of serious harm, such as sexual and physical abuse, the victim may not be ready or prepared to forgive the perpetrator. This may especially be the case where the apologizer is someone other than the perpetrator. If, for example, an apology is offered by a Church for harm done by a member of the clergy, the apology may not lead to forgiveness of the clergy member. The victim will not have had the opportunity to witness the anguish that may be critical to the forgiveness.

To take the position that forgiveness is a necessary or predictable outcome of apologies, is problematic. Forgiveness should not be viewed as a *quid pro quo* that is routinely expected in return for an apology. Forgiveness is a discreet and complex act, which may precede or follow an apology or be given without an apology. To be meaningful to the victim and the offender, it must be based on a deep understanding of the context of the harm and on a psychological readiness to offer forgiveness. As Martha Minnow cautions:

Forgiveness is a power held by the victimized, not a right to be claimed. The ability to dispense, but also to withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing. Even an individual survivor who chooses to forgive cannot, properly, forgive in the name of other victims. To expect survivors to forgive is to heap yet another burden on them.⁵⁰

Earlier in this Paper, it was pointed out that apologies may have a subjective value to disputants in the context of civil cases. The same could be said of acts of forgiveness. Both apologies and acts of forgiveness may be viewed as “valued components of dispute resolution that can be traded off against other valued components of dispute resolution.”⁵¹ This implies

⁴⁹ Trudy Govier, *Dilemmas of Trust* (Montreal and Kingston: McGill-Queen’s University Press, 1998) at 199.

⁵⁰ Martha Minnow, *Between Vengeance and Forgiveness – Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 114-115.

⁵¹ O’Hara and Yarn, *supra* note 13 at 1129-1143.

that wrongdoers who seek forgiveness for psychological or reputational reasons and receive it may be willing to compensate a victim more generously than they would if forgiveness was not forthcoming. Arguably more important than the monetary value of forgiveness is its potential to address the psychological effects of harm.

4.2 Connection to Healing

“Apologies may restore some dignity, but not the lives as they existed before the violations.”⁵² One of the paradoxes of apology is that while an apology cannot undo what has been done or change the past, it can affect the perception of the past or the harm. By affecting the perception of the past, an apology can change the present. Parties may then be able to heal their wounds and allow the healing process to continue into the future. Healing involves restoring a person to health.⁵³ In the context of serious physical, emotional, and sexual abuse, the healing process may be long and complex.

In her 1999 Report for the Law Commission of Canada, Susan Alter points out that studies have found that survivors of abuse are driven more by the need to heal than the need to obtain compensation. She quotes the conclusion of one study that survivors need “... to have their abuse acknowledged and their experience validated, and to receive an apology.”⁵⁴ Alter describes the importance of apologies in cases of sexual abuse of children in institutions: “The terrible violation and betrayal of trust experienced by the victims need to be addressed as effectively as possible. Acknowledging the harm done and apologizing for it are critical steps in making proper amends. For a victim, an apology is often considered to be the key that will unlock the door to healing.”⁵⁵

Lazare describes what is at the heart of the healing process and how an apology can promote healing:

⁵² Minow, *supra* note 50 at 93.

⁵³ See, for example, the definition of “heal” in the *Canadian Oxford Dictionary* (2nd ed.), *supra* note 5, which includes “to become sound or healthy again”; “to cure”; and to “repair, correct... put right.”

⁵⁴ Susan Alter, *Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations*, Law Commission of Canada, May 1999 at 5.

⁵⁵ *Ibid.* at 2.

[W]hat makes an apology work is the exchange of shame and power between the offender and the offended. By apologizing, you take the shame of your offense and redirect it to yourself. You admit to hurting or diminishing someone and, in effect, say that you are really the one who is diminished – I'm the one who was wrong, mistaken, insensitive, or stupid. In acknowledging your shame you give the offended the power to forgive. The exchange is at the heart of the healing process.⁵⁶

Most writers appear to focus on the interpersonal act of forgiveness and the potential that it has to promote reconciliation. But there is an equally important personal act which is independent and self-enhancing and can occur with or without an apology having been given.⁵⁷ Social worker Dr. Elaine Walton describes how forgiveness can be used in psychotherapy with female victims of sexual abuse where the offenders will not or cannot apologize. She describes “therapeutic forgiveness” as: “a process through which an abused person heals the wounds of hurt and hate, is disconnected from an unhealthy connection (physical or mental) with the offender, and is freed to pursue healthy and growth-promoting activities.”⁵⁸

Walton has developed a five-step process in which her clients apologize “on behalf of” the offender so that her clients can experience the “validation, freedom, and healing that come with apology and contrition even though the offender is not remorseful.”⁵⁹ The process allows victims to move beyond the victim role, experience personal growth, and consider whether reconciliation is an appropriate goal. Walton recognizes the danger that conventional forgiveness paradigms may involve inappropriate condoning of the offender or acquiescing to the victim role. Of her model, she says: “‘Apology on behalf of’ the offender is a way of empowering clients to take charge of their lives as they gain peace, freedom, self-acceptance, and release from self-pity. It is a way to heal wounds. It is a reminder that forgiveness really is for the benefit of the offended.”⁶⁰

⁵⁶ Lazare, “Go Ahead,” *supra* note 34 at 42.

⁵⁷ See Elaine Walton, “Therapeutic Forgiveness: Developing a Model for Empowering Victims of Sexual Abuse (Summer 2005) 33:2 *Clinical Social Work Journal* 193.

⁵⁸ *Ibid.* at 196.

⁵⁹ *Ibid.* at 201.

⁶⁰ *Ibid.* at 205.

4.3 Connection to Reconciliation

The concepts of healing and reconciliation are closely linked. Indeed, the definition of “reconciliation” includes the process of “healing” a dispute as well as “making friendly after estrangement.”⁶¹ Survivors and other victims may engage, on an individual basis, in a process of reconciliation with their past, with what happened to them, and with their experience – whether or not they ultimately reconcile with the wrongdoer or an organization associated with the wrongdoer. Indeed, this kind of personal – or internal – reconciliation supports healing which may, in turn, promote (external) reconciliation between the parties. External reconciliation may, in turn, foster further personal healing. Given that apologies also play a role in healing and reconciliation, the circularity connecting these three processes is apparent.

The following example demonstrates links between apology, healing, and reconciliation. Allegations of widespread sexual abuse at two Ontario training schools operated by the Christian Brothers surfaced in the 1980s. The alleged abuse went back to the 1940s. Two hundred charges were laid against thirty Christian Brothers. Approximately seven hundred former students came forward. In 1992, an agreement was made between parties representing the Church and the Government of Ontario. In addition to financial compensation and provision of counselling, the agreement provided for apologies. The apology that was ultimately delivered made reference to healing and reconciliation:

Apologies are at the heart of the reconciliation process. In fact, healing from the personal devastation of abuse cannot occur without apologies. Dedicated to reconciliation and healing, this Agreement wishes to facilitate apologies by those responsible where injuries are found to have occurred as a result of the process for validation of claims established in this Agreement. It is the aim of the Agreement to restore trust in the spiritual and secular institutions of society.⁶²

⁶¹ See, for example, the definition of “reconcile” in *The Concise Oxford Dictionary* (7th ed.) Oxford: Oxford University Press, 1982) and in *Canadian Oxford Dictionary* (2nd ed.), *supra* note 5.

⁶² D. Henton and D. McCann, *Boys Don’t Cry – the Struggle for Justice and Healing in Canada’s Biggest Sex Abuse Scandal* (Toronto: McClelland & Stewart, 1995) at 169.

As between parties, the process of reconciliation involves acknowledgment and contrition from the perpetrators, and forgiveness from the victims.⁶³ The observations of Lazare and others about the exchange of shame and power have relevance to reconciliation as well. There is also potential, in highly publicized cases or cases of widespread harm, for the benefits of reconciliation to extend beyond the parties themselves to other members of society.

The potential for societal reconciliation prompted the South African Truth and Reconciliation Commission to consider ways in which to transfer the effects of reconciliation from the individual level to the societal level and vice versa. Here are two examples of bridges between the individual and societal relationship levels. Archbishop Tutu opened each TRC session with a prayer. By so doing, he imported society's ethical norms to the individual level and encouraged reconciliation. The TRC also televised individuals' testimony. It has been argued that "a national victim" was created through this medium, as was "a new national collective conscience."⁶⁴

4.4 Case Types

(i) *Physical, Emotional, and Sexual Abuse*

Private interpersonal apologies in the context of physical, emotional, and sexual abuse have the potential to have positive effects. However, given the high stakes for the perpetrator (particularly the prospect of criminal sanctions), direct apologies by perpetrators are presumed to be relatively rare. Those that are provided are not generally publicized.⁶⁵ However, public

⁶³ Joseph V. Montville, "Complicated Mourning and Mobilization for Nationalism" in Jerome Brown, (ed.), *Social Pathology in Comparative Perspective: The Nature and Psychology of Civil Society* (Westport, CT: Praeger, 1995).

⁶⁴ Richard A. Wilson, "Reconciliation and Revenge in Post-Apartheid South Africa – Rethinking Legal Pluralism and Human Rights" (February 2000) 41:1 *Current Anthropology*.

⁶⁵ In the case of private boys' school, Upper Canada College ("UCC") in Toronto, direct apologies for sexual abuse were provided by UCC to those who came forward. At the end of a "long and difficult process of addressing [the] past," a formal apology was communicated to the community: Debra Black, "UCC sends apology for abuse" (February 2, 2007) *thestar.com* [<http://www.thestar.com/printArticle177488>].

apologies do play a prominent role in institutional abuse⁶⁶ cases, particularly those that stem from abuse in residential settings. Highlighted below are a number of examples drawn from Canadian and Australian jurisdictions. The adequacy of the apologies in these examples is also explored.

Jericho Hill School

In 1993 the Ombudsman for British Columbia, Dulcie McCallum, recommended that the government apologize for the abuse of students at Jericho Hill School, a residential school for the deaf, and compensate them. On June 28, 1995, the then Attorney General for British Columbia, Colin Gabelmann, stated in the Legislature:

There is no excuse or justification for what happened. The victims bear no responsibility for events over which they had no control. We regret that they were exposed to these terrible experiences; we regret this especially because they were young and vulnerable children. It took great courage on their part to come forward and disclose the abuse they endured.⁶⁷

The government also provided a written formal apology for those who accepted compensation packages. One of the claimants provided feedback to the effect that the letter was insufficient as “it did not document his personal experience, nor did it acknowledge his efforts to overcome the effects of the abuse.”⁶⁸ This reaction demonstrates that form letters may not be sufficiently personal and may, therefore, not provide the kind of closure that is hoped for.

⁶⁶ It has been suggested that the definition of institutional child abuse, traditionally focused on residential or educational facilities, should be broadened to include abuse within other community organizations and social institutions, such as sport and recreational organizations and community-based agencies. See, David A. Wolfe, Peter G. Jaffe, Jennifer L. Jetté, and Samantha E. Poisson, *Child Abuse in Community Institutions and Organizations: Improving Public and Professional Understanding* (2001), <http://www.lfcc.on.ca/institutional.html>. Later published in (June 2003) 10:2 *Clin Psychol Sci & Pract* 179.

⁶⁷ British Columbia, *The Power of an Apology*, *supra* note 44 at 2.

⁶⁸ *Ibid.*

Doukhobor Children

In 1999 the British Columbia Ombudsman, Dulcie McCallum, recommended that the government make “an unconditional, clear and public apology”⁶⁹ for harm done to the Doukhobor community in the 1950’s. One hundred and forty Doukhobor children had been removed from their parents and confined in New Denver. In 2004, five years after the recommendation was made, the Attorney General spoke in the Legislature:

We recognize that as children, you were caught in this conflict through no fault of your own. On behalf of the Government of British Columbia, I extend my sincere, complete and deep regret for the pain and suffering you experienced during the prolonged separation from your families. We recognize and regret that you were deprived of the day-to-day contact with your parents and the love and support of your families. We recognize and we regret the anguish that this must have caused.... We hope that this acknowledgement will enable you to work with us toward continued reconciliation and healing.⁷⁰

Apparently, many of the people to whom the statement was made were disappointed because they considered the statement of “regret” to fall short of a full “apology.”

Canadian Residential Schools

From 1874-1969, Canadian Aboriginal children were sent to residential schools under a policy of assimilation. Over time, there were one hundred and thirty residential schools in Canada. A total of approximately 100,000 students attended them, and it is estimated that 80,000 are currently alive. Most schools had closed by the 1970’s and the last one closed in 1996. Almost all the schools were operated in partnership with various religious organizations. Sexual and physical abuse was widespread. What resulted was “...the most significant abuse in Canadian history. The abuse was devastating because of the total control of the institutions representing our government and various churches and the many spheres of violations, including spiritual and cultural.”⁷¹ A Royal Commission on Aboriginal Peoples

⁶⁹ *Ibid.* at 3.

⁷⁰ *Ibid.* at 3-4.

⁷¹ Wolfe, Jaffe, Jetté, and Poisson, *supra* note 66 at 21.

was established in 1991. Its Report in 1996 brought the stories of abuse to national and international attention.

In response to the Report of the Royal Commission, the Canadian Government issued a “Statement of Reconciliation” in January 1998 which read, in part:

The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government which have contributed to these difficult pages in the history of our relationship together..... Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools... we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.⁷²

The “Statement of Reconciliation” was made in conjunction with *Gathering Strength*, an action plan that sought a partnership based on “recognizing past mistakes and injustices, the advancement of reconciliation, healing and renewal, and the building of a joint plan for the future.”⁷³ As part of the action plan, the Government of Canada created a healing fund to be administered by the Aboriginal Healing Foundation and committed \$350 million to support healing initiatives. The Government of the day also recognized that acknowledgement and apologies were important components of healing and reconciliation at the individual and community levels.⁷⁴

In 2001, the Government created Indian Residential Schools Resolution Canada to manage and resolve abuse claims. In 2003 the Government launched a National Resolution Framework that included a litigation strategy, health supports, a Commemoration Program, and an alternative dispute resolution (ADR) program. More than 3,700 claims (totaling approximately \$150 million) were resolved through the litigation and ADR processes.⁷⁵

⁷² *Healing the Past: Addressing the Legacy of Physical and Sexual Abuse in Indian Residential Schools* (Ottawa: Department of Justice, October 2, 2005) at 4 [<http://www.justice.gc.ca/en/dept/pub/dig/healing.htm>].

⁷³ Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, at 1 [http://www.inac.gc.ca/gs/schl_e.html].

⁷⁴ For more information see *Healing the Past*, *supra* note 72.

⁷⁵ Government of Canada, Indian Residential Schools Resolution Canada, *Backgrounder, Indian Residential Schools* at 1 [<http://www.irsr-rqpi.gc.ca/english/>].

In 2005, the Government appointed the Honourable Frank Iacobucci to work with the relevant parties to develop an agreement for a fair and lasting resolution of the Residential Schools issues. A Settlement Agreement was reached on May 10, 2006 which resolved various class actions and it has been approved by courts across Canada.⁷⁶ It became effective on September 19, 2007. Key elements of the Settlement Agreement include:

- \$1.9 billion to be set aside for the benefit of former students who, upon application, are entitled to a common experience payment, subject to verification, of \$10,000 plus an additional \$3,000 for each year of residence beyond the first year;
- an Independent Assessment Process to pursue claims of sexual or serious physical abuse;
- a Truth and Reconciliation Commission with a budget of \$60 million to promote education and awareness;
- \$20 million for events and memorials to commemorate the legacy of the Indian Residential Schools;
- an additional endowment of \$125 million to the Aboriginal Healing Foundation (\$100 million in cash and services from the Churches involved); and
- during the court approval process, advance payments of \$8,000 each for eligible former students who were sixty-five years of age or older, to be later deducted from the common experience payment.⁷⁷

The Canadian Government's response to abuse in Indian Residential Schools has generated a considerable amount of controversy. For example, when Indian Affairs Minister Jim Prentice commented that the Residential School Settlement would not include an apology because it was unnecessary, there was an outcry. In British Columbia, a First Nations Leadership Council issued a press release to condemn this position on the issuance of an apology. In the words of Regional Chief Shawn Atleo, "We all need to move forward, First Nations and Canadians, in healing and reconciling from this tragic legacy and to leave behind

⁷⁶ The Settlement Agreement is available at <<http://www.residentialschoolsettlement.ca/settlement.html>>.

⁷⁷ Government of Canada, Indian Residential Schools Resolution Canada, *Settlement Agreement Background*, *Indian Residential Schools* at 1-2. [<<http://www.irsr-rqpi.gc.ca/english/>>].

an era of mistrust and hurt.”⁷⁸ Chief Judith Sayers added, “We are extremely disappointed that the current government does not understand the significant role an apology would have in the healing and reconciliation process for our people. Government should not expect monetary compensation alone to heal the wounds of the residential school system. A formal apology from government is a necessary and critical component to allow our people to move forward from this dark and disturbing time in our history.”⁷⁹

On May 1, 2007, the House of Commons unanimously apologized to former students of the residential schools, but the Federal Government stated that it wanted to wait until the new Truth and Reconciliation Commission completes its five-year mandate to tour the country and issue a definitive report on the history of the schools. Mr. Phil Fontaine, the National Chief of the Assembly of First Nations, said he would continue to press for a Federal Government apology, adding: “We desperately need this expression of apology from the place that brought forward the residential school experience where so many people were harmed. It’s an important moment for us.”⁸⁰

Stolen Generations in Australia

Thousands of Indigenous children in Australia, known as the “stolen generations”, were forcibly removed from their parents from 1910 to 1970. An Inquiry was established in 1995 in response to concerns amongst Indigenous agencies and communities that the public’s ignorance of the history of the removal hindered recognition of the needs of victims and their families. Entitled *Bringing Them Home*,⁸¹ the Inquiry’s Report contained numerous recommendations for redress. The recommendations were far-reaching and were directed to healing and reconciliation for the benefit of all Australians.

⁷⁸ “First Nations Leadership Council Decry Federal Government Refusal to Issue Apology to Residential School Victims,” *Press Release*, March 30, 2007 at 1.

⁷⁹ *Ibid.* at 1-2.

⁸⁰ Bill Curry, “House Apologizes to residential school students” *The [Toronto] Globe and Mail* (May 2, 2007) at A6.

⁸¹ Commonwealth of Australia, Human Rights & Equal Opportunity Commission [hereinafter “HREOC”], *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997 [commonly known as the *Stolen Generations Report*].

The Inquiry took very seriously the many demands for apologies. One of the key recommendations was that the Australian Parliaments not only acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal, but also that they “negotiate ...a form of words for official apologies to Indigenous individuals, families and communities and extend those apologies with wide and culturally appropriate publicity.”⁸² Further, it was recommended that the Police Forces and Churches that played a role in the removal acknowledge their roles and “make such formal apologies and participate in such commemorations as may be determined.”⁸³

A number of apologies by State Governments, Churches, and Police Forces were provided; that of the Commonwealth Parliament, however, came under particular scrutiny. The Federal Government resisted giving the kind of apology that was recommended. Instead, it settled on a “Motion of Reconciliation” which was delivered by the Prime Minister on August 29, 1999. In his statement, the Honorable Jon Howard acknowledged “the mistreatment of many Indigenous Australians over a significant period” and he expressed “deep and sincere regret” for the injustices they suffered and the hurt and trauma that many continued to feel.⁸⁴ The Motion of Reconciliation was widely criticized as being inadequate, particularly because it failed to recognize the “stolen generations” as a group and it failed to say “sorry”. It was later recommended that a national apology be provided after wide consultation with individuals and representatives of the stolen generations.

In recognition of the fact that it was important to go beyond acknowledgement, apology, and compensation, the Inquiry recommended commemoration as well. It was proposed that commemoration occur at the individual, family, and community levels, after appropriate consultation.⁸⁵ It was also recommended that a national “Sorry Day” be arranged in consultation with an Aboriginal Council and that it be celebrated each year to

⁸² *Ibid.*, Recommendation 5a.

⁸³ *Ibid.*, Recommendation 5b and 6.

⁸⁴ The Honorable John Howard MP, House of Representatives, *Hansard*, August 26, 1999. p. 9205.

⁸⁵ HREOC, *supra* note 81, Recommendation 7b.

“commemorate the history of forcible removals and its effects.”⁸⁶ A “Sorry Day” has been held every year since May of 1998.

A number of other commemorative events have occurred, such as providing a grant to the Stolen Generations Foundation, delivering community workshops on the *Report*, flying indigenous flags, and organizing “walks for reconciliation.” In May of 2000, approximately one quarter of a million people walked, in solidarity with Aboriginals, across the Sydney Harbour bridge where a large “Sorry” sign was hung. The reaction of one Aboriginal woman was described in these words: “...That day was the start of her personal journey of healing. That so many people cared overwhelmed her and diminished her feelings of anger for her past treatment to an extent that she could begin to forgive and, in doing so, heal.”⁸⁷

(ii) *Personal Injury*

In cases of personal injury, apologies have the capacity to soothe the psychological pain of victims and wrongdoers. Consider the following American case. In 2005, a teenager threw a twenty pound frozen turkey into another car, shattering a woman’s face. The victim’s face had to be rebuilt through plastic surgery. Here is a further account:

In the courtroom, [the offender] cried uncontrollably as he apologized to [the victim] for what he had done. He kept repeating “I’m so sorry” to his victim, who actually stroked and hugged him in the courtroom. While this was going on, most of the people in the courtroom, including the court officers and prosecutor, had trouble holding back their own tears. The prosecutor said that he had never seen such a forgiving victim.⁸⁸

(iii) *Medical Malpractice*

In the United States, in particular, medical malpractice cases are very prevalent and they often result in extremely high damages awards (at least by Canadian standards). Medical malpractice litigation has had a significant effect on physicians’ insurance costs and, indeed, on their willingness to practise certain specialties. At the same time, consumers of medical

⁸⁶ *Ibid.*, Recommendation 7a.

⁸⁷ British Columbia, *The Power of an Apology*, *supra* note 44 at 6-7.

⁸⁸ Friedman, *supra* note 46 at 4.

services in the United States and elsewhere have taken issue with the traditional secrecy surrounding medical errors and the refusal of those in the healthcare professions to “own up” to their mistakes. Apologies have been promoted and supported in many jurisdictions as a way to reduce the suffering of patients and to facilitate conflict resolution.

A number of studies have shown a positive correlation between apologies and favourable effects on litigation. Senior legislative analyst Ms. Catherine A.G. Sparkman offers a number of examples:

A British study found that 37% of patients and family members bringing suit may not have done so had there been a full explanation and an apology, factors more significant than monetary compensation.... One commentator asserts that in the medical context, 30% of all plaintiffs claim they would not have sued if only there had been an apology.⁸⁹

Steven Keeva, a Chicago litigation lawyer cites research that indicates that 30% of medical malpractice cases would not have gone to Court if doctors had apologized to the plaintiffs.⁹⁰ According to Daniel Carobini, the art of apology is now included in the curriculum of some American medical schools.⁹¹ At least one medical school in Canada, McGill University, offers a “truth-telling” session to help students understand the consequences of medical errors.⁹²

⁸⁹ Catherine A.G. Sparkman, “Legislating apology in the context of medical mistakes” (August, 2005) 82:3 AORN Journal 263 at 263-264. The 30% figure is attributed to Steven Keeva, “Does law mean never having to say you’re sorry?” (December, 1999) 85 *American Bar Association Journal* 64.

⁹⁰ Quoted in British Columbia, *The Power of an Apology*, *supra* note 44 at 13.

⁹¹ *Ibid.*

⁹² *Ibid.*

PART FIVE: BENEFITS AND RISKS OF APOLOGIES

Every apology is unique. It cannot be said that apologies are necessarily good or bad, given the fact that an apology can only be meaningfully assessed within its particular context. And the context depends on factors including the needs and motivations of the aggrieved person and the wrongdoer, the nature of the injury, and relevant cultural norms. Apologies may be motivated by altruistic, strategic, or self-serving purposes and their impact will differ accordingly. Therefore, the most that can be said is that, as a general proposition, apologies have potential benefits and potential risks. The primary benefits and risks relating to apologies in civil cases are examined below.

5.1 The Benefits Relating to Apologies

It has been suggested that apologies have the potential to influence a number of positive outcomes. As Bilder suggests: “Apologies have traditionally, in virtually all human societies, performed important social functions, including diffusing conflict, avoiding retaliation, facilitating reconciliation and reaffirming the value of rules and obligations. Human experience shows that, in many contentious social situations, apologies can really help.”⁹³ From a theoretical standpoint, it is clear that apologies can do great good – for individuals, for the justice system, and for society in general. The potential benefits are elaborated upon in this section.

(i) Respond to the Psychological Needs of Victims

Perhaps the single most important potential benefit of apologies is their capacity to respond to the psychological needs of injured parties. Ideally, an apology which reflects the needs of the victim will contribute to healing and, depending on the circumstances, to reconciliation as well. As noted by Beverley Engel:

⁹³ Richard B. Bilder, *supra* note 28 at 437.

When we apologize to someone we have hurt, disappointed, neglected, or betrayed, we give them a wonderful gift that is far more healing than almost anything else we can give. By apologizing, we let the other person know that we regret having hurt him or her. Just as important, we let this person know we respect him, and we care about his feelings. It becomes one of the most effective tools for mending a relationship.⁹⁴

According to the literature in the social sciences, apologies serve the psychological needs of victims in a variety of ways. Through apologies, the victim is empowered and the wrongdoer is shamed. This exchange of shame and power brings the parties into balance. When responsibility is admitted through apologies, the victim is relieved of feelings of “misconstrued self-blame or criticism.”⁹⁵ Apologies may also reduce victims’ anger or determination to see the wrongdoer punished.

(ii) Serve the Legal/Strategic Motivations of Victims

It is not only the psychological needs of victims that may be served by apologies. Apologies may address their legal and strategic motivations as well. Victims may seek an apology because they view it as a form of vindication – something that substantiates their truthfulness, clears their reputation, or underscores the harm done to them. If motivated by a desire to punish, victims may use an apology “against” the wrongdoer – in civil court or in the court of public opinion. Those more conciliatory may view an apology as the exclusive desired remedy and see the advantages of accepting the apology and forgoing litigation. Even those that pursue legal remedies may give value to the apology and moderate their claims. And whether or not litigation is pursued, victims may view apologies as paving the way to resolution of conflict and, potentially, restoration of relationships.

(iii) Respond to the Psychological Needs of Wrongdoers

Apologies have the potential to diminish the psychological pain associated with wrongdoing. A wrongdoer may use the vehicle of an apology to express regret,

⁹⁴ Beverly Engel, *The Power of an Apology: Healing Steps to Transform All Relationships* (New York: Wiley & Sons, 2001).

⁹⁵ Shuman, *supra* note 9 at 183.

responsibility, and remorse so as to be relieved of the burden of feeling in the wrong. The wrongdoer's focus may be on relieving a guilty conscience, with or without concern for the wellbeing of the victim. The apologizer may independently wish to "right the balance" and thereby satisfy a personal moral code, ethical and cultural norms, and/or societal expectations. It may also be the case that the wrongdoer is conscious of the pain of the victim and hopes to lessen the pain by apologizing. The wrongdoer may also suffer from psychological pain attributable to the damaged relationship and seek to ease that pain through offering an apology and encouraging reconciliation. The apology may also be intended by the wrongdoer as evidence of a change in personal conduct and an indication of a commitment to act honourably in the future.

(iv) Serve the Legal/Strategic Motivations of Wrongdoers

The literature suggests that wrongdoers have differing motives when they offer apologies. Legal or strategic considerations may play an exclusive role, some role, or no role in prompting wrongdoers to offer apologies. O'Hara and Yarn draw a distinction between "cooperative transgressors" who apologize, at least in part, because "they feel an emotional need to correct a moral wrong" and "defector apologists" who "act only out a desire to benefit financially and reputationally."⁹⁶

Apologies may be offered to avoid punishment, to reduce damages claimed by a victim or ordered by a court, or to secure forgiveness (which has its own psychological benefits to the wrongdoer). They may also be offered to positively influence public opinion, reputation, or image. Offenders may offer insincere or inadequate apologies that are carefully crafted to achieve legal or strategic purposes. Depending on what is said, though, these apologies may still meet some of the victim's needs. For example, a given apology may acknowledge responsibility but fail to express remorse. The apology may have value to a victim who wishes to publicize the apology to buttress his or her case.

⁹⁶ O'Hara and Yarn, *supra* note 13 at 1173.

(v) Serve the Justice System

“Apology is an important component of dispute resolution, and any useful model of conflict resolution must acknowledge a human preference for apologies.”⁹⁷ In Ontario and beyond, there have been a number of reforms designed to make the civil justice system more accessible and responsive to the needs of litigants. Put simply, stakeholders in the justice system have strived to make the system “faster, better, and cheaper.” Early resolution is viewed as one way to achieve those legitimate aims. Lawyers and parties are encouraged to resolve cases through early negotiation or mediation. Apologies can play a positive role in those early resolution processes.

Those who work in the justice system have reported on the positive effect that apologies can have – by responding to victims’ and wrongdoers’ psychological needs, reducing the intensity of the conflict, and/or reducing the ultimate quantum of damages. If apologies are offered before litigation is commenced and a resolution can be reached, there is the added benefit of avoiding expensive proceedings. If a civil justice system does not support apologies, it discourages moral behaviour and acts in opposition to community norms.

(vi) Provide Societal Benefits

There is a general societal expectation that those who are harmed deserve, at a minimum, an apology from the wrongdoer. There are a number of theories which suggest that when people harm others, they create a state of injustice in a social sense as much as in a legal sense. According to one theory, harm creates an imbalance which must be righted. Another considers harm as a debt that needs to be paid. One theorist posits that the harm produces an “injustice gap” between the way things are and the way things would be if life was fair. This gap has to be filled to secure justice. Other theorists suggest that when people are harmed, they are metaphorically pushed down. It follows that the perpetrator needs to be brought down to correct the imbalance.⁹⁸ How might apologies work within these theories?

⁹⁷ *Ibid.* at 1121.

⁹⁸ For a review of the theories, see Exline, Deshea, and Todd Holeman, *supra* note 45 at 480-481.

Apologies cannot undo the past or completely right the wrong. However, apologies may act as a “measure” to restore balance, serve as a “currency” to repay a debt, constitute a “filler” for a gap, or impose a “weight” on the shoulders of the offender. As researchers Ms. Julie Juola Exline and her colleagues suggest:

Apologies might help to restore justice by tapping into the social and emotional dynamics of offense situations.... Apologies seem to represent a social offering of sorts, one that helps to satisfy demands for retributive and restorative justice. By admitting wrongdoing and expressing remorse, apologizers respond to the face needs of offended parties, helping to restore their sense of power. Once offended parties feel satisfied that their power has been restored, they may become less punitive and more forgiving....⁹⁹

Authentic apologies clearly offer the most potential for benefits at the societal level. However, even *pro forma* apologies and expressions of forgiveness may play important educative functions by reinforcing the rituals of apology and forgiveness in society. When played out, the rituals remind wrongdoers of the importance of taking responsibility for their actions and encourage victims to accept apologies and offer forgiveness. There are limitations, however, to the utility of *pro forma* gestures. A society that encourages or rewards hollow apologies runs the risk of devaluing apologies generally. The same could be said for forgiveness.

5.2 The Risks Relating to Apologies

There are a number of risks associated with apologies. The risks are discussed below in relation to the action or inaction of the wrongdoer.

(i) Worsen Conflict

No Apology

If a wrongdoer fails to issue an apology in circumstances that call for one, there is a risk that the victim will further resent the wrongdoer. This may lead to the victim adding the

⁹⁹ *Ibid.* at 481.

failure to apologize as a harm, increasing demands for monetary compensation, thinking more poorly of the wrongdoer's moral character, and/or taking steps to broadcast the absence of an apology. The failure to offer an apology also reduces the prospect of the victim offering forgiveness. People tend to regret their failure to provide apologies more than they regret giving apologies and those who regret their failure to provide apologies are apt to be disappointed in themselves rather than the other party.¹⁰⁰

Inadequate Apology

When apologies are deficient, they often do more harm than good. Apologies that fail to meet an aggrieved party's needs may inflame the conflict. Once the decision is made to apologize, it is important to deliver an apology that is adequate, sincere, and will be accepted. If an apology is rejected, the consequences for the apologizer are dire. An inadequate apology may lead to a number of negative consequences. The apology itself and its deficiencies may add to the issues in the dispute. The hurt associated with the inadequate apology may increase the victim's desire for retaliation. And the victim may use certain elements in the apology (words of self-blame for instance) to further damage the wrongdoer's reputation.

Insincere Apology

There is a risk that an apology may be insincere. Insincere apologies, when detected, can have a particularly negative effect on the dynamic of the conflict. Some aggrieved parties even reject in advance the notion of an apology on the basis that they know that the offender is incapable of providing a sincere or meaningful apology.

(ii) Damage Apologizer's Reputation

Offenders may hesitate to offer an apology on the basis that it is a sign of weakness or guilt and it will damage the apologizer's reputation. To the contrary, Lazare argues that an apology indicates strength which has the potential to restore and rehabilitate the self-concept of the offended party.¹⁰¹

¹⁰⁰ *Ibid.* at 491.

¹⁰¹ Lazare, "Go Ahead," *supra* note 34 at 42.

(iii) Cause Regret by Apologizer

As indicated above, there is a relatively small risk that an apologizer may provide an apology and later regret it. This may occur when an apology is not accepted by the victim (particularly when it was genuine), when the apologizer felt pressured to provide the apology, and/or when the apologizer feels that the other party was at least partially responsible and that party did not apologize.

(iv) Have Negative Legal Consequences

There is also a risk that an apology, whether acceptable to the victim or not, will have negative legal consequences such as voiding an insurance policy or being taken as evidence of liability. The legal risks will be explored in more detail in Part Six of this Paper.

(v) Exploit Victims

Apologies are, unfortunately, open to manipulation by “credible deceivers” who may employ apologies to avoid penalties or reduce liability.¹⁰² Undetected insincere apologies may be used strategically or unscrupulously to take advantage of a victim’s instinct to cooperate and to forgive.

Exploitation can also come, unwittingly or otherwise, through the actions of mediators or others who exert pressure on victims to accept apologies and reduce their claims. This may contribute to victims being under-compensated for the harm done to them. While apologies may be of value, mediators have to be scrupulous in ensuring that victims, particularly those that are vulnerable, are not pressured to accept them or give them monetary value.

Lawyers representing victims need to be sensitive to this issue, and provide careful advice – particularly when clients are asked to sign a release. As well, lawyers representing wrongdoers should ensure that they are not complicit in taking advantage of vulnerable victims.

¹⁰² O’Hara and Yarn, *supra* note 13 at 1190.

5.3 Harmonization of Benefits and Risks

Sections 5.1 and 5.2 highlighted the primary benefits and risks related to apologies. There is convincing evidence that apologies offer benefits to individuals, the justice system, and society in general. There are, however, some countervailing risks. The question that arises is this: How can the benefits of apologies be secured without subjecting one or both of the parties to undue risk?

It would appear that both victims and wrongdoers stand to gain psychological benefits from well-intentioned and appropriately delivered apologies. To encourage the use of apologies in dispute resolution, there is a need for a deep understanding of apologies on the part of the participants as well as any professionals who may be assisting them. It is also clear that legal rules and practices are an impediment to the offering of apologies, and that the justice system is not getting maximum benefit from apologies. Changes could be made to legal processes to facilitate apologies which would ultimately benefit individuals and society as a whole. The issues raised in this Part of the Paper also underscore the dissonance that can arise when apologies are used simply for strategic purposes. The four-step process suggested in Section 1.4 of this Paper would put a greater focus on the needs and expectations of the parties, allowing the benefits and risks to be fully explored before an apology is offered.

PART SIX: APOLOGY AND THE LEGAL PROCESS

In this Part of the Paper, apologies are examined in the context of the legal process. It is assumed that the disputes in question are those that could be the subject of a viable civil lawsuit, even if an action has not been commenced. In other words, the disputes that underlie the discussion that follows are those in which there is an arguable cause of action and an arguable case for damages. It is important to note that disputes of this kind do not have to enter the formal legal process. “Justice” can be achieved within or outside the formal civil justice system.

6.1 Apologies in the Civil Justice System

The issue of how apologies should be dealt with in the context of civil cases has been the subject of discussion and debate in many countries. It is recognized that apologies may break an impasse in negotiations, allow settlements to occur more quickly, or result in more favourable terms of settlement. The common wisdom is that the absence of an apology is one of the factors that leads injured parties to file lawsuits, to actively pursue them, and to claim higher damages than they might otherwise. The absence of an apology is also one of the items of “unfinished business” that may remain after a lawsuit has been completed.

The concern that apologies are withheld because of concerns about legal liability has prompted the passage of apology legislation in various jurisdictions around the world. In the United States alone, more than thirty states have enacted apology legislation over the last decade. Australia has also passed apology legislation. And Canada has witnessed a significant amount of activity on the legislative front in the last couple of years. Apology legislation has resulted, generally, from the conclusion that apologies have a positive effect on the settlement of cases and that, without legislation to protect them, apologies will be curtailed. In the sections that follow, a number of issues connected to apology and the civil legal process are considered: the role of lawyers in counseling apologies, the use of apologies

in assessing damages, and the consequences of using apologies at various stages of the legal process. The implications of apology legislation are examined in Part Eight of the Paper.

6.2 Role of Lawyers

Where parties are represented by lawyers, the decision as to whether or not to include an apology may be driven as much by the lawyers as by the client – perhaps more. Although lawyers take their directions from their clients, clients are very much influenced by their lawyers’ advice. It has been suggested that plaintiff’s lawyers who receive contingency fees may be less likely to promote apologies, since apologies may reduce the final settlement amount, upon which their fee is based. On the other hand, apologies may promote quicker settlements, which also serve the interests of contingency fee lawyers. Lawyers who are paid by the hour (more often defendants’ lawyers) may be reluctant to endorse apologies since they may reduce the time to resolution. Lawyers may also resist apologies for reasons other than remuneration.

Lawyers are agents of the parties. They are removed from the direct impacts of the harm and they may need to be convinced that an apology is warranted. Some lawyers may dismiss or undervalue the psychological benefits that apologies may have for plaintiffs and defendants. Lawyers for both parties may also underestimate the extent to which the absence of an apology may be impacting upon a plaintiff’s refusal to settle. Alternatively, they may discount the value of an apology given and advise the parties that a trial is inevitable. They may discourage parties from pressing for or giving apologies on the basis that apologies are not a remedy that courts are inclined to order.

Lawyers acting for plaintiffs may question the utility of requesting or demanding an apology. “[They] are likely to shrug off a client’s desire for an apology as secondary and even contrary to the goal of more tangible monetary or injunctive relief.”¹⁰³ Because of their legal training, they are likely to frame the case in terms of legal principles and to focus more on legal and economic issues than on emotional and intangible ones. They may fail to

¹⁰³ Levi, *supra* note 20 at 1167.

recognize that apologies may shift the “power and shame balance” and thereby empower the plaintiff.¹⁰⁴ They may suggest that “it’s not worth the time” to pursue an apology, given that apologies are often vigorously resisted by defendants. And, plaintiffs’ lawyers may worry that an apology will induce their clients to accept a lower monetary settlement than is warranted by the facts and applicable law.

Lawyers representing defendants may doubt the potential for apologies to lower the monetary impact on their clients. They may fail to recognize that “[t]he apology as object of exchange may have a value equal to the apologiser’s savings of damage payments and/or transaction costs.”¹⁰⁵ If the governing law allows apologies to be used as admissions of liability, they will generally caution against providing an apology.

Lawyers who are supportive of their client’s preference to receive or to give an apology need to provide legal advice regarding the most appropriate forum for the apology, the optimal time for delivering the apology, the actual wording of the apology, and the legal consequences of the apology. Those representing plaintiffs need to address the effect that the apology should have on claims for pecuniary damages in an effort to ensure that the plaintiff does not make an undue sacrifice of legal entitlements.

Lawyers have an ethical obligation to provide clients with appropriate legal advice to advocate for them in legal proceedings. They have no obligation to offer apologies on their behalf. In fact, many would argue that apologies delivered by lawyers are necessarily deficient. The binary nature of an apology means it “cannot be delegated ... without totally altering its meaning and vitiating its moral force.”¹⁰⁶

In 1997 Levi wrote that “[l]egalistic habits and skepticism about ‘soft’ solutions to hard conflicts condition lawyers to ignore [demands for apology].”¹⁰⁷ However, as the advantages of apologies – to both parties – have become more apparent in recent years, an

¹⁰⁴ IBA Legal Practice Division, *Mediation Committee Newsletter*, September 2006 at p. 19.

¹⁰⁵ Levi, *supra* note 20 at 1176.

¹⁰⁶ Tavuchis, *supra* note 4 at 49.

¹⁰⁷ Levi, *supra* note 20 at 1208.

increasing number of lawyers have recognized the need to consider and work with apologies in appropriate cases and they have supported legislative efforts which both encourage apologies and limit liability. As the newer generation of lawyers is schooled in interest-based negotiation and mediation and gains experience with these alternative forms of dispute resolution, there is reason to expect that lawyers' receptivity to apologies will increase.

6.3 Damages

The greatest majority of cases in the civil justice system are tort cases and negligence is the most prevalent tort case type. Because the actions of negligent wrongdoers are not intentional, apologies by them may be more palatable to victims than those that come from wrongdoers who intended harm. However, apologies have significant potential in other civil cases that involve intentional torts such as torts of assault, battery, and intentional infliction of nervous shock. When considering remedies in civil cases, two questions in particular come to mind. Firstly, how useful are monetary damages in compensating victims for intangible losses? Secondly, should apologies be taken into account in assessing monetary damages?

The damages that are awarded in civil cases are theoretically compensatory in nature and are designed to restore plaintiffs to the position they would have been but for the negligent conduct of defendants. In a sense, they are meant to “undo” the harm. Monetary damages are well suited to compensate plaintiffs for such losses as reduction of income, out-of-pocket expenses, and the like. However, monetary damages are an imperfect substitute for intangible losses such as pain and suffering or mental distress. Money cannot “undo” the losses associated with physical, emotional, or psychological harm. However, as discussed elsewhere in this Paper, apologies do have the potential to address the personal pain of victims.

Apologies are currently taken into account in assessing damages in defamation cases and may be relevant in assessing punitive damages. It has been argued that apologies should be taken into account in assessing damages in all civil cases. The rationale is as follows. It is not clear how monetary awards for intangible losses directly benefit those who suffer them.

Since apologies have been shown to be of therapeutic value to plaintiffs, defendants should be able to submit evidence of apologies. Those apologies, in turn, should be assessed by the court and, if found credible, should be taken into account to mitigate damages.¹⁰⁸ While this position is worthy of consideration, there are at least two concerns that deserve further examination.

Firstly, should defendants be eligible for a double reduction in damages? Let us assume that a defendant provides a plaintiff with an early and meaningful apology. Let us further assume that the apology has a therapeutic effect and the plaintiff's level of mental distress and need for counselling are reduced. The plaintiff's monetary claim should reflect the positive effect of the apology and the damages should be correspondingly lower. It is open to debate whether the defendant should receive an additional "discount" for offering a sincere apology.

Secondly, should apologies be used to mitigate damages if they cannot be used to establish liability? In other words, if apologies are protected and cannot be used to "hurt" the defendant's case on liability, should they still be available for the purpose so as to "help" on damages? The answer is not clear. Currently, it would appear that all sorts of combinations and permutations are possible. An apology could be entered as evidence of liability or be protected from such; and separately, an apology could be used to mitigate damages or be excluded from that determination. While the idea of symmetry is attractive (i.e., apologies can be used for both purposes or for neither), the conundrum would benefit from more study.

6.4 Rules of Evidence

In most common law jurisdictions in North America, the basic rule of evidence is that apologies may be used as admissions against interest and may be used as evidence to establish liability on the part of the wrongdoer. In most jurisdictions, however, there is protection for an apology that falls under the "cloak" of rules or common law jurisprudence that protect without prejudice settlement discussions. To fall within the cloak, parties must be engaged in

¹⁰⁸ Shuman, *supra* note 9.

a legal dispute that involves offers to settle. As a consequence, apologizers are less inclined to provide the kind of spontaneous apologies that might be of greatest psychological or emotional benefit to them.

Concerned about the dampening effect that rules of evidence and common law jurisprudence have on apologies, many jurisdictions have passed or are considering apology legislation. The general intent of apology legislation is to encourage apologies by widening the protection for them. Apology Acts vary in regards to the types of cases they cover, the kinds of statements or actions they apply to, and the extent of protection they offer for apologies. It should be noted that even when protected with respect to civil liability under apology legislation, apologies may potentially be used for a variety of purposes; for example, to impeach a witness, to increase or mitigate damages, or to establish criminal liability.

6.5 Stage of the Legal Process

(i) *Spontaneous Apologies*

The literature reveals that spontaneous apologies enjoy the greatest prospect of being accepted as sincere and having a therapeutic effect on the parties. They have advantages due to the fact that they are provided close in time to the wrong and before a claim is issued, they are offered by the person who caused the harm, and they demonstrate that the wrongdoer is not being self-protective. Spontaneous apologies are generally provided in the absence of legal advice and in circumstances for which no legal privilege exists. They are in the nature of “double-edged swords” because they are most likely to be accepted by victims and, at the same time, most vulnerable to being used by victims against the wrongdoer. Anecdotal evidence, however, supports the view that victims typically look favourably upon spontaneous apologies and do not take undue advantage of wrongdoers who offer them.

(ii) *Negotiated Apologies*

Although apologies are not a necessary aspect of the negotiation process, they are a potential “commodity”¹⁰⁹ that may be bargained for. As noted by Shuman “negotiated apologies are a bargained for exchange that seem inherently less sincere than spontaneous apologies.”¹¹⁰ A conditional apology couched in terms such as “I will apologize if you drop your monetary claim” certainly presents less sincere than an unconditional apology. While the *bona fides* of apologies offered through negotiation may be subject to scrutiny, even a sincere apologizer may be prudent to resist giving an apology until formal settlement discussions begin. Indeed, the legal system provides an incentive to hold off until then. Unless apologies are part of “without prejudice settlement discussions” they may be used to establish liability.

(iii) *Mediated Apologies*

“Mediation is an alternative to adjudication in which a neutral third party who has no final decision-making authority intervenes in negotiations to assist resolution of conflict.”¹¹¹ Mediated apologies may surface in a variety of situations including voluntary mediation of cases that are not (yet) subject of a lawsuit, voluntary mediation of cases that are being litigated, compulsory mediation (ordered or highly recommended by a court), and mandatory mediation of cases that may or may not yet have gone to litigation. Mediation may be required by contract or legislation. Even where mediation is mandated, parties are generally expected to meet and negotiate in good faith; they are not required to settle.

In terms of using apologies to facilitate resolution, mediation offers a number of advantages over litigation. Firstly, apologies are typically protected from being used as an admission of liability – both because mediation discussions are considered “without prejudice settlement discussions” and because a mediation agreement (or legislation, in some

¹⁰⁹ See Lee Taft, “Apology Subverted: The Commodification of Apology” (2000) 109 *Yale L.J.* 1135 in which Taft acknowledges but objects to the use of apology as a commodity.

¹¹⁰ Shuman, *supra* note 9 at 186-187.

¹¹¹ Levi, *supra* note 20 at 1169, drawing on a number of sources.

jurisdictions) preserves the confidentiality of mediation communications. Secondly, because parties are not limited to the remedies that a court would order, they can use and value apologies as they see fit and craft creative solutions to their problems. Thirdly, parties (rather than lawyers) are at the centre of mediation and their unique needs and they are encouraged to interact in a non-adversarial way. Fourthly, mediators, particularly those who are adept at interest-based or transformative mediation,¹¹² can assist the parties in crafting apologies and statements of forgiveness that are responsive to the needs and expectations of the parties. Lastly, mediation is a flexible process that can be tailored to give sufficient time and attention to the potential of apologies. This is true even of mediation processes that are embedded in a broader litigation process.

Where choice of mediator is permitted, parties and their counsel would be wise to select a mediator that has the skills and experience and mediation style to conduct an interest-based mediation for “[a]pology is an interest-based remedy, and reconciliation is an interest-based outcome. Both require intimate, interpersonal dialogue between victim and offender.”¹¹³ If mediators are not carefully selected, practical and ethical issues such as the following may arise. Evaluative mediators, whose primary goal is to facilitate settlements that accord with court outcomes, may have a chilling effect on the dyadic nature of apologies by discouraging their use. Directive mediators who may see the utility of apology in a particular case may be inclined to advocate for apology or to pressure a victim into accepting one. In fact, the apology idea may originate with the mediator – not the parties. In the case of unrepresented parties, mediators may fail to adequately address the power imbalance between the parties and fail to encourage parties to obtain independent legal advice before making any binding commitment to a resolution.

Until recently, there has been little empirical evidence describing how apologies operate on parties in the litigation context. However, over the last few years, research has emerged which indicates that apologies make settlement more likely. They do so by altering

¹¹² See generally Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) for a discussion of transformative mediation.

¹¹³ Pavlick, *supra* note 2 at 862-863.

perceptions of the dispute and the disputants, by reducing negative emotion, improving expectations about future conduct, and affecting judgments as to what is fair.¹¹⁴

In one small study of nineteen medical malpractice cases that were mediated, 91% of the cases where an apology was offered settled, versus 38% of cases where no apology was provided.¹¹⁵ These findings support what many mediators have observed and report anecdotally. Properly constructed, the mediation process can be “dialogue driven and relationship focused.”¹¹⁶ If delivered in a timely way through mediation, apologies have the potential to lessen hostility and to allow the victim and wrongdoer to listen to each other. However, it is important to keep in mind that successful apologies will depend upon the nature of the harm done and the sensitivities of the parties. This is particularly true in cases of sexual and physical assault.

(iv) *Adjudication*

Adjudication processes are those in which a third party neutral makes a binding decision on a matter of dispute between parties. The literature on the effect of apologies in an adjudicative forum focuses on litigation – the court process. Little has been written on the use of apology in arbitration, making that subject worthy of further study.

A recent newspaper report provides a good example of the interplay between apology and adjudication. A forty-five year old police officer launched a \$2.5 million lawsuit alleging workplace harassment over a period of two years by supervising officers. Four months later, she abandoned the lawsuit in favour of pursuing her complaint through a grievance. Expressing her views about remedy, she was quoted as having said, “Yes, I feel I should get some compensation... but what I would really like is for someone to step up and say what they did to me was wrong, that they’re sorry.”¹¹⁷

¹¹⁴ See, for example, Robbennolt, *supra* note 17.

¹¹⁵ Robbennolt, *supra* note 17 at 8.

¹¹⁶ Mark S. Umbreit, “Humanistic Mediation: A Transformative Journey of Peacemaking” (1997) 14 *Mediation Q.* 201 at 210.

¹¹⁷ Tracy Huffman, “Officer drops police force harassment suit” *Toronto Star* (December 7, 2007) at A16.

PART SEVEN: FACTORS THAT ENCOURAGE AND DISCOURAGE APOLOGIES

In Part Five of this Paper, the primary benefits and risks of apologies were examined. Those benefits and risks may serve to encourage or discourage the offering of apologies – if they are taken into account by the parties. This Part of the Paper examines the implications of a number of factors that encourage and discourage apologies: interpersonal orientation, relationship between the parties, characteristics of disputes, ethical implications, cultural norms, and legal implications. Some of these factors overlap with the benefits and risks previously discussed.

7.1 Interpersonal Orientation

Regardless of cultural factors and gender, apology is related to interpersonal orientation. Those that are very sensitive to the actions of others are more likely to appreciate gestures like apology and offer them more readily. Those who have a lower interpersonal orientation would tend to overlook the significance of apologies or view them as strategic devices. Women may be disproportionately represented in the high personal orientation category, but the category is open to both genders.

Although there is little empirical data to support them, theories about development psychology suggest that women are more receptive than men to giving and receiving apologies. Professor Carrie Menkel-Meadow points out that “women grow up in the world with a more relational and affiliational concept of self than do men.”¹¹⁸ Linguistics scholar Dr. Deborah Tannen posits that men resist apologizing because they see it as a sign of weakness, while women embrace apologies because they repair broken relationships.¹¹⁹

¹¹⁸ Carrie Menkel-Meadow, “Portia in a Different Voice: Speculations on a Women’s Lawyering Process” (1985) 1 *Berkley Women’s Law J.* 39 at 53.

¹¹⁹ Deborah Tannen, “I’m Sorry, I Won’t Apologize,” *N.Y. Times* (Magazine) (July 21, 1996) at 35.

A party's self-image may also be associated with apologies. "... [T]he injured party who has suffered a loss of self-esteem may require apology to move from a focus on punishment to readiness for resolution."¹²⁰ For wrongdoers who are invested in resisting responsibility, the thought of apologizing may be humiliating. To apologize would be to put the apologizer at the mercy of the victim, something that may be very difficult for the apologizer to do. As Levi notes, however, "[i]ronically, a party who is least capable of apologizing – one who experiences apologizing as humiliating self-effacement – may be best qualified to engage in the ritual of moral rehabilitation and reconciliation."¹²¹ In individualist cultures where autonomy is associated with self-image, apologies will generally be less prevalent than in collectivist cultures where allegiance to the group is paramount. These cultural factors are discussed in Section 7.5.

7.2 Relationship Between Parties

There are a number of ways in which relationships influence the propensity to give apologies. In the earlier section, the relationship of the individual to the group was identified as a major factor in how apology is used in different cultures. The closeness of the relationship between two individuals also has an impact on apologies, as does gender and an individual's interpersonal orientation.

Harms may be done to family, friends, acquaintances, and strangers. With the exception of cases involving strangers, disputing parties have a relationship that pre-dates the harm. Even strangers are brought into a relationship through the harm – a relationship that continues at least until the conflict is resolved. Apologies can have positive or negative effects on relationships. An authentic apology validates the victim by giving attention to the harm caused. It often reduces a victim's negative feelings about the wrongdoer and reduces feelings such as anger, resentment, and aggression. An apology, then, can serve to repair the relationship by restoring trust. Apologies that are deficient can have the opposite effects.

¹²⁰ Levi, *supra* note 20 at 1182.

¹²¹ *Ibid.* at 1183.

Commentators that take the position that women tend to apologize more than men point to the theory that women develop their sense of identity based on relationships to others while men develop their sense of identity by distinguishing themselves from others. Accordingly, women may use apologies to reinforce personal connections.¹²² Men may be more inclined to view apologies as a sign of weakness and defeat and, therefore, avoid giving them. If there is a gender difference in relation to apologies, there is an increased risk of miscommunication between men and women.

7.3 Characteristics of Disputes

Are all disputes equally amenable to apologies? Some writers attempt to link the appropriateness of apologies to the severity of the offence, arguing that the more severe cases are less appropriate candidates for apology. Tavuchis states that some offences are so minor that apology becomes superfluous and others are so heinous that they are unforgiveable.¹²³ Another approach, promoted by Anthropology Professor Hiroshi Wagatsuma and Law Professor Arthur Rosett for example, separates cases of physical or financial injury from psychological injury and suggests that only the latter are appropriate for apologies.¹²⁴ As Levi concludes, neither approach is fully satisfactory. Apologies are successful in some of the most serious cases (including criminal matters). And the reality is that many cases that benefit from apologies include physical and psychological injuries (and financial loss).

While the severity of injury and type of harm are worth evaluating when an apology is considered, they do not determine the likelihood of an apology's success. The needs and expectations of the victim are the starting point. Other important factors include the degree of emotional harm, the importance of financial compensation, the nature of the relationship of the parties, the role of lawyers, and available forums for resolution. It may be that the intersection of all these factors makes apologies less likely to play a significant role in

¹²² See Pavlick, *supra* note 2 at 851 and the authors cited therein.

¹²³ Tavuchis, *supra* note 4 at 21.

¹²⁴ Hiroshi Wagatsuma and Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20:4 *Law & Soc. Rev.* 461 at 487.

commercial matters and more likely to have a positive effect in employment, family, and tort cases.

7.4 Ethical Implications

To apologize in a way that is consistent with cultural norms is to act morally. To refuse to apologize in circumstances that demand an apology is to act immorally. Apology may be viewed as “a moral force – a force that can help make injured parties whole in a way that legal remedies and economics cannot.”¹²⁵ Professor of Law Jonathan Cohen argues that “[a]pology should be rooted in responsibility and remorse rather than in economics and strategy. It is the ethical response to injuring another, irrespective of economic consequences.”¹²⁶ Professor of Business Hershey H. Friedman expresses a similar sentiment: “Apologizing and showing remorse for wrongs committed against others is the only way an individual with integrity should act.... [S]incere remorse is a sign of courage and moral strength.”¹²⁷

As noted by Pavlick, “[s]ocial order depends on individual and societal commitment to norms that establish standards of social behavior and cultural expectations.”¹²⁸ Pavlick stresses the necessity of an apologizer to identify the violation of the moral norm. By so doing, the apologizer seeks to re-affirm shared values with the victim, and demonstrate worthiness for membership in the moral community.

Some writers contend that the essence of apology is lost if the wrongdoer is not in some meaningful way prejudiced by the giving of the apology. They oppose apology legislation, for example, on the basis that the moral content of apologies is diminished when apologies are shielded from the possibility of being used “against” wrongdoers. This and other views about apology legislation are examined in Part Eight of this Paper.

¹²⁵ Pavlick, *supra* note 2 at 832.

¹²⁶ Jonathan R. Cohen, “Apology and Organizations: Exploring an Example from Medical Practice,” Unpublished Draft, February 25, 2000.

¹²⁷ Friedman, *supra* note 46 at 10.

¹²⁸ Pavlick, *supra* note 2 at 836.

7.5 Cultural Norms

Kevin Avruch and Beatriz Vejarano remind us that “... notions as justice, truth, forgiveness, reconciliation, and accountability – to name a few – are always socially constructed and culturally constituted.”¹²⁹ Like many other aspects of how we relate to each other, apologies are rooted in our culture. Lazare, in his book *On Apology*, observes that “the concept of apology is basic to all human cultures.”¹³⁰ However, the nuances surrounding apologies differ from culture to culture. Lazare notes, for example, that apologies are more prevalent in Japan than in North America. In Japan, apologizing is considered a virtue. In North America, it presents as more of a negotiated process. Indeed, in an increasingly litigious society, it appears that a willingness to apologize may be viewed by some as a weakness or an invitation to a lawsuit.

Apologizing may be considered a form of normative behaviour that reflects cultural values. Apologies are “communication strategies” that begin at home and are used to keep relationships on track and repair disruptions.¹³¹ It is generally accepted that cultural practices are learned rather than inherited. Children observe and adopt (or adapt) the actions of adults in their cultural group. “By observing adult behavior, children learn what constitutes an appropriate form of apology, its effects, and when one should expect to give or receive an apology.”¹³²

Cultures differ in the extent to which they use apologies as a means of conflict resolution. Researchers suggest that the relationship of the individual to the group is a key determinant of how apologies function within a particular culture. Individualistic or low context cultures (the United States being a prime example) put great value on individual autonomy and the assertion of individual rights through litigation. They place less emphasis

¹²⁹ Kevin Avruch and Beatriz Vejarano, “Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography (2002) 4:2 *OJPCR: The Online Journal of Peace and Conflict Resolution* 37 at 43 [originally published in (2001) 2(1-2) *Social Justice: Anthropology, Peace, and Human Rights* 47].

¹³⁰ Lazare, *On Apology*, *supra* note 11 at 32-33.

¹³¹ Pavlick, *supra* note 2 at 67.

¹³² Pavlick, *supra* note 2 at 838.

on apology than collectivist or high context cultures (such as Japan) where relationships amongst group members are more highly valued than individual rights. When apologies cross cultures, there is an even greater chance that needs and expectations will differ.

Individualist cultures, of which Canada is one, tend to be rights-based and they rely to a greater degree than collectivist cultures on adjudication as a form of dispute resolution. Adjudicative processes such as arbitration and litigation are adversarial by nature. Their very procedures (such as affidavits, cross-examination) can further damage the relationship and the “winner-take-all” approach is not conducive to either healing or reconciliation. In collectivist cultures, accessing adjudicative processes may be viewed as a failure to achieve harmony privately.

Despite the forces that work against apologies in individualistic cultures, there are still plenty of opportunities for apologies. Children in these cultures tend to follow an apology norm. And adults typically resort to apologies for minor transgressions (“Sorry I’m late) or for events that occur within subgroups such as the family where relationships are very important (“Sorry I forgot your birthday”). Particularly when legal issues arise, though, people tend to shy away from giving apologies.¹³³ However, as noted elsewhere in this Paper, the civil legal system in many individualistic cultures is encouraging the use of apologies by making better use of them in mediation and by providing protection against using apologies as admissions of liability.

Culture is often described in relation to national norms. However, an expansive view of culture recognizes that there are cultural dimensions in all areas of our lives. Particularly in a multi-cultural country like Canada, there is a proliferation of cultural groups. These groups define themselves, at least in part, by aspects such as gender, ethnic origin, and religion. Indeed, each person has a cultural self which results from all of the cultural influences in that person’s life. In the same way that countries or groups of individuals have discernable

¹³³ As Pavlick notes, there is no evidence that members of apology-adverse cultures are uncomfortable with receiving apologies – just with offering them: *Ibid.* at 848.

cultural attributes, so do organizations. The way in which organizations view and respond to conflict defines their distinct disputing culture.¹³⁴

It is arguable that there are multiple cultural variables associated with virtually every dispute. This makes the crafting and delivery of acceptable and effective apologies a very challenging endeavour. The words of Assistant Professor Neil Funk-Unrau, who examined issues relating to public apologies by the Church to Canadian Aboriginal Peoples, have meaning for other kinds of cross-cultural disputes as well. He concluded:

More work needs to be done to assess the comparable transactional, relational and other distinctions between apologies offered in EuroCanadian Church settings and those meaningful in Canadian Aboriginal settings. Only by understanding what each [side] intends the apology to mean can we begin to evaluate the potential usefulness of the apology process as one step toward reconciliation.¹³⁵

7.6 Legal Implications

Adversarial adjudicative processes such as litigation focus primarily on the legal rights of parties, not their psychological or moral interests. In addition, “the formal legal system is not structured to help people preserve and continue their relationships. Instead, courts are much better equipped to assist those who have decided to dissolve their relationships.”¹³⁶

In adjudicative processes, the primary remedy is monetary damages. “Unfortunately, economic remedies do not always produce morally right, or even just, results.”¹³⁷ Oftentimes, both parties are dissatisfied with the results of the adjudicated outcomes imposed upon them. Apologies are intended, in large part, to improve emotional harmony – not something that is

¹³⁴ See, for example, a critique of the Roman Catholic Church’s organizational response to sexual abuse claims in Ireland: Elizabeth A. Dunne, “Clerical Child Sex Abuse: The Response of the Roman Catholic Church” (2004) 14 *J. Community Appl. Soc. Psychol.* 490.

¹³⁵ Funk-Unrau, *supra* note 7 at 22.

¹³⁶ O’Hara and Yarn, *supra* note 13 at 1129-1185.

¹³⁷ Pavlick, *supra* note 2 at 856.

germane in litigation. It should come as no surprise, then, that apologies have not traditionally played a leading role in adjudicative processes.

Apologies are essentially “binary” in nature.¹³⁸ They are most effective when they are delivered personally and they address the specific dynamics of the dispute in question. The litigation process necessarily adds many people (most notably, lawyers and judges) that are extraneous to the central dispute, making it more complicated to have the message delivered.

Decisions about whether and when to offer apologies are often influenced by concerns about legal liability. If clear admissions of liability are made without any attempt to protect them from disclosure, the statements may lead to findings of liability. As a practical matter, though, parties do not typically go so far as to explicitly admit liability – they more often make cautious apologies of some sort. Apologies (and admissions in the rare case they are given) may be protected if they are clearly made in the course of “without prejudice” communications; for example, during negotiation or mediation. The “without prejudice” protection may be derived from the common law, from a statute or regulation, or through contract. Sometimes there are multiple layers of protection that apply.¹³⁹

It is feared that apologies and other statements of regret will be treated as admissions of liability or will, in any event, lead to liability in Court. This fear leads potential or actual defendants to avoid making any statement that could later be construed as an admission or could be accepted by the Court as evidence of fault. Some parties are willing to apologize, but only after there has been a finding of liability. This is so, even though courts will not simply equate apologies with admissions of liability. In her review of case law, Mediator and Adjunct Professor Catherine Morris found that courts will “... carefully consider all other evidence, credibility of witnesses, and the intent of the persons making apologies before accepting them as admissions of liability.”¹⁴⁰ It appears that the same applies in the United

¹³⁸ Tavuchis, *supra* note 4 at 46.

¹³⁹ In Ontario, for example, apologies offered within a mandatory mediation context may be covered by a mediation agreement, common law, and Rules of Civil Procedure.

¹⁴⁰ Catherine Morris, “Legal Consequences of Apologies in Canada,” Draft Working Paper presented at “Apologies, Non-Apologies and Conflict Resolution,” University of Victoria, October 3, 2003, at 4 [<http://www.peacemakers.ca/publications/MorrisLegalConsequencesofApologyOct2003.html>].

States.¹⁴¹ Nonetheless, in the absence of clear statutory protection, lawyers are reluctant to advise clients to apologize.

This apology-liability conundrum has a number of unfortunate consequences. Parties who are unaware of the risk that an apology could be taken as an admission may offer an apology and thereby unwittingly increase the chance that liability will be found. Parties who genuinely believe they have no legal liability may forsake an apology, even when they feel that an apology is ethically warranted, for fear that it could lead to unwarranted liability. And parties who know that liability is highly likely may still avoid an apology, so as not to damage the possibility, however slim, that they may escape liability. If the apology is given after the Court has rendered its decision, the passage of time may reduce its effectiveness. Worse, if an early apology was warranted and one is only provided after a finding of liability, the apology may be met with a reaction of “too little, too late.”

Consider the case of the tainted blood scandal. The Canadian Red Cross Society offered an apology, but waited until after the charges had been determined by the Court. The organization stated:

The Canadian Red Cross Society is deeply sorry for the injury and death caused to those who were infected by blood or blood products it distributed, and for the suffering caused to families and loved ones of those who were harmed. We profoundly regret that the Canadian Red Cross society did not develop and adopt more quickly measures to reduce the risks of infection, and we accept responsibility through our pleas for having distributed harmful products to those who relied upon us for their health.¹⁴²

The Red Cross Apology attracted a fair degree of criticism because it was offered so late in the process.

As observed by O’Hara and Yarn, apologies and litigation appear to operate at “cross purposes.”¹⁴³ A victim may want an apology and be more inclined to litigate if one is not

¹⁴¹ See Levi, *supra* note 20 and sources cited at p. 1187.

¹⁴² British Columbia, *The Power of an Apology*, *supra* note 44 at 7.

¹⁴³ O’Hara and Yarn, *supra* note 13 at 1122-1123.

forthcoming. A potential defendant may also want to offer an apology but withhold it for fear that it will be taken as evidence of liability. As the authors state:

Forgone apologies impose costs on transgressors as well as victims. Wrongdoers often want to be forgiven, and concomitantly, may feel an urge to apologize. These desires to apologize and to receive forgiveness are themselves important human emotions of shame and humiliation to press for reconciliation. Any hesitation that results from our legal rules can exacerbate cognitive dissonance in the transgressor, and may foreclose apology, forgiveness, and reconciliation where they would otherwise be forthcoming.¹⁴⁴

In the face of a heartfelt apology, victims... report feeling a near instantaneous erosion of anger and pain. Interestingly, the emotional healing often seems to occur outside the will of the victim.... In contrast, victims who receive no apology can become angry and vindictive, pursuing litigation at a cost that far exceeds any rational expectation of monetary reward.... Indeed, recent literature provides ample anecdotal evidence that plaintiffs are more likely to sue when they do not get an apology, and more likely to forgo compensation when they receive one.¹⁴⁵

The intersection of apologies and liability presents a dilemma. The conventional wisdom is that any statement that expresses or implies responsibility may be treated in litigation as an admission of liability. This leads individuals and their lawyers to resist giving apologies. As noted elsewhere in the Paper, under most rules of evidence, admissions by party opponents are admissible at trial to prove liability. If parties make admissions in circumstances that are not protected, they may prejudice themselves.

The Acting Ombudsman of British Columbia made the following observation in relation to public apologies:

When public agencies are asked to make a public apology, fear of publicly accepting responsibility or liability and the possibility of legal actions as a consequence tend to override any agreement that a public apology may be the most effective means of settling a dispute. Nonetheless, the public demand for an apology continues and covers a broad spectrum of situations.¹⁴⁶

¹⁴⁴ *Ibid.* at 1123.

¹⁴⁵ *Ibid.* at 1124.

¹⁴⁶ British Columbia, *The Power of an Apology*, *supra* note 44 at p. 5.

As a result, he recommended that the Attorney General of that Province introduce legislation to protect public officials and promote apologies.

Statutes may protect against using apologies in one situation, but it is not completely clear the extent to which apologies could be used by the parties for other purposes in civil litigation, by other parties in civil litigation, or could be used by the state in the criminal law context.

PART EIGHT: TRENDS

“From the interpersonal to the international level, the response to many incidents of injustice begins with a demand for an apology.”¹⁴⁷ As is evident from examples used throughout this Paper, people are more regularly requesting or demanding apologies – for both recent and historical events. This Part identifies some of the trends that are occurring in relation to apologies.

8.1 Apology Phenomenon

Apologies have become so prevalent lately that some have concluded we are experiencing an “apology phenomenon.”¹⁴⁸ Searching for data to prove that observation, Lazare compared how often the words “apology” or “apologize” were used in the *New York Times* and the *Washington Post* from 1990-1994 and separately from 1998-2002. He discovered that the numbers jumped from 1,193 to 2,003 from one period to the next.¹⁴⁹ an increase of 810 or a 69% increase in the use of those two words. From general observation, it would appear that the same kind of proliferation is occurring in Canada as well.

There is no easy way to capture the full extent to which apologies are used in day-to-day life. However, research on the subject of apology is no longer limited to academic journals and conferences. It is the topic of television and radio shows, cartoons, self-help books and other commonly available sources of information. This suggests that more and more people are exposed to thinking on the subject.

While it is encouraging to think that the growing attention to the subject of apologies will lead to a corresponding increase in meaningful apologies, there remains a risk that the cynicism surrounding “limelight mea culpas”¹⁵⁰ may result in a diminution in the stature of

¹⁴⁷Funk-Unrau, *supra* note 7 at 1.

¹⁴⁸Lazare, *On Apology*, *supra* note 11, at 7.

¹⁴⁹*Ibid.*, at 6.

¹⁵⁰*The [Toronto] Globe and Mail*, February 3, 2007.

apologies. The frequency of apologies by sports heroes, actors, and other celebrities who regularly take to the media to offer public apologies for their own wrongdoing may taint the concept of apology and do little to restore their image. Two recent examples from the world of sport make this point.

The 1996 Danish winner of the Tour de France, Mr. Bjarne Riis, admitted more than a decade later to using performance enhancing drugs to win the premier race. In a televised new conference, he confessed: “I have made errors and I would like to apologize.”¹⁵¹ Mr. Riis’ admission “was the latest in a string of doping confessions from prominent cyclists.”¹⁵² It is an open question whether the apology served to improve either Mr. Riis’ reputation or the reputation of cycling.

In October, 2007 American sprinter and three-time Olympic gold medalist Ms. Marion Jones ended years of angry denials by admitting prior use of steroids. Outside the court where she had pled guilty to various charges, Ms. Jones offered a tearful apology that received widespread media coverage. She said, in part: “I recognize that by saying I’m deeply sorry, it might not be enough and sufficient to address the pain and hurt that I’ve caused you. Therefore, I want to ask for your forgiveness for my actions, and I hope you can find it in your heart to forgive me.”¹⁵³ Early reactions, at least, were not very positive. In the words of one journalist, “[s]he represents the big lie that many athletes live.”¹⁵⁴

8.2 Public Apologies

As noted in Section 8.1, the use of apologies appears to be on the rise. This Section examines the trend towards public apologies. Public apologies are those that are delivered through the broadcast media.¹⁵⁵ They can be roughly divided into two categories: (1) those that are issued by individuals, commercial operations, religious institutions, and other

¹⁵¹ Jan M. Olsen, “Tour de France winner admits to using drugs” *The [Toronto] Globe and Mail* (May 26, 2007) at A3.

¹⁵² *Ibid.*

¹⁵³ Jim Fitzgerald, “Sprinter asks for forgiveness for taking steroids” *Toronto Star* (October 6, 2007) at S1.

¹⁵⁴ Randy Starkman, “A web of spun of lies” *Toronto Star* (October 6, 2007) at S2.

¹⁵⁵ Sandra Harris, Karen Grainger, and Louise Mullany, “The Pragmatics of Political Apologies” in *Discourse & Society* (London: Sage Publications, 2006) 715 at 719.

organizations for actions that are perceived to damage their reputations [“non-Government apologies”] and, (2) those that are provided by politicians or prominent public figures in a wide variety of circumstances [“Government apologies”]. Each of these categories is reviewed below.

(i) *Non-Government Apologies*

In the Section above, two cases of public apologies by individuals were examined. Corporations, too, seem very motivated to issue public apologies, especially when their conduct and/or products have resulted in widespread harm. “When the potential harm to a corporation’s reputation and brand is significant, the potential liability-admission consequences will be pushed aside in favour of a speedy, decisive and public apology, often given by the CEO.”¹⁵⁶

A “speedy, decisive and public apology” did not surface in the “pet food crisis”¹⁵⁷ After the deaths of cats and dogs in Canada and the U.S. were linked to tainted food containing melamine imported from China, the manufacturers were silent. The following criticism was launched at the manufacturers, especially Menu Foods that made the majority of food affected by the recall: “What should the industry be doing? First, say you’re sorry. Act like you really care about the animals. You may not think you owe an apology, but in pet owners’ minds, you do.” The criticism was echoed by many pet owners. The recall cost Menu Foods at least \$45 million. In its defence, Menu Foods said: “Our proactive action in recalling suspicious product, despite the fact that it tested clean for all known toxins, undoubtedly saved the lives of many cats and dogs.”¹⁵⁸

¹⁵⁶ IBA Legal Practice Division, *Mediation Committee Newsletter*, September 2006 at p. 19.

¹⁵⁷ Marc E. Babej and Tim Pollak, “Misnavigating The Pet Food Crisis” *Forbes.com* – Magazine Article (April 9, 2007) at 1.

¹⁵⁸ “Pet food recall to cost Menu Foods \$45 million” *CBC News* (May 31, 2007) [<http://www.cbc.ca/Canada/Toronto/story/2007/05/31/menufoods/html>].

(ii) *Government Apologies*

In keeping with this trend in public apologies, governments around the world continue to grapple with whether and when to issue official, political apologies. Perhaps the most useful categorization of political apologies is one based on the magnitude of the act involved and the corresponding level of significance it has for both the public and the politician.¹⁵⁹ Harris, Grainger, and Mullany offer a typology based on the following levels of magnitude:

- A “social gaffe” that damages a particular individual or group and about which an apology is demanded or offered immediately;
- “Serious past events” for which the politician cannot be held personally responsible; and
- “Offences” which are both current and of high magnitude and have significant political implications; the offences may at least initially relate to a single individual or group.¹⁶⁰

Why do governments apologize? The motivations may parallel those that prompt interpersonal apologies. Firstly, they may feel it is the right or moral response to wrongdoing. Secondly, they may hope that the apology will maintain or enhance their reputation. Thirdly, they may resist apologizing, but feel pressured to do so. Fourthly, they may apologize to secure some legal, strategic, or tactical advantage.

While the motivations may be similar to those that encourage interpersonal apologies, the effects of political apologies are generally distinguishable. The shame/power dynamic is much more dispersed in a political apology and the “process of restoring ‘equilibrium’ is ... a much more complex process – if it can be achieved at all.”¹⁶¹ In addition, public apologies are open to scrutiny by a very wide audience and this increases the likelihood that they will be viewed as deficient. Indeed those that are unhappy with political apologies may also go public with their criticisms, as Mr. Truscott did. Political apologies are, almost by definition, carefully crafted. The pressure on political figures to integrate the cultural consensus

¹⁵⁹ Harris, Grainger, and Mullany, *supra* note 155 at 724.

¹⁶⁰ *Ibid.* at 724-732.

¹⁶¹ *Ibid.* at 733.

pertaining to the issue can result in the apology being “all things to all people.” As a result, it may be received as meaningless by victims.

Conversely, governments may refuse to apologize for a number of reasons. Firstly, they may feel that they have nothing to apologize for. Secondly, like others, they may have concerns about the effect of an apology on liability. Thirdly, they may have concerns about opening the floodgates and increasing demands for apologies in similar cases. Fourthly, they may feel that an apology will hurt their reputation, particularly if they have resisted giving an apology for a long time. Finally, governments may refuse to apologize in the absence of some strategic advantage to them, even if they accept that their actions or those of their predecessors were wrong.

Even when they are offered, official public apologies may fall short. A number of factors may hamper their effectiveness. Firstly, they are rarely spontaneous; in fact, they are often provided years or decades after the events in question. Consultations with affected parties add to the delay. Secondly, while the words might be “right”, the formal circumstances in which they are offered may diminish their impact. Thirdly, the person offering the apology, typically chosen because of his or her position, may not be the best person to deliver the message. And lastly, the statements are often generic and do not address the individual circumstances of each victim’s experience. Because of their shortcomings, public apologies do not lead to forgiveness as frequently as interpersonal apologies do.

Governments often resist calls for public apologies for the actions of past governments. They often feel that they should not be held to account for decisions taken by different people at a different time, over which they had no control. However, this ignores the concept of “continuing responsible government” in a democracy; “[t]his responsibility becomes continuous through being an integral part of the institution of government.”¹⁶² Governments also fear the legal implications of offering apologies, although the proceedings of Parliaments often enjoy a form of privilege which protects statements made in the

¹⁶² Parliament of Australia, Senate Committee, *Healing: A Legacy of Generations* (The Report of the Inquiry into the Federal Government’s Implementation of the Recommendations Made by the Human Rights and Equal Opportunity Commission in *Bringing them Home*) (Commonwealth of Australia, November 2000) at 112.

Legislature from being used in court. Governments, too, worry about the precedents that are set by apologizing, especially when they are aware of demands for apologies from other groups. Governments are sensitive to the degree of public support for an apology. The populace may resist wording in an apology that implies that the people are taking any responsibility or sharing guilt for historical or current events, particularly when the events are horrendous – and they often are when apologies are considered. As a result, governments may shy away from providing a full apology. That was arguably the case in the highly publicized saga of Mr. Arar.

Maheer Arar

On June 2, 2005, the federal Minister of Foreign Affairs, Mr. Bill Graham, offered sincere regrets to Mr. Maheer Arar, a Canadian citizen who had been sent by the United States to Syria as a suspected terrorist, where he was detained and tortured. Mr. Graham was quoted as saying, “Clearly we would have preferred that he be gotten out earlier. And I’m very sorry that he was not, for obvious reasons.”¹⁶³ This statement reportedly was not the kind of apology that Mr. Arar had hoped for.

A Commission of Inquiry was established on February 5, 2004 to investigate the actions of Canadian officials. On September 18, 2006, the Inquiry, led by Associate Chief Justice of Ontario Dennis O’Connor, released its report exonerating Mr. Arar. Ten days later, the RCMP Commissioner Giuliano Zaccardelli issued a carefully worded apology: “I wish to take this opportunity to express publicly to you and to your wife and to your children how truly sorry I am for whatever part the actions of the RCMP may have contributed to the terrible injustices that you experienced and the pain that you and your family endured.”¹⁶⁴

On January 26, 2007, after months of negotiations with the Canadian Government, Prime Minister Stephen Harper announced that Mr. Arar would receive \$11.5 million in compensation (including \$1 million for legal fees). Mr. Harper also released a letter of apology to Mr. Arar “for any role Canadian officials may have played in what happened....

¹⁶³ British Columbia, *The Power of an Apology: Removing the Legal Barriers*, *supra* note 44 at 5.

¹⁶⁴ Wikipedia [http://en.wikipedia.org/wiki/Maheer_Arar].

[a]lthough these events occurred under the last government.”¹⁶⁵ Mr. Arar said it meant the world to him that the Government acknowledged his innocence. He also complained that the Government’s use of the word “mistreatment” to describe his torture had stood in the way of healing his psychological wounds.¹⁶⁶

While there is a clear trend for Governments to offer apologies in highly compelling cases, only time will tell whether Governments will gain more comfort with giving unequivocal apologies. As the Arar apology demonstrates, there remains a reluctance to go beyond what “may” have been done and to embrace full responsibility. There is also a trend towards Government offering apologies for historical conditions. Arguably, the apologies in those cases tend to be more fulsome.

Bilder draws a distinction between the role of apology in resolving recent or current diplomatic incidents and differences and its potential role in dealing with past historical injustices. In relation to the latter, he notes that:

There has recently been a striking and widespread resort to the use of public apologies in both intranational and international contexts. The most dramatic of these have been governmental apologies for historical injustices – such as past wartime or other atrocities, racial or religious discrimination, or the abuses of colonialism – spurring a burgeoning interest and literature on the potential uses of such apologies as a way of rectifying or atoning for long-past wrongs.¹⁶⁷

In his article, Bilder summarizes arguments that suggest that apologies for historical injustices have the following frailties:

- are without responsibility since the wrongdoers are dead;
- are too late;
- incorrectly apply present day values of the past;
- are one-sided and lack reciprocity;

¹⁶⁵ “Maher Arar Accepts Ottawa’s Apology – And \$10.5 Million Compensation” CityNews (December 10, 2007) at 1 [http://www.citynews.ca/news/news_7236.aspx]; and Office of the Prime Minister, “Prime Minister releases letter of apology to Maher Arar and family and announces completion of mediation process” (January 26, 2007).

¹⁶⁶ Tracey Tyler, “Torture is not ‘mistreatment’” *Toronto Star* (October 27, 2007) at A4.

¹⁶⁷ Bilder, *supra* note 28 at 443-436.

- will not satisfy victim groups and will instead foster a sense of victimhood;
- are empty gestures since they are too easy and mere words; and
- cannot in any case satisfy the potential demand since there are simply too many past wrongs which could be addressed.¹⁶⁸

Regrettably, history is full of examples of wrongs for which redress is later sought. In recent years, Governments and other organizations around the world have grappled with demands for apologies, compensation, and other forms of redress for the actions of their predecessors. While the circumstances underlying these demands are varied, the motivating factors are often the same. When systemic historical actions are challenged, the Government in question has typically been out of office for decades or generations and the individual perpetrators are generally no longer alive. The concrete and symbolic aspects of the redress constitute a form of “justice” which legitimizes the pain and sorrows of the past and allows victims, their families, and their communities to move forward. Apologies tend to play an important role in redress.

As noted by Prue Vines, “Government apologies are by their nature very public – they are made in public, and they are made for public purposes rather than private purposes.”¹⁶⁹ The international arena provides many examples where groups have called for redress for governmental wrongdoing. Some of the demands for redress have been accepted; many have been ignored. What this section covers are two very significant cases drawn from the Canadian experience, where redress was provided. The cases relating to Japanese Canadians and Chinese Canadians are emblematic of the potential that redress can have on healing and reconciliation and the part that apologies can play.

¹⁶⁸ *Ibid.* at 446, quoting Trudy Govier and Wilhelm Verwoerd, “Taking Wrongs Seriously: A Qualified Defence of Public Apologies, (2002) 65 *Sask. L. Rev.* 139.

¹⁶⁹ Prue Vines, “The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?” [2007] *UNSWLRS* at 2.

Japanese Canadians

In the fifty years prior to World War II, thousands of Japanese people immigrated to Canada. Most of them settled in British Columbia and suffered many forms of discrimination. After the Japanese attack on Pearl Harbour on December 7, 1941, the Allies were concerned about the presence of the Japanese in North America. Canada used the *War Measures Act* to take action against Japanese Canadians.¹⁷⁰ Eminent scientist David Suzuki, who was six years old when interned, said this: “On December 7, 1941, an event took place that had nothing to do with me or my family and yet which had devastating consequences for all of us – Japan bombed Pearl Harbor in a surprise attack. With that event began one of the shoddiest chapters in the tortuous history of democracy in North America.”¹⁷¹

Approximately 22,000 men, women, and children of Japanese origin were forcibly removed from their homes, held in internment camps away from coastal areas, and deprived of their property. Approximately 17,000 of the detainees were Canadian citizens at the time. The seized property was later sold by the Government. In 1945, the Government encouraged Japanese Canadians to move east of the Rockies or back to Japan. Four thousand evacuees had immigrated to Japan by the end of 1946. Full rights for Japanese Canadians were not regained until 1949, and they had to rebuild their lives from nothing. In the 1970's, the Japanese Canadian community began to discuss redress. Later, Japanese Canadians, like their 120,000 counterparts in the United States who had faced a similar internment policy, claimed redress. The settlement of the American litigation prompted Canada to settle the outstanding conflict in Canada.

On September 22, 1988 the Canadian Government formally apologized for the actions of the past. Prime Minister Brian Mulroney delivered the apology in the House of Commons, stating in part:

I know that I speak for members on all sides of the House today in offering to Japanese Canadians the formal and sincere apology of this Parliament for those

¹⁷⁰ The Ukrainian Canadian Congress, the National Congress of Italian Canadians, and the German Canadian Congress also sought redress for internment during World War II.

¹⁷¹ Topic: “Relocation to Redress: The Internment of the Japanese Canadians,” *CBC Archives* [<http://www.archives.cbc.ca>].

past injustices against them, against their families, against their heritage, and our solemn commitment and undertaking to Canadians of every origin that such violations will never again in this country be countenanced or repeated.¹⁷²

Mr. Mulroney also acknowledged: “No amount of money can right the wrong, undo the harm and heal the wounds.”¹⁷³ He also offered a compensation package worth \$238 million, comprising individual payments of \$21,000 to each surviving evacuee and payments to two funds set up as a result of a settlement with the National Association of Japanese Canadians. The National Association for Japanese Canadians was given \$12 million to support educational, social, and cultural activities in the Japanese Canadian community; another \$24 million was to finance a new Canadian Race Relations Foundation. In addition, the Government cleared any criminal convictions related to the *War Measures Act* and restored Canadian citizenship for all those who were “repatriated”.

Writer Joy Kogawa, who wrote about living in the camps as a child, had this to say about the redress from the Government:

A lot of us felt like we worked hard for the apology and for an acceptable resolution and, for the majority of people, it was that. I felt that we had come to a certain historic point where we could say, alright, now it’s been acknowledged that what the government did was racist, and it was wrong, and it’s been put right, and so now we can cross over and we can no longer claim we are victims. We have to claim that we are now restored in a relationship, a real relationship in a country where we are equal.¹⁷⁴

Chinese Canadians

More than 15,000 young Chinese men were instrumental in the building of the Canadian Pacific Railway (“CPR”). After the railway was completed, the Government decided that it wanted to discourage the men and their families from staying in Canada. A head tax was instituted in 1885 and increased each year. By 1903, the tax was \$500 – the equivalent of two years wages. In 1923, Canada passed the *Chinese Exclusion Act*, which effectively stopped the immigration of Chinese people for nearly a quarter century. The

¹⁷² *Ibid.*

¹⁷³ “Ottawa Will Pay Compensation to Uprooted Japanese Canadians,” *New York Times*, September 23, 1988.

¹⁷⁴ “A Dark History in Canada: Japanese Internments,” *Audrey Magazine*, New America Media (November 29, 2006).

Chinese Canadian National Council sought restitution for the head tax. Former Prime Minister Paul Martin issued a personal apology and Member of Parliament David Emerson said he was considering a full and formal apology.

On June 22, 2006 Prime Minister Stephen Harper gave a formal apology to the Chinese Canadian community. He stated, in part:

[T]ragically, some one thousand labourers died building the CPR.... But from the moment that the railway was completed, Canada turned its back on these men. The Government of Canada recognizes the stigma and exclusion experienced by the Chinese as a result.... [O]n behalf of all Canadians and the Government of Canada, we offer a full apology to Chinese Canadians for the head tax and express our deepest sorrow for the subsequent exclusion of Chinese immigrants.... This apology is not about liability today: it is about reconciliation with those who endured such hardship, and the broader Chinese-Canadian community.... [W]e fully accept the moral responsibility to acknowledge these shameful policies of our past.”¹⁷⁵

The Canadian Government also provided individual payments of \$20,000 to those who were still alive and had paid the head tax and to living spouses of deceased payors. Of the 80,000 who paid the tax, only 30 or so were still alive. Another few hundred widows were alive at the time of the announcement. To commemorate the contribution of the Chinese community, the Government also established a \$24 million community historical recognition program to provide grant and contribution funding for related community programs.

8.3 Legislation

As has been noted in several Parts of this Paper, the civil legal system contains a number of impediments to apologies. The current trend in favour of apology legislation is one way to overcome concerns about apologies leading to liability. Because of the strong connection between legal and ethical issues, this trend is described in some detail in this Section of the Report.

¹⁷⁵ Office of the Prime Minister Stephen Harper, “Address by the Prime Minister on the Chinese Head Tax Redress” (June 22, 2006).

(i) *Arguments For and Against Apology Legislation*

The most compelling arguments in support of apology legislation in the context of legal disputes include these:

- Legislation provides certainty as to how apologies will effect liability;
- Legislative protection for apologies extends to all circumstances in which they are offered;
- Legislative protection from liability will encourage wrongdoers to take moral responsibility and offer apologies;
- Apologies will reduce the frequency and intensity of lawsuits and encourage more open dialogue;
- Apologies will lead to earlier, less expensive, and more satisfactory outcomes for aggrieved parties and wrongdoers; and
- Apologies may also encourage healing and reconciliation and repair social relationships.

Arguments against apology legislation include the following:

- Apologies should not be shielded by legislation because they may be required to establish liability;
- The justice system will be in disrepute if offenders who admit fault under protective legislation are not found at fault at trial;
- Apologies which do not enjoy legislative protection are more meaningful because of the risks associated with them;
- Apologies delivered under the protection of legislation may be more insincere or be perceived to be insincere; and
- Legislation will encourage the use of apologies for strategic reasons which may disadvantage aggrieved parties.

In response to the first and second criticisms, it is worth noting again that apologies are rarely determinative of liability and they already enjoy wide protection at common law, in statutes and regulations, and through contracts. If it is appropriate to shield them in those

circumstances, what is the policy justification for not shielding them in every circumstance? In fact, could it not be argued that it is unfair to deny protection for spontaneous apologies often given in the absence of legal representation, and limit protection to the kinds of “without prejudice” communications that typically involve lawyers? As Morris points out, “... the absence of apology legislation may well work to the disadvantage of people who, for reasons of gender, culture or religion, may be more prone to apologize than are other people.”¹⁷⁶

With respect to the third “con”, because of the general protection already in place, the current “risks” should not be overstated. In any event, are “higher risk” apologies necessarily more meaningful than “lower risk” ones? To assess the “meaningfulness” of apologies, it is arguably better to rely on the circumstances surrounding the apology (the who, what, why, when, where, and how) than to assume that apologies made after apology legislation is passed are thereby diminished. Supporters of apology legislation would also argue that apology legislation will encourage the kind of meaningful apologies that are currently withheld because of uncertainty as to their legal implications. No matter what the level of protection, apologizers should be willing to assume the moral, social, and legal consequences of their actions.

To comment on the fourth criticism, aggrieved parties are also under no compulsion to accept apologies that are made under legislative protection or to give them any “credit”. If, as has been suggested, people are adept at detecting insincere apologies, the legislation should have little or no impact. If legislation makes aggrieved parties more circumspect about apologies, wrongdoers will have to be particularly conscious about how to provide an appropriate apology.

In relation to the last criticism, it should also be pointed out that apology legislation does not deprive aggrieved parties from pursuing any legal remedy they choose. The legislation does not impose any restrictions on damages or other remedies; in addition, it does not require any *quid pro quo* for an apology. Given the concern that apologies may lead to

¹⁷⁶ Morris, *supra* note 140 at 9.

concessions, the importance of timely, competent legal advice for aggrieved parties – especially in serious cases – cannot be underestimated.

The trend towards apology legislation demonstrates that there is a growing consensus that the “pros” associated with apology legislation outweigh the “cons”. Legislatures in various parts of the world have shown a willingness to endorse the potential for apology legislation to support moral, social, and legal justifications for apologies. In recommending a legislative model, Getz stated:

While some of the criticisms of apology legislation may be reasonable bases of concern, they are better taken as counsels of caution for injured persons and their lawyers. Apology legislation is consistent with policies to broaden and improve the means for resolving civil disputes through alternatives to litigation; and to encourage less adversarial modes, such as mediation and dialogue between parties. The ability to apologize is part of this, and to secure the legal, social, and moral benefits of apologies, apology legislation is needed.¹⁷⁷

(ii) *Case Law*

Apology legislation of one form or another has been passed in many jurisdictions around the world. The general intent of apology legislation is to shield apologizers from having their apologies subsequently used “against them” in civil lawsuits. The primary impetus for this legislation was the growing crisis in liability insurance and the desire to encourage settlements of medical malpractice cases and other types of tort actions.¹⁷⁸ It is assumed that the shield will encourage defendants to apologize which, in turn, will reduce the frequency and intensity of lawsuits, lead cases to settle earlier at lower cost, and increase the satisfaction of plaintiffs.

The “conventional wisdom” – at least amongst lawyers – is that apologies may be used against their clients to establish liability. Articles that repeat that concern do not,

¹⁷⁷ Russell J. Getz, “Uniform Apology Act,” Presented at the Uniform Law Conference of Canada, Civil Law Section, Charlottetown, Prince Edward Island (September 9-13, 2007) at 9-10.

¹⁷⁸ Bisk, *supra* note 37 at p. 2.

however, provide references to cases in which liability was founded on an apology. Here is an example:

The law recognizes that an apology, when authentically and freely made, is an admission; it is an unequivocal statement of wrongdoing. The law permits such an acknowledgement to enter the legal process as a way to allow the performer of apology to experience the full consequences of the wrongful act. An apology made in this context, with full knowledge of the legal ramifications, is much more freighted than an apology made in a purely social context.¹⁷⁹

Is it only apologies that contain an explicit admission of liability or fault that have led to findings of liability? Are implicit admissions regularly read into apologies by the Court? How far along the apology spectrum can a person or organization go without risking a finding of liability? In fact, as Morris notes, there is case law that holds that implicating statements alone will not determine liability; the court looks to all the facts and the legal standard of liability. Therefore, it is difficult to assess the degree to which the “wisdom” is grounded in fact.

(iii) *Scope of Legislation*

Apology legislation generally takes one of two primary forms. The limited form provides that an expression of sympathy or regret is not admissible to establish liability; that part of an apology that contains an admission of fault or liability, however, is either not specifically protected or is specifically excluded. This type of “safe-harbour” legislation is in place in a number of U.S. States (such as California, Massachusetts, Florida, and Texas) and in several Australian states, including Victoria and Queensland.¹⁸⁰ Where statements of fault or liability are not specifically excluded, the legislation may still be interpreted to cover them. The broad form of apology legislation protects both an expression of sympathy or regret and apologies that contain admissions of fault or liability. For example, the U.S. States of

¹⁷⁹ Taft, *supra* note 109 at 1157.

¹⁸⁰ British Columbia, Ministry of the Attorney General, *Discussion Paper on Apology Legislation*, January 30, 2006 [*hereinafter Discussion Paper*] at p. 3.

Colorado and Oregon have enacted this kind of legislation¹⁸¹ as has the Australian State of New South Wales.¹⁸²

One of the arguments in favour of the broad form of apology legislation is that current law and practice substantially protect expressions of sympathy and similar statements that do not contain admissions of fault or liability, so to limit legislation to those statements simply preserves the *status quo*. Further, because it is difficult to say with certainty when a statement of fault or liability may be implied, some parties fear making any kind of acknowledgement at all. Alternatively, parties may make a statement that inadvertently puts them “over the line” into an admission and they may be disadvantaged. As Getz notes: “the uncertainty will lead lawyers to advise their clients to stay silent or to draft apologies in such legalistic and artificial language that the victim will see them as insincere or calculating. This is likely to exacerbate both suffering and discord.”¹⁸³

Another issue to consider is the scope of wrongdoing to which the apology legislation applies. The vast majority of statutes in the United States are limited to civil actions or arbitrations related to medical care although at least five states extend protection to all kinds of accidents and one state covers all civil actions.¹⁸⁴ Apology statutes in Australia are limited to personal injury claims, negligence, or torts generally. Some legislation specifically excludes intentional acts from coverage. The New South Wales legislation, for example, specifies that it does not apply to “intentional acts done with intent to cause injury or death.”¹⁸⁵

There does not appear to be any policy justification for limiting legislative protection to one or more categories of harm. The fact that the U.S. legislation was, at least originally, driven by concerns about medical malpractice suits arguably no longer justifies restricting

¹⁸¹ Bisk, *supra* note 37 at p. 9 identifies the following examples of expansive language in U.S. legislation: fault, liability, mistake, responsibility, and error.

¹⁸² British Columbia, *Discussion Paper*, *supra* note 180 at 5.

¹⁸³ Getz, *supra* note 177 at 11, relying on the B.C. Discussion Paper, *supra* note 179.

¹⁸⁴ Bisk, *supra* note 37 at 2.

¹⁸⁵ *Civil Liability Act*, 2002, NSW, s. 3B.

protection to just negligence or just unintentional torts. Apologies may be of value to aggrieved parties and wrongdoers in a wide variety of case types and circumstances.

Before a court determination, one cannot say with certainty whether a particular cause of action will be successful. Let us suppose that a party to a dispute has a potential legal claim against an alleged wrongdoer which could be argued on the basis of contract, an unintentional tort, and an intentional tort. Imagine further that an apology was desired by the aggrieved party and the alleged wrongdoer was inclined to apologize. If the legislation only protected unintentional torts, the apologizer may be forced to say, "I'm sorry for my actions and the harm caused to you, but my apology is limited to any potential claim in negligence, nothing more, etc." That would constitute an absurd result.

As recognized in the British Columbia Discussion Paper, "the public policy reasons for and against adopting apology legislation... would seem to apply whether or not intentional acts are included within the scope of the legislation."¹⁸⁶ In fact, an injured party might have an even greater psychological need for an apology in the case of an intentional act. This would suggest that intentional acts should be covered to encourage offers of apology. On the other hand, it could be argued that neither the interests of the aggrieved party nor the public interest would be served if an admission relating to an intentional act was protected from admissibility in subsequent legal proceedings. It has also been suggested that excepting intentional acts "could rise to litigation over whether or not an act was intentional, thus undermining a primary purpose of the legislation."¹⁸⁷

Finally, the application of legislation to insurance contracts bears scrutiny. It is common for insurance contracts to void coverage if an admission of liability is provided. What is less clear is whether insurance companies in Canada have successfully used an apology to deny coverage. When people apologize in insured matters, it is generally because they assume they are at fault, and they usually are. Whether or not it is necessary, as a practical matter, to provide explicit protection for admissions in the insurance context, it may

¹⁸⁶ British Columbia, *Discussion Paper*, *supra* note 180 at 5.

¹⁸⁷ *Ibid.*

provide comfort to those who are concerned about exposure. The New South Wales legislation specifically provides that an apology cannot be taken as an admission of liability so as to void an insurance contract.¹⁸⁸

The trend towards a legislative response to the apology-liability conundrum raises a number of interesting questions. For example:

- Are the legislative definitions of “apology” appropriate? If definitions are too broad, the legislation may simply encourage defendants to give statements that have a hollow ring. This could worsen the conflict.
- Does the liability shield diminish the power of the apology? Plaintiffs may perceive apologies given under legislative protection as less valuable than those given without protection.
- Is there an inconsistency inherent in allowing a party to admit liability as part of an apology for the purpose of responding to the other party’s needs or for the purpose of gaining some strategic advantage, only to allow that party to argue “no liability” at trial. It could be argued that the concept of fault and liability are legal concepts that need not fall within the protective umbrella.
- To what extent will legislation remove the barriers to offering apology? There are a variety of factors that may dissuade a wrongdoer from offering an apology. Legislation may address concerns about legal ramifications, but it will not eliminate other barriers, such as personal intransigence.
- If apology legislation contains words to the effect that a statement of fault or liability is admissible, does that override the possibility of shielding such a statement in without prejudice discussions? Apology legislation may have intended or unintended far-reaching effects.
- Do statutes that exclude admissions of fault or liability truly change the status quo? Some have challenged the notion that expressions of empathy, for example, would be accepted by a Court as indicative of liability.
- To what degree will apology statutes change the behaviour of people involved in wrongdoing? It has been suggested that lay people will not have knowledge of

¹⁸⁸ *Civil Liability Act 2002*, NSW, ss. 68 and 69.

evidentiary rules until they consult a lawyer, which may occur after they have made an apology. Medical professionals, however, will likely have more knowledge of the rules and be more inclined to offer timely apologies if they are legislatively protected.

- Should apology legislation be an “all or nothing approach?” In other words, should it either disallow apologies for all purposes or allow them for all purposes?

(iv) *Canadian Apology Legislation*

This Sub-section focuses on apology legislation in Canada. British Columbia, drawing primarily on the legislation enacted in New South Wales, Australia was the first to pass apology legislation in Canada. The other Provinces and Territories are beginning to follow suit.

British Columbia Legislation

In January, 2006, the B.C. Ministry of the Attorney General released its *Discussion Paper on Apology Legislation*.¹⁸⁹ Summarizing the conclusions of a number of authorities on the subject, the Paper noted:

Society places a great value on apologies as a way of redressing wrongs. When we act in a way that results in harm to another, an apology is seen to be an appropriate ethical response. It is also recognized that an apology can have a therapeutic impact on the person injured, facilitating the healing process and the process of reconciliation and closure.¹⁹⁰

The *Discussion Paper* repeated what has been widely observed; namely, that “apologies are not fully embraced within our legal culture.”¹⁹¹ The Ministry observed that while “a recent review of apologies in Canadian law indicated the legal consequences of an apology are far from clear ... lawyers continue to be legitimately concerned that an apology

¹⁸⁹ British Columbia, *Discussion Paper*, *supra* note 180.

¹⁹⁰ *Ibid.* at 1.

¹⁹¹ *Ibid.* at 2.

could be construed as an admission of liability.”¹⁹² The authors went on to note that an apology could also have “adverse consequences for insurance coverage.”¹⁹³

In February 2006, Acting Provincial Ombudsman Howard Kushner released a Report entitled *The Power of an Apology: Removing the Legal Barriers*.¹⁹⁴ His Report encouraged the Attorney General to implement legislation which would allow public agencies to apologize without fear that the apology would later be used as an admission of liability. He explained that many cases had been resolved on the basis of apologies that the Ombudsman’s office had recommended. However, he noted as well that public servants had often informed him that, even when they were willing to apologize, they had received advice not to, for fear of liability in any ensuing legal action. He recommended that the B.C. government consider the New South Wales apology legislation as a model, in the interests of administrative fairness.

Kushner wrote:

The experience of acknowledging responsibility and expressing a sincere apology for what happened to a person without fear of consequences is a fair response to wrongdoing. Providing apologies may not completely replace the option of seeking justice through litigation, but might offer an alternative to the adversarial process for those who seek recognition and remorse in order to feel justice is served.¹⁹⁵

British Columbia was the first Canadian Province to enact apology legislation. The *Apology Act*,¹⁹⁶ effective on May 18, 2006, is a stand-alone statute which defines an “apology” as: “... 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.”¹⁹⁷ The *Act* provides that an apology made by or on behalf of a person in “connection with any matter” does not constitute an express or implied admission of fault or

¹⁹² *Ibid.* at 2 and 3.

¹⁹³ *Ibid.* at 3.

¹⁹⁴ British Columbia, *The Power of an Apology*, *supra* note 44.

¹⁹⁵ *Ibid.* at 16.

¹⁹⁶ S.B.C. 2006, c. 19.

¹⁹⁷ *Ibid.*, s. 1.

liability, does not confirm a cause of action for purposes of the *Limitation Act*, does not void insurance coverage, and must not be taken into account in determining fault or liability.¹⁹⁸ Evidence of an apology having been made by or on behalf of a person are inadmissible in any “court”, which is defined to include “... a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.”¹⁹⁹ There is, however, no protection against apologies being used in an assessment of damages. Whether apologies will serve to reduce or increase damage awards in the future remains to be seen.

The B.C. statute represents a fine example of an expansive approach to protection of apologies. It:

- contains a broad definition of apology;
- shields apologies from being used to prove liability [in three ways];
- states that apologies cannot be used to extend limitation periods;
- requires that insurance coverage not be affected by apologies; and
- covers all forms of civil proceedings.

Saskatchewan Legislation

Saskatchewan adopted apology protection language almost identical to British Columbia’s, through passage of the *Evidence Amendment Act, 2007*.²⁰⁰ The *Act* came into force on May 17, 2007. Like British Columbia’s legislation, Saskatchewan’s does not restrict the type of civil “event or occurrence” to which the apologetic “words or acts” apply.²⁰¹ However, “Court” is not broadly defined to include tribunals and other forums, so the effect of the legislation outside of a civil action is unclear.

¹⁹⁸ *Ibid.*, s. 2.

¹⁹⁹ *Ibid.*, s. 1.

²⁰⁰ S.S. 2007, c. 24.

²⁰¹ *Ibid.*, s. 2.

Yukon Legislation

In the Yukon, Liberal Justice Critic Mr. Don Inverarity introduced an *Apology Act*²⁰² in April of 2007. Bill 103 defines “apology” and “court” expansively, using the same wording as in British Columbia’s legislation. It also makes it clear that an apology is not admissible as evidence of fault or liability. It departs from the British Columbia legislation in that it does not specify that an apology does not constitute confirmation of a cause of action for the purposes of the *Limitations Act*.

In support of the Bill, Mr. Inverarity stated:

Society places great value on apologies as a way of redressing wrongs. Notwithstanding the recognized value of apologies, both morally and as an effective tool in dispute resolution, apologies are not fully embraced in our legal culture. This bill clarifies the role of the apology from a legal standpoint.²⁰³

Mr. Inverarity also noted that the Ombudsman, Mr. Hank Moorlag, had endorsed this approach.

Manitoba Legislation

On November 8, 2007 the *Apology Act* of Manitoba came into force. The language and coverage is virtually identical to British Columbia’s except that, like the Yukon legislation, there is no mention of the effect of apologies on limitation periods. Interestingly, Manitoba’s legislation had its origins in a private member’s bill. It was introduced by the Liberal Leader, Dr. Jon Gerrard, who wanted to discourage the “defend and deny” mentality and encourage health-care workers and other professionals to apologize without the fear that apologies would be viewed as admissions of liability. Dr. Gerrard stated:

In my many years as a physician and then as an elected official, I have seen numerous cases where a simple apology could have gone a long way to settle disputes, bring closure to patients and families, and help in the emotional and mental healing process.... The role of an apology is often greatly

²⁰² Bill No. 103, Thirty-second Legislative Assembly, First Session.

²⁰³ “Inverarity Will Table Apology Legislation,” *News Release*, April 12, 2007.

underestimated and we need to have a health care system and a legal system that encourages the sharing of information with patients, not one that obstructs it.²⁰⁴

In the *News Release* issued by the Province of Manitoba when the Act was passed, Health Minister Theresa Oswald said, “This new legislation will ensure that we continue to move forward in developing patient safety initiatives.”²⁰⁵ Despite the emphasis on healthcare, the legislation is not restricted to medical malpractice claims.

Uniform Act

The passage of British Columbia’s apology legislation prompted the Uniform Law Conference of Canada (“ULCC”) to appoint a working group to prepare a draft *Uniform Apology Act* for presentation at the September, 2007 ULCC Annual Meeting. During the course of the project, Saskatchewan’s apology legislation was enacted. Mr. Russell Getz, Chair of the working group, prepared a paper that concluded that “apology legislation would be highly beneficial” and it recommended a “uniform statute modeled on the British Columbia and Saskatchewan enactments.”²⁰⁶

Getz explained the rationale behind apology legislation:

The *Apology Act* of British Columbia and the *Evidence Amendment Act, 2007* of Saskatchewan have their origins in law reform and civil justice reform efforts to improve the means available to people for resolving civil disputes. Research in pursuit of this work has indicated the benefits of apologies in resolving disputes, the real or perceived ambiguity respecting the legal effect of apologies, and legislative initiatives on the topic in a number of American and Australian jurisdictions.²⁰⁷

In summarizing the literature, Getz went on to say that “[a]pologies were found to have a beneficial and indeed essential place in moral life generally, and in personal

²⁰⁴ “Liberals Re-introduce Apology Act & Health Care Accountability Act,” [<http://mlp.manitobaliberals.ca/?p.+322>]

²⁰⁵ “Apology Act Passes in Manitoba Legislature,” *Manitoba News Release*, November 8, 2007.

²⁰⁶ Getz, *supra* note 177 at 2.

²⁰⁷ *Ibid.*

reconciliation in particular. They also have a potential place in the resolution of legal disputes.”²⁰⁸

Getz’s paper proposes that uniform legislation cover full apologies that consist of both an expression of sympathy and an admission of fault or wrongdoing. He wrote:

...[T]he definition of an apology in such legislation is consistent with the definition and understanding of an apology in general usage; that the broader definition is more consistent with the understanding of an apology in current law; that the arguments for and against are more likely to be better tested by considering apologies as broadly defined; and that the two instances of existing Canadian apology legislation are of this type.²⁰⁹

In advocating for a harmonized approach to apology legislation, Getz noted that “people may do or suffer harm away from home. The human and legal consequences should be predictable across the country. Thus a harmonized legal approach would be beneficial.”²¹⁰ Mr. Getz’s Paper and its attached draft *Uniform Apology Act* were considered at the 2007 annual meeting of the Uniform Law Conference. The following resolution was adopted at the Conference: “That the *Uniform Apology Act* and commentaries be adopted and recommended to the jurisdictions for enactment as a stand alone statute or as an amendment to the jurisdiction’s *Evidence Act*.”

The language proposed in the *Uniform Apology Act* is, again, virtually identical to British Columbia’s. One distinction is that, while British Columbia’s legislation specifies that “an apology must not be taken into account in any determination of fault... [emphasis added]”²¹¹, the parallel language in the *Uniform Apology Act* uses “may” instead of “must.”²¹² While there is no indication that the drafters meant to allow the court to have discretion in this regard, the reason for the word change is not clear.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* at 5.

²¹⁰ *Ibid.* at 14.

²¹¹ S.B.C. 2006, c. 19, s. 2(1)(d).

²¹² *Uniform Apology Act*, s. 2(1)(d).

8.4 Truth and Reconciliation Commissions

In the field of reconciliation, there is a trend towards setting up Truth and Reconciliation Commissions (TRCs). There have been approximately thirty TRCs set up since the early 1970's. TRCs have generally been set up by transitional Governments as part of a move to a more democratic Government which seeks to redress human rights atrocities of the past. As their names suggest, TRCs typically espouse a goal of moving away from retributive justice and fostering truth-telling and reconciliation.²¹³ Most of the TRCs have been premised on predominantly Christian values, raising the question of their utility in other religious contexts. Perhaps their greatest success has come from revealing the approximate 'truth' through public testimony and from creating a record of tragic periods in the history of many countries.

Perhaps the most prominent example is South Africa's Truth and Reconciliation Commission, which was established in 1995 to address the aftermath of apartheid. Apartheid was the official Government policy between 1960 and 1994. That TRC ran for two and one-half years. Chaired by Archbishop Desmond Tutu, the South African TRC comprised three committees: the Amnesty Committee, the Human Rights Violation Committee, and the Reparations and Rehabilitation Committee. An investigative unit conducted inquiries in conjunction with the Research Department. Archbishop Tutu rejected the view that the past should be forgotten, writing: "... such amnesia would have resulted in further victimization of victims by denying their awful experiences."²¹⁴

One of the criticisms of the South African TRC has been that reconciliation was limited, given that apologies were not considered adequate and compensation levels were very low. There was no public apology from the new Government and relatively few whites offered apologies for what had been done to the black and coloured populations. Another criticism was that wrongdoers could obtain amnesty from criminal prosecution for politically

²¹³ Avruch and Vejarano, *supra* note 129 at 39.

²¹⁴ Quoted in Justice Richard J. Goldstone, "Reconstructing Peace in Fragmented Societies," Remarks drawn from address delivered for the Olof Palme International Centre at the Gottenburg Book Fair in September 2000.

motivated offences. Bishop Tutu argued that “freedom was exchanged for truth.”²¹⁵ This was justified by him on the basis that restorative justice, more reflective of African values of healing and nurturing (*ubuntu*), was given prominence over retributive justice. It was also the case that the ‘truth’ was difficult to obtain through trials, because secrecy surrounded the human rights violations. However, criminal trials did proceed if no amnesty was granted.

In the opinion of Justice Richard J. Goldstone of the Constitutional Court of South Africa, the search for and recording of the truth serves the following public interests:

- Preventing or at least curbing false denials and revisionism;
- Assisting such nations to guard against the repetition of such violations;
- Allowing victims to tell their stories;
- The likelihood that many perpetrators will be removed from public office; and
- Averting collective guilt from being ascribed to the group from which the perpetrators come.²¹⁶

As noted earlier in this Paper, the Canadian Government has set up a TRC to address the historical wrongs done to aboriginal children who were sent to residential schools. Its work will undoubtedly be closely watched by the Canadian and international communities.

²¹⁵ Quoted in Avruch and Vejarano, *supra* note 129 at 40.

²¹⁶ Goldstone, *supra* note 214 at 6.

PART NINE: POLICY OPTIONS

As indicated in Part One, this Paper is a discussion paper that presents concrete examples, theoretical models, and practical frameworks. It is not intended to provide definitive answers to the many questions that surround the legal and ethical implications of apology in civil cases. The Paper contains many ideas that the Commissioner may wish to take into account when he provides his recommendations to Government. In this Part of the Paper, various options for further consideration are proposed.

(i) General Education and Information-Sharing

It is the parties to a dispute that are at the heart of apologies. In addition to educating and training lawyers, Alternative Dispute Resolution (ADR) professionals, and healthcare professionals in relation to apology, it is important to address the education and information needs of the disputants and others who may be involved. The following options are recommended for consideration with a view to promoting general education and information-sharing in the community. These sessions would be open to all, including those who receive separate education and training as well.

To promote general education and information-sharing about apologies in the community, it is recommended that these options be considered:

- That the Government of Ontario and educational institutions provide public education sessions and information on the utility of apologies in the mediation of civil cases.
- That community groups encourage forums and workshops on the power of apology and forgiveness and their connection to healing and reconciliation between individuals and within the community;
- That the public education and information sessions be provided in the official languages and in languages relevant to specific communities.

- That public television and radio stations give further attention to the effective role that apologies can play in society, and that they use case studies in their coverage.
- That specific educational programs be created and delivered to professionals in the healthcare field that support victims and wrongdoers involved in the apology process.

(ii) *Education and Training of Lawyers and ADR Professionals*

For reasons highlighted in this Paper, apologies (and other responses to harm) are under-utilized in civil legal processes. There is more room for apologies to be used early in the evolution of a conflict through negotiation and mediation. The mediation process is particularly well-suited for apologies. There are a number of ways to improve the effective use of apologies in civil legal processes. The following options relating to lawyers and ADR professionals are recommended for consideration.

So that lawyers and ADR professionals can promote the appropriate use of apologies in civil legal processes more effectively, it is recommended that the following options be considered:

- That the Ontario Bar Association (OBA) and ADR organizations give more prominence to continuing education and training for ADR professionals and lawyers on the effective use of apologies in civil legal processes.
- That the range of topics covered in continuing education programs include the benefits and risks of apologies; legal and ethical issues that arise in connection with apologies; and how to promote and protect the interests of disputants at each stage of the civil justice process.
- That the Ontario Bar Association and ADR organizations promote the use of mediation agreements that provide sufficient protection for apologies offered in the mediation setting.
- That the Ontario Bar Association and ADR organizations encourage the training of mediators and lawyers in interest-based and transformative approaches to

mediation and the ways in which those approaches can support the use of apology in dispute resolution.

- That law schools in Ontario include the subject of apology and associated legal and ethical issues in their curricula.

(iii) *Apologies in the Medical Field*

Apologies have the potential to address some of the needs of patients harmed by medical errors. A number of hospitals have adopted policies of disclosing medical errors, apologizing for them, and compensating patients for the resulting injuries. Many U.S. hospitals have documented positive outcomes relating to these initiatives. Even in the absence of a policy, some hospitals have taken this approach in serious cases.

To encourage the appropriate use of apology in cases of medical errors, the following options are provided for consideration:

- That medical schools implement or continue training on apologies and the benefits and risks associated with them – including therapeutic, ethical, and legal considerations.
- That other schools that train healthcare professionals, such as nurses, do the same.
- That Hospitals and other healthcare institutions adopt policies relating to disclosure of medical errors and the circumstances in which apologies are appropriate.

(iv) *Effectiveness of Apologies*

The Paper demonstrates that public apologies are increasingly being used by individuals, organizations, and Governments. Regrettably, public apologies are often deficient and only serve to further exacerbate conflict. The following suggested options are designed to improve the effectiveness of both public and interpersonal apologies.

To improve the effectiveness of apologies in society, the following options are proposed for consideration:

- That the Ontario Government, OBA, ADR organizations, law schools, Law Commission of Ontario and/or other organizations promote and sponsor additional research and information-sharing in the area of apology – particularly focused on how to improve the effectiveness of apologies.
- That the research topics include the unique cultural factors present in Canada.
- That further ethically sound empirical research be conducted to capture the actual experiences of disputants and lessons relating to quality of apologies.
- That a practical “toolkit” be developed to assist politicians, senior public servants, and others who are or may be involved in providing public apologies, such toolkit to include best practices and case studies.
- That the Ontario Government or a non-for-profit organization consider establishing an advisory role for one or more individuals with legal and ADR training and experience who could provide advice or input on the provision of public apologies.
- That disputants, lawyers, and Governments consider using novel forums for supporting the offering and acceptance of apologies including the features of Truth and Reconciliation Commissions.

(v) *Apology Legislation*

There is a trend in North America and beyond towards some degree of legislative protection for apologies and related statements. British Columbia has led the way in Canada and others have followed. The subject of apologies is being debated in legal circles in Ontario. The Uniform Law Conference of Canada has drafted a Uniform Apology Act and recommended its use across the country. Those that have adopted apology legislation in Canada take a broad approach to what is covered. The following options are suggested in relation to apology legislation.

To promote and protect the use of apologies in the civil justice system, it is suggested that the following options be reviewed:

- That the Ministry of the Attorney General of Ontario (MAG) give serious consideration to introducing apology legislation in a form consistent with that proposed by the Uniform Law Conference of Canada to protect apologies from being used for the purpose of establishing liability.
- That MAG considers broad legislation which applies to all statements and actions made in response to harm and to all case types, and that the protection be available in all civil forums.
- That MAG, in the course of its policy development process, consult with stakeholders that have an interest in the subject of apology, including organizations in the legal, alternative dispute resolution (“ADR”), victims’ rights, and healthcare communities.
- That the consultation process and ultimate drafting of legislation address the issue of whether apologies should be used for the purpose of mitigating damages in civil cases.

(vi) *Commemoration*

The literature reveals that, particularly in cases of widespread harm, it may be helpful to commemorate the losses experienced by the victims involved. With that in mind, the following options are suggested.

To commemorate the losses of victims and/or their families and descendants, the following options are recommended for consideration:

- That the wrongdoer or person apologizing on behalf of the wrongdoer provide both private and public apologies, depending on the wishes of the victims.
- That the apologizer provide monetary compensation which is an actual or symbolic testament to the losses.
- That the apologizer support community activities and services that help victims and their supporters recover from and/or learn from the harms of the past.
- That the apologizer and community organizations provide public information and education sessions for the victims, their supporters, and the broader community.

- That innovative ways in which to remember the past be considered including monuments and days of recognition.

PART TEN: CONCLUSION

This Paper reviews many of the legal and ethical issues surrounding apology in civil cases. It draws on literature from a wide variety of disciplines including law and psychology, examines specific apologies, and canvasses the state of the law. It also identifies trends in the area of apology and provides the Commissioner of the Cornwall Public Inquiry with ideas and options for him to consider as he formulates his ultimate recommendations. Because this is a Discussion Paper, it does not purport to state any particular position on the many questions and dilemmas that pertain to the issue of apology in civil cases.

The issuance of a satisfactory apology has been described as a “... delicate and precarious transaction.”²¹⁷ Indeed, it takes a great deal of sensitivity and planning to have an apology accepted and for it to have maximum effect. In addition, there are many pitfalls that may be encountered in creating and delivering an apology. Presumably, if it were not for the many potential benefits of apologies, they would not even be attempted. It is precisely because apologies have the capacity to benefit disputants psychologically and to offer certain legal and strategic benefits that they are so often provided.

Indications are that the use of apologies is on the upswing. To the extent that they are being used to good effect, that is a positive trend. There is reason for concern, however, that apologies are not being used as effectively as they could be. In fact, the rash of “mea culpa” and politically motivated apologies that have garnered attention in recent years may serve to undercut the fundamental worth of apologies. To encourage the use of authentic apologies, the author proposes a four-step apology process; namely:

- determine the needs and expectations of the victim in relation to an apology;
- determine the needs and expectations of the apologizer;
- mediate the apology between the parties; and

²¹⁷ Tavuchis, *supra* note 4 at 15.

- support the delivery of the apology.

As suggested at the outset of this Paper, apologies are vitally important as they can contribute significantly to the resolution of conflict and to the realization of healing and reconciliation. By using the kind of apology process suggested above, the positive potential of apologies will be more likely realized. The comments made on an earlier draft of this Paper and the input received at the Workshop held on January 17, 2008 reinforced many of the key themes of this Paper. Participants felt that it is valuable to keep in mind the seven “Rs” suggested in this Paper and that a properly crafted apology is always welcome.

Lynn Johnston, the insightful Canadian cartoonist and creator of *For Better or for Worse*, wrote metaphorically that: “An apology is the superglue of life. It can repair just about anything.”²¹⁸ It is hoped that this Paper will contribute to further research and discussion about how to maximize the effectiveness of apologies.

²¹⁸ See quotations at <http://www.theotherpages.org/index.html>.

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