

“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 (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.

(vi) 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 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 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.