

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 you 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 179 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 standalone 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 liability, does not confirm a cause of action for purposes of the *Limitation Act*, does not void insurance

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.

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 and protection, 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 fear 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, the Commissions 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. The Commission ran for two and one-half years. Chaired by Archbishop Desmond Tutu, the Commission 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, 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 underutilized 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.