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Remorse and Reconciliation in the Courtroom: An Exploratory Survey of Judicial Discourse on Apologies

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Introduction

The frequently heard expression "I am sorry…" stands as a prime example of a statement and a process both simple and profound. As noted in Tavuchis' (1991) ground-breaking study of this process and in many subsequent scholarly and analytical works, through a carefully chosen set of words, an apology can provide a basic acknowledgement of a wrongful action and a personal and moral assessment of that action. However, these same words can be perceived as either the beginning of reconciliatory and restorative justice process or as a trite formula designed to place the speaker in the most positive light.

The potential of an apology as the beginning of a powerful restorative process is borne out by the frequent public demands from those wronged in various ways for an apology as one crucial step in achieving justice and undoing the harm that has been done. The reconciliatory potential of this process has also been highlighted by restorative justice advocates as an important and powerful aspect of making amends and restoring relations after the harm is done (Schneider, 2000, Alexander, 2006). However, the other side of this process is perhaps more frequently visible, a communicative action designed also (or perhaps primarily) to restore the apologizer's self-image and demonstrate the apologizer to be a worthy moral agent. Allan (2007) notes the distinction between an

exclusively self focused (what I term here as "rehabilitative") and self-other focused (what I will refer to as "restorative") apology and the confusion in much of the scholarly literature about this distinction[1]. Towner (2009) also distinguishes between two categories of "apologetic rhetoric" – apologia statements designed to restore self-image and reconciliatory apologies designed to facilitate healing.

This distinction has particular significance within a court setting. Whereas an apology is generally understood to be a gesture of remorse and an acknowledgement of responsibility for wrongdoing, the demand for an apology or the offer of an apology in a courtroom setting raises significant issues re assessment of level of sincerity of the apology, future legal liability for this wrongdoing, the potential impact on any financial or other reparation to be offered or demanded in response, etc. Thus the same simple process can show great potential as a step toward conflict reconciliation or be used as a calculated way to mitigate demands for compensation.

How is this distinction understood and managed within actual judicial practice? This paper attempts an introductory answer to this question by examining some of the official judicial discourse around the roles and functions of apology as recorded within a selection of court rulings and judicial decisions made in Canadian national and provincial courts between 1992 and 2005.

Definition of Apology

Before beginning to examine the role of apology in the courtroom, it is important to establish a framework for what exactly an apology is. In its simplest and most basic form as 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 (Tavuchis, 1991). The power of this particular speech act lies in the ex-

1 Most apologies cannot be viewed as exclusively one or the other, but rather emphasize rehabilitation or self or restoration of the other in varying degrees.

tent to which it fulfills its intended role, whether restorative or rehabilitative.

Much of the literature affirming and responding to the Tavuchis analysis of the process assumes this to be communicative action with a restorative role and with the motivation of restoration of relationship of speaker and listener. While the specific list of communicative functions varies from author to author, four specific functions, relevant to the current study, appear very consistently.

First, the apology acknowledges a particular situation of wrongdoing as a violation of the listener. According to Govier and Verwoerd (2002) and Lazare (2004), this aspect of acknowledgement is the most crucial aspect of the process, providing a basis for moving through the rest of the process and toward potential future reconciliation. Second, the event is named in terms that clearly indicate the apologizer's remorse for the action and the apologizer acceptance of responsibility for the damage done to the listener. Third, while naming the wrongdoing and taking responsibility for it, the apologizer offers assurance that the wrongdoing will not be repeated by expressing some form of a commitment to changed behaviour. Fourth, the apology may or may not offer some form of reparation or compensation (Alter, 1999, Cunningham, 1999).

Each of these functions will take on a specific nuance depending on the extent to which the apology is intended as a restorative or rehabilitative process. The acknowledgement of wrongdoing can be viewed as either a courageous effort to reach out to the other side or as an effort to restore one's own self-image as a moral agent. Expressions of regret and remorse can also be viewed from either perspective and the willingness to take responsibility may well be strongly influenced by the focus on self or other. Commitments of changed behaviour can be either an important step of providing security and safety for the wronged listener or another gesture of self-rehabilitation. In the same way, the extent of reparation or compensation offered may depend on either the needs

of the recipient or on the self-interest of limiting the cost to be borne by the one making the offer.

Apology Within a Legal Context

Types of Cases Considered		
Crimes against Personal Status and Security		**21**
Defamation / Libel	14	
Disclosure of Personal Information	7	
Labour Relations / Employment Grievances		**19**
Labour relations / union representation	12	
Ongoing Harassment and Discrimination	5	
Other Wrongful Dismissal	2	
Crimes against Person or Property		**14**
Sexual Assault	5	
Physical Assault	3	
Physical Harassment	4	
Theft	2	
Crimes against the Court		**11**
Contempt of Court	8	
Failure to Appear in Court or Fulfill Conditions	2	
Frivolous Court Action	1	
White Collar Crime		**3**
Professional Misconduct	2	
Fraud	1	
Context of Apology Not Specified		**4**
Total		**72**

During the spring and summer of 2005, the author and a student research assistant surveyed the CanLII legal databases for a representative sample of judicial rulings that included some significant discussion about the use of and meaning of an apology with a specific court cases[2]. While the reli-

2 Special acknowledgements and appreciation are due to Sarah Laing, a conflict resolution student who did most of the legal research for the survey during the spring of 2005, and to Trudy Govier for her encouragement and support for this project.

ance on written documentation did exclude the potential for observation of legal apology discourse within its context, the researchers concluded that a reliance on this specific form of written discourse allowed for analysis of a larger sample of cases spread across a wider span of time and a greater range of the geographical jurisdictions than would have been possible through direct observation[3]. The focus on judicial rulings also provides insight into the judicial justification of use of apology within this setting. Within this survey, 72 rulings were selected for special textual analysis as examples of the judicial discourse about legal apologies. In each of these rulings, the specific paragraphs relevant to apology discussions were subjected to a basic textual analysis, identifying and recording basic themes according to an analytical framework consisting of the specific functions of an apology as noted above.

This list indicates that an apology can be demanded or voluntarily offered in response to a wide variety of legal infractions but some tantalizing trends may be hinted at in this admittedly non-scientific survey. It is significant, for example, that this process appears to be emphasized more greatly in cases where harm to "face" or personal prestige is at least as important as physical or financial damage. Some judicial rulings make this distinction even more clearly by identifying the apology with a non-quantifiable loss of reputation and status and considering financial or physical harm as a separate category. This is particularly significant for cases of defamation or slander, where this loss of reputation or status is specifically emphasized. Hence, various provincial defamation acts emphasize the use of apology as an appropriate response to wrongdoing much more than any other recent Canadian or provincial legal statutes (e.g. Nova Scotia, 1989). In addition to defamation cases, survey results show that apology discourse can arise in a variety of legal settings resulting in intense debate over a range of different aspects of

3 Thanks to an anonymous reviewer for pointing out the potential benefits of a direct observation study. Such a study could be a useful next step for this particular research project.

acknowledgement, remorse, compensation and commitment for change.

Another relevant factor is the growing popularity of use of apology as a response to a wider range of financial and physical harm, especially within medical malpractice cases and the introduction of legislative provisions designed to protect such apologizers from legal liability for implied admission of guilt (Taft, 2005, Wei, 2006, Robbennolt, 2009). Although not deliberately planned as such, the timeframe of the sample also allows for some tentative generalizations to be drawn about court discourse about apology during the decades immediately prior to the adoption of apology protection legislation in several provincial jurisdictions across Canada[4].

Legal Apology as an Acknowledgment of Wrongdoing

As noted above, several writers identify the acknowledgement of wrongdoing, taking responsibility for the harm done, as the most significant aspect of the whole apology process. Thus a major consideration, if not the primary consideration, for many regarding the acceptability of any offer of an apology to potential apology recipients or those sitting in judgment over the apologizer is the question of whether this process provides a full acknowledgement of the wrongdoing as a violation of the recipient (Govier & Verwoerd, 2002, Govier, 2006, Lazare, 2004). Does the offender fully understand the significance of her / his wrongdoing? From a restorative perspective, a particular event is reframed and given meaning to establish a clear record of exactly what happened and to validate the dignity and human worth of the recipient of the apology (Govier, 2006). From a rehabilitative perspective, the acknowledgement becomes the first point at which the perpetrator of the wrong begins to take responsibility for what happened.

4 The British Columbia legislature was the first in Canada to enact apology protection legislation in 2006. In the next three years, apology protection legislation was also passed in Alberta, Saskatchewan Manitoba, Ontario, Nova Scotia and Newfoundland.

In the judicial rulings examined here, the extent of acknowledgement was certainly a factor to be considered. In *Lin vs. Leung*[5], a British Columbia judge and a subsequent Appeal court judge rejected an apology for contempt of court because it included no admission of misconduct. The acknowledgment of wrongdoing also lost its legitimacy if accompanied by statements intended to justify or minimize the wrongdoing. In another British Columbia case[6], plaintiffs rejected an apology from EQUITY magazine partially because the apology was accompanied by a justification of the published reference considered to be defamatory. The judge ruled that the plaintiff's refusal to accept the apology provided the space for the defendant to present further evidence to justify their original defamatory comment. The ruling raises some significant question about the value of an acknowledgement of wrongdoing if this is followed by further efforts to establish that there was no wrongdoing at all or to continue the same actions already legally judged to be misconduct.

In some situations, even a partial apology is deemed to be acceptable as long a it includes some, albeit limited, acknowledgement of wrongdoing. For example, the statement of a young offender, appearing before the Supreme Court of the Yukon Territory, indicating that missing a court date was a "serious thing" was deemed as sufficient acknowledgement to be considered as an apology[7].

However, a partial apology can more frequently be considered as faulty, especially if the apology includes only a partial or vague acknowledgement of wrongdoing. Lazare (2004) notes that a vague, incomplete or conditional acknowledgement of an offense serves only to further aggravate the offense and aggrieve the offended party. Ribbennolt's (2003, 2006) research into the impact of apologies on legal settlement negotiations also supports the contention that a limited or partial acknowledgement of wrongdoing can make the

5 *Lin v. Leung*, 1992 CanLII 1400 (BC S.C.)

6 Dowding v. Pacific West Equities Ltd., 1992 CanLII 1131 (BC S.C.)

7 *R. v. M. (S.)*, 2002 CanLII 56 (YT S.C.)

offended party less amenable to settlement discussions. The importance placed on the explicit acknowledgment of wrongdoing also influences the emphasis placed within the judicial rulings on the next point – the importance of explicit expressions of remorse and the apologizer's willingness to take responsibility for the offence.

Legal Apology as Expression of Remorse and/or Responsibility

In addition to acknowledging the wrongdoing, the apology process is also intended to communicate the apologizer's acknowledgement of responsibility for the action, although in a context that may also implicitly acknowledge and reinforce the impossibility of undoing the harm that has been done (Minow, 1998). This can create a moral asymmetry between the apologizer and recipient heightened by the recognition that no future action can fully remove this asymmetry. In Tavuchis' words, "We are faced, then, with an apparently enigmatic situation in which the offender asks forgiveness as the necessary and symbolic corrective for a harmful action on the flimsiest of grounds: a speech act that is predicated on the impossibility of restitution" (1991, p. 34). By offering the apology without justification or defense, the speaker deliberately takes on the vulnerability of moving the speech encounter toward an unknown endpoint (Schneider, 2000).

From a restorative perspective, in the context of a communication directed from the apologizer to the victim of the wrongdoing, the apology process institutionalizes a symbolic exchange whereby the speaker provides a social legitimation of the pain of the recipient and the social and moral norms held by the recipient in the hope that the recipient will respond in some reciprocal fashion. Some analysts define apology as an exchange of shame and power (Schneider, 2000, Lazare, 1995). Roles are reversed as the apologizer deliberately places her/himself at the mercy of the recipient who may or may not accept the apology. For many restorative justice scholars and practitioners, this aspect of an apology process

can the most significant one because it creates an ambiguity, a deliberate shift of relationship dynamics, that then provides a space for the birth of new understandings and new interactions.

In the courtroom context, however, instead of some form of re-balancing of the moral scale or exchange of shame and power we may see an exacerbation of the asymmetrical power relations already evident as the culprit is dragged before the seat of judgment. The judicial desire for some visible expression of shame and remorse for the wrongdoing being acknowledged becomes perhaps the most tangible demonstration of the apologizer's assent to the degree of shaming foisted on him or her. According to Alexander (2006), however, the courtroom has become, far too often, a place for judges and recipients to attack, demean, ridicule and disparage the apologizer – all antithetical to the intent of a restorative apology. The apology then becomes a necessary performance within a public "ritual of humiliation" (Murphy, 2007, p. 450).

On the other hand, from the perspective of a self-rehabilitative apology, the expression of remorse, as shown through the admission of responsibility and the expression of remorseful feelings, may be viewed as the clearest possible indication that the character of the apologizer is distinctly different than the character of the wrongdoing and that apologizer clearly dissociates him/herself from the wrongdoing in the strongest possible terms (Weisman, 2009). Therefore the expression of remorse justifiably becomes the single most influential lens with which to assess the sincerity of any specific apology.

In most of the rulings considered here, this visible expression became the single most significant indicator of the sincerity of the apology given, so much so that in a significant number of examples of judicial discourse, the expression of remorse was almost equated with the apology as a whole, similar to the conclusion from Weisman's (2009) survey of Canadian judicial rulings between 2002 and 2004. Therefore, the lack of any such visible expression or the inclusion of contrary

expressions could be enough to reject the whole apology. For example, an apology for a sexual assault was rejected on the basis of lack of remorse because it was presented as a very general statement regretting "what happened" and left on a phone answering machine.[8] Another apology was rejected because it was sent to legal counsel accompanied by another more hostile letter "letting off steam," hence leaving the impression that the remorse expressed in apology was insincere[9].

Several judges assessed the sincerity of any expression of remorse by certain clearly defined criteria such as the specific wording of the apology, timing of a public apology, mode of delivery of the apology, etc. In *Kerr vs. Conlogue*[10], an apology for a defamatory article on front page of entertainment section of a local newspaper was rejected because of the wording was viewed as "halfhearted and ineffectual" and the written apology was located on an inside page of a different section of the newspaper. In several other cases, the timing of the apology was severely criticized[11]. The wording and timing of an apology for defamation is particularly critical if the occasion of the apology becomes another vehicle for disseminating the original defamation. In *Ramsey vs. PP*[12], a radio talk show host's apology for defaming a local politician was rejected because it was written and presented on air in such a way as to further publicize the original smear against the politician.

Can a sincere apology with a sincere expression of remorse be demanded by the court or coerced by agents of the judicial system? For some judges a demand for an apology was a reasonable demand. In *VE vs. Weir*[13], the judge ruled that an apology for defamatory remark could be demanded to be part

8 *R v. Popiel*, 1999 CanLII 55 (AB C.A.)

9 *McIntyre v. Rogers Cable T.V. Ltd*., 1996 CanLII 3582 (BC S.C.)

10 *Kerr v. Conologue*, 1992 CanLII 924 (BC S.C.)

11 E.g. *Trooper Technologies Inc. v. Thermo Tech Technologies Inc*., 1999 CanLII 6029 (BC S.C.). *Peters v. Hamilton-Brown*, 2000 CanLII 17209 (NB Q.B.). *Kopeck v. Constantin*, 2003 CanLII 339 (BC S.C.)

12 *Ramsey v. Pacific Press, et.al.,* 2000 CanLII 1551 (BC S.C.)

13 *Vaquero Energy Ltd. v. Weir*, 2004 CanLII 166 (AB Q.B.)

of a pre-trial settlement as a way of demonstrating taking of responsibility for offence. However, the judicial ruling in *Canada vs. Stevenson*[14] stated that an apology couldn't be demanded because coerced remorse is not a genuine expression of remorse. "A grudging so-called apology is plainly no more than a reluctant concession to an opponent possessing, for the time being, and overwhelming advantage of some sort. It is all too likely to be regarded as a form of unjust humiliation and not necessarily as a vindication of what is right." Several other rulings agreed with this approach. In *Obradovic vs. BO*[15], a forced apology was criticized as "self-serving and insincere." In *Ontario vs. Pine*[16], the judge ruled that a demand for apology also could also work against some other more genuine non-coerced expression of remorse. A Saskatchewan court ruled that an apology for rape inadmissible if coerced by police[17].

However, even if the demand for an apology was entertained, it should not be taken to extremes. In one case a plaintiff provided a detailed demand for apology with 6 outlined paragraphs but the judge considered this excessive and rejected the demand[18].

Bibas and Bierschbach (2004) note the difficulty of encouraging and responding adequately to sincere, heartfelt expressions of remorse within the contemporary adversarial North American justice system, hence the call for some legal protection to encourage the expression of sincere full apologies. This difficulty is particularly acute in the context of partial apologies crafted so as to exhibit an appropriate degree of remorse without actually admitting the alleged wrongdoing. Both judges and recipients will frequently view a carefully worded apology that manages to steer clear of any legal liability negatively, perceiving this to be a deliberate evasion

14 *Canada (Attorney General) v. Stevenson*, 2003 CanLII 341 (F.C.C.)

15 *Obradovic v. Bullmoose Operating Corp*., 2005 CanLII 1605 (BC L.R.B.)

16 *R. v. Pine*, 2002 CanLII 16275 (ON C.A.)

17 *R. v. M. (B.),* 2003 CanLII 413 (SK Q.B.)

18 *Fisher v. Richardson*, 2002 CanLII 653 (BC S.C.)

of responsibility and possibly responding more harshly than they would have if no apology had been forthcoming at all (Latif, 2001, Ribbennolt, 2003).

Legal Apology as Commitment of Change

Weisman (2009) includes as one of the criteria for a valid expression of remorse the extent to which this expression is linked with the willingness of the apologizer to change behaviour and transform her/his character so that the wrongdoing will not be repeated. Here, too, there is a clear distinction between an expression of change intended to reconcile with and provide assurance for the recipient, or intended to demonstrate the good character of the apologizer. In many of the judicial rulings studied, the specific and direct articulation of a commitment of changed behaviour provided credibility for the expression of remorse. However, while this may be one criteria, it was not necessarily a sufficient criteria on its own. Therefore in *Lin vs. Leung* (cited above), an apology was rejected because there was no evidence of defendant's change of conduct. In some cases, an apology could be accepted as given in good faith but still insufficient on its own for relevant charges to be dropped. One judge, hearing an appeal about whether an apology should have been considered for a contempt charge in a prior court appearance, ruled that the apology should have been taken into consideration but still did not, on its own negate the charge[19]. Another judge, also responding to an apology for breaching an injunction against practicing dentistry, acknowledged the sincerity of the apology but ruled that a two-year probation period was required in order to assess change of conduct before a charge of contempt of court could be purged[20].

In several of the rulings studied, the anticipated change of behaviour could also be viewed as something more than proof of the sincerity of remorse; the apology could become the catalyst for the consequential change of behaviour within

19 *R. v. Glasner*, 1994 CanLII 3444 (ON C.A.)

20 *Alberta Dental Association v. Unrau*, 2001 CanLII 315 (AB Q.B.)

and beyond an offending institution. For example, in *Robichaud vs. Brennan*[21], an apology from the Department of National Defense for discrimination against one of its employees was considered appropriate because it "serves a broad educative function … it tells every employee throughout the country and abroad that a prominent institution and employer in our society stands firmly for equality in the workplace."

Legal Apology as Compensation

From a restorative perspective, the act of offering an apology can be seen as a moral act which re-establishes some common understanding of right and wrong between the apologizer and the listener, facilitates the exchange of the power of the victimizer for the shame of the victim, and creates a space for forgiveness and healing to take place. However, within a courtroom context, any attempt to demonstrate goodwill and to make recompense for the harm done is constrained by the need to consider the implications of legal liability and potential demands for compensation.

Taft (2000) decries the "commodification" of apologies, which he defines as the subversion of a moral expression into something to be traded for personal material benefit within a legal context. He cites an example of a Missouri criminal defense lawyer suspended from practice for six months due to contempt of court, but under the condition that a public apology could result in a less severe sentence. The lawyer promptly apologized and the court decision was changed to a public reprimand. When an apology can be used as a market item, it has become something to be bought and sold for a price rather than a significant moral action.

Should apologies be viewed as something distinct from or integrally connected to offers of material compensation for wrongdoing? Taft's concern about treating an apology as a moral act or as a marketable commodity highlights the ambiguity of the relationship between apologies and reparations in other public settings outside the local courtroom.

21 *Robichaud v. Brennan*, 1989 CanLII 145 (C.H.R.T.)

Other researchers disagree about the necessity of linking the apology process to compensation. Alter (1999) includes some concrete form of compensation as one of the essential elements of an apology process. On the other hand, Cunningham (1999) defines the sincerity of an apology in terms of the rebuilding of relationships, concluding that compensation may follow from this but can occur independently.

In the sample of judicial rulings studied here, the offer of an apology had a significant influence on the level of compensation to be awarded but the specific degree of influence varied greatly. The significance of an offer of apology is highlighted by one case where a plaintiff demanded $100,000 in compensation but, upon receiving a counter-offer of $27,500, indicated that this would have been sufficient if accompanied with an apology. Frequently, the apology was only one of several factors used by a specific judge to indicate the apologizer's level of remorse and / or commitment of changed behaviour and therefore the actual influence of the apology on its own is difficult to measure. This influence would also be affected by the context of apology offered to mitigate compensation vs. apology demanded as part of the compensation.

The range of judicial responses is revealing. In *Carter vs. Gair*[22], the defendant offered an apology which was rejected by the plaintiff but the judge responded by dropping the compensation awarded by $500 – from $5000 to $4500. On the other hand, a newspaper's initial refusal to print an apology for a libelous statement resulted in a $5000 increase to a $25,000 compensation award[23]. In another case, the defendant offered what the judge considered a partial apology, retracting a specific libelous statement but ignoring intimidation and hostility that occurred subsequent to the harmful statement. In response, the judge dropped the amount of compensation to be awarded from $12, 000 to $6000[24].

22 *Carter v. Gair*, 1999 CanLII (BC C.A.). This case was an appeal of *Carter v. Gair*, 1997 CanLII 4151 (BC S.C.)

23 *Bains v. Indo-Canadian Times, Inc.*, 1995 CanLII 2180 (BC C.A.)

24 *Kathlow v. Olsen*, 1994 CanLII 934 (BC S.C.)

The demand for partial compensation in response to a partial apology also highlights the dilemma of what Lazare (2004) refers to as a "negotiated apology". While much of the current apology literature treats an apology as a one-time communication which demands a particular type of response, Lazare notes that most of the content of an apology is negotiable and that the negotiation of these points may be the only way for all sides affected by a serious dispute to feel that they can gain something out of it. This is particularly crucial if the parties to the case expect to maintain or re-establish some sort of relationship after the court case ends.

Several judicial rulings provide some intriguing glimpses into the negotiation of compensation in relation to an offered or demanded apology. In *Hodgson vs. CN*[25], the judge explicitly affirmed the negotiation of an apology by stating that the offer of an apology would have a significant impact on the level of compensation to be awarded even if the actual language and wording of the apology still remain to be negotiated. Another libel case was settled after both sides presented their preferred apology wording and demanded this be signed. Eventually the defendant retracted one version and apologized according to the plaintiff's terms; no further costs were awarded to the plaintiff[26]. The negotiation over which version to use had become a crucial aspect of the final settlement decision.

Reconciliatory Process in Adversarial Context

Despite the common public assumption of an apology as the first step toward forgiveness and reconciliation, the nature of the North American adversarial justice system works against the establishment of the kind of setting that could allow this type of apology to be offered and heard (Schneider, 2000, Alexander, 2006). Adversarial legal processes require both sides of any dispute to defend their interests and state their position in the strongest way possible. Any sign of vulner-

25 *Hodgson v. Canadian Newspapers Co.*, 2003 CanLII 44877 (ON S.C.)

26 *Tatum v. Limbrick*, 1994 CanLII 1086 (BC S.C.)

ability in this context is a sign of weakness to be exploited by the opposing side. So the apology, rather than standing on its own as an admission of an irreparable debt, becomes one more tool in the debate about the appropriate amount of punishment and compensation. At the same time, judicial oversight of this adversarial process requires that this process also be geared to portraying the apologizer in the most morally positive terms in the eyes of the judge, hence the imperative for a self-focused rather than self-other-focused process.

Bibas and Biersbach (2004) reinforce this tension in an extensive review of the role of remorse and apology in the criminal justice system, concluding that the emphasis on procedural values such as fairness, efficiency and accuracy sets up direct procedural and indirect contextual barriers to full expressions of remorse and offers of a restorative apology. For example, while legal counsel may be encouraged to negotiate with each other and seek out informal settlements, the defendant's only significant contact with any court actor other than their counsel is within a highly formal semi-public context that does not encourage spontaneous expressions of heart-felt feeling. When an opportunity to apologize is provided, defendants are not able to interact directly with the individuals to whom the apology should be directed. Instead, the apology becomes a stilted formal statement addressed to the judge who must then evaluate the defendant's words and demeanor. Petrucci (2002) also notes that that apology processes appear to have no formal place in criminal law, but strongly advocates that these be used as an effective way of empowering victims and reducing the recidivism of offenders.

One of the judicial rulings reviewed here indirectly addressed this tension by directly comparing the role of an apology offered within a mediation session with the role of a court-ordered apology. "Solutions may be examined in mediation that might only be possible in a confidential environment with the assurance that an offer, proposal or suggestion may not subsequently be used by the other party if the matter returns to litigation. An apology or expression of remorse is

a particularly good example. Because of the law concerning admissions against interest, the adversarial system is often felt to inhibit that kind of communication"[27].

Within civil litigation, however, policy-makers and litigators have begun to encourage the use of restorative apologies by attempting to provide statutory protection for full-fledged comprehensive expressions of remorse and apology. Such legislation in still fairly recent and more research is required to determine the reaction to such apologies by judges and recipients and the degree to which the existence of perceived protection from liability enhances or detracts from the perceived value of the process. According to Robbennolt (2003), a full apology, irregardless of whether it is protected from legal liability through evidentiary rules, does significantly more to defuse disputes and enhance the possibilities of satisfactory settlements than partial apologies deliberately-worded so as to evade expressions of remorse and acknowledgment of responsibility which can be construed as legal liability. Taft (2005), however, is more critical of the value of a protected apology, indicating that the existence of the protection means that the apologizer really displays no moral courage and takes no personal risk in what then becomes another impersonal formulaic legal statement.

Conclusion

The struggle to define and articulate the significance of an apology process in court proceedings indicates the tension between a restorative vs. rehabilitative process within an adversarial context. The restorative potential of this process must be translated into a setting where a judge must evaluate and balance actions, words and motivations of all parties to determine winners and losers.

The judicial evaluation must take into consideration some of the primary aspects of an apology process, including the acknowledgement of wrongdoing, the expression of remorse and responsibility for the wrongdoing, commitment of be-

27 *Marshall v. Ensil Canada Ltd.,* 2005 CanLII 5355 (ON S.C.)

havioural change so that the wrongdoing is not repeated and degree of compensation for the damage done. As indicated in the limited sample of judicial rulings reviewed here, each of these aspects brings its own ambiguities and problems. How explicit and comprehensive must the acknowledgement be in order to make the apology valid? Is an apology sincere if an expression of remorse is demanded rather than spontaneously offered? How can the apology be used most effectively to ensure the wrongdoing is not repeated? How should it be used to respond to demands for compensation?

These issues highlight the deeper issues of the interface between restorative justice processes and retributive justice systems, something that has implications for the evolving relationships of civil and criminal justice systems with mediation programs, circle processes and the like. Much more research on this interface should be done and certainly will be done as this relationship moves forward. As the concept of a legally protected apology continues to gain political and legal currency, the need for such research will only increase.

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