HEALTHCARE MEDIATION AND THE NEED FOR APOLOGIES
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This article looks at the role apology plays in resolving conflicts between patients and doctors. Patients may have a manifest need for sincere expressions of sympathy, which may ultimately help unblock the conflict situation, and even lead to better reparations for the harm done. Moreover, some factors in the current context mean that patients have a very hard time getting apologies. The authors explore mediation as a conflict management mode that is more conducive to apology. Given that mediation still has some limitations in this respect, solutions are put forward to facilitate apology in mediation.

An apology is one possible response to a gesture, injury, oversight or attitude. There are, of course, other possible responses: denial of the problem, downplaying the other party’s pain or even counter-attack. It only takes a few examples from daily life to show us how apologies can influence people. On one hand, think of the spouse apologizing for being late, a restaurant owner who sincerely expresses regret for slow service, or a parent apologizing to a neighbour on behalf of a child who has just broken a window. Then think of these same situations with different responses: a spouse claiming that he was told the wrong time for the meeting, a restaurant owner who defends himself, saying that the wait was not as long as the previous day’s, or a parent who blames the neighbour for not having fenced in his yard, allowing children access to it. With the first type of response, a

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difficult situation is defused, whereas the second and third types of response escalate the conflict.

When the concept of apology is applied to conflict management, especially in a mode such as mediation, we can grasp its full reach in terms of unlocking a conflict situation. This is even more true in the context of a conflict between a patient (or a member of the patient’s family) and a physician. In fact, the desire for an apology or another kind of sincere expression of sympathy may be at the heart of disputes in this field.\(^1\) The emergence of apology laws in Canada and the United States also attests to this phenomenon.\(^2\) Apologizing can be the key to resolving the impasse created by a conflict situation. It thus appears essential for mediators to have a thorough grasp of the psychological and legal aspects of apology in mediation.

This article first reflects on the role of apology in conflict resolution, primarily in the field of medicine. The goal is to pinpoint the needs that underlie the demand for an apology, as well as the characteristics of an apology that is effective at defusing a conflict. We then discuss apology’s place in the mediation process, as well as exploring mediation’s advantages and limits in terms of the dynamics of apology. Lastly, we propose strategies for better incorporating apology into mediation. This approach allows the mediator to better guide the apology process and maximize the use of apology in overcoming impasses in a conflict.

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The role of apology in conflict resolution

When we focus on it, we are surprised to realize how many victims – or people who believe themselves to have been harmed – express a need to hear an apology. The media is full of such examples. From victims of sexual abuse to those injured in the contaminated blood case, a very broad range of harm brings out this need for apology. Yet not much attention has been paid to this aspect of conflict in the legal literature.

This may partly be due to the fact that, in North America in particular, the legal system and law in general has not been that interested in the role that apology plays in a dispute. Nonetheless, the topic seems to have attracted greater interest in the last few years; there seems to be greater appreciation for the role that apology can play in resolving conflicts. This is particularly true subsequent to the emergence and use of mediation as a procedure for dispute settlement, as mediation emphasizes the relationship between the parties.

For a better understanding of the role apology plays in conflict resolution, it is important to understand the need that underlies the demand for an apology, as well as the features of a sincere, effective apology. Moreover, as not all forms of apology can defuse conflicts, we will also look at the qualitative aspect of apologies. Lastly, we will briefly locate the repercussions of handling the need for apology in the legal system. We will look at some examples from Québec and Canadian law; however, the observations and recommendations can be extrapolated to other legal systems due to concerns that are shared by doctors, patients and all persons subject to trial.

3 For example, see Judith Lachapelle, “Thérapies agresseurs-victimes: salutaires ou risquées?” La Presse (7 February 2009) A2; “Les victimes d’abus sexuels exigent de vraies excuses” Le Métro (31 July 2002); Don Murray, « Montréal Ce Soir » Radio-Canada (29 April 2002); Marcel Pedneault & Alain Gravel, « La 400e d’Enjeux » Radio-Canada (6 May 2003).


5 For example, Ebert, supra note 2; Ashley A. Davenport, “Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation Malpractice Cases” (2006) 6 Pepperdine Dispute Resolution Law Journal 81; Robbennolt, supra note 2.
The need to receive an apology

At the outset, let us note that it would likely be more relevant to apologize in the context of a conflict with substantial emotional repercussions for the parties. Emotions are particularly strong when the issues associated with the conflict concern integrity, dignity and pain (psychological or physical). Given the nature of the caregiver-patient relationship and repercussions of the harm done as a result of a medical accident, apology’s role seems especially relevant to this type of dispute.6

Although some kinds of harm may be impossible to remedy simply by saying “I’m sorry,” others can at least be defused by a sincere apology.7 The fact that some people choose to undertake legal proceedings in order to get an apology attests to the importance of the need, as well as the subjectivity of the reasons, that may be driving patients and families at that time.

Although there is no shortage of examples to support this claim,8 the testimony of a husband whose wife died as a result of an overdose of medication is particularly eloquent. Subsequent to the unfortunate events, the

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husband decided to retain a lawyer to institute proceedings against the doctors who were responsible. Moreover, when the man was questioned about his motivation, he said that he was not really interested in the money. Rather, he wanted the doctors to apologize. Regardless of the high cost of his decision to undertake legal proceedings, this is what he had to say: “That’s what I need, and that’s why I’m doing what I’m doing. So we have to sue. I’ve lost my wife and I think I’ve got the stomach for it because of her death.”

Apologizing could have a big impact on resolving a conflict and remedying harm. Expressing sympathy about what the patient and the patient’s family have experienced may take on great meaning and provide moral reparations for an injury of that kind. In some cases, the injured person simply wants the other party to admit that they acted wrongly, and that is all it will take to iron out a conflict or reach an agreement. Apologies provide comfort and soothe wounds. Sometimes, they are the cornerstone to solving conflicts.

The need for an apology generally stems from a need to have one’s situation and pain acknowledged. For example, if a patient sees the doctor as insensitive or indifferent to what he is going through, the conflict could intensify. If he fails to apologize, the party “at fault” could be showing a deep lack of respect and consideration for the injured person’s pain, adding to the damage already done and helping to escalate the conflict. Apologizing can also fill another major need felt by patients and their families: assurance that the error will not be repeated. In fact, an apology can act as acknowledgement of the error and the harm caused and indicate awareness and a change in behaviour. What is involved here is a need to know that a given incident – an injury caused by substandard care, for example – will not happen to someone else. This allows the patient and the family to give meaning to resolving the conflict.


9 “In the Doctor’s Corner” *CBC News* (11 February 2003), online: cbcnews


Lastly, note that the apology can also be beneficial to the person who is doing the apologizing. In fact, we believe it is false to think that doctors are not affected by the errors they make – even though medicine is a fallible science by definition and the law can only compensate for malpractice, not the error. In general, doctors try to cure people. Seeing the opposite – seeing the patient’s condition worsen – may be hard to live with and may create intense emotional distress following a medical accident. In addition to easing the victim’s frustration, apologies can also help ease the doctor’s sense of guilt and help provide some relief, in the event that the doctor feels guilty as a result of the events. Forgiveness – or the onset of a forgiveness process – often stems from the apology, which can be beneficial to a party who feels somewhat guilty.

The concept of “effective apology”

Now that the need to receive an apology has been explained, we must look at the kind of apology that can meet this need. The term “apology” as we are using it must be interpreted broadly. It is not restricted to formulations that explicitly refer to an apology (“I apologize for …”). It also includes the various sincere expressions of sympathy or regret that one person can show someone else. However, it is clear that an apology must go beyond subtle, nebulous intimations that are open to a variety of interpretations. Similarly, the term must not be construed here according to its legal meaning, i.e., the kind of apology that can be invoked as a defence in the context of a legal proceeding. Instead, our remarks concern apologies that can be made in the course of daily life.

Apologies usually contain one or more of the following components: admission of responsibility, expression of regret for the harm done, and gestures or an expression of sympathy for the harm experienced by the other party. While the first component concerns responsibility or guilt, the other two primarily deal with the “offender’s” feelings. To illustrate the distinction, Cohen invokes the example of a car accident. With respect to the

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14 Pavlick, supra note 4; Marcus et al., supra note 8; Gallagher et al., supra note 6.
15 Cohen, supra note 11; Cohen, supra note 7.
first component, the offender could say: “It’s my fault; I was not watching the road.” With respect to the second component, the offender could say: “I’m sorry this happened.” Lastly, the third component could be expressed by: “I hope you are back on your feet quickly.” In short, apologies can come in different forms and have different consequences. In mediation, what we are primarily interested in is the expression of regret and sympathy.

While the acknowledgement of responsibility is interesting, the expression of regret and sympathy is probably a more realistic goal in the context of mediation. Furthermore, one recent workplace mediation study has shown that acknowledging one’s unintentional impact on another is just as effective as recognizing one’s intentional faults, which suggests that simply recognizing the other’s suffering might be enough to bring about some level of reconciliation between parties.

Doubtless the quality of an apology and the identity of the person making it will have major repercussions for the comfort the apology can provide. In particular, the sincerity of the apology appears to be critical. We need simply consider partial apologies or apologies that are so qualified that they no longer meet the definition of an apology or apologies that are solely made to influence the amount of damages or that are obviously the result of pressure and do not appear convincing. Moreover, although we can speculate about various “sincerity indexes,” the primary judge of sincerity of an apology is, first and foremost, the recipient. Similarly, for an apology to have any beneficial impact, it should probably be made by the person with the moral authority to make it. Thus, in some cases, the patient will want the doctor himself to make the apology; the patient will not agree to have an intermediary, such as a lawyer, handle the task.

However, an apology is not always enough to remedy all of the harm caused. The patient’s condition and the status of the conflict can have a substantial influence on needs. In some cases, for example, the conflict may have reached such a pitch that any form of sympathy shown by the doctor will be seen as insincere, or even provocative. The patient may also only want financial compensation for the damage, without much regard for the doctor’s remorse. An apology will not do much to compensate for

17 Lee, supra note 4; Pavlick, supra note 4; Robbennolt, supra note 2.
18 Lee, ibid.; Pavlick, ibid.
physical or financial harm. Let’s look at the case of a patient whose condition requires specialized medical equipment following a therapeutic intervention that went wrong. In other words, compensation will sometimes be required to remedy harm done. Also, apologies can represent an additional remedy rather than simply an alternative remedy.

Lastly, despite the potential benefits of making an apology in some circumstances, the fact is that this type of action is fairly rare, especially in medicine. Aside from the legal obstacles (the fear that apologies will be construed as an admission of liability), which we will look at later, some psychological barriers may account for hesitance about apologizing to someone, despite the potential benefits. This difficulty seems to be partially due to cultural reasons, since apologizing is a much more routine phenomenon in Japan than it is in North America. While the Japanese find apologizing much less shameful than going to court, the reverse seems to be true for North Americans. Similarly, in legal culture, there is no advantage for lawyers to suggest to clients the possibility of asking for or accepting an apology as reparation. This is true for a variety of reasons, including ignorance of the apology’s role and importance under some circumstances and the habit of picturing compensation in terms of money and legal rights.

The justice system and the apology

The potential benefits of apologizing in a conflict situation are often obscured by the justice system. This seems reasonable, given the system’s purposes. The fact that this means of conflict resolution focuses primarily on financial compensation for harm done is partially due to cultural and legal reasons and serves the purpose of convenience. Traditionally, the law and legal professionals have not paid much attention to the emotional component of conflicts. In addition, as we will later explore, the law limits the remedies that courts are authorized to award. In matters of negligence, courts can award damages to a successful plaintiff, but they cannot order an apology. Moreover, drawing up an inventory of potential restorative solutions in each case seems utopian, especially given the fact that the system must provide clear benchmarks for all parties; it is hard to picture judges being able to

19 Wagatsuma & Rosett, supra note 7.
inquire about each party’s real needs and thus find solutions, including the possibility of apology, that will better meet his needs. The complications in which all parties would then be involved are hard to imagine. Given the current status of the situation, psychic harm is certainly compensable, but essentially financially.

In some cases, unless the need for apology is addressed, the possibility of achieving complete, satisfactory reparations for the damage is limited. Moreover, converting all damage into a pecuniary claim, regardless of the nature of the damage, may inflate the amount of some claims, which could have received another type of compensation based on the claimant’s actual needs. Far from being an incentive for apologizing, the monetary inflation of claims usually has the reverse effect of crystallizing positions. The “if I apologize, he’s going to want more” myth comes to the fore; it is easy to see how a vicious circle of escalating conflict begins. In our view, mediation can help to defuse such situations.

**Apology and the mediation process**

Given the potential that apologies hold for conflict resolution, as well as the legal system’s inability to encourage this type of reparation, it becomes necessary to explore alternative solutions. In this section, we will look at how mediation offers one positive avenue in this regard. However, it is not enough to explore the advantages of mediation as a process for creating a framework conducive to making apologies. We must also explain why the mediation framework may not be enough to create a climate conducive to making apologies.

**Mediation’s advantages with respect to apology**

Firstly, when there is little or no dialogue between the parties, this reduces the possibility for apology substantially. This communication gap, especially in the context of a conflict, is often lamented by patients and their families. Mediation is a mode that is based on establishing a dialogue between the parties. Personal, face-to-face contact can encourage consideration of the need for

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apology; also, the apologies that may be made (see above) could be of higher quality. Establishing communications between the patient and doctor could raise both parties’ awareness of their situation and reciprocal emotions.

Secondly, mediation privileges negotiation that focuses on the parties’ interests rather than their positions or rights. This feature of mediation makes it a vehicle that is especially conducive to apology. There is a much greater opportunity for exploring a wider array of needs outside the framework of the legal system and, as a result, a patient’s need to hear an apology can be given greater consideration. Moreover, the fact that mediation is not part of an adversarial debate that puts the focus on the parties’ errors can create a climate that makes it easier to apologize. Pavlick sums this issue up, stating: “Apology is an interest-based remedy, and reconciliation is an interest-based outcome.”

Thirdly, mediation provides professionals with the opportunity to apologize “safely,” given the confidentiality of the process (see below for its limits). This advantage can help ease the “insurer's” fears, the fears of the lawyers who are to defend the professional, and the professional’s own fears. The greater protection the mediation mechanism provides allows the doctor to apologize or express sympathy in some other way to the patient or his loved ones following an adverse event. This could also help reassure insurers, as insurers can be present when the apology is made and have some control over how the apology is delivered.

A very interesting fact that we stressed earlier, one that attests to the growing recognition of the role apology plays in conflict resolution, is that some Canadian provinces and U.S. states now have apology laws that provide legal protection for the apologies made by individuals and sometimes corporations. Such laws are designed to keep an apology from giving rise to legal liability by making the apology inadmissible as evidence, or specifying that it does not constitute an admission of liability. However, the legislation varies in terms of the scope of its protection; people who want to take advantage of it will be well advised to first read the applicable legislation, if any, in their province or state. These laws can encourage the creation of a practice of apologizing when an adverse event occurs in health care facilities, for example. We will have the opportunity to take a more in-depth look at the relevance of the legislative solution at the end of this article.

23 Pavlick, supra note 4 at 862-863.
Fourthly, as mediation is not restricted by procedural aspects, it also offers the opportunity to intervene earlier in conflict resolution. While the services of a mediator are always an option, many parties, especially those embroiled in medical disputes, prefer to wait before considering such – either in order verify the earnestness of the proceedings, to understand the extent of the damages (especially with respect to young children), or to secure expert opinions on causation. But early involvement in a dispute resolution process could help the conflict be resolved before it peaks, and greatly facilitate an apology. Once a conflict is too far along, the victim or alleged victim is generally unreceptive to any type of apology and the doctor, for his part, may be less inclined to make one. Moreover, an apology that occurs early in the conflict can more quickly alleviate the pain of a doctor who may want to make an apology so as to decrease or eliminate a feeling of guilt.

Fifthly, mediation can not only promote apology during the process, but also make it possible to incorporate apology into the final agreement. In fact, the patient (or, more broadly, the respondent or “injured party”) may want the doctor (or, more broadly, the health professional) to make a written apology, or the agreement could include a remark to the effect that the doctor apologized during mediation. This phase could be important in arriving at a solution that is satisfactory to both parties. Mediation thus opens the door to a wide array of potential solutions, subject to the parties’ assent, making it a conflict resolution mode that is very conducive to apology. Note that this possibility is not included in legal remedies, and it would therefore not be possible to demand it under this mode.

Mediation’s limits with respect to apology
While mediation seems to create a framework that is conducive to achieving moral reparations, including apologies, it still has some limits that need to be explored. In fact, experienced mediators are well aware that the mediation framework does not lead to spontaneous apologizing. A number of obstacles can hinder the effectiveness of the process of making apologies between parties, and lead to an impasse in the dynamics of the conflict.

Firstly, the strong fears of medicolegal disputes, combined with the unclear – or perceived unclear-protection – of confidentiality in mediation

can be an obstacle to making apologies. In fact, although it is not certain that an expression of sympathy can later be construed as an admission of liability (extra-judicial admission), professionals may fear that apologies will be used as evidence of liability – or be used in more subtle ways – in the framework of legal action, especially if no apology law is in effect in that province or state, or if the law only provides partial apology protection. Strongly prompted by the insurer, a professional will thus be very hesitant to make any statement that could later compromise his defence in a legal proceeding, or which could cause him to lose his professional liability insurance – considerations likely to discourage more than one sympathetic impulse. Moreover, as the level of harm increases, the need for moral reparation can become clearer for the victim. Yet as the level of harm increases, an apology puts the professional in increasing jeopardy. As for the principle of confidentiality in mediation, this is a generally acknowledged guarantee, but one whose parameters and scope can be, in some respects, fuzzy (see “Inserting an apology clause,” below). Potential uncertainty on this matter could justify some reticence. The scope of the vagueness could vary from jurisdiction to jurisdiction and, if applicable, the mediator must mention it to the parties, ideally prior to mediation, if not at the beginning of the process. That being said, with the development of mediation, the confidentiality of the mediation process becomes further recognized in many countries and clearer in its scope of application.

Secondly, as mediation is a resolution mode that is fairly new to the field of medicine, it could be underused due to the suspicion it generates. Similarly, the role of apology in resolving a conflict is, to date, underestimated and not well known; the parties may not think about the possibility of asking for or, in particular, making an apology. These “cultural” obstacles

25 See Golberg et al., supra note 10; Karl H. Larsen, “Admissibility of Evidence Showing Payment, or Offer or Promise of Payment, of Medical, Hospital, and Similar Expenses of Injured Party or Opposing Party,” Annotation, (1996) 65 A.L.R. 932.
27 Régis, supra note 6.
must not be neglected. A lack of familiarity with the mediation process as well as with the effectiveness of apology in dissolving impasses in conflicts may be an insidious obstacle. In fact, we cannot think about resorting to something we are not aware of. Combined with uncertainty about how the apology will be used, a lack of familiarity can lead to a substantial conscious and unconscious block.

Thirdly, the mediator’s personality or method can also be an obstacle to the making of apologies in the mediation process. If one party needs an apology, the mediator must be comfortable with allowing the parties to talk about their emotions and interests. Umbreit differentiates between two categories of mediators: the traditional, or classical, mediator and the humanistic-transformative mediator. The first type of mediator is more directive and focused on the problem and reaching an agreement. This mediator has less tolerance for the expression of emotions. The second mediator, who is not directive, focuses on dialogue and the relationship between the parties, and acknowledges the importance of emotions. The second type of mediator will do more to encourage apology.

Similarly, Roberge suggests another mediator typology, based on an empirical study of Canadian judges engaged in judicial dispute resolution. Three types of mediators emerge from this study: 1) Legal expert and risk manager; 2) Expert in problem solving and creating integrative solutions; and 3) Participatory justice facilitator. Using this typology, only types 2 and 3 would be likely to encourage the making of apologies during a mediation process. The person looking for an apology should ensure his vision of the process matches that of the prospective mediator.

Lastly, another obstacle to apologizing may be that the cause of the harm is unclear. Did the harm result from an underlying illness rather than the care received? Nevertheless, given the potential benefits of apologies and the very conducive environment for them created by mediation, we will next examine potential solutions for dealing with the limits of the mediation process.

28 Pavlick, supra note 4 at 863.
Strategies for promoting apology in the mediation process

Three kinds of solutions are set out in this article for encouraging greater recourse to apology in mediation. First, the mediator’s training and insertion of clauses in the mediation agreement, designed to increase safety guarantees for apologies, seem to provide flexible, immediate solutions. After that, the option of legislation should be considered as a more global and systemic solution to the problem.

Mediator coaching

We previously talked about the fact that lack of awareness about the role of apology in terms of needs as well as in terms of potential repercussions for resolving disputes may contribute to underuse of apology in the mediation process. Here, the mediator’s guidance can be an important tool in developing apologies. The mediator can act in several ways to facilitate the apology process.

First, the mediator can be in the best position to identify the need for an apology, which could go completely unnoticed by the defendant. The mediator can also suggest less compromising ways of making an apology to the defendant, if the defendant is concerned. For example, the mediator can suggest some apology formulations that are less legally prejudicial, such as “I’m sorry about what happened,” rather than “I apologize for my mistake.”

Another strategy for the mediator would be to convene a caucus with one of the parties and reiterate the negative impacts the other party has incurred. He then takes the opportunity to verify whether or not the party is aware of how his or her action contributed to the conflict. To prevent the parties from losing face, the following question may prove to be useful: “If you had known of the negative impacts that your actions would have on the escalation of the conflict, would you have proceeded differently?” The idea is to focus on the learning process to make it easier for the parties to accept their respective share of responsibility in the conflict.

Still, partial apologies, or apologies that are made with too much reserve, may have less reach than a true apology. In fact, an apology that is

31 See Cohen, supra note 11.
too moderate or controlled could be seen as insincere. The mediator must also take this fact into account in the assistance provided in formulating an apology. Here, of course, the mediator is working in caucus, preparing to return to a plenary session in which apologies could be presented to unblock the litigious situation.

To the party who is waiting to hear an expression of regret or sympathy, the mediator could explain the doctor’s reticence about apologizing or the nature of the circumstances surrounding the apology’s “timidity.” For example, stressing that the professional’s difficulty in apologizing is not necessarily intentional but is rather due to outside influences, such as a legal advisor’s, can partially defuse the conflict. The mediator can also develop some skills to help better identify cases in which this type of reparation is more suitable, as well as the best timing for apologizing.

**Insertion of an apology clause**

The principle is well known and some legal decisions have also confirmed it. As mentioned above, however, it is not possible to ensure that confidentiality is respected under all circumstances. This uncertainty, combined with an especially strong fear of legal proceedings in conflicts between doctors and patients, could, in some parties, create a fear about making certain statements on the nature of apology in mediation. It could thus be appropriate to think of alternatives that will create more security for the party who is thinking about apologizing. A contractual solution could be useful here.

This option would involve adding an apology clause to the mediation agreement. The clause must be designed to increase the security guarantees on making apologies in the mediation process, and thus encourage and reassure the parties. The clause could have two components, one on the scope of the apology itself, and the other on the scope of the guarantee of confidentiality in mediation.

For example, with respect to the first component, the clause could be written as follows:

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33 For example, see *Droit de la famille-2250 (SOQUIJ)*, [1995] R.D.F. 524, [1995] J.Q. no 3159 (C.S.); *Birdair, supra* note 26; *Droit de la famille – 082914, 2008 QCCS 5452*. The guarantee of confidentiality may also be enshrined in legislation; in Quebec, for example, see the Code of civil procedure, R.S.Q., chapter c. 25 at article 815.3.
The apologies or expressions of sympathy or regret made by either party during the mediation process shall not constitute a declaration, acknowledgement or extrajudicial admission of malpractice, administrative or other error such as shall incur a party’s liability in a proceeding to settle a dispute.

It would also be possible to add such a guarantee to the agreement reached by the parties at the end of the process. If making a written apology is part of the terms of the agreement, the agreement could also state that this apology shall in no way constitute an admission of liability.

As for the second component, the scope of confidentiality protection and its corollary, the non-compellability of the mediator, it is up to the parties involved to determine its exact scope. For example, the parties could specify whether confidentiality guarantees apply to discussions with spouses and family members, or if disclosure of some information to loved ones is authorized (and then require that the latter sign a confidentiality agreement, if applicable). The clause could also state whether some information may be made public and if confidentiality applies to all documents, statements, proposals, transcripts issued or actions taken during sessions. The above must, of course, stay within the limits of the law and public order. The parties can then opt to be bound by existing agreements of the type found at most reputable private mediation centres. While the scope of existing models seems fairly wide-ranging regarding the information covered by the confidentiality guarantee, as an additional precaution, it might be advisable to specify that apologies, admissions and any form (gesture or verbal) of expression of sympathy are confidential and cannot be used as evidence in any other proceeding.

It is best for the contract clause to give the parties a lot of leeway, enabling them to establish the safeguards they deem to be necessary, or even modify them along the way, if necessary. Such clauses do not deny parties the opportunity to disseminate some information, such as the content of the agreement, if they judge it to be useful, or if it is an explicit condition of the agreement. For example, a patient and doctor may agree that the content of the agreement containing the written apology can be disclosed to specific people, such as family members. The mediator could suggest adding such a clause at the outset, in the initial mediation sessions. Not only could this approach bring the potential for apology to the parties’ attention, it could also allow them to talk about it.

Finally, in our opinion, not all information is protected in mediation. In fact, information that has been obtained legally, through evidence, does not become confidential just because it has been mentioned in media-
Doing otherwise would greatly limit a party’s potential evidence in the event that legal proceedings were to continue, making mediation a real “escape hatch” in terms of evidence. For example, the fact that medical expertise has been presented in mediation would not keep one party from showing evidence on the same facts in the framework of a proceeding.

Legislative approach

In a broader, more systemic framework, a legislative solution is also desirable. Since 2006, there has been some movement to implement this option in Canada and some American states, as mentioned above. Apology laws are perhaps a response to perceived, rather than real, risks of liability. The legislative option strengthens the contract option, which can be subject to a court’s judgement in various jurisdictions, a fact that could diminish anxiety in the parties, especially given the fact that jurisprudence has, so far, had little to say about apologizing as evidence of liability.

Would not encouraging rather than discouraging the expression of sympathy be a substantial improvement to our system? Can it be acceptable, if only morally, to encourage a system that works against sincere expressions of sympathy to victims and transparency? The goal seems commendable enough to make the legislative option far-reaching, especially in light of the increasingly eloquent realization of the need for greater transparency and communication between doctors and patients in the context of therapeutic accidents. In fact, certain provinces have increased the legal obligations to disclose harm done to patients. For example, Ontario now requires the disclosure of “critical incidents” to patients; in Quebec, it is obligatory to disclose “any accident” having occurred during the delivery of services.

As with contract clauses, the legislative option can have two facets. Firstly, it would be useful to consider a provision that explicitly states that an expression of sympathy is not admissible as evidence of malpractice. While

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34 See Thibault, supra note 26 at 161; Birdair, ibid.
36 Ministère de la santé et des services sociaux, supra note 6.
37 See Excellent Care for All Act, 2010, s. 8 (2) para 3 and Hospital Management, R.R.O. 1990, Reg. 965, s. 2 (5.2); An Act respecting health services and social services, R.S.Q. c. S-4.2, s. 8.
this provision could explicitly target therapeutic accidents, extending its application to other, similar sectors could also be anticipated; however, that is not the goal of this study. For example, as has been mentioned, in some Canadian provinces and American (states such as Massachusetts), the law clearly states that an expression of sympathy cannot be used as evidence of malpractice in accident cases. Secondly, it could be desirable to broaden the confidentiality guarantees applicable to mediation, in particular.

This avenue could help raise awareness of the important role apology plays. Similarly, the fact that a legislative text explicitly acknowledges a guarantee could prompt the parties to make greater use of the mediation process, while acknowledging the special status of relations between the parties and the mediator in this context. Note that the legislative option should not tie the hands of parties, but leave them ample room to negotiate contractually. It is simply a matter of specifying the weight and overall scope of the confidentiality guarantee or interpretation of apologies used in evidence in this context.

Conclusion

In short, apologies meet an important but too often overlooked need of patients and their families who have been the victims of a therapeutic accident. An apology can provide moral reparations for a psychic injury, for which financial compensation, though necessary, cannot always atone. Apologies should thus play a greater part in the compensation and conflict resolution process. Moreover, various fears that apologies raise limit such a development. Among them are a lack of awareness of the role apology plays and the fear that an apology will later be used against its author in legal proceedings as an admission of liability.

Given such resistance, the mediation process provides attractive opportunities for encouraging apology. Still, some obstacles in the process make it necessary to look for effective solutions. Among them, solutions that are designed to provide for better guidance from the mediator and to bolster contractual and legal security guarantees offer promise. Note, however, that this article suggests various solutions to mediators who want to encourage apology: unfortunately, this does not guarantee the quality of the apologies that will be made. In particular, it is not possible to make sure apologies are sincere, a factor that is sometimes critical to the impact they will have on the injured party.

In conclusion, although this article has focused primarily on the role of apology in conflicts between patients or patient families and doctors, its recommendations can be extrapolated to other conflicts involving a moral
or psychic injury and a personal relationship between the parties. Cases of harassment, labour relations and restorative justice generally may benefit from the means of reparation suggested here. In general, we can claim that there could be a need for apology in any conflict that arises from an injury and pain. From this perspective, the strategies suggested here could be applied to other contexts.