

Apologies, Mediation and the Law: Resolution of Civil Disputes

ROBYN CARROLL*
ALFRED ALLAN*
MARGARET HALSMITH*

Carroll, R., Allan, A., Halsmith, M., 2017. Apologies, Mediation and the Law: Resolution of Civil Disputes. *Oñati Socio-legal Series* [online], 7 (3), 569-600. Available from: <https://ssrn.com/abstract=3029486>



Abstract

Mediation is a process that provides opportunities for parties to civil disputes to engage in dialogue that can satisfy their expectations and needs for apologies. While the literature on law and apology identifies why and ways in which the process can be beneficial, there are concerns associated with apologies offered in mediation. This article provides an overview of the apology and mediation literature in which these benefits and concerns are explored and the psychological research that reveals the complexity of apologies. We use case examples that illustrate this complexity and indicate ways that mediators working with parties in mediation who have indicated that apologies are important to them, might work with this. The article also reflects on the ways that the law interacts with apologies in the mediation of private law disputes and concludes that the law plays a significant indirect role in supporting parties who seek an apology as an outcome of mediation.

Key words

Apology; Mediation; Law; Disputes; Resolution

Resumen

La mediación es un proceso que ofrece a las partes implicadas en disputas civiles la oportunidad de entablar un diálogo que permita satisfacer sus expectativas y necesidades de disculpas. Mientras la literatura sobre derecho y disculpas identifica el porqué y las formas en las que el proceso puede ser beneficioso, existen preocupaciones asociadas a las disculpas ofrecidas en la mediación. Este artículo ofrece una visión de la literatura sobre disculpas y mediación, que analiza estos beneficios y preocupaciones, y de la investigación psicológica que muestra la

* Robyn Carroll is a Professor of Law at the University of Western Australia. Robyn teaches and researches civil remedies, dispute resolution, contracts and family law and has published extensively on apologies in the law. Robyn can be contacted at the Law School, The University of Western Australia. UWA Law School, M253, 35 Stirling Highway, Crawley, Perth, Western Australia, 6009; robyn.carroll@uwa.edu.au

* Alfred Allan has qualifications in law and psychology and is professor at Edith Cowan University where he has been teaching psychology since 1997. He is the author and co-author of several books, chapters and refereed articles in legal, psychological and psychiatric journals. School of Arts and Humanities, Edith Cowan University, 270 Joondalup Drive, Joondalup, WA6027, Australia. a.allan@ecu.edu.au

* Margaret Halsmith is Principal Mediator of Halsmith Dispute Resolution, Western Australia and Chair of Resolution Institute, the Australian & New Zealand membership organisation. Margaret can be contacted at PO Box 193 Wembley Western Australia 6913; margaret.halsmith@HDR.net.au



complejidad de las disculpas. Se usan ejemplos de casos que ilustran esta complejidad e indican formas en las que podían aplicarlos los mediadores que trabajan en mediaciones en las que las partes han indicado que las disculpas son importantes para ellos. Este artículo también refleja las formas en las que el derecho interactúa con las disculpas en la mediación entre disputas de derecho privado y llega a la conclusión de que el derecho juega un papel indirecto importante en apoyar a las partes que buscan una disculpa como el resultado de la mediación.

Palabras clave

Disculpas; mediación; derecho; disputas; resolución; resolución de conflictos

Table of contents

1. Introduction	572
2. Overview of the research literature relating to mediation, apologies and law ..	573
2.1 Mediation and apologies.....	573
2.1.1. Themes emerging from the apology and mediation literature	573
2.1.2. Features of mediation that predispose it to being a process conducive to constructive apologies	574
2.1.3. Process design, the role of the mediator and approaches to mediation	574
2.1.4. Mediator interventions and skills	576
2.2. Psychological research on apologies	576
2.2.1. Features of the apology.....	576
2.2.1.1. The sincerity of the apology	576
2.2.1.2. The content of the apology	577
2.2.1.3 The focus of the apology.....	578
2.2.2. Variables that influence injured parties' requirements of apologies	578
2.2.2.1. Personal variables.....	578
2.2.2.2. Injured parties' perceptions and attributions	579
2.2.2.3. The relationship between the parties.....	579
2.2.2.4. The wrongful behaviour.....	579
2.2.2.5. Nature and severity of the harmful consequences	580
2.2.3. Implications of the research for apologies in mediation	580
2.3. Apologies, mediation and law	581
2.3.1. The dispute resolution role of law – a process focus.....	581
2.3.2. The rights enforcement role of law – a remedial focus.....	582
2.3.3. The regulatory role of law – a standards focus	582
3. From research to practice – mediation and apologies in legal dispute resolution	582
Case example 1 – A franchising dispute.....	583
3.1. Complexity of an apology	584
Case example 2 – A child sexual abuse case	585
3.2. Components of an apology	586
Case example 3 – A workplace dispute.....	586
3.3 Composition of an apology	588
4. Apologies and mediation - revisiting the themes that emerge from the literature	588
Theme 2: the value of apologies will be lessened if they are legally protected and mediation is used for instrumental or strategic purposes	589
Theme 3: Mediation can be used oppressively and result in unfair outcomes and re-victimisation of parties	590
6. Conclusions.....	590
References.....	590

1. Introduction

Mediation is a process that provides opportunities for parties to civil disputes to engage in dialogue that satisfies their expectations and needs for apologies (Riskin 1982, Stephen *et al.* 1987, Cohen 2000, Bolstad 2000, Schneider 2000, Latif 2001, Pavlick 2003, Foong 2007). This article reviews the literature on apologies and mediation, in particular the reasons why the process can be beneficial and concerns associated with apologies offered in mediation. We refer to psychological research that reveals the complexity of apologies and, using three case examples from mediation practice, discuss the application of this research and scholarship to the mediation of civil disputes where one or more of the parties has indicated at the outset, or early on, that apologies are important to them.¹ The aims of the article are to provide further insight into apologies in mediation practice and to identify the ways that the law interacts with apologies and mediation of civil disputes.

The article is structured as follows. In this Part, we introduce the article and explain what we mean by the words 'mediation' and 'apology'. Part 2 provides an overview of the research and literature from the connected fields of mediation, psychology and law. In this Part we first identify three broad themes that emerge from the mediation and apology literature. We also refer to the key features of mediation, process design and mediator interventions and skills that are central to the process. Second, we review the psychological research into peoples' perceptions of apologies and provide a framework for understanding their experience of apology. Third, we identify a number of legal issues raised by the apology and mediation literature and identify three distinct roles played by the law in this setting. In Part 3, we use some illustrations from the mediation practice of one of the authors to discuss and illustrate the complexity of apologies in the light of the research presented in Part 2. In Part 4 we revisit the themes identified in Part 2 in view of the discussion in Part 3 and in Part 5 we offer our conclusions.

We use the Australian National Mediator Accreditation System (NMAS) Practice Standards definition of 'mediation' in this article to describe a facilitative process 'in which the participants, with the support of the mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision' (MSB 2015, Standard 2.2).² In facilitative mediation, the mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted (NADRAC 2003, p. 9).

Much has been written about the meaning of apology from a number of discipline perspectives including sociology (Tavuchis 1991), medicine (Lazare 2004, 2006), philosophy (Smith 2008), psychology (Allan 2007, Slocum *et al.* 2011) and law (Vines 2007, Carroll 2010). In this article, we work with a meaning of apology that recognises that there are components of an apology and that what constitutes an apology in a particular situation and context is highly variable. There is consensus that a full apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the victim and acknowledges the wrongdoer's transgression. For some, it is important that the apology also offers some form of recompense and a commitment to change in the future. Psychological research establishes that what constitutes an acceptable apology is a unique and subjective experience for each individual. Exactly which components need to be present for an

¹ We confine our analysis in this article to cases where one or more of the parties has made known to the mediator that apologies are important to them. This advance notice on the part of the mediator has implications for the way a mediator will approach the mediation from the outset. Considerations that might apply specifically to apologies offered spontaneously are not discussed although many of them will be the same as in the scenario we are discussing.

² In this article we use the word 'parties' to refer to 'participants' in mediation.

apology to be beneficial in any particular circumstance will depend on many variables. We discuss the research and these variables in Part 2.2 of the article.

2. Overview of the research literature relating to mediation, apologies and law

2.1 Mediation and apologies

Mediation is a process that plays a prominent role in many legal systems around the world. For parties drawn into the legal system in common law countries it provides an alternative to traditional adversarial legal processes in which the judicial outcomes of disputes are limited to legal remedies that can be imposed on them. With this in mind, a number of scholars have proposed mediation as an ideal forum for apologies to play a role in the resolution of civil disputes, (Levi 1997, 2000, Latif 2001, Halsmith 2002, Pavlick 2003, Raines 2005, Foong 2007) particularly in the resolution of medical disputes (Kellett 1987). There is empirical evidence that parties are interested in receiving apologies in medical (Relis 2009) and anti-discrimination cases (Allan *et al.* 2010).

2.1.1. Themes emerging from the apology and mediation literature

A number of themes emerge from the literature. The first theme is that mediation is an ideal forum because it provides an opportunity for meaningful apologies to be given which can be a catalyst for resolution, forgiveness and reconciliation. Pavlick (2003, p. 82), for example, sees mediation as the 'likely forum for apology' while Alter (1999, p. 25) writes that 'non-court based, alternative dispute resolution (ADR) processes offer greater hope and potential for a genuine apology process to unfold'. Latif (2001, p. 296) concludes that third party involvement may facilitate offer and acceptance of an apology in mediation, for example, that otherwise would not occur because although the parties may be willing to apologise there is some miscommunication of the term. There is, however, recognition by a number of commentators that apologies offered in mediation are seldom 'Happy Ever After apologies'. Levi (1997, p. 1175) uses this latter term to describe the rare situation where wholehearted remorse is achieved. Levi suggests additional categories of apologies in mediation namely 'Tactical/Cynical', 'Explanation' and 'Formalistic' apologies. The view is often expressed, as for example by Alter (1999), that anything less than an authentic apology will have little or no value.

A second theme is the danger that the law will encourage insincere, non-authentic and instrumental apologies by affording legal protection to apologies which might otherwise be an admission and therefore evidence of fault for purposes of legal liability. Legislation that prevents apologies being used for this purpose is criticised as a legislative mechanism to limit victims' recovery and shield corporate injurers from liability, diluting the deterrent function of tort law (Arbel and Kaplan 2017). Commentators refer to the 'subversion' and 'commodification' of apologies and attribute this to laws of confidentiality and privilege that are believed also to undermine the value of apologies as a moral act. The latter concern has been expressed most notably in the writing of Taft (2000, 2005, 2013). Taft raises questions about the value of apologies offered in mediation if the recipient knows or subsequently might discover that the apology has been offered in circumstances where the legal significance of their words is removed by legislation. In his more recent writing, Taft draws on his experience as a mediator to address his concerns by providing a practical framework for apologetic discourse in this legal setting involving lawyer, client and mediator. He concludes that '[n]owhere does the role of apology hold more potential in the legal arena than in ADR settings' (Taft 2013, p. 203). The concern expressed in this theme is not isolated, however, to the implications of affording legal protection to apologies containing admissions of fault that are communicated during mediation. It is part of the broader debate about the privilege attached to settlement negotiations and apologies otherwise protected by

the law (Orenstein 1999, Taft 2000, Cohen 2002, Vines 2005, 2008, Kleefeld 2007, Zylberman 2009, Runnels 2009, Carroll 2014, Khouri 2014).

A third theme, related to the second, is that the value of apologies offered in mediation may be undermined if mediation is used for instrumental purposes and other purposes by parties and their lawyers to achieve settlement of disputes. There are concerns that mediation can be an oppressive process that impacts adversely on parties in a weaker position to negotiate (Baylis and Carroll 2002). In family law mediation, for example, there is a concern that mediation perpetuates existing power dynamics (Astor 2005, Field 2006, King *et al.* 2014, p. 314, Batagol and Brown 2011). More particularly there are concerns that some people may feel pressured to accept an apology and achieve a less advantageous settlement than they could achieve through the litigation process. O'Hara and Yarn (2002) refer to the evolutionary economic perspective which indicates that some but not all people should feel an emotional urge to forgive in the face of a heartfelt apology. They explain that some people will be predisposed to forgive even strangers and organizations. As a consequence, organizations can exploit victims' predispositions, raising important ethical considerations for lawyers involved. Yarn and O'Hara urge mediators to think more carefully about the circumstances under which they encourage apology and the manner in which they facilitate the offering and acceptance of apologies.

These themes and their implications for mediation practice and the law will be revisited in Part 3.

2.1.2. Features of mediation that predispose it to being a process conducive to constructive apologies

One feature of mediation and other self-determinative processes that makes them conducive to apologies is the ability of parties to decide the outcome of the process. Other features include the opportunity they provide for direct party participation in the process and for confidential and meaningful interpersonal dialogue (Levi 1997, 2000, Latif 2001, Pavlick 2003, Raines 2005, Foong 2007). In this way, mediation provides an opportunity for parties to express their needs and ways they believe their needs might be met. Mediators are trained to facilitate communication between the parties and to facilitate the negotiation outcomes that satisfactorily meet parties' individual and mutual interests and they proceed on the assumption that parties can cooperate. In doing so, mediators provide opportunities for parties to reach 'resolutions that go beyond "legal solutions" to solutions that reflect their interests' (NADRAC 2011, p. 1). Apologetic discourse is one way that parties' interests can be satisfied. Mediation provides an opportunity for parties to make decisions about outcomes, which may include formal terms of agreement and informal outcomes including formal and informal apologies. Notwithstanding the opportunity that the process and the mediator provide, adherence to the principle of cooperative party self-determination means that the option of apology, like any option, will not necessarily be accepted.

2.1.3. Process design, the role of the mediator and approaches to mediation

Descriptions of mediation that outline the process, guide practitioners, inform parties and support standards of practice might be thought to suggest that mediation is based on a single model of practice. The Australian National Mediator Accreditation System Practice Standards (MSB 2015), for example, describe mediation as a process 'that promotes the self-determination of participants' and requires a mediator to be non-directive as to content (MSB 2015, Standard 2.2). There is, however, scope within this description for a mediator to use a blended model such as advisory or evaluative mediation or conciliation (MSB 2015, Standard 10.2).

Recognising that mediation is a process guided by principles, mediation scholars have devised models and criteria to describe, categorise and understand mediation

practice (Riskin 1996, 2003, Boulle 2005, Alexander 2008). Alexander (2008, pp. 98-101) notes that these models variously describe and reflect mediator approaches, ideologies, qualities, interactions, interventions and objectives and identifies a number of existing mediation models. Building on these, Alexander introduces a two dimensional meta model that plots the practice of mediation on one axis by the type of discourse that occurs within the mediation (including negotiation discourse and transformative dialogue) and on the other axis by the extent to which the mediator intervenes in the process or the problem. These models both 'reflect and inform' practice and are important, as Alexander (2008, p. 117) notes, not only for mediators but for the parties, service providers, regulators and researchers.

A process focused, facilitative mediator works with the expectations and options identified by the parties, and does not suggest or advise parties on options, including apologies. In contrast, practitioners who facilitate an advisory or evaluative approach or conciliation (where their role is to assist parties to comply with legislative requirements), might recommend ways that a matter could be resolved, including, for example, by offers of apology. In this way, a mediators' view of their role and their approach to the mediation process and in particular whether they raise options with the parties is one factor that may influence how apologies are perceived by the parties and any advisers or supporters attending with them. In practice, there are other ways that apologies can be suggested as options or recommended during mediation even in facilitative mediation, which often includes participation by professional and personal support people who make suggestions or give advice on apologies to the person they are supporting. The circumstance we are discussing in this article, that is where the parties have made known to the mediator that an apology is important to them, most likely means that variations in approach in this respect will be moderated.

The mediator's approach to managing conflict (Boulle 2005, pp. 87-90) and negotiations between the parties (Boulle 2005, pp. 90-103) influences the way the parties interact with each other and their psychological needs. An approach that supports an interest based negotiation, and where the dialogue includes the possibility of healing or restoring a relationship between the parties, is more likely to provide greater opportunity for parties' psychological needs to be addressed than an approach, other than mediation, that works from the parties' positions. The approach to conflict and negotiation facilitated by the mediator is, among many factors that contribute to the dynamics of mediation.

Other factors that influence the extent to which a mediation provides opportunities participants to 'identify, clarify and explore interests, issues and underlying needs' (MSB 2015, Standard 2.2(b)) and for healing and restoring relationships and transforming the way that parties relate to one another to re- establish trust in a relationship, include the purpose of the mediation, the mediators' approach to mediation, their training, skills and their personal style. One factor that might be significant, for example, is whether the mediator is a lawyer. Based on findings in her research into the response of lawyers to apologies offered to their clients, Robbennolt (2008, p. 395) concludes that lawyer mediators 'may not be as attuned to disputants' needs to give or receive apologies as would non-lawyer mediators' and as a result that 'lawyers may be best suited to serve as mediators under circumstances in which a more evaluative form of mediation is appropriate.'

We are not aware of any empirical research to inform us whether and how much the mediator's approach to mediation affects a recipient's perception of apologies. We work on the assumption that the approach by a mediator to the process and to managing conflict and facilitating negotiation may influence the parties' perceptions of apologies in mediation. This influence is reduced in the situations under discussion in this article where apologies are an overt aim of the mediation.

2.1.4. Mediator interventions and skills

Whichever mediation approach or blend of approaches is adopted and whatever the nature of the discourse that is supported by a mediator, there is a range of skills and techniques that can be used to identify the parties' goals in coming to mediation, their interests, what options might satisfy their interests and to ensure that their needs are considered through the process.

There are well identified process steps and interventions that mediators use, albeit to varying degrees, when identifying and working with a party's perceptions (Charleton and Dewdney 2004, Boulle 2005). There is potential for apologies to feature in the dialogue between parties at all stages of the process; in pre-mediation sessions between the mediator and the parties; in joint sessions when the parties speak about what has brought them to mediation and what they hope to achieve through the process; during identification and exploration of the issues and dialogue in joint and separate sessions as options and agreements are developed by the parties; and during negotiations between parties seeking to resolve matters by agreement. The skills a mediator can use to facilitate dialogue between the parties and to explore their perceptions of apologies and how their need for an apology might be satisfied include listening, questioning, summarising, reflecting and reframing. Through an appreciation of the complexity, components and composition of an apology and the different purposes of each stage of mediation and the extent to which on a case by case basis the purpose of the stage matches the development and making of apologies, a mediator can assist the parties to achieve the outcomes that address their interests.

2.2. Psychological research on apologies

In this section we provide an analysis of the psychological research on the experience of apology recipients and offer some conclusions that can be drawn. This analysis explains the breadth and complexity of apologetic gestures, why in some cases apologies need to be more elaborate than in other cases and why parties to disputes may sometimes accept what appear to be incomplete, insincere or otherwise poor apologies.³ The framework of analysis is presented in the context of a civil dispute, although its application is not confined to that context. The analysis has relevance to anyone who seeks to anticipate, on an empirical basis, how an injured party will respond to an apology in any particular situation.

2.2.1. Features of the apology

Apologies, whether as a discrete event or as a longer process, share three features including sincerity, content and focus. We discuss the available research relating to each of these features in this section.

2.2.1.1. The sincerity of the apology

Sincerity is important to injured parties (Mazor *et al.* 2004, Tomlinson *et al.* 2004, Bachman and Guerrero 2006a, De Cremer and Schouten 2008, Choi and Severson 2009, Davis and Gold 2011, Slocum *et al.* 2011, Tabak *et al.* 2012, Allan *et al.* 2013) who use several indicators to determine this sincerity. They will take into account what an apology costs a wrongdoer in terms of time and effort and so forth (Ohtsubo *et al.* 2012). They prefer in-person apologies (Allan *et al.* 2010, Iedema *et al.* 2011, Robbennolt 2013) but they do, however, accept written apologies (Allan *et al.* 2010) and those offered by third parties on behalf of wrongdoers (Slocum *et al.* 2011, Robbennolt 2013) because they suggest wrongdoers seriously considered the situation. Injured parties also see written apologies as indicators of wrongdoers' sincerity because they believe that documenting apologies involves

³ Section 2.2 of this article is based to a large extent on Parts 2.4, 2.5 and 3 of an article by two of the authors, Allan and Carroll (2017). Some sentences and footnotes included in Allan and Carroll (2017) have been omitted in this article and some additional references have been included.

taking legal risks (Allan *et al.* 2010). Injured parties consider the timing of apologies important (Sitkin and Bies 1993, Rubin *et al.* 1994, Allan *et al.* 2010) and initially researchers found early apologies to be more effective (Zillman and Cantor 1976, Kremer and Stephens 1983, Weiner *et al.* 1991, Sitkin and Bies 1993). Recently researchers found that injured parties find delayed apologies acceptable (Frantz and Bennigson 2005, Slocum *et al.* 2011) when they perceive them to be well-considered (Slocum *et al.* 2011), especially if wrongdoers have been punished or paid compensation (Allan *et al.* 2013). It appears that the most appropriate time for apologies depends on injured parties ripeness and readiness to receive them (Frantz and Bennigson 2005, Iedema *et al.* 2011). Researchers found that spontaneous apologies have a beneficial influence (Weiner *et al.* 1991, Risen and Gilovich 2007, Robbennolt 2013), although Robbennolt found that people do not necessarily distinguish between spontaneous and non-spontaneous apologies and that the situation may be more complex than previously believed (Bornstein *et al.* 2002). Injured parties may view spontaneous apologies as attempts to escape or reduce punishment and/or revenge (Schlenker and Darby 1981, Darby and Schlenker 1989) and experience more anger. Injured parties may find non-spontaneous apologies useful (Weiner *et al.* 1991, Risen and Gilovich 2007, Jehle *et al.* 2012, Robbennolt 2013) because they can provide specific information (Shapiro *et al.* 1994), reveal wrongdoers' emotions (Robbennolt 2013) and provide public, or at least private, vindication (Allan *et al.* 2010) as most, if not all, apologies involve an element of self-humiliation on the part of wrongdoers.

2.2.1.2. The content of the apology

Researchers found that people consider the content of apologies more informative than their presentation (Shapiro *et al.* 1994). Most researchers, at least by implication, accept that apologies consist of specific components (Blum-Kulka *et al.* 1989, Darby and Schlenker 1989, Scher and Darley 1997, Schmitt *et al.* 2004, Anderson *et al.* 2006, Fehr and Gelfand 2010, Slocum *et al.* 2011, Kirchhoff *et al.* 2012, Mazor *et al.* 2013). They differ as to the specific number and names of the components. Following Slocum *et al.* (2011) we will refer to them as Affirmation, Affect and Action. Affirmation represents the cognitive aspects of apologies which researchers independently refer to as admission of responsibility (Weiner *et al.* 1991, Anderson *et al.* 2006, Mazor *et al.* 2013), blameworthiness (Schlenker and Darby 1981) or fault (Kirchhoff *et al.* 2012). Injured parties expect wrongdoers to specifically identify and explain (Bies *et al.* 1988, Shapiro *et al.* 1994, Anderson *et al.* 2006, Slocum *et al.* 2011, Behrenbruch and Davies 2013, Mazor *et al.* 2013) events with a high degree of specificity, particularly those shrouded in uncertainty (Brockner *et al.* 1990, Shapiro *et al.* 1994), and to accept responsibility for them and their consequences (Bennett and Earwalker 1994, Hodgins and Liebeskind 2003, Anderson *et al.* 2006). Affect denotes the emotional aspects of apologies which researchers refer to individually as expressions of remorse (Gold and Weiner 2000, Anderson *et al.* 2006), regret (Schlenker and Darby 1981), true sympathy (Fehr and Gelfand 2010) or concern, caring, and empathy (Mazor *et al.* 2013). Injured parties look and listen for signs in wrongdoers' body language and voices (Slocum *et al.* 2011) that show they feel remorse for what happened (Anderson *et al.* 2006, Kirchhoff *et al.* 2012). The Action component reflects the behavioral aspect of apologies and injured people's expectation that there must be actual, or meaningful offers of repair or compensation (Fehr and Gelfand, 2010), or promises of future restraint and forbearance (Scher and Darley 1997, Schmitt *et al.* 2004, Anderson *et al.* 2006), or action preventing recurrences (Mazor *et al.* 2013).

Researchers found that each of these components has an autonomous effect and independently has a greater effect than the offering of no apology, but that the accumulation of components has an additive effect (Robbennolt 2003 2006, Schmitt *et al.* 2004). People therefore prefer full apologies to no apologies and partial (less than three components) apologies. This full preference is not without exceptions (Robbennolt 2003, 2006).

2.2.1.3 The focus of the apology

Slocum and her colleagues (2011) found that apologies can range from exclusively self to self and other focussed. People's inherent self-centeredness (Maner *et al.* 2002, Zechmeister and Romero 2002) makes it inevitable that they will primarily focus on their own needs (Itoi *et al.* 1996). They might offer self-serving apologies (Leunissen 2014) to avoid the risk of humiliation and/or greater punishment should their apologies be rejected. This is especially likely after severe incidents (Ho 2012). Injured parties sometimes accept such self-focused apologies, but ideally they want self-other focused apologies which indicate that wrongdoers recognise the physical, psychological and social impact the events had on them (Tversky and Kahneman 1974, Shapiro 1991, Shapiro *et al.* 1994, Iedema *et al.* 2011, Mazor *et al.* 2013, Robbennolt 2013, Allan *et al.* 2015). They therefore want self-other focused statements which indicate wrongdoers feel regret for the right reason and understand why they are hurting (Anderson *et al.* 2006, Slocum *et al.* 2011). Injured parties therefore want wrongdoers to apologise because they experience guilt and/or shame; not because they pity them (Anderson *et al.* 2006, Slocum *et al.* 2011) want to appease them (Weiner *et al.* 1991), want to save face (Banerjee *et al.* 2010) or avoid lawsuits (Robbennolt 2013).

2.2.2. Variables that influence injured parties' requirements of apologies

Five variables that may influence injured parties' decisions whether apologies are good enough to meet their specific requirements in the particular situation can be identified (Schlenker and Darby 1981, Shapiro *et al.* 1994, Anderson *et al.* 2006, Fehr and Gelfand 2010, Slocum *et al.* 2011, Mazor *et al.* 2013).

2.2.2.1. Personal variables

People's expectations of apologies and their propensity to accept them differ (Howell *et al.* 2011, Allan *et al.* 2013) and several variables may explain this. Researchers found that though people from different cultures share many expectations regarding apologies, their distinct cultural socialisation patterns (Bataineh and Bataineh 2008) and their manner of interpreting and managing conflict (Sugimoto 1999, Gelfand *et al.* 2001) lead them to unique cultural expectations (Blum-Kulka and Olshtain 1984, Hickson 1986, Itoi *et al.* 1996, Sugimoto 1997, Fukuno and Ohbuchi 1998, Takaku *et al.* 2001, Takahashi 2005, Guan *et al.* 2009, Ohtsubo *et al.* 2012). Injured parties' cultural perceptions of themselves as independent, connected with specific others, or connected with broader society, influence how they evaluate apologies. Those who emphasise relationships require wrongdoers to show remorse for the pain they had caused them, whilst injured parties who feel more connected to the broader society want wrongdoers to show that they realise they violated a social norm (Fehr and Gelfand 2010).

People's age influences their interpretation of apologies (Ashy *et al.* 2010, Banerjee *et al.* 2010, Allan *et al.* 2015) but it remains unclear whether it influences what they expect of apologies. The few research findings regarding education and forgiveness suggest that higher educated people may be more willing to forgive. Some studies found that higher educated people have a greater tendency to forgive (Mazor *et al.* 2005, Idemudia and Mahri 2011, but see Mullet *et al.* (1998) and they might therefore they be more willing to accept apologies.

Many researchers examined gender differences in respect of apology. While Mazor *et al.* (2005) found men more likely to forgive than women, Toussaint and Webb (2005) failed to find such difference. These studies mostly focus on how males and females differ as apologisers and how the content (Gonzales *et al.* 1990, Gonzales *et al.* 1992, Hodgins and Liebeskind (2003), Hodgins *et al.* 1996), frequency (Schumann and Ross 2010) and strategic use (Bataineh and Bataineh 2005) of their apologies differ. The few researchers who examined whether the genders differ regarding their expectations of apologies did not find significant gender

differences, for example Ashy *et al.* (2010), Boon and Sulsky (1997) and Hodgins and Liebeskind (2003).

Researchers investigating injured parties' dispositions in the context of the attribution of responsibility (Sulzer and Burglass 1968) and forgiving (McCullough and Hoyt 2002, Schmitt *et al.* 2004, Maltby *et al.* 2004, Berry *et al.* 2005, Brose *et al.* 2005, Maltby *et al.* 2008, Ashy *et al.* 2010, Idemudia and Mahri 2011) found that people considered to be well-functioning and agreeable tend to be more forgiving. These findings suggest that injured parties' dispositions may influence their interpretation and acceptance of apologies and apology researchers found emphatic people (Takaku 2001, Takaku *et al.* 2001, Allan *et al.* 2013) and those susceptible to social pressure (Risen and Gilovich 2007) less critical of apologies they receive. In contrast, injured parties with defensive self-esteem (Eaton *et al.* 2007) and with low need-for-cognition (i.e., less motivated to engage in effortful thought) may be more critical of apologies (Thomas and Millar 2008).

2.2.2.2. Injured parties' perceptions and attributions

Injured parties may have higher expectations of apologies coming from those whose status and linguistic styles differ from their own because people tend to make harsher judgments of out-group people (Fincham and Hewstone 1982, Dixon *et al.* 1994), but to date researchers have investigated the effect of status on the offering of apologies, for example Gonzales *et al.* (1992) and Salvador *et al.* (2012), rather than on how status influences injured parties' expectations of apologies.

The degree of responsibility injured parties attribute to wrongdoers influences the anger they experience (Schroeder and Linder 1976, Gonzales *et al.* 1994, Darley and Pittman 2003, Weiner *et al.* 1987, Bachman and Guerrero 2006b) and their anger influences their willingness to accept apologies (Bennett and Earwaker 1994, Struthers *et al.* 2008) and forgiveness (Boon and Sulsky 1997, Leunissen *et al.* 2013). Injured parties experience less anger when they attribute negligence to wrongdoer than when they attribute recklessness or intentionally to them, because they associate intentional behaviour with immoral motives (Reeder and Spores 1983, Reeder *et al.* 2002). Injured parties who question the character of wrongdoers expect apologies that counter these concerns, and apologies that fail in this regard may increase injured parties' anger and escalate the conflict (Struthers *et al.* 2008).

2.2.2.3. The relationship between the parties

The multiple ways in which relationships between people can vary will influence what injured parties would expect of wrongdoers' apologies. Injured parties in horizontal established relationships make similar attributions of responsibility and forgiveness irrespective of whether they are co-workers, friends or romantic partners (Eaton and Struthers 2006). Researchers found that relationships qualities, such as levels of attachment and injured parties' satisfaction with the relationship, influence their expectations of apologies (McCullough *et al.* 1997, McCullough *et al.* 1998). The level of trust within relationships influences injured parties' expectations of apologies (Slocum *et al.* 2011) because whilst all injured parties experience a betrayal of trust (Robinson 1996) and a consequent sense of injustice these emotions intensify as the perceived level of trust increases (Daly, *et al.* 1997). Injured parties' expectation of apologies therefore increases as the levels of trust in relationships rise, peaking in fiduciary relationships such as between business and intimate partners (Eaton and Struthers 2006).

2.2.2.4. The wrongful behaviour

Injured parties as a general rule perceive wrongdoers' commissions (in contrast to omissions) (Fazio *et al.* 1982), breaches of formal norms (Darley 2004), and

untrustworthiness (in contrast to incompetence) negatively and this could influence what they expect of apologies.

Injured parties, for instance, see wrongdoers' integrity violations (e.g., financial mismanagement) as *prima facie* evidence of their flawed characters and find their expressions of regret more reassuring than their acceptance of full responsibility (Kim *et al.* 2006).

2.2.2.5. Nature and severity of the harmful consequences

Events may not have tangible consequences (e.g., physical or financial harm), but they always have intangible consequences which may be as devastating for injured parties as tangible consequences (Cody and McLaughlin 1987). Intangible consequences can range from psychological (e.g., anger, embarrassment, shame, feelings of injustice and disrespect, and impaired self-images) and psychopathological reactions (such as post-traumatic stress disorders) to physical pain and cognitive disabilities associated with physical injuries.⁴ Injured parties may also experience lingering or permanent consequences that perpetuate the stress and could prevent their anger from dissipating (Berkowitz and Harmon-Jones 2004). Injured parties who focus on the discrete and tangible harm of events may have lesser expectations of apologies if they received the compensation or reparation they wanted (Allan *et al.* 2010).

Injured parties' perceptions of the severity of the consequences of events do, however, notably influence their expectations of apologies (Bennett and Earwaker 1994, Itoi *et al.* 1996, Hodgins and Liebeskind 2003, Zechmeister *et al.* 2004, Robbennolt 2003, 2006, Kirchhoff *et al.* 2012). They do not expect elaborate apologies after what they perceive to be trivial events (Blumstein *et al.* 1974, Shapiro 1991) but their perceptions of what constitutes trivial events often differ from that of wrongdoers (Witman *et al.* 1996) and their expectations of apologies increase as their perception of the severity of the consequences increases (Walster 1966, Blumstein *et al.* 1974, Schlenker and Darby 1981, Shapiro 1991, Ohbuchi *et al.* 1989, Ohbuchi and Sato 1994, Boon and Sulsky 1997, Robbennolt 2003, 2006, Anderson *et al.* 2006, Bennett and Earwaker 1994).

2.2.3. Implications of the research for apologies in mediation

The research reviewed in this Part has many implications for mediators. We discuss the implications of apologies being complex, having multiple components and the importance of the composition of an apology reflecting this. First, the complexity of apologies is accounted for by perceptions of sincerity, content and focus of the apology and by variables which include the relationship between the parties, the nature of the wrongful behaviour, the nature and severity of the harmful consequences, the injured party's perceptions and attribution of responsibility and personal variables related to the wrongdoer and the recipient. It tells us that the perception of what apology in any particular circumstance will meet a recipient's needs is based on their subjective and unique experience. Whether an apology is acceptable to the injured party is a personal judgment. Mediation is a process that is designed to create norms rather than to impose them, making it particularly suitable for tailor-made apologies. In making such an observation the mediator is likely to assist the parties' discussion of apology. A mediator can refer to these variables to assist parties to an adverse event to persevere for an apology that contributes to the resolution of a civil dispute between them.

Second, not all components need to be present for an apology to be 'good enough' to have value to an injured party. Nor does an apology require specific words. A person might feel they have received an apology through words or gestures even when the words 'sorry' and 'apology' are not used. In keeping with mediators'

⁴ For a review of the debate regarding the relative value of apologies depending on whether the consequences are tangible or intangible, see Allan (2007). Also see Shuman (2000).

responsibility for the process and parties' responsibility for the content, mediators need not assess or evaluate the value of an apology that has been offered from their perspective or from an objective point of view. Apologies can be considered, discussed and offered during mediation. The perception of the mediator regarding whether an apology has been considered, discussed or made often differs significantly from the perceptions of each of the parties. If, upon checking, (most likely in private session) parties regard an apology as having been made and received, the mediator can accept this and move on.

Third, there is no formula for 'a perfect apology'. Whether a person considers an apology 'good enough' in the circumstances will depend on the sincerity, content and focus of the apology and multiple variables relating to the circumstances in which the apology takes place. A mediator can use this knowledge to assist parties to understand their psychological needs and how these needs might be addressed by an apology. In a legal setting, it explains why an apology that satisfies an injured party's need for affirmation, even in the absence of sincerity and a self-other focus, might be accepted. It can also explain why an apology that meets an injured party's need for affect through an expression of regret or remorse and a commitment to action in the form of changes in the future may be acceptable, even in the absence of acknowledgement of legal fault or wrongdoing by the other party.

2.3. Apologies, mediation and law

In addition to possessing the required knowledge and skills of a mediator and an understanding of how people experience apologies, mediators need to be aware of legal rules that might influence the parties' behaviour relating to apologies both outside and within the mediation process. In this section, we identify three roles performed by the law that affect indirectly the parties' experience of mediation and their behaviour and decision making relating to apologies in mediation. These are referred to in the discussion in Part 4.

2.3.1. The dispute resolution role of law – a process focus

One of the reasons mediation is considered conducive to apologies is the protection afforded to an apology by rules of confidentiality and inadmissibility in court proceedings of what has been communicated during mediation (Cohen 1999, Pavlick 2003, Carroll 2005, Foong 2007). These rules apply broadly to mediation communications, to encourage full and frank discussions. Although they are not directed to protecting or encouraging apologies specifically they can have this effect. In some instances, for example in the Hong Kong, there is an express policy link between the promotion of dispute resolution through mediation by legislation and the encouragement of apologies through legislation that specifically make apologies inadmissible, (Department of Justice 2016) Often referred to as 'apology legislation', the latter is both broader in scope as to when it applies and narrower in its specific application to apologies (Kleefeld 2007, Carroll 2014). Through the enactment and enforcement of confidentiality and inadmissibility rules the law indirectly supports apologetic discourse. These rules are not uncontroversial and some authors express reservations about the use of apology in the context of legal proceedings and protected apologies, (Taft 2000, Arbel and Kaplan 2017). These concerns may be lessened if there is transparency about any legal protection applicable to apologies that are offered in mediation (Taft 2013).

Other examples of the way that the law supports mediation as an alternative dispute resolution process to litigation are government supported schemes that encourage and fund the use of mediation, court-referred mediation and the enactment of legislation that requires parties to attend mediation in good faith before they can commence litigation.

2.3.2. The rights enforcement role of law – a remedial focus

The circumstances in which an apology will be ordered by a court are rare (Carroll 2013, Zwart-Hink 2014, Van Dijck 2017). This reality is important for dispute resolution where a party has made known that an apology is important to them. Discrimination cases in Australia and some other countries (Carroll 2013, Allan *et al.* 2010) is one of the few areas of law where a party can be ordered by a court or tribunal to apologise. In defamation disputes, the law places a great deal of importance on prompt and vindictory corrections and apologies for a defamatory publication when assessing the damages to be paid by the publisher. Apologies have a similar role to play in breach of privacy cases (ALRC 2014). In these areas of law parties will negotiate an apology as a term of settlement in the knowledge that litigation is an alternative process where apologies may be significant to the outcome of the case. In most civil cases however, a court does not take apologies into account when awarding remedies. As negotiations for the resolution of civil disputes take place in the 'shadow of the law' (Mnookin and Kornhauser 1979) the parties' negotiations will be influenced by the remedies that a court is likely to award to the successful party as well as the legal and evidential strength of their claim. This is significant for mediation where apologies can be offered during the process both on a formal and an informal basis.

2.3.3. The regulatory role of law – a standards focus

The dispute resolution and process focused role of law can be complemented by laws that create and enforce mediator standards, training and accreditation. Similarly, legal education and standards of conduct and the ethical obligations of legal practitioners will influence the willingness and ability of legal practitioners advising clients and representing them in mediation to support the parties' interests relating to apologies. In Australia the MSB Standards (MSB 2015) have an important role to play in this regard. In addition to practice standards that have been developed and apply for accreditation purposes within domestic legal systems, the International Mediation Institute has developed global professional standards for mediator accreditation purposes and a code of professional conduct (IMI).

3. From research to practice – mediation and apologies in legal dispute resolution

A number of questions arise for a mediator who is assimilating the research literature and legal issues identified in the previous Part. The psychological research identifies three interrelated features of apologies that have important implications for mediators in their practice: complexity, components and composition, discussed below. The law provides a background of legal rights and remedies and the alternative of litigation against which parties participate in a self-determinative process. In this Part we use case examples based on detailed case studies written by (deleted for review process), an experienced mediator and one of the authors of this article.⁵ Although we indicate particular features of each of these cases, they all serve to illustrate many of the research findings and key points made in the previous Part.

For a mediator designing a mediation to accommodate a requested, or expected, apology there is a myriad of variables to consider. One question that arises is, how is this different from designing a mediation for other potential outcomes? Mediated apologies are unique in a number of ways. Apologies are likely to have a number of the attributes of a litigious approach: for example; past focused, one-sided, requested by one and decided by another and aimed at a binary outcome. The attributes of other agreement making in mediation are typically future focused,

⁵ In each case the parties have been de-identified. These examples have been selected because each involves circumstances in which an apology was expected, either explicitly or implicitly. For more detailed facts and analysis of these cases go to (deleted for review process).

mutual, jointly self-determining and integrative. The latter can also be attributes of apologies reached in mediation. Rather like a platypus, an apology that is received as a result of a request or an expectation in mediation has a similar 'odd fit' look to it: the request and expectation are underpinned by a sense of entitlement, which usually is an anathema to mediation. In this case, however, unlike where parties are negotiating outcomes underpinned by legal entitlements, an apology that is made is itself underpinned by authority, the authority to make the apology. This same apology needs to meet some interests of both the provider and the recipient. This interest based negotiation is the realm of mediation.

The first case example illustrates the opportunity that mediation can provide for the parties to a seemingly intractable dispute, with one party apparently holding all the power and the other party feeling so powerless as to have nothing to lose cost, to listen to each other and reflect on the consequences of their actions. The mediator facilitates a discussion to assist parties to consider the dispute from a broader perspective than legal rights and commercial expediency.

Case example 1 – A franchising dispute

Joint franchisees Aldo and Hetty have a shop lease with their franchisor, Sprinkles Cupcakes, due for renewal. The shop is not meeting its targets and Hetty and Aldo are anxious about their financial situation, so much so that Hetty has taken employment elsewhere. They would like the franchise contract to be renewed in Aldo's name only so that Hetty can be open about her employment. It is difficult and stressful to keep the new arrangements a secret particularly for Aldo and Hetty who tend to wear their hearts on their sleeves. Before coming to mediation the lawyer for the franchisor, Rowan, offered a deal to Hetty and Aldo: Sprinkles Cupcakes would renew the lease in Aldo's name only if Aldo agreed to a clause in the new contract that made him responsible for all aspects of the external decorating of the store. Currently this is the responsibility of Sprinkles Cupcakes. Hetty and Aldo did not agree to this proposal and in accordance with the Franchising Code of Conduct mediation was commenced. Prior to the mediation Hetty, Aldo and Rowan there had been extensive exchanges of papers between lawyers and a number of teleconferences. The parties had not met in person.

In the initial separate session with Hetty and Aldo it became clear that their distress had multiple sources including their incredulity that they could be treated in a way they experienced as particularly dismissive, '...as if we are no more than figures in a spreadsheet'. 'Facing up to possibly going broke is one thing; being trampled is another and being trampled by people we thought were on our team hurts deeply.' 'Going to work to watch the money bypass the family as it pours into Sprinkles Cupcakes' coffers adds insult to injury.' 'It's no skin off their nose whether there is one or two of us on the lease.'

It was made clear in the initial separate session with Rowan that he was under immutable instruction to return from the mediation with an agreement that was financially beneficial to Sprinkles Cupcakes with responsibility for maintenance of the exterior of the store accepted by Aldo. He explained 'Times are tough. They can't expect a legal amendment to be made at the expense of Sprinkles Cupcakes just on their say-so.' 'This to-ing and fro-ing has been enormously time-consuming and has taken my client's time away from growing the business, which would have been to the advantage of franchisees everywhere.'

Hetty, Aldo and Rowan were brought together:⁶ the mediator made opening comments followed by parties' opening comments, mediator restatements and agenda formation. Throughout, time was spent listening to the strain of the past for each and similarly their anxiety about the future, before then filling a whiteboard with options for potential solutions. When asked by the mediator for his impression of what seemed to be important to Aldo and Hetty of their experience, Rowan commented 'They have stayed positive. They seem to have protected the children from their worry.' When asked by the mediator for their impression of what was important to Rowan, Hetty commented 'It's his job. The Master Franchisor is hiding

⁶ By this stage the Aldo and Hetty were representing themselves.

behind him. He'll get paid either way.' 'What's important to Rowan is that he gets runs on the board so that he is hired again.'

Rowan requested a break during which he phoned the Franchisor. He returned and asked for some time with the mediator. Rowan explained that having considered the implications of each of the options on the whiteboard, which he regarded as exhaustive and the Master Franchisor regarded as admirable, he had instructions to re-draft the lease with Aldo as the sole franchisee with no changes to any other terms and conditions. Rowan explained to the mediator that if Hetty and Aldo were willing to hear him out, he would like to convey an apology from the Master Franchisor. After discussion with the mediator, Aldo, Hetty and Rowan sat around the oval mediation table where Rowan said 'The Master Franchisor wants to apologise to you both and to your family for your time, your energy and your hope which have all been damaged through this process. She notes her admiration for your perseverance and comments that such perseverance is likely to serve you well as franchisees. I am instructed to re-draft the lease with Aldo as the sole franchisee and the current terms and conditions to remain. The Master Franchisor asked me to pass on to you that you have spared other franchisees from this experience. She wishes you well.'

Aldo and Hetty seemed to be unable to believe their ears. Although the mediator had explained that mediation is a process of value adding, Aldo and Hetty had become inured to such possibilities. At that moment, their gratitude for the apology seemed to outweigh the importance of the agreement they subsequently reached on the lease. The acknowledgement of their fortitude seemed to shift the focus from a top-down dynamic to a human to human connection.

3.1. Complexity of an apology

To a mediator the complexity of apologies in mediation creates more questions than answers. Professionally this is an ideal frame of mind for a mediator whose role is to design and maintain the process so that people have the opportunity to learn about themselves and others, specifically their interests. When apologies appear to morph and change throughout a mediation, a mediator regards this as a reflection of the parties' evolving identification and appreciation of theirs and others' interests.

One practical way of working with the questions that emanate from the complexity of apologies in mediation while maintaining the requisite even-handedness, is to develop and redevelop hypotheses regarding aspects of the complexity and the complexity itself. Hypotheses are useful when they are inclusive of all possibilities for each participant, for example:

- that apology is a unique alchemy of the process and content
- that apology alleviates the stress of having been estranged
- that apology is a complementary experience of giving and receiving
- that the act of the apology being offered and accepted eclipses the apology itself

From these and many other hypotheses based on the variables described above under features and requirements of apologies, open questions can be derived to explore and clarify the issues relating to apologies.

Working with the complexity of the factors and interactions among the factors, described above at 2.2.1 and 2.2.2, involves listening to what the parties are hearing and experiencing as an apology even if the mediator's perception of what has been communicated is different. A party might perceive an apology even if the mediator does not. The second case illustrates this point. It also illustrates that mediation can be an opportunity for people to work toward some kind of intra personal and interpersonal resolution for a wrong for which they hold another person responsible, where no legal recourse is available for the offending and harmful conduct.

Case example 2 – A child sexual abuse case

Frank, an acknowledged victim of child sexual abuse by a member of a church and Ross, who holds a senior religious position and is the representative of the church which staffed the institution where Frank grew up, attended mediation together under a church initiated scheme, 'Towards Healing' Mediation provided an opportunity for Frank's concerns to be heard by Ross, for Frank to know that his concerns had been heard and for each to explore the possibility of agreements which would assist Frank to address his needs arising from his experiences.

In his early comments in the first joint session, Ross undertook to 'listen and to try to understand Frank's experiences and the effects of them'. Frank took strong exception to the notion that anyone could understand his experiences and their effects. He went on to explain that the most anyone could provide, and that no one had been able to so far, was acknowledgement of 'a traumatised life, born of a childhood in hell'. In response, somewhat tentatively, Ross replied that he accepted that he would not be able to understand the effects of Frank's upbringing on Frank, nor in fact on others.

Ross and Frank agreed to discuss the following issues, among others, with a view to reaching agreement on

- apologies relating to 4 particular sets of circumstances;
- provision of financial assistance; and
- provision of information and records from Frank's childhood.

Frank was emphatic that the apologies would be meaningful only if Ross were fully informed of what he would be apologising for. Frank was equally emphatic that it was Ross' role to inform himself, not Frank's role and not the role of an assistant to Ross. Further, Frank explained that the apologies could be meaningful only if they were in the words Ross chose.

Frank withdrew from the mediation during the second joint session on the recommendation of his family to preserve his health. This was prior to the mediation reaching the agreements stage. Frank and Ross had each made what the mediator assessed to be a genuine effort to participate and as a result recommended that the mediation be resumed if each was willing to participate. Eighteen months later Frank returned to mediation. He chose to resume with Ross as the church representative and with the same mediator. Frank and Ross each advised the mediator separately that neither had had any contact with the other during the 18 month period.

In his opening comments, Frank referred to and described four particular circumstances of abuse which continue to cycle through his mind on an almost daily basis. Soon after each of their opening comments, Frank called for a break and during the private session commented to the mediator that this was a much improved experience, compared with the first mediation. The reason for this Frank explained, was 'Ross' apology'. The mediator, who had heard neither the word 'sorry' nor 'apology' nor any similar word spoken by Ross in his opening comments, was somewhat taken aback. Following the mediation session, upon checking the verbatim notes from each participant's opening comments; the mediator was able privately to confirm her recollection.

The joint session resumed. Frank thanked Ross for his early apology, to which Ross nodded. Ross explained that he also wanted to discuss detailed apologies after agreements were reached on financial assistance and other matters. Agreements were reached regarding written apologies: Ross would provide apologies, written in his own words, regarding the four sets of circumstances focused on by Frank. While Frank would appreciate receiving the written the apologies sooner rather than later, it was agreed that Ross could 'take his time' so that he could reflect on his words.

Three weeks later, the mediator was advised that a general letter of apology as well as four specific apologies had been received and were being hand delivered to Frank. Some months later, Frank sent a detailed letter of thanks to the mediator and another to Ross. The letter explained that the process had been gruelling and beneficial and that he could now imagine a time when his hurt would be

manageable. He went on to explain that initially he read the letter of apologies many times each day and that recently he had framed the general letter and put away the specific apologies.

The complexity of the circumstances in which Frank and Ross found themselves, affected by the vagaries of interactions among legal issues, time elapsed, irretrievable damage and resilience, is a reminder that a mediator does not know the parties; the mediator assists parties to make a connection sufficient to mediate on issues of mutual concern.

3.2. Components of an apology

To consider explicit components of an apology is to take an analytic approach to what seems, by its complexity to be a holistic endeavour. Typically, the first stages of mediation involve an analytic approach and the second set of stages progress toward a holistic approach to the issues. An analytic approach could consider the following components of an apology:

- a specific statement of what was done
- recognition of responsibility and accountability
- acknowledgement of pain, distress, other feelings and emotions
- a judgement about the offence
- a statement of regret
- future intentions
- an explanation of why they acted the way they did.

Based on these and the many other factors described above as features and requirements of apologies, a mediator can ask open questions to introduce and later to reality test a variety of aspects of an apology. In this way the exploration and explanation of events in the past may allow the parties to move on, prior to deciding about an express apology, depending on what is important to each of them.

The third case example illustrates that assumptions sometimes are made by parties, or their advisers, about the composition and form that an apology will need to take to have value and about the risks attached to an apology. It also illustrates that confidentiality within the process can be conducive to apologies being offered and received in the parties' interests, even if the apologies are not available beyond the process for legal purposes.

Case example 3 – A workplace dispute

Aleco and Serco, whose parents were immigrants from the same region in Europe, both work for the Grounds Department of an NGO. Aleco has been the supervisor for 18 months having had roles in other areas within the NGO for 5 years prior to that; Serco, his senior by many years, has been a ground staff team member for 32 years. Aleco is very enthusiastic about his work, so much that he is studying horticulture at night school. Aleco and Serco work together respectfully until Aleco issues instructions to Serco to undertake a project using Aleco's design and annotated plans. Serco proceeds with the project according to his own plans and completes the work with great success. Serco publicly receives praise from the Grounds Department team and associated areas.

Although Aleco feels undermined he decides to ignore the lunch room chatter in the interests of team cohesiveness. The next morning Aleco's design and annotations are found posted on the noticeboard in the lunchroom together with some derogatory comments directed towards Aleco's experience and competence. By lunch time further comments are added. Aleco becomes vigilant, finding that he needs to remove the design and derogatory comments throughout the day. This continues for the next six working days into the next week. Aleco is convinced that Serco is behind the campaign.

As a result of the stress he feels, Aleco takes three days' leave. Over the coming weeks he has appointments with a psychologist through the NGO's Employee Assistance Program (EPA). He returns to work for short periods, continuing to take time for his appointments and frequently taking additional time off. There is a heated altercation between Aleco and Serco during this time.

Dissatisfied and feeling harassed, defamed and increasingly 'stressed out', Aleco insists on being advised of his legal rights. A consultation is arranged with Rosalie, a lawyer appointed by the NGO's insurer. Hearing this 'on the grapevine', Serco attends one session with a lawyer arranged by his union. The HR manager, keen to avoid further escalation of the dispute, concerned for Aleco's wellbeing and fitness for work, and wishing to retain both employees, arranges for mediation.

In the mediation, after hearing Aleco's version of events Serco calls a break to explain to his lawyer, Marius, that he needed to make an apology. Marius explains to Serco that depending upon the assessment of Aleco's impairment, if Serco apologises issues including vicarious liability and negligence could arise. Serco explained to Marius that he was aware of the huge significance to Aleco of his words regarding Aleco's competence and the shame that would bring his family 'back home'. Serco is emphatic that he had had no part in the maligning of Aleco on the noticeboard that was still appearing from time to time. He acknowledges that there had been highly personal accusations exchanged on the morning they had a fight at work. Serco adds that he also regrets not having actively let the team know that he wanted the noticeboard campaign to end. Above all, 'back home' in Europe Serco would have been obliged to apologise because he had offended his superior in the workplace.

Persuaded, Marius advises that provided the apology takes place with the protection of the confidentiality and inadmissibility of mediation communications, he believed that liability would not become an issue. With the help of Marius and the mediator reading from notes from parties' opening comments, Serco composes an apology during the private session.

In the resumed joint session, Aleco accepts the offer of an apology and makes two requests: that the apology is made face-to-face in private after other agreements are reached and that afterwards a shorter written version is posted on the noticeboard. Serco agreed, as did each of the legal advisors, to making the apology in private. While Serco was willing to put the apology in writing and place it on the noticeboard for up to a week, Marius advised definitively that this was not possible. After some discussion between the lawyers outside the room and explanations in the joint session Serco agreed to making, and Aleco agreed to receiving, the apology in private and to maintain the apology as confidential.

After a number of other agreements were reached, including an agreed statement that would be made by Aleco and Serco in response to any queries from workmates, the lawyers left the room.

The mediator briefly facilitated the development of some guidelines for delivering and receiving the apology, noted them on the whiteboard and advised that she would knock on the door at five-minute intervals until she was asked to come in by either or both parties. 15 minutes later, when the apology had been made, the mediator was invited into the joint room, together with the legal advisors and the mediation was closed, to the satisfaction of each participant.

To consider explicit components of an apology is to take an analytic approach to what seems, by its complexity to be a holistic endeavour. Typically, the first few stages of mediation involve an analytic approach and the second set of stages progress toward a holistic approach to the issues. An analytic approach could consider the following components of an apology

- specific statement of what was done
- recognition of responsibility and accountability
- acknowledgement of pain etc
- a judgement about the offence
- a statement of regret

- future intentions
- explanation of why they acted the way they did.

From Case Example 3, we see that the apology Serco believed he was compelled to make to Aleco could have been composed by selecting from a list of components of apologies, as agreed between Aleco and Serco, in the interests of being comprehensive and addressing the social dislocation experienced by Aleco. It was implicit from the discussions during the mediation that to Aleco, 'more is better' in terms of an apology.

3.3 Composition of an apology

The composition of an apology includes the nuanced components of an apology and their perceived interconnections. Composition can include the order in which components are raised; the emphasis of each component; the perceived balance between self and other; the sequencing; the flow; the accuracy from the point of view of each. The composition of an apology relates to the content that is delivered and received, for example, statements, affirmations, commitments, the process, for example, timing of delivery and response, and the form of an apology, for example whether it is spoken, or written.

A focus on composition continues the reality testing by the mediator of the components of an apology, expanding it to the holistic setting of the apology and the questions relating to the who?, what?, where?, when?, why?, and how? for the parties. Thinking about the composition of the apology allows it to be tailor-made to fit the circumstances of both the offeror and recipient of the apology. For example, in the Franchising Dispute example, Rowan's apology to Hetty and Aldo was outside his expected role and yet the apology he offered fulfilled Hetty and Aldo's need to make sense of being part of a process which in hindsight accomplished nothing except setbacks. The timing of the apology offered by Rowan on behalf of the Master Franchiser, his spontaneity, the explanation offered and his tone acknowledged Hetty and Aldo's bewilderment about their treatment and quickly brought closure to the dispute.

4. Apologies and mediation - revisiting the themes that emerge from the literature

In this Part, we revisit to themes identified in Part 2 of the article. While it is beyond the scope of this article to do justice to the breadth and depth of the mediation and apology literature, the following Part reflects on these themes in the light of the material presented in Part 2 and discussed in Part 3.

Theme 1: Mediation is an ideal forum for authentic and meaningful apologies

Since ADR took a firm foothold in private dispute resolution and the civil justice system in common law countries more than two decades ago there have been many advocates for mediation as a conducive and 'legally safe' place for parties to meet their needs for giving and receiving meaningful apologies. Where the parties make known the importance of apologies to them, mediators can adapt the process and use their skills to facilitate conversations to meet the parties' interests. As a result, the parties' relationship might be restored and they might be able to resolve their dispute and make an agreement. This will not necessarily involve a formal apology.

It is a testament to the principles, process and practice of mediation that in the context of interest- based dynamics, with the input of parties, lawyers and personal support people, the process can accommodate rights and power-based perspectives to provide an emotionally safe and legally protected environment for an exchange which seems fundamental to equanimity in the human condition. Another way to describe the process is as Complementary Dispute Resolution (CDR) which

represents a set of practices that holds promise for resolving all manner of disputes through the perspectives and cooperation of practitioners of all disciplines.

We suggest that it is consistent with the role of a facilitative mediator to work with the psychological concept of the 'good enough' apology rather than a binary view of apologies as either authentic, meaningful and of value on the one hand or as unauthentic, not meaningful and therefore without value on the other. What constitutes an 'authentic' and 'meaningful' apology and the value to a party to mediation of any particular apology in any particular circumstance is determined by many factors. The impartial role of the mediator as to outcomes, which are determined by the parties, does not require the mediator to judge the sincerity or adequacy of the apology, or any other offers and terms of settlement. Whether an offer of apology, viewed by a third party, might be considered to be an explanation, an account, or a defence, and whether it might be offered for instrumental or strategic reasons for example, does not determine the value of an apology to its recipient. At the same time, it may be helpful if these descriptions are used by a mediator to reality test whether any particular apology is 'good enough' to satisfy the parties' interests.

The law plays an important dispute resolution role by encouraging parties to resolve their disputes in mediation where there has been adequate assessment of the suitability of that process. In Australia, there are number of areas of dispute resolution where it is mandatory for parties to attempt to resolve their dispute in mediation before they use the litigation processes. The Franchising Code of Conduct, for example, under which the mediation of Hetty and Aldo's franchise dispute took place provides for mandatory pre-litigation mediation, (Franchising Code of Conduct 2014). Once parties undertake mediation the law potentially has a regulatory role to perform by creating industry standards and accreditation schemes for mediators. In Australia most accreditation schemes are voluntary and industry-based and therefore are regulated only by laws that apply generally to providers of professional services.

Theme 2: the value of apologies will be lessened if they are legally protected and mediation is used for instrumental or strategic purposes

This theme emerges as part of the broader debate about the efficacy and effectiveness of legislation that protects a party who offers an apology from it being admitted as adverse evidence in any subsequent legal proceedings. This debate reflects the need to balance the rights enforcement role and remedial focus of the law, which favours admissibility of all material evidence, and the dispute resolution role and process focus of the law, which seeks to encourage parties to find ways to settle their private law disputes without recourse to the courts. As Cohen convincingly demonstrates, there are pros and cons of striking the balance in different ways. Where the protection applies to apologies offered in mediation, a skilled and knowledgeable mediator will be in a position to address concerns that arise.

The concept of a 'good enough' apology means that it may satisfy a party's interests to accept an apology that an objective bystander would not perceive to be sincere, complete or self and other focused. Self-determination is a core principle underlying the mediation process. Connected to the self-determination is the opportunity that mediation provides for parties to agree on terms in the knowledge of what remedies they could achieve through litigation. One of the mediator's responsibilities is to satisfy themselves that the parties understand the terms on which they are agreeing and that they are accepted voluntarily, albeit reluctantly. To the extent that this theme raises concerns about the integrity of mediation and the value of some apologies offered in mediation, we suggest that a skilled and knowledgeable mediator is best placed to address them in working with the parties and their legal advisers, if applicable.

The rights enforcement role of law is important to the mediation process and to decisions about apologies in at least two ways. First, parties who know that they do not have an actionable legal claim (as in Frank's case against the church) need to understand that the only alternative to an apology negotiated in mediation is no apology or a less satisfactory apology than what is being offered. The absence of a claim based on a legal right means that litigation is not an alternative way to receive an apology and even where there is a legal right to be enforced (as in Aldo and Hetty's case for example) an apology will rarely be available as a remedy in any case. This legal reality forms part of the parties' BATNAs and will influence their decision making about apologies.

Theme 3: Mediation can be used oppressively and result in unfair outcomes and re-victimisation of parties

Mediation is not always a suitable process for parties. This can be the case in disputes where one or more of the parties have made known that an apology is important to them. A properly trained mediator will assess the suitability of the parties and their dispute to mediation initially through an intake process and thereafter on an ongoing basis. Mediators have ethical obligations to suspend or terminate the mediation if they believe that a party is unable to participate. Further obligations include ensuring that parties are afforded procedural fairness and that the mediator exercises impartiality. Failure to meet these standards is to fail in professional practice.

When an apology is offered, sought or even demanded in mediation, mediators need to exercise their knowledge and skills to ensure fairness and impartiality between the parties. While a mediator cannot control whether or not apologies will be offered and accepted, the sincerity with which they are offered (and accepted) and how they are composed, a mediator ultimately controls the mediation process and must bring it to an end if necessary. Once again, the law plays a regulatory role in this respect through contractual and tortious and statutory duties of mediators and accreditation schemes.

6. Conclusions

This article overviews the research literature from the connected fields of mediation, psychology and law. A number of broad conclusions can be drawn from the literature. First, apologies are often sought by parties to disputes who feel wronged and aggrieved. Second, apologies comprised of expressions of regret and remorse, acknowledgments of wrongdoing, and offers to make changes in the future can be important to the resolution of disputes. Not all of these components must necessarily be present for the apology to have value for the person to whom it is offered, each circumstance is unique and the experience of apology is subjective. Third, mediation is a process that provides an opportunity for parties to have their interests relating to apologies met in a way that adversarial, rights based legal proceedings does not. The law has a significant, albeit indirect, role to play in supporting the opportunity that mediation presents and protecting parties where the process is unsuitable or misused. It is important, therefore, for mediators to have a sound understanding of significant psychological features of apologies and the law's underpinning role in civil dispute resolution. This article facilitates that process through a review of the research literature and a discussion of case illustrations from mediation practice.

References

- Alexander, N., 2008. The mediation metamodel: understanding practice. *Conflict Resolution Quarterly*, 26 (1), 97-123.
- Allan, A., 2007. Apology in civil law: a psycho-legal perspective. *Psychiatry, Psychology and Law*, 14 (1), 5-16.

- Allan, A., and Carroll, R., 2017. Apologies in a legal setting: insights from research into injured parties' experiences of apologies. *Psychiatry, Psychology and Law*, 24 (1), 10-32.
- Allan, A., et al., 2013. Apology in restorative and juvenile justice (2013) *Psychiatry, Psychology and Law*, 20, 176-190.
- Allan, A., et al., 2015. Apologies following an adverse medical event: The importance of focusing on the consumer's needs. *Patient Education and Counseling*, 98 (9), 1058-1062. doi: 10.1016/j.pec.2015.06.001.
- Allan, A., McKillop, D., and Carroll, R., 2010. Parties' perceptions of apologies in resolving equal opportunity complaints. *Psychiatry, Psychology and Law*, 17 (4), 538-550.
- ALRC - Australian Law Reform Commission, 2014. *Serious Invasions of Privacy in the Digital Era Summary Report 123* [online]. Sydney: Australian Law Reform Commission. Available from: <https://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123> [Accessed 4 August 2017].
- Alter, S., 1999. Why apologies are necessary, in apologising for serious wrongdoing: social, psychological and legal considerations, final report for the law commission of Canada, 25 [online]. Available from: http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/apologising_serious_wrong-e/apology.html [Accessed 4 August 2017].
- Anderson, J.C., Linden, W., and Habra, M.E., 2006. Influences of apologies and trait hostility on recovery from anger. *Journal of Behavioral Medicine*, 29 (4), 347-358.
- Arbel, Y.A., and Kaplan, Y., 2017 forthcoming. Tort Reform through the Backdoor: A Critique of Law & Apologies. *Southern California Law Review. Villanova Law/Public Policy Research Paper*, No. 2016-1030. Available from: <https://ssrn.com/abstract=2835482> [Accessed 4 August 2017].
- Ashy, M., Mercurio, A.E., and Malley-Morrison, K., 2010. Apology, forgiveness, and reconciliation: an ecological world view framework. *Individual Differences Research*, 8 (1), 17-26.
- Astor, H., 2005. Some Contemporary theories of power in mediation: a primer for the puzzled practitioner. *Australasian Dispute Resolution Journal*, 16 (1), 30-39.
- Bachman, G.F., and Guerrero, L.K., 2006a. Forgiveness, apology and communicative responses to hurtful events. *Communication reports*, 19 (1), 45-56.
- Bachman, G.F., and Guerrero, L.K., 2006b. Relational quality and communicative responses following hurtful events in dating relationships: An Expectancy Violations Analysis. *Journal of Social and Personal Relationships* 23 (6), 943-963.
- Banerjee, R., Bennett M., and Luke N., 2010. Children's reasoning about the self-presentational consequences of apologies and excuses following rule violations. *British Journal of Developmental Psychology*, 28 (4), 799-815.
- Batagol, B., and Brown, T., 2011. *Bargaining in the shadow of the law: the case of family mediation*. Annandale, NSW: Themis Press.
- Bataineh, R.F., and Bataineh, R.F., 2005. American university students' apology strategies: an intercultural analysis of the effect of gender. *Journal of Intercultural Communication* [online], 9, 1. Available from: <https://www.immi.se/intercultural/nr9/bataineh.htm> [Accessed 4 August 2017].

- Bataineh, R.F., and Bataineh, R.F., 2008. A cross-cultural comparison of apology by native speakers of American English and Jordanian Arabic. *Journal of Pragmatics*, 40 (4), 792-821.
- Baylis, C., and Carroll, R., 2002. The nature and importance of mechanisms for addressing power differences in statutory mediation. *Bond Law Review*, 14 (2), 285-319.
- Behrenbruch, C., and Davies, G., 2013. The Power of explanation in healthcare mediation. *Australasian Dispute Resolution Journal*, 24 (1), 54-60.
- Bennett, M., and Earwaker, D., 1994. Victim's responses to apologies: the effects of offender responsibility and offense severity. *Journal of Social Psychology* 134 (4), 457-464.
- Berkowitz, L., and Harmon-Jones, E., 2004. Toward an understanding of the determinants of anger. *Emotion*, 4 (2), 107-130.
- Berry, J.W., et al., 2005. Forgivingness, vengeful rumination, and affective traits. *Journal of Personality*, 73 (1), 183-225.
- Bies, R.J., Shapiro, D., and Cummings, L., 1988. Causal accounts and managing organizational conflict: is it enough to say it's not my fault? *Communication Research*, 15 (4), 381-399.
- Blum-Kulka, S., and Olshtain, E., 1984. Requests and apologies: a cross-cultural study of speech act realization patterns (CCSARP). *Applied Linguistics*, 5 (3), 196-213.
- Blum-Kulka, S., House, J., and Kasper, G., eds., 1989. *Cross-cultural pragmatics: requests and apologies*. New Jersey: Ablex.
- Blumstein, P.W., et al., 1974. The honoring of accounts. *American Sociological Review*, 39 (4), 551-566.
- Bolstad, M., 2000. Learning from Japan: the case for increased use of apology in mediation. *Cleveland State Law Review*, 48 (3) 545-578.
- Boon, S.D., and Sulsky, L.M., 1997. Attributions of blame and forgiveness in romantic relationships: a policy-capturing study. *Journal of Social Behavior and Personality*, 12 (1), 19-44.
- Bornstein, B.H., Lahna, R., and Miller, M., 2002. 'The effects of defendant remorse on mock juror decision in a malpractice case. *Behavioral Sciences & the Law*, 20 (4), 393-409.
- Boulle, L., 2005. *Mediation: principles, process, practice*. 2nd ed. Chatswood, NSW: LexisNexis.
- Brockner, J., et al., 1990. When it is especially important to explain why factors affecting the relationship between managers' explanations of a layoff and survivors' reactions to the layoff. *Journal of Experimental Social Psychology*, 26 (5), 389-407.
- Brose, L.A., et al., 2005. Forgiveness and personality traits. *Personality and Individual Differences*, 39 (1), 35-46.
- Brown, C., 2009. Apology legislation: oiling the wheels of tort. *Tort Law Review*, 17 (3), 127-139.
- Carroll, R., 2005. Apologising "safely" in mediation. *Australian Dispute Resolution Journal*, 16 (1), 40-54.
- Carroll, R., 2010. You can't order sorriness, so is there any value in an ordered apology? an analysis of apology orders in anti-discrimination cases. *University of New South Wales Law Journal* 33 (2), 360-385.

- Carroll, R., 2013. Apologies as a legal remedy. *Sydney Law Review* [online], 35 (2), 317-347. Available from: <https://ssrn.com/abstract=2304552> [Accessed 4 August 2017].
- Carroll, R., 2014. When "sorry" is the hardest word to say: how might apology legislation assist? *Hong Kong Law Journal*, 44 (2), 491-517.
- Charleton, R., and Dewdney, M., 2004. *The mediator's handbook – skills and strategies for practitioners*. 2nd ed. Sydney: LawBook Co.
- Choi J.J., and Severson M., 2009. "What! what kind of apology is this?": the nature of apology in victim offender mediation. *Children and youth services review*, 31 (7), 813-820.
- Cody, M.J., and McLaughlin, M.L., 1987. Interpersonal accounting. In: H. Giles and W.P. Robinson, eds. *The handbook of language and social psychology*. London: Wiley, 227-255.
- Cohen, H., 1984. Mediation in divorce: boon or bane. *Women's Advocacy*, 5 (2), 1-2.
- Cohen, J.R., 1999. Advising clients to apologize. *Southern California Law Review*, 72 (4), 1009-1069. Available from: <http://www-bcf.usc.edu/~uscirev/pdf/072402.pdf> [Accessed 4 August 2017].
- Cohen, J.R., 2000. Apology and organisations: exploring an example from medical practice. *Fordham Urban Law Journal*, 27 (5), 1447-1482.
- Cohen, J.R., 2002. Legislating apology: the pros and cons. *University of Cincinnati Law Review*, 70, 819-872.
- Competition and consumer (industry codes—franchising) regulation, 2014 (Cth) Sch. 1, Franchising code of conduct.
- Daly, M., Salmon, C., and Wilson, M., 1997. Kinship: The conceptual hole in psychological studies of social cognition and close relationships. In: J.A. Simpson, and D.T. Kenrick, eds. *Evolutionary Social Psychology*. New Jersey: Lawrence Erlbaum.
- Darby, B.W., and Schlenker, B.R., 1989. Children's reaction to transgression: effects of the actor's apology, reputation and remorse. *British Journal of Social Psychology*, 28 (4), 353-364.
- Darley, J.M., 2004. Citizens' sense of justice and the legal system. In: J.B. Ruscher, and E.Y. Hammer, eds. *Current Directions in Social Psychology*. New Jersey: Pearson, 178-183.
- Darley, J.M., and Pittman, T.S., 2003. The psychology of compensatory and retributive justice. *Personality and Social Psychology Review*, 7 (4), 324-336.
- Davis, J.R., and Gold, G.J., 2011. An examination of emotional empathy, attributions of stability, and the link between perceived remorse and forgiveness. *Personality and Individual Differences*, 50 (3), 392-397.
- De Cremer, D., and Schouten, B.C., 2008. When apologies for injustice matter: the role of respect. *European Psychologist*, 13 (4), 239-247.
- Department of Justice, The Government of the Hong Kong Special Administrative Region, 2016. *Consultation Paper: Enactment of Apology Legislation in Hong Kong*, 1 [online]. Available from: <http://www.doj.gov.hk/eng/public/pdf/2015/apology.pdf> [Accessed 6 August 2017].
- Dixon, J.A., et al., 1994. The role of speech accommodation and crime type in attribution of guilt. *Journal of Social Psychology*, 134 (4), 465-473.

- Eaton, J., and Struthers, C.W., 2006. Reduction of psychological aggression across varied interpersonal contexts through repentance and forgiveness. *Aggressive Behavior*, 32 (3), 195-206.
- Eaton, J., et al., 2007. When apologies fail: the moderating effect of implicit and explicit self esteem on apology and forgiveness. *Self and Identity*, 6 (2-3), 209-222.
- Fazio, R.H., Sherman, S.J., and Herr, P.M., 1982. The feature-positive effect in the self-perception process: does not doing matter as much as doing? *Journal of Personality and Social Psychology*, 42 (3), 404-411.
- Fehr, R., and Gelfand, M.J., 2010. When apologies work: how matching apology components to victims self-construals facilitates forgiveness. *Organizational Behavior and Human Decision Processes*, 113 (1), 37-50.
- Field, R., 2006. Using the feminist critique of mediation to explore "the good, the bad and the ugly" implications for women of the introduction of mandatory family dispute resolution in Australia. *Australian Journal of Family Law*, 20 (1), 45-78.
- Fincham, F.D., and M Hewstone, M., 1982. Social categorization and personal similarity as determinants of attribution bias: a test of defensive attribution. *British Journal of Social Psychology*, 21 (1), 51-56.
- Foong, D., 2007. A discussion of apology and its use in alternative dispute resolution. *Australasian Dispute Resolution Journal*, 18 (2), 73-82.
- Frantz, C.M., and Bennis, C., 2005. Better late than early: the influence of timing on apology effectiveness. *Journal of Experimental Social Psychology*, 41 (2), 201-207.
- Fukuno, M., and Ohbuchi, K., 1998. How effective are different accounts of harm-doing in softening victims' reactions? a scenario investigation of the effects of severity, relationship, and culture. *Asian Journal of Social Psychology*, 1 (2), 167-178.
- Galanter, M., 1981. Justice in many rooms: courts, private ordering and indigenous law. *Journal of Legal Pluralism*, 19, 1-47.
- Gelfand, G.F., et al., 2001. Cultural influences on cultural representations of conflict: interpretations of conflict episodes in the United States and Japan. *Journal of Applied Psychology*, 86 (6), 1059-1074.
- Gold, G.J., and Weiner, B., 2000. Remorse, Confession, group identity, and expectancies. *Basic and Applied Social Psychology*, 22 (4), 291-300.
- Gonzales, M.H., et al., 1990. Pardon My Gaffe: effects of sex, status, and consequence severity on accounts. *Journal of Personality and Social Psychology*, 58 (4), 610-621.
- Gonzales, M.H., Haugen, L.A., and Manning, D.J., 1994. Victims as "narrative critics", factors influencing rejoinders and evaluative responses to offenders' accounts. *Personality and Social Psychology Bulletin*, 20 (6), 691-704.
- Gonzales, M.H., Manning D.J., and Haugen, J.A., 1992. Explaining our sins: factors influencing offender accounts and anticipated victim responses. *Journal of Personality and Social Psychology*, 62 (6) 958-971.
- Guan, X., Park, H.S., and Lee, H.E., 2009. Cross-cultural differences in apology. *International Journal of Intercultural Relations*, 33 (1), 32-45.
- Halsmith, M., 2002. Towards healing: what can mediation offer abused child migrant men? *ADR Bulletin*, 5 (4), 1-6.

- Halsmith, M., 2016. *Case Studies Mediation and FDR Mediation* [online]. Available from: <http://www.hdr.net.au/Case-Studies-Mediation-and-FDR-Mediation.aspx> [Accessed 14 August 2017].
- Hareli, S., and Eisikovits, Z., 2006. The role of communicating social emotions accompanying apologies in forgiveness. *Motivation and Emotion*, 30 (3), 189-197.
- Hickson, L., 1986. The social contexts of apology in dispute settlement: a cross-cultural study. *Ethnology*, 25, 283-294.
- Ho, B., 2012. Apologies as signals: with evidence from a trust game. *Management Science*, 58 (1), 141-158.
- Hodgins, H.S., and Liebeskind, E., 2003. Apology versus defence: antecedents and consequences. *Journal of Experimental Social Psychology*, 39 (4), 297-316.
- Hodgins, H.S., Liebeskind, E., and Schwartz, W., 1996. Getting out of hot water: facework in social predicaments. *Journal of Personality and Social Psychology*, 71 (2), 300-314.
- Howell, A.J., et al., 2011. The disposition to apologize. *Personality and Individual Differences*, 51 (4), 509-514.
- Idemudia, E.S., and Mahri, S., 2011. Can gender, religion, education, age and personality predict willingness to forgive? *Gender & Behaviour*, 9 (1), 3765-3781.
- Iedema, R., et al., 2011. Patients' and family members' views on how clinicians enact and how they should enact incident disclosure: the "100 patient stories" qualitative study. *British Medical Journal* [online], 343, d4423. Available from: <http://www.bmj.com/content/343/bmj.d4423> [Accessed 6 August 2017].
- International mediation institute (IMI), s.d. *Code of professional conduct* [online]. Available from: <https://imimediation.org/imi-code-of-professional-conduct> [Accessed 14 August 2017]
- Itoi, R., Ohbuchi, K., and Fukuno, M., 1996. A cross-cultural study of preference of accounts: relationship closeness, harm severity, and motives of account making. *Journal of Applied Social Psychology*, 26 (10), 913-934.
- Jehle, A., et al., 2012. How voluntariness of apologies affects actual and hypothetical victims' perceptions of the offender. *Journal of Social Psychology*, 152 (6), 727-745.
- Kellett, A.J., 1987. Healing angry wounds: the roles of apology and mediation in disputes between physicians and patients. *Journal of Dispute Resolution* [online], 111-131. Available from: <http://scholarship.law.missouri.edu/jdr/vol1987/iss/10> [Accessed 6 August 2017].
- Khouri, N., 2014. Sorry Seems to be the hardest word: the case for apology legislation in New Zealand. *New Zealand Law Review*, 4, 603-646.
- Kim, P.H., et al., 2006. When more blame is better than less: the implications of internal vs. external attributions for the repair of trust after a competence vs. integrity-based trust violation. *Organizational Behavior and Human Decision Processes*, 99 (1), 49-65.
- King, M., et al., 2014. *Non-adversarial justice*. 2nd ed. NSW: The Federation Press.
- Kirchhoff, J., Wagner, U., and Strack, M., 2012. Apologies: words of magic? The role of verbal components, anger reduction, and offence severity. *Peace and Conflict: Journal of Peace Psychology*, 18 (2), 109-130.
- Kleefeld, J. 2007. Thinking like a human: British Columbia's Apology Act. *University of British Columbia Law Review*, 40 (2), 769-808.

- Kremer, J.F., and Stephens, L., 1983. Attributions and arousal as mediators of mitigation's effect on retaliation. *Journal of Personality and Social Psychology*, 45 (2), 335-343.
- Latif, E., 2001. Apologetic justice: evaluating apologies tailored towards legal solutions. *Boston University Law Review*, 81 (1), 289-320.
- Lazare, A., 2004. *On apology*. Oxford University Press.
- Lazare, A., 2006. Apology in medical practice: an emerging clinical skill. *Journal of the American Medical Association*, 296 (11), 1401-1404.
- Leunissen, J.M., 2014. *All apologies: on the willingness of perpetrators to apologize*. Thesis (PhD). Erasmus University.
- Leunissen, J.M., et al., 2013. The apology mismatch: asymmetries between victim's need for apologies and perpetrator's willingness to apologize. *Journal of Experimental Social Psychology*, 49 (3), 315-324.
- Levi, D., 1997. The role of apology in mediation. *New York University Law Review* [online], 72 (5), 1165-1210. Available from: <http://www.nyulawreview.org/issues/volume-72-number-5/role-apology-mediation> [Accessed 6 August 2017].
- Levi, D., 2000. Why not just apologise? How to say sorry in ADR. *Alternatives to the High Cost of Litigation*, 18 (8), 147-168.
- Maltby, J., Day, L., and Barber, L., 2004. Forgiveness and mental health variables: interpreting the relationship using an adaptational-continuum model of personality and coping. *Personality and Individual Differences*, 37 (8), 1629-1641.
- Maltby, L., et al., 2008. Personality predictors of levels of forgiveness two and a half years after the transgression. *Journal of research in personality*, 42 (4), 1088-1094.
- Maner, J.K., et al., 2002. The effects of perspective taking on motivations for helping: still no evidence for altruism. *Personality and Social Psychology Bulletin*, 28 (11), 1601-1610.
- Mazor, K.M., et al. 2005. Health plan members' views on forgiving medical errors. *American Journal of Managed Care*, 11 (1), 49-52.
- Mazor, K.M., et al., 2004. Health plan members' views about disclosure of medical errors. *Annals of Internal Medicine*, 140 (4), 409-418.
- Mazor, K.M., et al., 2013. More than words: patients' views on apology and disclosure when things go wrong in cancer care. *Patient Education and Counselling*, 90 (3), 341-346.
- McCullough, M.E., and Hoyt, W.T., 2002. Transgression-related motivational dispositions: personality substrates of forgiveness and their links to the big five. *Personality and Social Psychology Bulletin*, 28 (11), 1556-1573.
- McCullough, M.E., et al., 1998. Interpersonal Forgiveness in close relationships II: theoretical elaboration and measurement. *Journal of Personality and Social Psychology*, 75 (6), 1586-1603.
- McCullough, M.M., Worthington Jr., E.L., and Rachal, K.C., 1997. Interpersonal forgiving in close relationships. *Journal of Personality and Social Psychology*, 73 (2), 321-336.
- Mnookin, R.H., and Kornhauser, L., 1979. Bargaining in the shadow of the law: the case of divorce. *Yale Law Journal*, 88 (5), 950-997.

- MSB - Mediator Standards Board, 2015. *National Mediator Accreditation System ('NMAS'). Part III Practice Standards* [online]. Available from: <http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf> [Accessed 14 August 2017].
- Mullet, E., *et al.*, 1998. "Forgivingness": factor structure in a sample of young, middle aged, and elderly adults. *European Psychologist*, 3 (4), 289-297.
- NADRAC - National Alternative Dispute Resolution Advisory Council, 2003. *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* [online]. Canberra: Australian Government, Attorney-General's Department. Available from: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF> [Accessed 14 August 2017].
- NADRAC - National Alternative Dispute Resolution Advisory Council, 2011. *Maintaining and enhancing the integrity of ADR processes – from principles to practice through people* [online]. Canberra: Australian Government, Attorney-General's Department. Available from: <http://bit.ly/2fFZ84Y> [Accessed 14 August 2017].
- NMAS - National Mediation Accreditation Standard (NMAS), 2012. *Approval Standards* [online]. Available from: <http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf> [Accessed 14 August 2017].
- O'Hara, E.A., and Yarn, D., 2002. On apology and conciliation. *Washington law review*, 77 (4), 1121-1192.
- Ohbuchi, K., and Sato, K., 1994. Children's reaction to mitigating accounts: apologies, excuses, and intentionality of harm. *The Journal of Social Psychology*, 134 (1), 5-17.
- Ohbuchi, K., Masuyo, K., and Nariyuki, A., 1989. Apology as aggression control: its role in mediating appraisal of and response to harm. *Journal of Personality and Social Psychology*, 56 (2), 219-227.
- Ohtsubo, Y., *et al.*, 2012. Are costly apologies universally perceived as being sincere? *Journal of Evolutionary Psychology*, 10 (4), 187-204.
- Orenstein, A., 1999. Apology excepted: incorporating a feminist analysis into evidence policy where you would least expect it. *Southwestern Law Review* [online], 28 (2), 221-279. Available from: <http://www.repository.law.indiana.edu/facpub/553/> [Accessed 6 August 2017]
- Pavlick, D., 2003. Apology and mediation: the horse and carriage of the twenty-first century. *Ohio State Journal on Dispute Resolution* [online], 18 (3), 829-866. Available from: <http://hdl.handle.net/1811/77064> [Accessed 6 August 2017].
- Petrucci, C.J., 2002. Apology in the criminal justice system: evidence for including apology as an additional component in the legal system. *Behavioral Sciences and the Law*, 20 (4), 337-362.
- Raines, S., 2005. Can online mediation be transformative? Tales from the front. *Conflict Resolution Quarterly*, 22 (4), 437-451.
- Reeder G.D., and Spores, J.M., 1983. The attribution of morality. *Journal of Personality and Social Psychology*, 44 (4), 736-745.
- Reeder, G.D., *et al.*, 2002. Inferences about the morality of an aggressor: The role of perceived motive. *Journal of Personality and Social Psychology*, 83 (4), 789-803.
- Relis, T., 2009. *Perceptions in litigation and mediation: lawyers, defendants, plaintiffs, and gendered parties*. Cambridge University Press.

- Risen, J.L., and Gilovich, T., 2007. Target and observer differences in the acceptance of questionable apologies. *Journal of Personality and Social Psychology*, 92 (3), 418-433.
- Riskin, L.L., 1982. Mediation and lawyers. *Ohio State Law Journal* [online], 43 (1), 29-60. Available from: https://kb.osu.edu/dspace/bitstream/handle/1811/65180/1/OSLJ_V43N1_0029.pdf [Accessed 6 August 2017].
- Riskin, L.L., 1996. Understanding mediators' orientations, strategies, and techniques: a grid for the perplexed. *Harvard negotiation Law Review* [online], 1, 7-51. Available from: <http://scholarship.law.ufl.edu/facultypub/668/> [Accessed 6 August 2017].
- Riskin, L.L., 2003. Decision Making in mediation: the new old grid and the new new grid system. *Notre Dame Law Review* [online], 79 (1), 1-54. Available from: <http://scholarship.law.nd.edu/ndlr/vol79/iss1/1/> [Accessed 6 August 2017].
- Robbennolt, J.K., 2003. Apologies and legal settlement: an empirical examination. *Michigan Law Review*, 102 (3), 460-516.
- Robbennolt, J.K., 2006. Apologies and settlement levers. *Journal of Empirical Legal Studies*, 3 (2), 333-375.
- Robbennolt, J.K., 2008. Attorneys, apologies, and settlement negotiation. *Harvard Negotiation Law Review* 13 (2), 349-398.
- Robbennolt, J.K., 2013. The effects of negotiated and delegated apologies in settlement negotiation. *Law and human behaviour*, 37 (2), 128-135.
- Robinson, S.L., 1996. Trust and breach of the psychological contract. *Administrative Science Quarterly*, 41 (4), 574-599.
- Rubin, J.Z., Pruitt, D.G., and Kim, S.H., 1994. *Social conflict: escalation, stalemate and settlement*. 2nd ed. New York: McGraw-Hill.
- Runnels, M., 2009. Apologies all around: advocating federal protection for the full apology in civil cases. *San Diego Law Review*, 46 (1), 137-160.
- Salvador, R.O., Folger, R., and Priesemuth, M., 2012. Organizational apology and defense: effects of guilt and managerial status. *Journal of Managerial Issues*, 24 (2), 124-139.
- Scher, S.J., and Darley, J.M., 1997. How effective are the things people say to apologize? effects of the realization of the apology speech Act. *Journal of Psycholinguistic Research*, 26 (1), 127-140.
- Schlenker, B.R., and Darby, B.W., 1981. The use of apologies in social predicaments. *Social Psychology Quarterly*, 44 (3), 271-278.
- Schmitt, M., et al., 2004. Effects of objective and subjective account components on forgiving. *The Journal of Social Psychology*, 144 (5), 465-485.
- Schneider, C.D., 2000. What it means to be sorry: the power of apology in mediation. *Mediation Quarterly*, 17 (3), 265-280.
- Schroeder, D.A., and Linder, D.E., 1976. Effects of actor's causal role, outcome severity and knowledge of prior accidents upon attributions of responsibility. *Journal of Experimental Social Psychology*, 12 (4), 340-356.
- Schumann, K., and Ross, M., 2010. Why women apologise more than men: gender differences in thresholds for perceiving offensive behaviour. *Psychological Science*, 21 (11), 1649-1655.
- Shapiro, D.L., 1991. The effects of explanations on negative reactions to deceit. *Administrative Science Quarterly*, 36 (4), 614-630.

- Shapiro, D.L., Buttner, E.H., and Barry, B., 1994. Explanations: what factors enhance their perceived adequacy? *Organizational Behavior and Human Decision Processes*, 58 (3), 346-368.
- Shuman, D., 2000. The role of apology in tort law. *Judicature*, 83 (4), 180-189.
- Sitkin, S.B., and Bies, R.J., 1993. Social accounts in conflict situations: using explanations to manage conflict. *Human relations*, 46 (3), 349-370.
- Slocum, D., Allan, A., and Allan, M., 2011. An emerging theory of apology. *Australian journal of psychology*, 63 (2), 83-92.
- Smith, N., 2008. *I was wrong: the meanings of apologies*. Cambridge University Press.
- Stephen, D.L., Green, E.D., and Sander, F.E.A., 1987. Saying you're sorry. *Negotiation Journal*, 3 (3), 221-224.
- Struthers, C.W., et al., 2008. The effects of attributions of intent and apology on forgiveness: when saying sorry may not help the story. *Journal of Experimental Social Psychology*, 44 (4), 983-992.
- Sugimoto, N., 1999. *Japanese apology across disciplines*. New York: Nova Science Publishers.
- Sugimoto, N., 1997. A Japan-US comparison of apology styles. *Communication Research*, 24 (4), 349-369.
- Sulzer, J.L., and Burglass, R.K., 1968. Responsibility attribution, empathy, and punitiveness. *Journal of Personality*, 36 (2), 272-282.
- Tabak, B.A., et al., 2012. Conciliatory gestures facilitate forgiveness and feelings of friendship by making wrongdoers appear more agreeable. *Journal of Personality*, 80 (2), 503-536.
- Taft, L., 2000. Apology subverted: the commodification of apology. *The Yale Law Journal*, 109 (5), 1135-1160.
- Taft, L., 2005. Apology within a moral dialectic: a reply to Professor Robbenolt. *Michigan Law Review* [online], 103 (5), 1010-1017. Available from: <http://repository.law.umich.edu/mlr/vol103/iss5/3> [Accessed 6 August 2017].
- Taft, L., 2013. When more than sorry matters. *Pepperdine Dispute Resolution Law Journal*, 13 (1), 181-203.
- Takahashi, Y., 2005. Toward a balancing approach: the use of apology in Japanese society. *International Review of Victimology*, 12 (1), 23-45.
- Takaku, S., 2001. The effects of apology and perspective taking on interpersonal forgiveness: a dissonance-attribution model of interpersonal forgiveness. *Journal of Social Psychology*, 141 (4), 494-508.
- Takaku, S., Weiner, B., and Ohbuchi, K., 2001. A cross-cultural examination of the effect of apology and perspective taking on forgiveness. *Journal of Language and Social Psychology*, 20 (1-2) 144-166.
- Tavuchis, N., 1991. *Mea culpa: a sociology of apology and reconciliation*. California: Stanford University Press.
- Thomas, R.L., and Millar, M.G., 2008. The impact of failing to give an apology and the need-for-cognition on anger. *Current Psychology*, 27 (2), 126-134.
- Tomlinson, E.C., Dineen, B.R., and Lewick, R.J., 2004. The road to reconciliation: antecedents of victim willingness to reconcile following a broken promise. *Journal of Management*, 30 (2), 165-187.

- Toussaint, L.L., and Webb, J.R., 2005. Gender differences in the relationship between empathy and forgiveness. *Journal of Social Psychology*, 145 (6), 673-685.
- Tversky, A., and Kahneman, D., 1974. Judgement under uncertainty: heuristics and biases. *Science*, 185 (4157), 1124-1131.
- Van Dijck, G., 2017. The Ordered Apology. *Oxford Journal of Legal Studies*, 37 (3), 562-587.
- Vines, P., 2005. Apologising to avoid liability: cynical civility or practical morality? *Sydney Law Review*, 27 (3), 483-505.
- Vines, P., 2007. The power of apology: mercy, forgiveness or corrective justice in the civil liability arena. *Public Space: the Journal of Law and Social Justice* [online], 1 (1), 1-51. Available from: <http://epress.lib.uts.edu.au/journals/index.php/publicspace/article/view/535> [Access 6 August 2017].
- Vines, P., 2008. Apologies and civil liability in the UK: a view from elsewhere. *Edinburgh Law Review*, 12 (2), 200-230.
- Walster, E., 1966. Assignment of responsibility for an accident. *Journal of Personality and Social Psychology*, 3 (1), 73-79.
- Weiner, B., et al., 1987. An attributional analysis of excuse giving: studies of a naive theory of emotion. *Journal of Personality and Social Psychology*, 52 (2), 316-324.
- Weiner, B., Graham, S., Peter, O., and Zmuidinas, M., 1991. Public confession and forgiveness. *Journal of Personality*, 59 (2), 281-312.
- Witman, A.B., Park, D.M., and Hardin, S.B., 1996. How do patients want physicians to handle mistakes? a survey of internal medicine patients in an academic setting. *Journal of Internal Medicine*. 156 (22), 2565-2569.
- Zechmeister, J.S., and Romero, C., 2002. Victim and offender accounts of interpersonal conflict: autobiographical accounts of forgiveness and unforgiveness. *Journal of Personality and Social Psychology*, 82 (4), 675-686.
- Zechmeister, J.S., et al., 2004. Don't apologise unless you mean it: a laboratory investigation of forgiveness and retaliation. *Journal of Social and Clinical Psychology*, 23 (4), 532-564.
- Zillman, D., and Cantor, J.R., 1976. The timing of information about mitigating circumstances on emotional responses to provocation and retaliatory behaviour. *Journal of Experimental Social Psychology*, 12 (1), 38-55.
- Zwart-Hink, A., Akkermans, A., and van Wees, K., 2014. Compelled apologies as a legal remedy: some thoughts from a civil law jurisdiction. *University of Western Australia Law Review*, 38 (1), 100-122.
- Zylberman, L., 2009. Apology legislation: should it be safe to apologise in Manitoba? an assessment of Bill 202. *Manitoba law journal online* [online], 6, 175-191. Available from: <http://mlj.robsonhall.com/mlj/content/apology-legislation-should-it-be-safe-apologize-manitoba-assessment-bill-202> [Accessed 4 August 2017].