POLARITY ANALYSIS AND ALTERNATIVE DISPUTE RESOLUTION FOR ABUSE CLAIMS IN INSTITUTIONAL SETTINGS

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Introduction

People often think that there is really only one way to solve a problem. This is our normal mindset in approaching a difficulty. We come in with a bias.

But in approaching dispute resolution this is a tendency that needs to be recognized and avoided. The traditional alternatives have been civil litigation as the expectation and mediation as either the panacea or the bump on the road to court.[1] These alternatives are deeply interrelated. Properly understood, they must be understood to be in a dynamic relationship called a polarity.[2] A technique known as polarity analysis can serve as a necessary corrective to any bias that you might harbour.

A polarity is a set of relating and often contending phenomena that do not function independently. They form obverse sides of the same coin and are interdependent. Common polarities include the relationship between stability and change, and between the individual and the community, or between approaches such as the emotional and the rational. One cannot be defined without reference to the other.

I believe that this is now true, or should be true, of dispute resolution. The techniques or litigation and mediation are no more than tools for reaching the outcome that clients want, and tool selection is a critical exercise. The strengths and weaknesses of each must be critically assessed in relation to the unique and specific circumstances of the case at hand.

The elements of a resolution

The basic question is how to allocate a loss. In the context of abuse in institutional settings, the loss to be allocated is both financial (who is going to pay whom and for what), and human in a very profound way (can the process lead to some form of healing and reconciliation). Scoffers need to be careful about this: a big award may be the last thing that a victim needs or can cope with. Our ethical obligations as lawyers require us, within limits, to attend to the real interests of our clients.

The elements of a resolution are typically general and special damages, damages for loss of income, interest, and costs. While general and special damages are not terribly controversial, given readily accessible comparables, loss of income can be deeply problematic because it has a personal dynamic. Victims are oversold on their expectations. Causation looms large since victims tend to blame everything on the abuse and deeply resent suggestions otherwise. The loss of life potential can be deeply grieved and ever present. Costs can be a real impediment to

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1 See for example, "Too much ADR?" CBA National Jan-Feb 2007 p. 26. While arbitration was seen as a credible alternative it has suffered from increasing similarity to court processes, with mediation as the better approach; see "Knocking heads together-Mediation" The Economist, 3 Feb. 2007.

2 This paper relies heavily on the conceptual approach taken by Barry Johnson in Polarity Management, subtitled "Identifying and Managing Unsolvable Problems" (HRD Press, Inc., 1992); and see www.polaritymanagement.com.

settlement since contingency arrangements can bite into the final award, leaving victims with less and their lawyers with an element of conflict.

Other compensation issues include: whether compensation will be paid in lump sums or in periodic instalments; whether or not the details of compensation payments will be confidential; what, if any, financial counselling will be made available to claimants who receive compensation payments; what, if any, additional non-financial benefits, such as individual therapy/counselling, educational/vocational training or upgrading, will be offered; and whether or not non-financial benefits will be made available to family members.

Financial benefits resulting from not having to litigate claims can be shared, for example, the financial savings that all parties will realize because of reduced legal and expert involvement, the guarantee of immediate payment of compensation instead of appeals and possible enforcement procedures, the avoidance of the financial risk of having to pay the other party's legal costs, and the provision of non-financial benefits unavailable through the traditional civil litigation model.

In the area of abuse claims in institutional settings especially, non-financial relief and the possible impacts of the resolution process loom especially large.

What are the interests at stake?

Interest-based bargaining is a recognized approach to settlement negotiations. The other approach is positional bargaining.[3] What are the real interests of the claimants and of the institutions? Money is not the only issue.[4]

The interests of victims

Claims against institution are often radically different from claims against individuals. Institutions have often played a significant role in the lives of victims in the past, religious institutions especially. Religious institutions are held to higher moral standards. And they continue to play a role in the lives of victims, even when the victim has separated from the institution. The emotional connection and the sense of betrayal can be mitigated but remains a real presence.

Apart from compensation, victims understandably want more from the settlement process. The Law Commission of Canada identified some of these additional elements, many of which are

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3 Roger Fisher et al, Getting to Yes: Negotiating Agreement Without Giving In (2d) 1991; Beyond Machivelli: Tool for Coping with Conflict (1994)

4 The policy thinking and work done around mass settlements may provide a useful starting point. The Law Commission of Canada, "Restoring Dignity: Responding to Child Abuse in Canadian Institutions" (President Roderick A. MacDonald, Vice President Nathalie Des Rousers and Commissioners Gwen Boniface, Stephen Owen and Alan Buchanan)(Ottawa: Minister of Public Works and Government Services, 2000).

See also the magisterial work of the Honourable Fred Kaufman: "Searching for Justice, An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse", (2002) at www.gov.ns.ca/just.

desired by victims of abuse in an institutional setting quite apart from the government institutions that the Law Commission was considering.

- Establishing an historical record; remembrance
- Acknowledgement
- Apology
- Accountability
- Access to therapy or counselling
- Access to education or training
- Prevention and public awareness

Many of these desiderata apply by analogy to abuse victims in non-governmental settings.

The interests of institutions

Institutions have their own interests that can be expressed in some basic policy positions:

- The institution wants to be and to be seen operating in a way that is consistent with its constitutional values.
- The institution wants to be and to be seen as being fair to the victims and pro-active in assisting them. Under no circumstances does it want to be seen as obstructing compensation.
- The institution has limited resources and needs to be and to be seen as fiscally responsible. This means that a validation process for claims is necessary, which may be seen as an inconsistent impulse by victims and their advocates.
- The institution is worried about precedent.

The interests of the victims and the institutions are not entirely inconsistent. They can be made to intersect.

Process concerns: the validation of claims

For victims, the process of reaching resolution is critical. An institution, however, needs a credible validation process in some circumstances, especially where there is no admission of abuse or related criminal conviction, or there is genuine uncertainty about key elements.[5]

The law is very clear that a subsequent process is not able to second guess the criminal court on the factual findings of the judge but is bound by them. There may, however, be some claims that were not a constituent part of the criminal process. In addition, the victim impact statements are not part of the mandatory evidence that must be accepted. Accordingly, it must be open to defendants to ask additional questions of the victims after reviewing their victim impact statements and supporting material provided, if the loss of income claim is to be validated, for example.

In his review, "Searching for Justice", Mr. Kaufman also focussed on false claims:

> A credible and fair validation process is one that credibly separates out true and false allegations of abuse, and is procedurally fair to those most affected by it, particularly claimants and those against whom abuse is alleged. This means that such a process must include procedural safeguards to protect against false accusations and appropriate measures to respect the dignity and legitimate privacy interests of both claimants and alleged abusers.[6]

There is much to learn from Mr. Kaufman's report in the area of validation[7]. He suggests that where serious allegations of sexual abuse have been made in respect of which there is no criminal finding, a credible validation process should generally involve, at a minimum, the following:

- proof under oath, affirmation or an equivalent;
- the opportunity to challenge the account given by the claimant;
- the opportunity for the parties to tender witnesses and documents supporting or challenging the claimant's account;

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5 Kaufman, Executive Summary, p. 43 noted: "Findings expressly or by implication made in prior judicial or administrative proceedings should generally obviate the need for further validation of those findings as a precondition to obtaining redress". This is now the law: *Toronto (City) v. C.U.P.E., Local 79* [2003] S.C.J. No. 64; *W.H. v. H.C.A.* [2006] O.J. No. 3283 (C.A.) at paras 31 and 32.

6 Kaufman, Executive Summary, p. 43.

His report is a damning indictment of Government of Nova Scotia's compensation program that had little or no verification of individual claims. Mr. Kaufman noted that "...it left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, innocent employees who have been branded as abusers, and a public confused and unenlightened about the extent to which young people were or were not abused while in the care of the Province of Nova Scotia".

- the obligation for government to consider whether there is available evidence, including that of the alleged abuser, to challenge the claim. Where credible evidence is available, the government must consider tendering that evidence in support of its position. Generally, the alleged abuser should be given the opportunity to provide his or her account;

- fact finding by one or more independent adjudicators experienced in evaluating credibility and reliability for these or analogous types of claims;

- an appropriate burden of proof to validate a claim;

- rules for the mutual disclosure of documentation, consistent with the practice in civil actions, or otherwise as may be agreed upon.[8]

Any validation procedure will need to strike a delicate balance.

It must be sufficiently rigorous to substantiate the legitimacy of the claims submitted and thereby minimize the potential for exploitation through fraudulent claims. At the same time, however, the validation process should avoid, as much as possible, putting claimants through the types of emotionally trying procedures that characterize civil litigation, such as cross examination, that amount to "re-victimization".

Mr. Kaufman insists that "a validation process should endeavour to minimize the potential harm of the process itself upon those affected. This means that such a process should not unnecessarily or gratuitously compound the emotional, psychological or physical impact of prior abuse felt by true victims. This also means that such a process should not unnecessarily or gratuitously harm those who are innocent of abuse or of wrongdoing".[9] He proposed a useful catalogue of possible "accommodations" within a credible validation process:

- it may be conducted in private;

- it may provide for the disposition of documents, transcripts and notes following the completion of the validation process;

- it may impose limitations upon access to confidential records, consistent with the principles enunciated by the Supreme Court of Canada in *R. v. O'Connor* [10]and analogous legislation;

- it may permit the presence of a support person during the claimant's testimony or at other times during the process;

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8 Kaufman, Executive Summary, p. 51.

9 Kaufman, Executive Summary, p. 44.

10 [1995] 4 S.C.R. 411; 89 C.C.C. (3d) 109.

- it may limit the number of persons attending the fact finding hearing;
- it may provide for an informal hearing room and other physical arrangements to minimize the adverse effects of the process;
- it may limit the right of opposing counsel to cross-examine the claimant, provided that questioning can be directed to the claimant through the fact finder;
- it may provide for arrangements to prevent a face-to-face encounter between the claimant and the alleged abuser, except where necessary to establish identity;
- it may require undertakings signed by participants as to confidentiality, where not inconsistent with statutory obligations;
- it may provide for evidence to be taken by video-conferencing or other comparable means;
- it may allow claimants or analogous witnesses to adopt prior videotaped statements as their account, thereby reducing the need to fully recount their alleged victimization;
- it may establish rules to encourage timely admissions of fact, and excuse witnesses from having to recount facts that have been agreed upon.[11]

In addition to these accommodations, victims should have an opportunity to describe in their own words the abuse they suffered and the impact it has had on their lives, often directly to a representative of the institution. A sympathetic arena should be provided for this purpose. Counselling or therapy for claimants and their families both before and after they present their claims, unavailable in the traditional litigation model, should be made available.

These different and sometimes competing interests cannot be well accommodated in the traditional litigation model. Can they be reconciled in another framework? Polarity analysis suggests that they can.

Polarity analysis and dispute resolution alternatives

In the area of dispute resolution of sexual abuse claims arising in an institutional setting, the alternatives are litigation and mediation. These form the two poles of a polarity. A polarity can be depicted quite easily and analysed in graphic form. The advantage of doing this is completeness. It allows proponents of either viewpoint to understand the arguments on the other side.

A polarity has four quadrants, in this context consisting of the following:

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[11] Kaufman, Executive Summary, p. 51-52.

Formal and Controlled	Informal and Consensual
LITIGATION	**MEDIATION**
Forced, Slow and Costly	**Lacking rigour**

This is the basic structure of this particular polarity.

The Advocates

There are tradition bearers and reformers.

Tradition bearers resist change. They emphasize the upside of the current tradition, which is civil litigation. They also tend to emphasize the downside of the opposite pole, i.e., the negative aspects of mediation. These are the problems that the tradition bearers want to avoid, and the losses they fear if there is a change.

Because tradition bearers, the pure litigators, are the beneficiaries of the existing system and enjoy protected status, they are amenable to a charge that they are acting in their own self interest. They may fear the loss of power, prestige and clients.

Reformers promote change. They will argue that a shift towards more mediation is necessary. If the existing system is so good, then it would continue to enjoy significant support. But the legitimate pressures for change deny that and must be accommodated.

Reformers emphasize the downside of the present pole of litigation, being cost and delay, and emphasize the upside of the opposite pole, being the advantages of informality and consensus. Change in the polarity is driven by the energy of the reformers in reaction to the status quo.

It is important to recognize that within the frame of reference of each of the poles, neither the reformers nor the tradition bearers are entirely mistaken. The problem is that each particular emphasis skews the picture. Once the complete picture is understood, scope emerges for a way to manage the polarity to secure the best benefits of both litigation and mediation.

Completing the Polarity Diagram

It is helpful in considering each of the four quadrants to occasionally return to the picture of the basic polarity to maintain orientation.

The tradition bearers

Tradition bearers would promote the advantages of the upside of litigation, noted in the following polarity.

Formal and Controlled	Informal and Consensual
LITIGATION	MEDIATION
Forced, Slow and Costly	Lacking rigour

Advantages to litigation:

- Justice/ day in court
- Public and publicly acceptable
- Objective and neutral validation
- Neutral rules
- Familiar and predictable, understood process
- Result respected/ establishes truth
- Win big
- Non-consensual/ there will be an outcome
- Process barriers discourage unmeritorious claims

Tradition bearers would also focus criticism on the lower quadrant, being the downside of the mediation pole.

Formal and Controlled	Informal and Consensual
LITIGATION	**MEDIATION**
Forced, Slow and Costly	**Lacking rigour**

Disadvantages to mediation:

- Validation lacking
- Likely to pay too much
  - Lower value claims that would not be litigated get something
  - High claims less likely to be settled
  - Total payments, mediation and litigation, too high in group context
- Encourages unmeritorious claims
- Adds costs to process
- May not be taken seriously
- Not mandatory

The Reformers

In response to the arguments of the tradition bearers, the reformers emphasize the upside of mediation, being its informality and consensual nature, seen in the following polarity:

Formal and Controlled	**Informal and Consensual**
LITIGATION	**MEDIATION**
Forced, Slow and Costly	Lacking rigour

Advantages of mediation:

- Collaborative and consensual
- Process advantages resulting from informality
  - Speed, brevity, privacy, confidentiality, location, presence of supports
  - Proof and validation accommodations
- Remedial options broader

- Healing, non-financial
- Financial packages – grids, pots, structured
- Caps on financial contribution
- Apportion risk of loss

- Less costly, levels playing field
- Less judgmental/win-win possible
- Less confrontational
- Relationship preservation possible

Reformers would also emphasize critically the downside of litigation.

Formal and Controlled	Informal and Consensual
LITIGATION	MEDIATION
Forced, Slow and Costly	Lacking rigour

Disadvantages to litigation:

- Process is complex, oppressive, lengthy, intense, costly
- Favours wealthy
- Risky/ Winner takes all
- Cumbersome and not cost effective
  - Production
  - Interminable discoveries
  - Expert witnesses
- Public

- Judgmental on credibility, stigmatizing
- Adversarial and destructive
- Discourages meritorious claims
- Finality concerns-appeals possible

Observations on the Litigation/Mediation Polarity

To make observations on the polarity, it is helpful to envision all four quadrants filled in as suggested on the preceding pages. The version of the polarity presented here is, however, incomplete; there are probably other points to be added to each of the four quadrants. Suggestions would be gratefully received.

It is interesting to observe that each of the quadrants reflects the true perception of those who are sponsors of the quadrant. This means that, in order to understand the full picture, all of the quadrants must be grasped; the power of polarity analysis is in its completeness.

Those who are sensitive to and experience the negative aspects of litigation find their answers in the upper quadrant of mediation. Similarly, those who fear an experience of the lower quadrant of mediation find their answers in the upper quadrant of litigation. There is an understandable tendency for people to see only the opposed quadrants. The reformer sees the downside of the current situation and the upside of the position that is being advocated. Similarly, the tradition bearer sees the upside of the current position and the downside of the position being advocated by the reformer. The power of polarity analysis is in the fact that it forces the participants to see and address the entire problem.

The dynamic over time is a movement from negative to positive, then consolidation in the positive quadrant. Eventually the negative aspects of the positive quadrant begin to appear and a movement occurs that shifts the system from that quadrant to the lower, negative quadrant. The dynamic then repeats. For example, at one time the litigation model enjoyed substantial benefits, which are listed in the upper litigation quadrant. Over time, however, the litigation system continued to evolve and eventually the problems associated with it began to emerge, moving the system into the negative quadrant, where it now arguably resides. This becomes the pressure for reform. It is predictable that pressure for more mediation will continue until there is meaningful litigation reform.

Eventually, however, the problems associated with mediation will themselves become more and more evident. Then the tradition bearers for mediation will emerge and will seek to maintain it, while the reformers for more litigation elements, , armed with new resources, will take over and push the dynamic in favour of the positive quadrant of litigation. This sets up the infinite loop that is typical of polarity relationships.

Once the dynamic is understood, the goal becomes clear. It is to preserve the best of both positive quadrants, and to spend as little time as possible in either negative quadrant. Continuous

monitoring and adjustment by those who understand the dynamic in the system is necessary to maintain an appropriate balance or tension. In a specific case or set of cases that is the role of good counsel, who should be attentive to the interests of their clients and the dynamics of the situations they face.

The choice between litigation and mediation

As the polarity analysis shows, the apparently stark choice between litigation and mediation can be tempered. Issues can be hived off. The design of the resolution process can be quite creative, building in elements of traditional litigation, where, for example, some elements of validation are necessary, while preserving the best of mediation. There is much scope for this in the area of resolving abuse claims in institutional settings, as noted above.

But there is an aspect of the dynamic that must be kept in mind. Some people, often the lawyers, cannot say yes. There are sometimes psychological reasons and sometimes reasons that veer towards self-interest. Whatever the reason, you need to assess early whether the other side can say yes. If the answer looks like an inevitable no, then negotiation will be fruitless because you will be negotiating with yourself and increasing the other side's expectations as you do so.

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LITIGATION

MEDIATION

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- Process is complex, oppressive, lengthy, intense, costly
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