Apologising to Avoid Liability: Cynical Civility or Practical Morality?

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1. Introduction

In Australia's recent whirlwind of tort reform, one reform which was not mentioned in the Ipp Report,[1] has been taken up by every jurisdiction except for the Commonwealth. This is the special mention of apology or expression of regret accompanied either by a legislative disclaimer of liability arising out of the apology and/or a provision about the admissibility of the apology into evidence. This provision is based on the view, firmly supported anecdotally if not empirically,[2] that people often sue wrongdoers because they are so enraged by the lack of an apology that a wrong which they would otherwise suffer without recourse to law becomes intolerable and litigation follows. At the very least this demonstrates that something about the process of apologising is important to people.

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1 Panel for the Review of the Law of Negligence (Chaired by Justice Ipp) *Review of the Law of Negligence: Final Report* (2002) (hereafter *Ipp Report*) <http://revofneg.treasury.gov.au> (1 February 2005).

2 Very few empirical studies have been carried out which really investigate this question. See for example Jennifer Rebbennolt, 'Apologies and Legal Settlement: an Empirical Examination' (2003) 102 *Mich LR* 460 and Russell Korobkin & Chris Guthrie, 'Psychological Barriers to Litigation Settlement: An Experimental Approach' (1994) 93 *Mich LR* 107. These experimental studies have yet to be matched by empirical research using actual cases. A few studies of propensity to sue are discussed below in the section entitled 'Empirical Data about Apologies and Propensity to Sue'. Many of the Second Reading speeches for the various civil liability acts refer to anecdotal evidence, as do many of the articles arguing that apologies will reduce the desire of plaintiffs to sue: Steven Keeva, 'Does Law Mean Never Having to Say You're Sorry?' (1999) *ABAJ* 64 (suggests 30 per cent of medical malpractice cases could be resolved with an apology); Peter Rehm & Denise Beatty, 'The Legal Consequences of Apologising, (1996) *J Disp Resol* 115; Hiroshi Wagatsuma & Arthur Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 *L Soc R* 461.

Is this sudden emphasis on apologies merely a fashion? Some people have suggested that this is the 'age of apology'.[3] Calls for apologies for the treatment of Indigenous people in Australia and elsewhere, for wartime acts by Japan, Germany, Russia and others, as part of the process of truth and reconciliation in South Africa and Chile, have all been made and in many cases those apologies have been made.[4] American scholars have drawn on the importance of the apology in Japan as one model.[5] American Presidents have apologised to their people. Indeed the apology of Richard Nixon is a well-known 'failed' apology, in that he failed to acknowledge his fault and even tried to assert that it was for the greater good.[6] The Blair Government's apology for the treatment of the Birmingham Four and the Guildford Six has just been reported.[7] In Australia, the refusal of John Howard to apologise to Aboriginal people for the injustices of the past, and to Cornelia Rau, who was mistakenly locked up in Baxter immigration detention centre,[8] has been extremely controversial.

In the area of interpersonal disputes, apologies are central to mediation and alternative dispute resolution,[9] and in criminal law apologies are a significant part of reintegrative shaming.[10] In these situations apologies are seen as essential to healing and rebuilding relationships and communities. The law of defamation, of course, has always paid attention to apologies. All these things suggest that there is something very significant about apologies in very many societies. That is, that apologies are meaningful to people in some way and have a significant function.

The significance and meaning of apology in the context of civil liability is an interesting aspect of the argument about the aims of tort law which has been such a feature of Professor Luntz's work.[11] If tort law is all about compensation (and I do not think it is), does this mean that an apology can be regarded in some way as compensatory? Is this treatment of apology an implicit recognition that the aim of

3 Roy Brooks, 'The Age of Apology' in Roy Brooks (ed), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (1999).

4 Elizabeth Latif, 'Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions' (2001) 81 *Boston U LR* 289.

5 Note especially, Wagatsuma & Rosett, above n2.

6 Lee Taft, 'Apology Subverted: Commodification of Apology' (2000) 109 *Yale LJ* 1135 at 1141; Latif, above n4 at 308.

7 Reported on ABC Radio National, 10 Feb 2005.

8 Tony Stephens, 'Sorry Seems the Hardest Word' *The Sydney Morning Herald* (14 Feb 2005) at 6.

9 Jennifer Brown, 'The Role of Apology in Negotiation' (2003–2004) 87 *Marq LR* 665*;* Deborah Levi, 'The Role of Apology in Mediation' (1997) 72 *NYULR* 1165.

10 John Braithwaite, *Crime, Shame and Reintegration* (1989); Stephanos Bibas & Richard Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114 Y*ale LJ* 85.

11 Luntz's work on the aims of torts as compensation has led to his well-known support for no-fault compensation schemes. Luntz's work has always been informed, not only by meticulous legal analysis, but by attention to the effectiveness of the legal framework in achieving its aims. See Chapter One of Harold Luntz & David Hambly, *Torts, Cases and Commentary* (5th ed, 2002) (which has 128 pages) for a demonstration. See also, inter alia, Harold Luntz *Compensation and Rehabilitation* (1975); Harold Luntz 'Looking Back at Accident Compensation: an Australian perspective' (2003) 34 *Vict U Well LR* 279.

tort law is corrective justice? What kind of apology would meet this aim? Prima facie, apologies do not seem to have a connection to deterrence, although in the medical context of open disclosure an argument has been put that open disclosure can reduce medical accidents.

In this paper I argue that the best way to think about apology in the civil liability arena is as a form of corrective justice. The legislative treatment of apology in the civil context arises out of recognition of the significance of apologies in our society, but most of the legislatures which have attempted to deal with apologies have failed to deal coherently with the real nature of an effective apology in the context of personal injury litigation and are therefore unlikely to achieve the desired result.

2. Apologies in the Medical Context

One of the driving forces of the tort reform process was a crisis in medical insurance, so it is appropriate to consider the medical context specifically. The Ipp Panel, which was asked by the Commonwealth Government to report on the reforms to the law of negligence in 2002, was asked to report specifically on medical negligence.[12] The area of medical negligence has become of major concern to doctors. Despite the fact that there is still no consistent evidence that litigation is increasing on a per capita basis, and recognition that there may even be a decrease per medical service in the litigation rate,[13] the view that an increasingly blaming society is massively increasing its litigation rate remains prevalent and this causes doctors to be extremely fearful of litigation.

Possibly because of this fear, it is in the medical context that the apology has been most discussed. There is some evidence from the United States of advantages to defendants in open disclosure and apology. A great deal of the literature on apology has also been developed in relation to medical negligence.[14] Most of what little empirical evidence there is about reduced litigation in response to apologies and/or open disclosure has arisen in the medical context. For example, the AHMAC Report refers to the practice adopted at the Lexington Veteran Affairs Medical Centre in the USA they lost two major medical malpractice cases in 1987. The Lexington Centre, in a practice that appeared to be totally counter to legal

12 Ipp Report, above n1. See the terms of reference.

13 'It seems likely that there has been an increase in claims numbers over the past 10-15 years – possibly doubling over that period in some jurisdictions. However, this is not simply explained by a theory of more litigious patients. Over that same period the number of Medicare services provided has increased by 66 per cent and the number of hospital admissions has increased by 76 per cent so a significant proportion of that increase will have arisen from greater exposure to risk': Australian Health Ministers Advisory Council Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: an Integrated Reform Package* (hereafter *AHMAC* Report) at [3.25]: <http://health.act.gov.au/c/health?a=sendfile&ft=p&fid=1054039512&sid> (3 January 2005).

14 For example, Rae Lamb, 'Open Disclosure: The Only Approach to Medical Error' (2004) 13 *Quality and Safety in Health Care* 3–5; Jonathon Cohen 'Apology and Organisations: Exploring an Example from Medical Practice' (2000) 27 *Ford Urban LJ* 1447; David Schwappach & Christian Koeck, 'What Makes an Error Unacceptable? A Factorial Survey on the Disclosure of Medical Errors' (2004) 16 *Int J Qual Health Care* 317–326.

advice, began to notify patients of adverse events even when patients were not aware of them. They also admitted fault verbally (and in writing if the patient so desired). This was done partly to ensure that there was evidence of a process of dealing with adverse events in case of future litigation, but it also had 'unanticipated financial benefits',[15] in that many more settlements were made and the hospital's costs for malpractice claims dropped markedly. The AHMAC Legal Process Reform Group[16] recommended that legislation provide that an apology made as part of an open disclosure process be inadmissible in an action for medical negligence, referring to the development of the Open Disclosure Project[17] and the National Open Disclosure Standard for Public and Private Hospitals developed by the Australian Council for Safety and Quality in Health Care. They said:

> The elements which might be included in an effective initial disclosure of an adverse event to a patient (or where relevant and appropriate, their family) include:
>
> - Factual information about what happened;
> - Factual information about the immediate effect on the patient;
> - An apology or expression of regret to the patient;
> - Discussion of the possible consequences for the patient;
> - Factual information about options to ameliorate harm done to the patient;
> - A brief outline of what will be done to ensure that lessons are learned from the adverse event to prevent recurrence; and
> - The identification of someone who will be able to answer any questions which the patient or family may have once they have had some time to think about it.[18]

Thus, apologies in the medical context have come to be seen as part of a process which includes better healing for patients, better learning for medical practitioners and hopefully reduced litigation as a result. Note that they refer to an 'apology or expression of regret.' This is because of concern that an apology might amount to an admission of liability in itself, which has been seen as a stumbling block to the resolution of personal injury litigation, whether or not an insurance contract is involved.

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15 AHMAC Report, above n13 at 49; the Lexington Centre's experience is also discussed in Steve Kraman and Ginny Hamm, 'Risk Management: Extreme Honesty May be the Best Policy' (1999) 131 *Annals of Internal Medicine* 963–967 and in Cohen, above n14.

16 AHMAC Report, above n13 at 2.

17 The Open Disclosure Project was carried out at the request of the Australian Council for Safety and Quality in Health Care by the National Open Disclosure Consortium in 2001 and 2002. The aim was to develop national standards, education and support for open disclosure of adverse events to patients. 'Adverse event' is defined as 'An incident in which harm resulted to a person receiving health care' by Merrilyn Walton in *Open Disclosure to Patients or Families After an Adverse Event: A Literature Review* at 53. The project website is at <http://www.nsh.nsw.gov.au>.

18 AHMAC Report, above n13 at 48.

However, as the Legal Review for the Open Disclosure Project notes, the Lexington experience does not prove that litigation rates would drop in Australia if a similar scheme was introduced — but there is certainly no evidence that the rate would increase.[19]

3. Apologies and Insurance

An important stumbling block to the practice of apology has been the interpretation of the frequent clause in insurance contracts, which voids the contract if any admission of liability is made. These clauses are known as admissions and compromise clauses. It is common for organisations to advise clients not to apologise because that might be taken as an admission of liability. For example, in 2003 United Medical Protection's Australasian Medical Insurance Limited policy stated:

> 4.1 You must not make any admission, offer or promise in relation to any claim covered by this policy without our prior written consent.[20]

Although apology is not mentioned in this clause, nor is it usually mentioned in such clauses, there is often concern that an apology will be construed as an admission of liability which would avoid such a contract. Admissions and compromise clauses are common in insurance contracts. Such clauses normally say that if a person makes an admission or a compromise on a claim, the insurance contract will be terminated and the insured may be left unprotected,[21] but if the liability would have existed regardless of the admission or compromise the exclusion does not apply.[22] The *Commonwealth Insurance Contracts Act* 1984 (Cth) prevents the termination of the contract, instead allowing the insurer to reduce the claim by the amount the insurer has been affected by the admission or compromise. Of course, this could be the whole sum in some circumstances.

The existence of these clauses and the advice which has arisen out of the fear that an apology will activate the clause has had a significant chilling effect on the willingness of defendants to apologise to people they have injured. This is ironic considering that there is little legal evidence that an apology will be regarded as an admission which will create liability. This is discussed below.

4. The New Civil Liability Legislation

As with many of the Australian tort reforms, the legislation provided across the jurisdictions in respect of apologies does not form a single pattern. Four models exist and in this paper I set out why different models have been chosen and the likely effect of the different models.

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19 Corrs Chambers Westgarth, *Open Disclosure Project: Legal Review* (2002), above n17 at 27–28.

20 Id at 30.

21 *Terry v Trafalgar Insurance* [1970] 1 Lloyd's Rep 524.

22 *Broadlands Properties Ltd v Guardian Assurance Co Ltd* (1984) 3 ANZ Ins Cas 60–552 at 708, 304.

The New South Wales provision is in Part 10 of the *Civil Liability Act* 2002 (NSW), ss67–69:

> **67 Application of Part**
>
> (1) This Part applies to civil liability of any kind
> (2) This part does not apply to civil liability that is excluded from the operation of this Part by Section 3B.[23]
>
> **68 Definition**
> In this Part:
> **apology** means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.
>
> **69 Effect of apology on liability**
> (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the fault of the person:
> (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
> (b) is not relevant to the determination of fault or liability in connection with that matter.
> (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the fault of the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

The significant elements in this legislation include:

A: the fact that apology is defined to include an admission of fault, rather than merely as an expression of regret;

B: the apology does not constitute a legal admission of fault or liability;

C: the apology is not relevant to the determination of fault or liability; and

D: the apology is not admissible in civil proceedings as evidence of fault or liability.

Element A is significant because the apology is defined as more than a mere expression of regret. It is not just 'I am sorry this happened to you', but 'I am sorry for doing this thing which has harmed you. I was at fault'. Element B states that the apology does not constitute a legal admission of liability — that is, the fact that I have acknowledged that I was at fault is not the same as me being legally liable. Thus, legal liability remains to be proved in another way. Element C emphasises

23 Section 3B provides that the Act does not apply to intentional torts, sexual assault or any civil matter involving intention to cause injury or death, nor to dust diseases, or injury or death resulting from tobacco products nor matters under the following legislation: *Motor Accidents Act* 1988 (NSW); *Motor Accidents Compensation Act* 1999 (NSW) or *Transport Administration Act* 1988 (NSW); *Workers Compensation Act* 1987 (NSW); *Workers Compensation (Bushfire, Emergency and Rescue Services) Act* 1987; *Victims Support and Reconciliation Act* 1996. Not all jurisdictions have so restricted the provision.

this by saying that the apology is not even relevant to the determination of legal liability. Thus, it will not be relevant for the purposes of determining admissibility of evidence by relevance and it cannot be used to go towards the determination of liability. Element D prevents the apology from being admitted in civil proceedings as evidence of liability, but it does not prevent the apology from being admitted for other purposes. For example, in mitigation of damages in defamation; or possibly, in jurisdictions which allow exemplary or punitive damages, it might be admissible as evidence of contrition so that such damages might not be awarded.

The ACT legislation[24] is in essentially the same terms as the New South Wales legislation, having all four of the above elements.

The Western Australian legislation[25] and the Tasmanian provisions[26] differ from those of New South Wales and the Australian Capital Territory. First, they define 'apology' as 'an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person'.[27] They also apply to civil liability of any kind. Section 5 AH of the Western Australian provision and ss7(1) and 7(2) of the Tasmanian provision are in the same terms as New South Wales' s69. Thus the Western Australian and Tasmanian legislation have elements B, C and D but not element A.

The Northern Territory Personal *Injuries (Liabilities and Damages) Act* 2003 (NT) ss12–13 and *Queensland Civil Liability Act* 2003 (Qld) ss68–72 have only element D of the elements outlined above. That is, they refer only to admissibility of an apology defined purely to evidence in civil proceedings so that the only exclusion from evidence is a mere expression of regret.

The Victorian provisions are different again. The *Wrongs Act* 1958 (Vic) s14I defines 'apology' as 'an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault'. Section 14J provides:

> (1) In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law, an apology does not constitute-
> (a) an admission of liability for the death or injury; or
> (b) an admission of unprofessional conduct, carelessness, incompetence, or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.
>
> (2) Sub-section (1) applies whether the apology –
> (a) is made orally or in writing; or
> (b) is made before or after the civil proceeding was in contemplation or commenced.
>
> (3) Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

24 *Civil Law (Wrongs) Act* 2002 (ACT) ss12–14.
25 *Civil Liability Act* 2002 (WA) ss5AF–5AH.
26 *Civil Liability Act* 2002 (Tas) s7.
27 WA s5AF; Tas s7(3).

The South Australian provisions are similar in effect:. *Civil Liability Act* 1936 (SA) s75:

> In proceedings in which damages are claimed for a tort, no admission of liability or fault is to be inferred from the fact that the defendant or a person for whose tort the defendant is liable expressed regret for the incident out of which the cause of action arose.

Thus the South Australian and Victorian provisions have only element B.

Similar legislation has been passed recently in the United States in California[28] and Texas[29] and has existed in Massachusetts since 1986.[30] The Californian Evidence Code provides:

> S 1160 The portion of statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

Thus, these jurisdictions have only element D.

The differences across the jurisdictions can be put in the form of the following table:

Table 1: Apology Elements by Jurisdiction

	A	B	C	D
	(apology incl fault)	(not an admission of liability)	(not relevant)	(not admissible as evidence of liability)
ACT	X	X	X	X
NSW	X	X	X	X
NT				X
Qld				X
SA		X		
Tas		X	X	X
Vic		X		
WA		X	X	X
California				X
Massachusetts				X
Texas				X

28 California Evidence Code, s1160.
29 Texas Civil Code, s18.061 (introduced in 1999).
30 Mass Gen Laws Chapter 233, s23D.

The most striking thing about this table is the extent to which the jurisdictions have chosen to protect only the 'safe' or 'partial' apology, the expression of regret. Such an expression of regret in the majority of jurisdictions is not an admission of liability nor is it admissible as evidence of liability.

5. What is the Legislation Trying to Achieve?

The speeches in the Australian Parliaments demonstrate that the main aim of this legislation is the reduction of litigation. In introducing the changes into parliament, the Premier of New South Wales, Mr Carr said:[31]

> An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court.

In the same session, Mr Brown said:

> When I was getting my driver's licence I was told that, if I ever had an accident and it was my fault, I should never apologise as it could be taken to be an admission of guilt and I could be sued. Australians are happy to apologise if they are at fault. They try to work things out. It is totally un-Australian not to apologise if one thinks that one has done something wrong. The Carr Labor Government has included provisions in this bill that will ensure that any apology made by or on behalf of a defendant will not constitute an admission of liability and it will not be relevant to the determination of fault or liability in connection with civil liability. The Government, through this bill, is restricting the rights of individuals that have developed through common law in protection of the community. That is what the community expects the Government to do. That is what the Carr Labor Government is doing. It is doing everything it can to change the law of tort in New South Wales. I encourage other States to change the law of tort.[32]

In the Northern Territory, it was observed by Mr Kiely:

> This legislation, which a community could be rightly happy with, is a means by which individuals are empowered to make expressions of regret without that statement being used at a later date as an acknowledgement of fault. Thanks to this legislation, a person may make an oral or written statement expressing regret for an incident that is alleged to have caused the personal injury. Such a statement does not contain an acknowledgement of fault by that person, and is not admissible in future proceedings. I do not know how many times each of us here have heard stories where people wanted to say sorry but were constrained by fear that saying sorry might mean some liability. The same goes for all the times

31 Robert Carr, Legislative Assembly, *Parliamentary Debates (Hansard)*, 30 October 2002 at 5764.

32 Mathew Brown, Legislative Assembly, *Parliamentary Debates (Hansard)*, 30 October 2002 at 6244.

> people have stated all they wanted to hear was the person who caused the accident to say sorry so that closure could be effected. I believe this clause alone will have a significant effect on the frequency of claims.[33]

Dr Toyne:

> It is simply to promote that pre-court process by providing an extra formal provision within the act. Given that it is practice for doctors to be instructed not to apologise, this provides some scope for them to enter the negotiation on a different basis.[34]

The various speeches suggest that the main aim of the legislation is to stop litigation because most people will be satisfied with an apology and an explanation. The first such legislation, that of Massachusetts, was apparently passed at the instigation of a senator whose daughter had been killed on the road while riding a bicycle. He apparently thought that expressions of regret and sympathy alone could reduce people's desire to sue.[35] However, it is arguable that the choice of expression of regret rather than an apology acknowledging fault by the majority of jurisdictions is less likely to be successful in reducing litigation than parliamentarians hope.

This raises the issue of whether a true apology involves an admission of fault, and how effective a mere expression of regret or partial apology can be in reducing litigation.

6. What is an Apology?

The legislation in both Australia and the United States defines apology as an expression of regret either with or without an admission of fault. Most jurisdictions define the protected apology as no more than an expression of regret. Most of the legislation is based on the distinction between apology and expression of regret — the expression of regret being regarded as a 'safe' apology. Thus, element A is missing from them.

However, in the moral domain an apology is more than a mere expression of regret. Saying 'I am sorry for your loss' is an expression of regret, but in the moral domain that is not a real apology. Saying 'I am sorry that I hurt you' is a real apology because it acknowledges responsibility. Paul Davis[36] gives an example of the difference:

> I – a white man – might have some blacks among my friends. That might offend some who think whites should not befriend blacks. If so, I would regret that offence, ie I would wish it that those who are offended were not so. However, I would be quite disinclined to apologise. This is because I would not feel that I am doing anything wrong if the behaviour in fact causes offence to some. I would feel

33 Leonard Kiely, Legislative Assembly, *Parliamentary Debates (Hansard)* 27 February 2003.
34 Dr Peter Toyne, Legislative Assembly, *Parliamentary Debates (Hansard)* 27 February 2003.
35 Taft, above n6 at 1151.
36 Paul Davis, 'On Apologies' (2002) 19 *Journal of Applied Philosophy* 169 at 169.

> that the offence results from, not a culpability of mine, but a deficiency in the outlook of those who are offended.

There is an extensive literature which shows that many people do not regard an apology as real unless it includes an admission of wrong.[37] This was also noted in the Victorian debate on the provisions:[38]

> The next matter to which I refer is a set of provisions …[which] state that apologies or reductions or waivers of fees on their own do not constitute admissions of liability. The intention of this is clear: that the government wants to not have people clam up and feel they cannot express a normal human emotion of sympathy or condolence in the event of an accident for fear that whatever they say might be taken down or memorised and subsequently used against them in court proceedings.
>
> As I said, the intention is clear. The problem with these provisions is that they do not seem to achieve that intention, because while they provide that an expression of sorrow, regret or sympathy falls within the definition of an apology, they go on to qualify that by stating that it does not include a clear acknowledgment of fault.
>
> Further on in the legislation it says in several places that nothing in the relevant section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.
>
> To summarise, if you say to someone 'I am sorry', that is not a clear acknowledgment of fault, but if you say to someone 'I am sorry. It is all my fault', then the apology provision is rendered inoperative. The Australian Medical Association (AMA), amongst others, has expressed the view that this sort of highly qualified, highly restrictive drafting is not calculated to encourage the outcome the government seeks to achieve. The AMA believes doctors, amongst others, are going to be very cautious in trying to take advantage of these provisions because of their limited nature.

Lee Taft argues that, '[f]or an apology to be authentic, it must meet essential criteria: there must be an unequivocal expression of sorrow and an admission of wrongdoing. Without a meaningful and unequivocal expression of wrongdoing, apology cannot be an authentic moral act'.[39] Cohen suggests that an apology has three elements — admitting fault, expressing regret for the action and expressing sympathy.[40] He also emphasises the importance of sincerity and voluntariness.

An effective apology, according to Brown, requires an affirmative purpose, must be the legitimate result of 'analysis and introspection on the part of the offender', and timely — a delayed apology may make the offence or harm seem greater.[41] One question is the extent to which an apology should also contain a

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37 Brown, above n9 at 668ff; Taft, above n6; Erin O'Hara & Douglas Yarn, 'On Apology and Consilience' (2002) 77 *Washington Law Review* 1121; Latif, above n4.

38 Robert Clark, Legislative Assembly, *Parliamentary Debates (Hansard)*, 8 October 2002 at 285.

39 Taft, above n6 at 1154. See also Daniel Shuman, 'The Role of Apology in Tort Law' (2000) 83 *Jud* 180.

40 Jonathon Cohen 'Advising Clients to Apologise' (1999) 72 *S Cal L Rev* 1009 at 1014–1015.

promise to change something in the future. In the psychological domain, an apology is 'remedial work'[42] itself. Goffman describes an apology as an exchange 'which [splits] the self into a blameworthy part and a part that stands back and sympathises with the blame giving, and, by implication, is worthy of being brought back into the fold.'[43]

The construction of apologies as admissions of liability comes out of the moral domain where an apology consists of an admission + expression of regret and may include asking for forgiveness. We need to pay attention to the moral domain because that is the domain in which plaintiffs and defendants live and make their decisions. Because it is so well-recognised that apologies in the moral and ordinary social domain acknowledge fault, it has often been assumed that that is the same as a legal admission of liability. That is not necessarily so at common law.

7. Does the Legislation Make a Difference?

A. Apologies vs Admission of Liability

The common law is able to distinguish between apologies, admissions of liability and admissions of fact. There are two contexts in which the question of whether an apology amounts to an admission of guilt is important. The first question is whether a party to an accident who says 'I'm sorry, that was my fault' has breached his or her contract of insurance.

As noted above, admissions and compromise clauses are common in insurance contracts. A medical example was given above. Such clauses normally say that if a person makes an admission or a compromise on a claim the insurance contract will be terminated and the insured may be left unprotected.[44] However, if the apology does not amount to an admission of liability then an apology would not breach an admission or compromise clause.

The second question, therefore, is whether the apology amounts to an admission of liability which will count against the defendant in court. The High Court of Australia addressed this question in 2003 in *Dovuro Pty Ltd v Wilkins*.[45] In that case, contaminated canola seed had been released to growers and caused them pure economic loss. The Dovuro Company, which had released the seed to the growers, made written statements and apologies. The first was a media release which said:

> We apologise to canola growers and industry personnel. This situation should not have occurred but due to strong interest in Karoo the unusual step was made of undertaking contract seed production in New Zealand to assist rapid multiplication; whilst the urgency to process and distribute the seed of Karoo in time for planting caused additional time pressures.

41 Brown, above n9 at 668 ff.

42 Erving Goffman, *Relations in Public: Microstudies of the Public Order* (1971). See also Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991).

43 Goffman, id at 113.

44 *Terry v Trafalgar Insurance*, above n21.

45 (2003) 215 CLR 317.

The second statement was in a letter:

> I'd like to stress at this stage that this does not excuse Dovuro in failing in its duty of care to inform growers as to the presence of these weed seeds. We got it wrong in this case, and new varieties will not be brought on the market again in this manner. Dovuro will not be producing seed in New Zealand again. The company will continue in bulking up its varieties (as it does every year) in Western Australia.

Both these statements are what the literature calls 'full' apologies. That is, they not only express regret but admit fault and even go so far as to say what will be done to remedy the situation in future. They would not be protected under the legislation in any jurisdiction except that of New South Wales and the Australian Capital Territory.

However, in the High Court Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ generally agreed with the proposition that where such admissions include a matter which is a conclusion about the legal standard required, the admissions could have no effect and could not amount to a basis for a finding of negligence. Only Kirby J appeared to think they could have some significance and he did not directly discuss it. The importance here is, as Gleeson CJ said,[46] the

> …[c]are that needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made…The statement that the appellant "failed in its duty of care" cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct.

Thus, an apology could not amount to an admission of liability because it is for the court to determine that. This is consistent with a line of previous cases which have held that a statement as to a legal conclusion by a party cannot be relied on to establish that conclusion, because that is the role of the court.[47] In the same way that in the criminal law the fact that someone confesses voluntarily does not necessarily mean they are guilty, in the civil domain an apology is not necessarily to be construed as an admission of liability. This applies even to an apology which admits some sort of fault. As is now well recognised, false confessions occur voluntarily as well as as a product of coercion. In the same way, an apology which is made voluntarily may or may not be evidence of legal liability or guilt. It may be made by a person who feels morally guilty; or just by a person who wishes the accident hadn't happened and is inclined to feel responsible in general: it is extremely common, for example, for a parent to feel that the death or injury of a child is their fault ('If only I had not let him go to that party') when there is no question of fault at all. This is what the courts recognise. Fault remains to be

46 Id at [25].

47 *Rhone-Poulenc Agrochimie SA v UIM Chemical Services P L* (1986) 12 FCR 477 (hereafter *Rhone-Poulenc*) (in the context of s52 *Trade Practices Act* (Cth)); *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 (hereafter *Eastern Express*).

proved and that determination is for the court, not for the parties, to make. Thus it can be argued that in relation to apologies the common law is simply reinforced by the new legislative provisions in the six jurisdictions which provide that an apology does not constitute a legal admission of fault or liability.[48] The advantage of having the provision in legislative form is largely in ease of recognition to the legal and insurance community.

B. Admitting Apologies into Evidence

Even if they are not admissions of liability, the problem with apologies is that their prejudicial effect may outweigh their probative value. It is said of confessions, 'A confession relieves doubts in the minds of judges and jurors more than any other evidence';[49] but this relief is misplaced because people may feel in the wrong when they are not legally at fault. Therefore, preventing the admissibility of evidence of an apology may be very important for a defendant.

The issue of whether an apology will be admitted in evidence is the core area of the legislation in most jurisdictions where they have been legislatively considered. The general rule is that evidence which is relevant is admissible unless there is a reason to exclude it. One of those exclusions is hearsay evidence. One exception to the law preventing the admission of hearsay evidence is statements which go against the interests of the person. An admission of fault falls squarely into this category. However, as noted above, a statement as to a legal conclusion by a party cannot be relied on to establish that conclusion, because that is the role of the court.[50] When a party makes an informal admission of facts by words or conduct, that admission may be admitted in evidence against that party as evidence of the truth of its contents. The apology evidence would normally be evidence which is admitted as an exception to the hearsay rule, but keeping it out of the court is particularly important in areas where juries remain fairly common, for example in medical negligence cases.

In *Dovuro's* case, the court held that, although the apology did not mean that the company was liable, the facts admitted in the apology could be used to go towards a determination of liability. New South Wales, the Australian Capital Territory, Tasmania and Western Australia have provided that an apology 'is not relevant to the determination of fault or liability in connection with that matter'.[51] Does that mean that an apology cannot be admitted for the purpose of establishing the facts contained in the apology if some other basis for relevance can be found? Where a person has apologised, saying after a car accident, 'I'm sorry I hit you, I was looking at my mobile phone,' is the statement 'I was looking at my mobile phone' protected by these relevance provisions? Looking at one's mobile phone

48 ACT s14(1)(a) ; NSW s69(1)(a); SA s75; Tas s7(1); Vic s14J (1); WA s5AH(1)(a).

49 Richard Conti, 'The Psychology of False Confessions' (1999) 2 *Journal of Credibility Assessment and Witness Psychology* 14 at 14.

50 *Rhone-Poulenc*, above n47 (in the context of s52 *Trade Practices Act* (Cth); *Eastern Express*, above n46.

51 *Civil Liability Act* 2002 (NSW) s68(1)(b); ACT ss12–14; SA s75; Tas s7; Vic s14J (1); WA s5 AH.

while driving would normally be evidence going to liability. So far no cases have considered these provisions, and one commentator has suggested that such a statement would not be admissible on that basis.[52] However, if a statement could be regarded as relevant on some other basis it seems likely that it would be admissible. For example, if the defendant said 'I'm sorry I did this; my role as an importer was occupying my mind,' then the apology might be admissible for the purpose of identifying the defendant. However, the two clauses of the above sentence might be severed so that only the words about 'my role as importer' were admissible in evidence. The words 'I'm sorry I did this' would not be relevant for the purpose of establishing the facts, but that does not necessarily mean that they would not be admitted into evidence, depending on the view the court took of severance. By contrast, the Victorian provision specifically states that nothing in the section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.[53] It is not clear from any of the legislation that all aspects of an apology would be protected from admission in all cases.

Preventing the apology from being admitted aims to prevent a jury drawing a wrong conclusion about liability from the fact that an apology has been uttered, and this may be more effective than a judicial direction that an apology does not amount to an admission of liability. This is important given the extent to which judges and juries are thought to be swayed by the existence of an apology or a confession. However, this is not to say that after this sort of protective legislation has been introduced, judges in particular may be less likely to be affected by the existence of an apology.

8. Empirical Data about Apologies and Propensity to Sue

Unfortunately there are very few studies which consider the propensity to sue of potential litigants[54] and even fewer which consider the impact of apology on the desire of people to sue following personal injury. In 1991, Herbert Kritzer published an account of different propensity to sue in the United States, England, Australia and Canada. He drew on previous studies to find that the United States and Australia showed similar propensity to sue, with Canada and England being

52 Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (2004).

53 Vic s14J(3).

54 The few include Kritzer's study noted below; Troyen Brennan, Helen Burstin, Endel Orav, David Studdert, Eluvathingal Thomas & Brett Zbar, 'Negligent Care and Malpractice Claiming Behaviour in Utah and Colorado' (2000) 38 *Med Care* 250; Jeffrey Fitzgerald, 'Grievances, Disputes and Outcomes: a Comparison of Australia and the United States' (1983) 1 *Law in Cont* 15; Allan Abrahamese, Sandra Berry, Patricia Ebener, Deborah Hensler, Elizabeth Lewis, E Allan Lind, Robert MacCoun, Willard Mannng, Susan Marquis, Jeannette Rogowski & Mary Vaiana, *Compensation for Accidental Injuries in the United States*, (1991); Troyen Brennan, Helen Burstin, William Johnson & Stuart Lipsitz, 'Do the Poor Sue More? A Case Control Study of Malpractice Claims and Socioeconomic Status' (1993) 270 *Journal of the American Medical Association* 1697–16701; Yvonne Brittan, Peter Corfield, Paul Fenn, Hazel Genn, Donald Harris, Sally Lloyd-Bostock, Mavis Maclean, *Compensation and Support for Illness and Injury* (1984); Faten Sabry, *The Propensity to Sue: Why do People Seek Legal Action?* (2004).

lower. The data he used from Australia and the United States was from 1983. Kritzer argued that the factors which contributed to higher propensity to sue included more favourable treatment of plaintiffs by cost rules, the existence of jury trials (the Australian data was from Victoria which had and continues to have more jury trials than other Australian jurisdictions) but that these were not so significant as 'more general views of the role of adversity and misfortune'[55] which he attributed to culture. He did not discuss the role of apology at all. Studies which consider apologies continue to be rare. However, the Lexington Centre experience, the Open Disclosure project and the studies that do consider apology all suggest that the acknowledgement of fault is important for its effect on the desire to sue and willingness to settle, as well as increasing the ability of medical practitioners to learn from mistakes.

One set of experimental studies based on simulated accidents between a bicycle and pedestrian was carried out by JK Rebbennolt.[56] Participants in the study reviewed the scenario and then, standing in the shoes of the injured party, evaluated a settlement offer. In one study the only variable which changed was the nature of the apology offered (partial apology (expression of regret), no apology or full apology (acknowledging fault)). Another study examined how respondents reacted to an apology in light of their knowledge of the evidentiary rules which admitted or did not admit the apology, and did or did not protect it. The results of the studies suggested that respondents were far more inclined to accept a settlement offer where a full apology was offered, less so for partial apologies and much less inclined where no apology was offered. The study also noted that respondents saw the offender as more moral, more forgivable and more likely to be careful in the future if they offered a full rather than a partial or no apology. The partial apology appeared to create uncertainty in participants as to whether to accept the offer. One study also suggested that where an injury was severe, a partial apology might actually be detrimental (this effect was not seen where injury was slight).

Some other studies in the medical context tend to support these conclusions. A German study of handling of errors found that while severity of injury was the major factor affecting patients' choice of action to be taken, where there was a severe injury,

> Most patients accept that errors are not entirely preventable, but they expect accountability and clear words. These clear words should include the acknowledgment that something wrong has happened, that measures will be taken to prevent future events…and an expression of sincere regret.[57]

An Australian study of medical complaints showed that where 97 per cent of complaints had resulted in an explanation and/or apology, none had proceeded to litigation.[58] However, another Australian study showed that only 16 per cent of

55 Herbert Kritzer 'Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases' (1991) 18 *J Law & Soc* 400 at 422.

56 Rebbennolt, above n2.

57 Schwappach & Koeck, above n14.

complainants to the New South Wales Health Care Complaints Commission said they would have been satisfied by an apology.[59] It should be noted that only 6.4 per cent of the complaints considered in this study were about clinical care (as opposed to issues such as morally wrong personal behaviour) so it is difficult to evaluate the force of this study with respect to apologies and propensity to sue.

However, the literature shows clearly that many people do not regard an apology as real unless it includes an admission of wrong. The definition of apology is a real strength in the New South Wales and Australian Capital Territory legislation compared with all the other provisions, because it allows a person to not only express regret but also to admit wrongful behaviour without that automatically creating an admission of legal liability.

9. Why Apologise for Negligence?

The first and major aim of the legislation in all the jurisdictions mentioned has been to reduce litigation rates by allowing apologies to be unimpeded. If apologising does reduce litigation rates or the desire to litigate, it suggests that there is some connection between apologising and the central aims or roles of the law of negligence. People sue for many reasons. They may need compensation, they may wish to deter wrongful behaviour, or they may need to blame someone or force the recognition of responsibility.[60] This corresponds to the three major aims or functions of the law of negligence commonly recognised — compensation of victims for harm, deterrence of wrongful behaviour and what is now known as 'corrective justice'. I turn to consider whether an apology may contribute in some way to each of these functions.

A. Apologies and Compensation

Compensation is clearly one of the aims of tort law, although there is major evidence that it is a poorly achieved aim.[61] However, that is not the present issue. It is arguable that there is a compensatory aspect to apologising which is one of the reasons the apology seems so attractive to legislators. What is compensation? The usual answer of the law of damages in tort is that the aim of compensatory damages is to put the plaintiff back in the position they would have been in had the accident not happened.[62] Viewed in this light and with our customary emphasis on monetary compensation, an apology does not look as if it could meet any compensatory function. However, viewing the victim in terms of the damage to

58 Kathryn Anderson, Deirdre Allan & Paul Finucane, ' A 30–Month Study of Patient Complaints at a Major Australian Hospital' (2001) 21 *J Qual Clin Pract* 109.

59 Ann Daniel, Raymond Burn & Stefan Horarik, 'Patients' Complaints about Medical Practice' (1999) 170 *Medical Journal of Australia* 598–602.

60 This has been the rationale behind some of the stolen generation litigation. See for example, Australia National Sorry Day Committee web site: <http.www/austlii, edu.au/au/special/rsjproject/sorry> (12 August 2005).

61 Don Dewees, David Duff & Michael Trebilcock, *Exploring the Domain of Accident Law, Taking the Facts Seriously* (1996); Patrick Atiyah, *The Damages Lottery* (1997); Patrick Atiyah, *Accidents, Compensation and the Law* (3rd ed, 1980).

62 *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25; *Skelton v Collins* (1966) 115 CLR 94.

their human dignity might make a difference to this. It might be argued that in some ways apologies work to remediate the sense of dignity of the plaintiff: psychologists certainly see apologies as 'remedial work.'[63] However, considering apologies as a form of compensation is an inadequate characterisation of a process which really turns on the acknowledgement of a wrong and it is therefore preferable to consider apologies in the context of corrective justice.[64]

One of the major problems with the tort system, discussed by Professor Luntz and others,[65] is the tension between the competing roles of compensating injury and attributing fault. This is a particular problem in negligence because often there is such a level of disproportion between the level of fault and the compensation required to be paid by the wrongdoer.[66] This is more of a problem in negligence than it is in, for example, criminal law, because negligence does not necessarily involve deliberate harm. Negligence may be just a moment's inattention. Many corrective justice proponents reject the idea of no-fault schemes on the basis that they neglect the necessary moral recognition of responsibility. It may be worth considering whether no-fault compensation schemes which incorporated the possibility of formal apologies (voluntary or coerced) might meet some of the objections of corrective justice theorists. Similarly, an apology might be a mechanism which reinforces the 'very strong positive reasons for not awarding damages that go *beyond* compensation of actual loss' which Stephen Waddams discusses in his paper.[67]

B. Apologies and Deterrence

Prima facie, it seems unlikely that apologies could operate as a deterrent. Certainly it seems extremely unlikely that, for example, a driver would drive carefully because otherwise he or she might have to apologise. However, deterrence as the aim of tort law is often used as shorthand for the aim of reducing the number of accidents. In this case, the Open Disclosure experience seems to offer a way in which apologies which include the proper acknowledgement of fault might help to reduce accidents. The argument is that when apologising rests on acknowledgement of responsibility then it is also likely to lead to (a) finding a way to prevent the accident occurring again and (b) making public (or at least to the victim) that the accident can be avoided. An example was given of this occurring in the Open Disclosure process by the Chief Executive Officer of the NSW Clinical Excellence Commission, who noted that this had led to the:

> discovery of an instrument used to retract abdominal tissue during surgery that was left inside two patients … NSW Health put out an alert to all hospitals

63 Goffman, above n42; Tavuchis, above n42.

64 This is argued by Sandra Marshall, 'Noncompensatable Wrongs, or Having to Say You're Sorry' in Matthew Kramer (ed), *Rights, Wrongs and Responsibilities* (2001).

65 For example, inter alia, Luntz, 'Looking Back at Accident Compensation: an Australian Perspective', above n10, Luntz & Hambly, *Torts, Cases and Commentary*, above n11.

66 See for example Jeremy Waldron, 'Moments of Carelessness and Massive Loss' in David Owen, *Philosophical Foundations of Tort Law* (1995).

67 Stephen Waddams article, 'The Price of Excessive Damage Awards' in this volume.

> regarding the instrument, to inform staff of the incidents and to remind them to ensure it was counted … so we don't have to learn from our own mistakes, we can learn from the mistakes of others.[68]

Of course, this can only happen if the apology process includes recognition of mistakes, not just expressions of regret. This appears to be the lesson from the Lexington Hospital experience.[69] It is for this reason that 'apology should be rooted in responsibility and remorse rather than in economics and strategy.' Such real apologies are most likely to be effective in all the ways sought. However, it could be argued that the deterrent effect arose really from management's ability to recognise and deal with mistakes and that apology is simply incidental to it. Thus, deterrence is also not a sufficient explanation for why apologies are important.

C. Apologies and Corrective Justice

A better way of considering the importance of apologising lies in considering the apology in the context of corrective justice theory. Negligence law is based on the attribution of fault and the catch-cry in recent years, in both the drive for reform and in the attitude of the appellate courts in Australia, has been the term 'personal responsibility'.[70] This version of personal responsibility has been focused on the plaintiff. However, the apology must come from a defendant. If a defendant gives a partial apology they have not acknowledged their responsibility for the harm; however, if the defendant gives a full apology they have acknowledged their responsibility for the harm. If making the defendant acknowledge this responsibility is the plaintiff's aim, then an apology means that goal is achieved and there may be no necessity to go to court in order to force that recognition. Where there has been negligence or something has gone wrong, the victim may be concerned that the tortfeasor does not realise or fails to acknowledge that they have done wrong. An apology will meet that need, but where such an apology acknowledging fault does not arise, the victim may feel that they must sue to force the issue. Such an analysis takes corrective justice to be one of the central aims of tort law.

Corrective justice theory raises the question of the relationship between moral fault and legal liability. Although legal fault or responsibility is not to be equated with moral fault[71] it is clearly important for the legitimacy of decisions made in negligence that there be some relationship between our social and moral sense of responsibility and the decisions made at law. This is one reason why such a vast literature exists in tort theory about the meaning of fault and responsibility.[72] As

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68 Ruth Pollard, 'Hospitals Riddled with Fatal Mistakes' *The Sydney Morning Herald* (31 Jan 2005) at 1.

69 Cohen, above n14 at 1459.

70 This term is used in the Ipp Panel, above n1. The views of personal responsibility inherent in various negligence judgments and changes to those views are discussed in Prue Vines 'Fault, responsibility and negligence in the High Court of Australia' (2000) 8 *Tort law Review* 130.

71 *Vaughan v Menlove* (1837) 3 Bing NC 468.

72 See, for example, the articles in footnote 74 below and Tony Honore, *Responsibility and Fault* (1999); Peter Cane, *Responsibility in Law and Morality* (2002).

Leon Green said,[73] '[there is a] deep sense of common law morality that one who hurts another should compensate him'. Fault is central to negligence law because of its connection to moral responsibility,[74] and in particular, to personal responsibility.

Corrective justice theory focuses strongly on the connection between law and morality by arguing that there is a specific obligation against the individual who causes harm to correct that harm in some way.[75] Ernest Weinrib has been a leading proponent of corrective justice theory in tort law. He draws on Aristotle's account of corrective justice, emphasising the transactional nature of the relationship between victim and wrongdoer.[76] After wrongdoing alters the equilibrium between the party, the relationship between victim and wrongdoer should be restored to equality. Weinrib strongly contrasts corrective justice, which is about the dyadic relationship between the parties, with distributive justice, which is concerned more with distribution of good/risk etc in a relationship and across society.

In Stephen Perry's account of corrective justice, he[77] argues for a principle of reparation which is fault based. In his view, we should put together the

> localised distributive argument for fault and the agency-oriented understanding of outcome responsibility…Outcome-responsibility [the view that the wrongdoer must be responsible for the outcome of his or her actions rather than just the actions themselves, often regardless of fault] ensures that the distributive argument for fault can be non-arbitrarily limited to victims and wrongdoers. Fault is the further consideration that supplements outcome-responsibility so as to produce a general obligation to compensate.[78]

On this view, the establishing of fault or responsibility is important because it recognises that any harm or loss caused is real and that it has had an effect on one party because of the actions of the other. Perry's emphasis on 'degradation of some aspect of human well-being' is illuminating because it can allow us to consider that the balance of the relationship between the two parties is disturbed not just in terms of money or injury, but also in terms of human dignity.

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73 Leon Green, 'Foreseeability in Negligence Law' (1961) 61 *Colum L Rev* 1401 at 1412.

74 For example, Ernest Weinrib, 'Toward a Moral Theory of Negligence Law' in Michael Bayles & Bruce Chapman (eds), *Justice, Rights and Tort Law* (1983); Jules Coleman, 'Moral Theories of Torts: Their Scope and Limits' in Michael Bayles & Bruce Chapman (eds), *Justice, Rights and Tort Law* (1983); Stephen Perry, 'The Moral Foundation of Tort Law' (1992) 77 *Io LR* 449; Larry Alexander 'Causation and Corrective Justice; Does Tort Law Make Sense?' (1987) 6 *L & Phil* 1–23; Leonard Schwartz 'Apportionment of Loss Under Modern Comparative Fault; the Significance of Causation and Blameworthiness' (1991) 23 *U Tol LR* 141; Christopher Schroeder, 'Corrective Justice and Liability for Increasing Risk' (1990) 37 *UCLA LR* 439; David Owen, 'The Fault Pit' (1992) 26 *Georgia Law Review* 703; Honore, above n72, and many more.

75 See Perry, ibid and Ernest Weinrib, 'The Special Morality of Tort Law' (1989) 34 McG LJ 403 for accounts of corrective justice theory.

76 Ernest Weinrib, *The Idea of Private Law* (1995) at 57.

77 Perry, above n74.

78 Perry above n74 at 497.

This is where apology comes in. In corrective justice terms, an adequate apology may be seen as an equaliser of the relationship. In terms of general social culture this is important for creating the ability of the two parties to continue on in their social roles. This applies both to the person who accidentally trips up another person walking past, and to the person who accidentally takes off the wrong toe of a patient. In terms of human dignity, if person X falls over person Y's foot they may feel humiliated. If person Y apologises for having their foot in a silly place and for having caused the fall, then person Y has taken themselves down from a superior level and equalised the relationship between the two parties. This is a trivial example but it illustrates the 'corrective' nature of the process quite well. This explains why an apology might be effective in reducing the desire of a person to sue. It also might explain one of the issues that arose from the empirical data which suggested that a full apology was likely to lead to a person agreeing to settle whether an injury was severe or not; but a partial apology was likely to lead either to uncertainty with mild injury or, in the case of a severe injury, to the injured party becoming even more determined to proceed.

The use of apology in the criminal context underscores this approach to civil justice. It would be unthinkable in the criminal context for apology not to include recognition of wrongdoing. The literature on the use of apology in the criminal justice system and the little sociological literature on apology emphasise that apologies acknowledging fault are:

> secular remedial rituals. They both teach and reconcile by reaffirming societal norms and vindicating victims. As such, they are concerned not just with individual dispositions but also with membership in a particular moral community.[79]

The leading sociological/psychological treatments of apology are those of Nicholas Tavuchis[80] and Erving Goffman.[81] They both emphasise the social role of apologies. Similarly, from a legal perspective, Peter Cane argues that tort law may have a role in both supplementing moral principles and 'mediating between divergent moral views.'[82] Cane sees tort law as 'a set of rules and principles of personal responsibility'[83] which operates to set down acceptable behaviours — such as making up for wrongs or, perhaps, apologising. Sincerity is critical. As a bicycle manufacturer observed to me in relation to his practice of dealing with product liability claims,

> In this situation *sincere compassion* makes all the difference. To the relatives of the injured this seems only natural. To be not sharing in the sorrow is unnatural and heartless. It is also quite inappropriate from a party that has made a profit from the product sale and service provision.

79 Bibas & Bierschbach, above n10 at 109.
80 Tavuchis, above n42.
81 Goffman, above n42.
82 Cane, above n72 at 26.
83 Cane, above n72 at 15.

The reference to the profit levels of the manufacturer is also an example of how the apology process may operate to correct the balance between the parties. This is consistent with the literature on apologising, which emphasises its dyadic, remedial and corrective nature and shows that apologies are best thought of as part of the corrective justice aspect of tort law.

10. Cynical Civility or Practical Morality?

The value of the legislation into which the Australian jurisdictions have entered will lie in the extent to which they do not chill or fracture the normal response to apologise. The evidence suggests that even the partial apology or expression of regret will be useful in reducing the desire to litigate, particularly where injury is not severe, but the moral literature and empirical evidence suggests that the failure to incorporate acknowledgement of fault is likely to significantly reduce the chance of this.

The problem of the partial apology is that it requires such precise wording in order for the statement to be protected. If a doctor goes beyond saying 'I'm sorry your vocal cords no longer work' to 'I'm sorry I hurt you', it seems that the protection will be lost in those jurisdictions which confine protection to the mere expression of regret. The greater danger is that people will remain afraid to apologise for fear of litigation, when it seems that at common law even the full apology did not amount to an admission of legal liability. What the evidence suggests is that the critical difference in provisions is not whether the apology is admissible or not, but the characterisation of the apology, because it is the character of the apology which is most likely to effect behavioural change. That is, it appears to be significant whether an apology incorporates taking responsibility for wrongdoing and, to a lesser extent, whether the apology is shielded from litigation risk by litigation and rules of evidence.

Because the jurisdictions vary so much, the opportunity will arise for us to evaluate the approach taken by the different jurisdictions, in particular, to compare the New South Wales and Australian Capital Territory provisions with those of the rest of the country.

Some people have been concerned that legislating for safe apologies may create a situation where apologies are cynically and insincerely made. Certainly it seems possible that lawyers might begin to advise their clients to apologise as a strategy. There are a number of answers to this. The first is that insincere apologies are unlikely to be effective and they are unlikely to reduce the propensity of a plaintiff to sue. Secondly it can be argued that even where an apology is insincere it may be part of a process of normalisation of the situation which may have some impact on both parties. It is thus likely to amount to a partial rather than a full apology even where the wrongdoer has appeared to accept responsibility, as in the New South Wales and Australian Capital Territory definitions of apology. In my view, the empirical evidence and the arguments from moral philosophy, sociology and psychology all suggest that the protection of the mere expression of regret is most likely to lead to a situation where insincere and ineffective apologies are

made. (It may well be that, paradoxically, the apology which is most likely to be effective is the riskiest apology. That is, the apology which admits fault and where the person being apologised to knows that the apology is *not* protected by legislation).

The path that New South Wales and the Australian Capital Territory have taken, on the evidence, seems to be the most likely path to succeed in reducing litigation.

This legislation should be cautiously welcomed. In this paper I have tried to show that if this legislation is effective it will be largely because it has reduced the chilling effect of the fear of apologies and because apologies themselves can play a role in the central aim of tort law which I see as corrective justice. The fact that apologies can also be seen as contributing in some ways to both the compensation goal (although a weak argument) and the deterrence function of tort law simply emphasises the point that apologies are a significant part of the social functioning of human beings and should be allowed to carry out their functions. The answer to the question in the title is therefore that it depends on the apology. Where apologies are real and sincerely meant, they may operate as practical morality and meet some of the goals of corrective justice. This will not mean that all victims who are apologised to will decide not to sue the wrongdoer. Clearly, the need for compensation where the injury is severe will impact on that in the absence of real no-fault compensation schemes. At the same time, the impact of an apology on the person depends greatly on their psychological makeup and their perception of the wrong done to them, but it seems that for legislation to aim to prevent the chilling effect of people being advised not to apologise is entirely appropriate in the civil domain.