



Précis Paper

Apologies, Liability and Civil Society: Where to from here?

A discussion on the importance of apologies in the legal arena, in particular the role of apologies in preventing litigation as well as the kinds of issues which arise when thinking about apologies and the law.

Discussion Includes

- The current treatment of apologies by the law
- Types of apologies protected by legislation
- The relationship between apologies, moral wrongness and negligence law
- Apologies as a remedy for harm
- The position of an apology in the law in jurisdictions outside of Australia
- The importance of sincerity

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Apologies, Liability and Civil Society: Where to from here?

1. In this edition of BenchTV, Prue Vines (Professor – UNSW Sydney) and Dr Jennifer Moore (Senior Lecturer- UNSW Sydney) discuss the importance of apologies in the legal arena, in particular the role of apologies in preventing litigation as well as the kinds of issues which arise when thinking about apologies and the law.

The current treatment of apologies by the law

2. Apologies could play an important role in compensating for emotional harm.
3. However, the law does not presently manage emotional aspects of harm very well.
4. It is arguable that the idea of awarding damages in the form of money is too legalistic and if we think about compensation strictly in terms of money, we may be missing out on other ways of compensating people.
5. It is clear that apologies are an important part of ordinary, civil life as well as a part of our moral and our emotional wellbeing.
6. As such, apologies connect up emotions and morality (in the sense of 'wrongness') which in turn connects to the law, which deals with wrongness.
7. Over the last 20 years and in about 56 jurisdictions around the world, legislation has been enacted which protects apologies.
8. Such legislation serves to protect apologies from amounting to an admission, being treated as admissible for liability purposes and prevents insurance contracts from being voided.
9. The aim behind the enactment of such legislation is to reduce litigation by increasing people's likelihood of apologising.
10. The rationale for this is that various literature has shown that people who are apologised to are less angry and less likely to sue or if they need to sue, to settle earlier.

Types of apologies protected by legislation

11. In many jurisdictions around the world, only apologies in the area of medical malpractice are protected.
12. In Australia, every jurisdiction has apology legislation, however there are differences in each jurisdiction in regard to the extent to which an apology is protected under the law.
13. NSW, Queensland and ACT protect a 'total apology' which is an apology which expressly acknowledges fault. The relevant legislation for each of the jurisdictions are the *Civil Liability Act 2002* (NSW) s69(2); *Civil Liability Act 2003* (Qld) ss 72A-72D and *Civil Law (Wrongs) Act 2002* (ACT) s132.
14. The other jurisdictions only protect a partial apology or an expression of regret.

15. Literature has shown that a partial apology can often produce a worse outcome than no apology at all as a simple expression of regret that does not acknowledge fault, quite often causes people to be angrier than if they receive no apology at all.
16. The most significant advantage of protecting a total apology rather than a partial apology is that people do not have to be careful about what words they use to convey their apology and therefore there is generally no hesitation in communicating an apology.
17. Literature has shown that the best type of an apology is one where the perpetrator acknowledges their wrongdoing.

The relationship between apologies, moral wrongness and negligence law

18. Apologies are a response to blame and moral wrongness however whether someone has committed a moral wrong will not necessarily mean they are liable in negligence if they did not meet the required standard of care.
19. That is, when we think of morality, we think that people who do the wrong thing should apologise for doing the wrong thing, regardless of the outcome or indeed, any harm occurring.
20. In negligence law, there is no liability without the harm which flows from the wrong.
21. Literature shows that people tend to consider people who commit a wrong from which harm flows to be more wrong than if the same action is done but no harm flows from it.

Apologies as a remedy for harm

22. The law has generally only recognised certain types of harm.
23. It took tort law a long time to recognise psychiatric harm
24. However, literature has shown that when you are dealing with non-pecuniary or mental harms, sometimes an apology makes more difference than money.
25. The law does not recognise the value of an apology as a remedy at present except for in discrimination law and as mitigating damages in defamation.
26. The position in Australia for litigating to receive damages in tort law can be contrasted to New Zealand which has a system called the Administrative Compensation Scheme which is no fault.
27. Under this system, the victim does not have to litigate and instead can file a claim and obtain rehabilitation and compensation through the Accident Compensation Corporation.
28. However, as the New Zealand system is no-fault, it does not recognise the need for people who feel they have been morally wrong to be apologised to by the wrongdoer.
29. It may be possible to join some of the aspects of the fault-based scheme in Australia by using the apology as a remedy for compensation, which would not necessarily interfere with the no-fault based system in New Zealand.

30. It would be improper to presume however, that apologies could ever replace money as compensation, particularly in the medical malpractice field.
31. In medical malpractice matters, often the physician or nurse is advised by a legal practitioner to not apologise, so as to avoid an admission of liability.
32. However, this is contrasted to findings in literature which has shown that the wrongdoer needs to feel enabled to apologise quickly as a delayed apology is not a good apology and can have negative consequences and actually exacerbate harm.
33. Australia has attempted to address this by introducing a national 'open disclosure policy' in hospitals to allow early and complete apologies and explanations.
34. However, as some jurisdictions do not protect a total apology, it is difficult for a national scheme to uniformly applied and therefore, lawyers often advise doctors not to apologise, stifling the doctor's desire to apologise and avoiding an admission of liability.
35. This contributes to health litigation budgets being higher than they need to be.

The position of an apology in the law in jurisdictions outside of Australia

36. Canada developed expansive protective apology laws that protected total apologies in most civil liability.
37. In 2016, Scotland passed apology protecting legislation which does not protect full apologies but does protect apologies which include the wrongdoer saying, 'they will not let the wrongdoing happen again.'
38. Hong Kong passed legislation on 1 December, 2017 expressly protects any facts associated with a total apology.

The importance of sincerity

39. Apology protection legislation is aimed at reducing litigation or bringing settlement earlier and therefore reducing liability expenses.
40. However, an apology may also be an effective remedial tool, particularly when we look at liability in the context of negligence. This is because a judge ordered apology may have the effect of adding something additional into the compensation process and alleviating some of the mental stress and emotional harm which cannot be addressed simply by monetary compensation.
41. It may however be argued that a judge ordered apology lacks the requisite sincerity to enable to wronged person to feel better after receiving such an apology.
42. However, it may be contended that the sincerity of the apology is not actually important and it is the community recognition that the wrongdoer has done wrong and should apologise which is the key to helping the injured person feel better.
43. That is, that the injured person is getting the benefit of the knowledge that the community agrees with them.

BIOGRAPHY

Prue Vines

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Professor Prue Vines has been a member of the UNSW Law School since 1990. Her major areas of research interest are torts (especially apologies in civil liability) and succession law (especially the impact of succession laws on Indigenous people). She has been the author of many books, chapters and articles on each of these including being co-editor (with Carolyn Sappideen) of Fleming's Law of Torts, co-author (with Rosalind Croucher) of the leading succession textbook, Succession: Families, Property and Death and sole author of Law and Justice in Australia: foundations of the legal system. Her most recent publication is (with Carroll and Chiu) Annotation of the Apology Ordinance Hong Kong. She has been the Director of First Year Studies at UNSW Law since 1996. She is the co-director of the Private Law Research and policy Group at UNSW and from 2006-2017 was Visiting Professor at Strathclyde University Law School, Glasgow Scotland. Professor Vines is a Fellow of the Australian Academy of Law and UNSW Scientia Education Academy Fellow.

Dr Jennifer Moore

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Dr Moore is a Senior Lecturer at UNSW Law and a Barrister and Solicitor of the New Zealand High Court with qualifications in public health/epidemiology (PhD. University of Melbourne's Faculty of Medicine) and health social sciences. She combines these fields to specialise in health law and torts. Prior to joining UNSW in 2017, Moore was the 2015-2016 New Zealand Harkness Fellow in Health Care Policy and Practice at Stanford University, USA where she undertook empirical health law research.

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