

Apologies in civil liability claims

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Is it too late now to say sorry? An overview of legal and policy considerations applicable to apologies in civil liability claims

Overview

Parties to pending civil litigation often experience a tension between the benefits of making a full and frank apology, and the fear that making such an apology will be taken as an admission of fault (and therefore liability) for the relevant conduct.

This paper provides a brief overview of some of the benefits associated with making apologies, some of the reasons why apologies are often not pursued by parties in a pre-litigation context, and a discussion of the legislative frameworks developed to provide a degree of protection to those who apologise.

Why apologise – the benefits of an apology

Literature on the topic¹ often distinguishes between a ‘partial apology’ (being ‘an expression of sorrow without any exploration of why’ and a ‘full apology’ (being apologies that ‘include an explicit admission or acceptance of fault or responsibility’).²

It can immediately be seen from the distinction that a full apology may in some circumstances be capable of establishing necessary elements of tortious conduct, such as a breach of duty of care, while a partial apology may involve nothing further than commiseration for the negative outcomes experienced by an aggrieved party. A cautious lawyer would understandably have concerns, in the absence of adequate protections for their client, with a full apology being issued and for this reason may counsel against even a partial apology to avoid potential legal exposure.

Of course, where the parties involved are in mediation, a full apology may serve the practical purpose of reducing the prospect of litigation. An apology can serve important personal and social purposes, such as vindication, acknowledgment of wrongdoing and publicising the unlawful nature and harmful effects of the wrongful conduct.³ Indeed, it has been asserted, although perhaps only anecdotally, that ‘[a]n apology is frequently worth more to an applicant than money’.⁴ It is in recognition of this view that non-pecuniary remedies, such as apologies, can be sought by potential litigators in the appropriate context.

¹ See, for example, Wheeler, C ‘Open Disclosure and Apology – Time for a Unified Approach Across Australia’, presented at the 2013 AIAL National Administrative Law Conference on 19 July 2013.

² Note, however, that scepticism has been expressed as to the utility of this distinction when it leads to the assumption that, as a matter of morality, only a ‘full’ apology is sufficient (see, for example, Carroll, R ‘Apologies as a Legal Remedy’ (2013) Vol: 35 *Sydney Law Review* 317, 323.

³ Carroll, R ‘Apologies as a Legal Remedy’ (2013) Vol: 35 *Sydney Law Review* 317, 337 – 339.

⁴ *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, at [43] (Driver FM).

Apologies are not a panacea

This is not to suggest apologies will necessarily absolve an accused party of any responsibility for the alleged conduct, nor that an apology will preclude subsequent litigation. These outcomes can depend on a range of factors such as:⁵

- the history and disposition of the parties (eg, is it a longstanding feud which is less amenable to reconciliation, or a recent and discrete issue which might readily be concluded through acknowledgment of the wrong and its consequences)
- the degree of confidence that the parties have in their litigation prospects, where the outcome may possibly provide significant financial or strategic benefits, and
- the nature of the apology itself (eg, whether it is comprehensive, sincere and accepting of responsibility, or qualified, brief and designed to evade any admission of guilt).⁶

There are also logical reasons to be cautious when it comes to making apologies. As identified by Prue Vines,⁷ 'the problem with apologies is that their prejudicial effect may outweigh their probative value'. That is, an apology may be seen in subsequent litigation as disproportionately persuasive as to matters of guilt or fault, against other exculpatory evidence tendered, notwithstanding that 'people may feel in the wrong when they are not legally at fault'.⁸ For example, a person who feels morally responsible for an outcome may offer an apology, even though they are not legally responsible, but that apology may work against them in later legal proceedings.

That said, an appropriately framed apology in the right context may serve the benefit of reducing the prospects of litigation without necessarily exposing the apologiser to liability. This has been recognised in each jurisdiction with statutory protections for certain kinds of apologies.

Legislative protections for apologies

In Australia the States and Territories, rather than the Commonwealth, have been largely responsible for legislating protections (of varying breadth) for issuing apologies in the course of prospective civil litigation. Some examples of these protections are included in Annex 1.

Broadly speaking, those schemes can be categorised as defining the protected 'apology' in a manner which is 'full' or 'partial' as follows:

- Australian Capital Territory, New South Wales, Queensland and South Australia define apology in the 'full' sense. That is, the protections afforded to an apologiser operate when the apology admits or implies fault or liability in relation to the incident.
- Northern Territory, Tasmania, Victoria and Western Australia define apology in the 'partial' sense. That is, an apology is only afforded protection where it does not contain an admission of fault in connection with the matter.

The protections offered by each jurisdiction also differ. For example, most jurisdictions preclude the apology or statement of regret from being admissible during civil proceedings as evidence of liability.

⁵ For further discussion on this see Allan, A., Carroll, R., 'Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event', *Psychiatry, Psychology and Law* Vol. 24, No. 1, p 16-18.

⁶ See Carroll, R., Allan, A., Hal Smith, M., 'Apologies, Mediation and the Law: Resolution of Civil Disputes', *Onati Socio-legal Series* [online], 7(3), 2017, pp 576 – 580, for discussion on the psychological research on apologies.

⁷ Vines, P, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?', *Sydney Law Review*, Vol 27: 483, p 496.

⁸ *Ibid.*

However, only some jurisdictions include provisions which expressly state that the apology is not relevant to determining fault or liability. In NSW, for example, s 69(1)(b) of the *Civil Liability Act 2002* (NSW) states that:

An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person –

...

is not relevant to the determination of fault or liability in connection with that matter.

Similar provisions are not currently found in equivalent legislation in Victoria or the Northern Territory.

That said, the trend appears to be towards consolidation. In her 2005 assessment of the distinctions between each jurisdictions' 'apology' legislation, Vines noted that the Northern Territory, Queensland, South Australia and Victoria lacked 'not relevant' provisions in their respective legislation, and at that point only the ACT and NSW defined apology in the 'full' sense.⁹ It may be, therefore, that with time the differences between the jurisdictions will disappear.

Perceived shortcomings of the legislative framework

Legislative protections for apologies may put lawyers' minds at ease when it comes to managing the pre-litigation interests of their clients, however there is room for improvement. It has been suggested that the main purpose of legislatively enforced protections for apologies is to reduce litigation.¹⁰ This is an admirable pursuit which would have positive impacts on the private would-be litigant through the reduction of legal fees, and benefit the public administration of justice by reducing the caseload of courts. However, achieving this outcome requires a degree of certainty which is yet to be delivered by the current framework.

At a high level, the literature suggests that at least two aspects of the legislative framework could be modified, being:

- A uniform approach across Australia, which would reduce complexity for cross-jurisdictional entities, such as businesses, and provide a greater degree of certainty when deciding whether or not to issue/publish an apology, and
- The ambiguity (perceived or actual) of what kinds of statements are, in fact, covered by the legislative definition of 'apology'. This ambiguity, which is compounded by the broad range of consequences which attach to an 'apology' however defined, leads to an inherently conservative attitude towards offering them.

Acknowledging that uniformity across Australia would offer benefits to cross-jurisdictional entities (and those who might seek an apology from them), the latter issue appears the more pressing opportunity for reform. Part of the uncertainty around the protections afforded by the legislative schemes is the absence of significant judicial consideration of what is covered. There are a range of possible explanations for this lack of guidance from the courts, including:

- The frameworks are working and litigation has been successfully avoided when an apology is issued

⁹ Vines, P, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?', *Sydney Law Review*, Vol 27: 483, p 490.

¹⁰ Vines, P, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?', *Sydney Law Review*, Vol 27: 483, p 491.

- The frameworks are not working and no apologies are being issued out of caution, resulting in the question not arising during the subsequent litigation, or
- Whatever apologies have been issued prior to litigation are uncontroversial or do not raise the question of liability, so their consequences (and the effect of the protective legislative frameworks) are not litigated.

It is difficult to say with certainty what the underlying cause is. However, a consequence is that practitioners are currently without clear instruction (in the form of judicial consideration, at least) on what will and will not be protected by the schemes. This in turn may result in furthering the caution attitude towards advising clients that an apology is a safe and productive means of resolving a dispute, and increase the chance of litigation.

Criticisms having a protective framework for apologies

Perhaps unsurprisingly there is not uniform agreement that apologies, whether full or partial, should be afforded protection by the law. A key objection identified by the literature is that legislating to protect apologies will lead to insincere and strategic practices. That is, lawyers may advise their clients to offer an (insincere) apology, safe in the knowledge that it does not prejudice any future litigation strategy, in the hopes that doing so will reduce the injured party's likelihood of pursuing litigation.¹¹ A response to this might be that if a would-be litigant is satisfied with an apology notwithstanding the underlying but perhaps hidden insincerity, it is no objection to say that this outcome also benefits the apologiser.

This view also presupposes that a remedy other than an apology is the desired outcome. In that respect an apology need not be the exclusive mechanism through which a dispute is resolved. While there are limitations to the degree of restitution which might be effected through an apology, financial payments may be provided (perhaps in a diminished amount) in tandem with an apology. Doing so avoids the obvious criticism that financial loss on behalf of a would-be plaintiff cannot be restored by apologies alone, while recognising that the psychological effects of unlawful conduct can be just as burdensome as the financial impacts.

Of course, the protection afforded to an apology may, in and of itself, undermine the value of the apology. That is, even a convincingly sincere apology may be cheapened by the recipient's knowledge that laws protect the apologiser from any consequences.¹² This issue raises the difficult question of balancing, as a matter of policy, the interest in promoting a culture of apology while simultaneously ensuring such apologies retain value.

Notwithstanding the above concerns, it is suggested that an appropriately composed apology may overcome the perceived artificiality created by legal protections.

Example of the legal consequences of an apology: Medical insurance

In some contexts, such as insurance, there can be a particular tension between the possible resolution of a claim through an apology, and the self-protective caution which militates against making such an apology.

¹¹ See discussion in Carroll, R., Allan, A., Hal Smith, M., 'Apologies, Mediation and the Law: Resolution of Civil Disputes', *Onati Socio-legal Series* [online], 7(3), 2017, pp 574.

¹² See Carroll, R., Allan, A., Hal Smith, M., 'Apologies, Mediation and the Law: Resolution of Civil Disputes', *Onati Socio-legal Series* [online], 7(3), 2017, p 589.

It is not uncommon for insurance contracts to include provisions which void the contract in the event that admission of liability is made. The Australian Legal Practitioners' Liability Committee suggests that the purpose of these clauses is:

[b]ecause the insurer is agreeing to defend and indemnify the insured practitioner from any claim within the scope of the policy, it is important that it has the opportunity to assess and defend the question of liability.

An admission of liability may therefore prejudice the insurer's capacity to independently assess the merits of the claim. While an apology will not necessarily amount to an admission of liability, it is understandable that an abundance of caution may point against engaging in any form of reconciliation as the consequence of breaching a contractual provision of this nature may be costly.

Such concerns are understandable but sit uneasily with the body of evidence which suggests apologies, and even admissions of liability, can reduce the likelihood of litigation in the medical context. They also raise difficult issues around the conflict between a medical practitioner's potential desire to apologise (for example, to alleviate feelings of guilt and rebuild the relationship with the patient), and the desire to ensure they are financially protected if litigation ensues. The statistics in this field appear to point towards a reluctance on behalf of practitioners to apologise, or even provide some explanation of the conduct, with Dr Jennifer Robbennolt identifying one study in which:

40% [of persons who brought a medical suit] reported not receiving an explanation [and] in only 13% of cases did patients report responsibility for what had happened was accepted either in part or in full and in only 15% of cases did patients report receiving an apology.

Elements of an apology

In circumstances where an apology is to be issued, careful consideration will naturally be given to the content of that apology. A range of articles have proposed what elements should constitute an apology, and the benefits associated with being full and frank in doing so. For example, Chris Wheeler suggests a 'full' apology should have the following elements:

- Recognition of the wrong
- Responsibility for the harm caused
- Reasons behind the cause of the problem, rather than seeking to justify the behaviour
- Regret in the form of a statement expressing 'sincere sympathy, sorrow, remorse and/or contrition'
- Responsiveness or redress, in an attempt to fix the issue at hand, and
- Release, in the form of a request for forgiveness.¹³

The success of any such apology will no doubt turn on contextual factors and it is difficult to provide a one-size-fits-all approach to this complex issue. Nevertheless, an appropriately worded apology is an important dispute resolution strategy which may help to reduce the considerable financial and emotional stresses associated with litigation.

¹³ Wheeler, C 'Open Disclosure and Apology – Time for a Unified Approach Across Australia', presented at the 2013 AIAL National Administrative Law Conference on 19 July 2013.

Annex: List of legislative provisions

Civil Liability Act 1936 (SA)

75 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 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 person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.
- (3) This section does not apply in relation to—
- (a) liability in respect of the tort of defamation; and
 - (b) civil liability of a kind that is excluded from the operation of this section by regulation.
- (4) In this section—
- 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.

Civil Liability Act 2002 (NSW)

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 or civil liability for defamation.
- Note—
- Section 20 of the Defamation Act 2005 makes similar provision to this Part about the effect of apologies in defamation proceedings.

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 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 person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

Wrongs Act 1958 (Vic)

14I Definitions

In this Part—

apology means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault;

civil proceeding includes—

- (a) a proceeding before a tribunal; and
- (b) a proceeding under an Act regulating the practice or conduct of a profession or occupation; and
- (c) a proceeding of a Royal Commission, whether established under the Inquiries Act 2014 or under the prerogative of the Crown; and
- (d) a proceeding of a Board of Inquiry or Formal Review established under the Inquiries Act 2014;

injury means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

14J Apology not admission of liability

(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) Subsection (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.

14K Reduction or waiver of fees

(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 and it is alleged that the death or injury occurred as a consequence of the provision of a service, a reduction or waiver of the fees payable for the service or a related service 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) Subsection (1) applies whether the reduction or waiver of fees—

- (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.

14L Application

This Part applies to an apology or reduction or waiver of fees made on or after the commencement of section 6 of the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002.

5AF Term used: apology

part —

means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.

5AG Application of this Part

Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.

This part extends to a claim even if the damages are sought to be recovered in an action for breach of contract or any other action.

This part does not apply unless the civil liability giving rise to the claim arises out of an incident happening on or after the commencement day.

claim for damages —

is concerned with whether or not the incident out of which the personal injury arises happened on or after the commencement day; and

the date of the injury first appeared on or after the commencement day,

the date of the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

section —

commencement day means the day on which the *Civil Liability Amendment Act 2003* section 8 comes into operation 1.

5AH Effect of apology on liability

An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages —

does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and

is not taken into account in determining fault or liability in connection with that incident.

The admission of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

Civil Liability Act 2003 (Qld)

72A Application

This part applies to civil liability of any kind.

However, this part does not apply to the following—

civil liability that is excluded from the operation of this part by section 5;

civil liability for defamation;

civil liability of a person for an unlawful intentional act done by the person with intent to cause personal injury;

civil liability of a person for an unlawful sexual assault or other unlawful sexual misconduct committed

by the person.

Notwithstanding subsection (2)(c) and (d), this part applies to an apology made by or on behalf of an institution in relation to the abuse of a child by a person associated with the institution.

In this section—

abuse, of a child, means—

sexual abuse or serious physical abuse of the child; or

psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse of the child.

associated with, an institution, see section 33C.

institution see section 33A.

72B Purpose

The purpose of this part is to allow a person to make an apology about a matter without the apology being construed or used as an admission of liability in relation to the matter.

72C Meaning of apology

An **apology** is an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not it admits or implies an admission of fault in relation to the matter.

72 Effect of apology on liability

An apology made by or on behalf of a person in relation to any matter alleged to have been caused by the person—

does not constitute an express or implied admission of fault or liability by the person in relation to the matter; and

is not relevant to the determination of fault or liability in relation to matter.

Evidence of an apology made by a person is not admissible in any civil proceeding as evidence of the fault or liability of the person in relation to the matter.

Civil Liability Act 2002 (Tas)

6A Application

This Part applies to civil liability of any kind, except civil liability that is excluded from the operation of this Part by section 3B.

7 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.

(3) In this section,

apology means an expression of sympathy or regret, or of a general sense of benevolence or

compassion, in connection with any matter, which does not contain an admission of fault in connection with the matter.

Personal Injuries (Liabilities and Damages) Act 2003 (NT)

11 Purpose of Division

The purpose of this Division is to enable a person to express regret about an incident that may have caused a personal injury without being concerned that the expression of regret may be construed or used in a proceeding as an admission of liability or negligence.

12 Meaning of expression of regret

An expression of regret is an oral or written statement by a person:

- (a) that expresses regret for an incident that is alleged to have caused a personal injury; and
- (b) that does not contain an acknowledgement of fault by that person.

13 Expression of regret not admissible as evidence

An expression of regret about a personal injury made at any time before the commencement of a proceeding in respect of that injury is not admissible as evidence in that proceeding.

Civil Law (Wrongs) Act 2002 (ACT)

12 Application

- (1) This part applies to civil liability of any kind.
- (2) However, this part does not apply to civil liability for an award of damages or compensation—
 - (a) for defamation; or
 - (b) under any of the following:
 - (i) the *Discrimination Act 1991*;
 - (ii) the *Workers Compensation Act 1951*.

13 Meaning of apology

In this part:

apology means an oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion, in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident.

14 Effect of apology on liability etc

- (1) An apology made by or on behalf of a person in relation to an incident claimed to have been caused by the person—
 - (a) is not (and must not be taken to be) an express or implied admission of fault or liability by the person in relation to the incident; and
 - (b) is not relevant to deciding fault or liability in relation to the incident.
- (2) Evidence of an apology made by or on behalf of a person in relation to an incident claimed to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in relation to the incident.