

**THE POWER OF APOLOGY: MERCY, FORGIVENESS OR CORRECTIVE  
JUSTICE IN THE CIVIL LIABILITY ARENA?**

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**Abstract**

*The recent rash of apology-protecting legislation in tort law in the common law world raises interesting questions about why apologies are so important. The function of apologies within society generally is not absolutely clear. It is even less clear what their function in relation to civil liability is and how the relationship between the law and apologies works. It is fairly clear that legislators desire apologies to reduce litigation on the basis of some naïve view that that is what people really want and that the common legal advice to never apologise is actually very bad for society in general. In this paper I argue first that defining apologies is crucial to determining their function, that apologies have multiple functions and that one of them is corrective justice. Another is to mediate relationships and to achieve reconciliation or healing through a process of apology, forgiveness and redemption. When should an apology be protected and why can only be answered if we have a real understanding of both the psychological and sociological effects of apologies. In particular we need to understand the interactions of different types of norms, including norms of civility, legal norms, professional ethics and so on. The article attempts to go some way towards this understanding.*

**Introduction**

The dominant tort in the law of torts is the tort of negligence which requires proof of fault in order to establish liability. It is statistically the most used tort and its forms of

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argument have come to infiltrate other torts as well.<sup>2</sup> Whatever the reason, it is notable that negligence law is a model for ideas about responsibility. Peter Cane, for example, sees tort law as ‘a set of rules and principles of personal responsibility’<sup>3</sup> which operates to set down acceptable behaviours. The relationship between legal ideas of responsibility and moral ideas of responsibility has always been subject to argument. The strict positivist would argue that there is no necessary relationship at all.<sup>4</sup> Others argue that there is strong congruence between them.<sup>5</sup> I would prefer to argue that while there might not be a strict correlation between legal and moral ideas of responsibility, if there is no correlation at all, the law is likely to lose its legitimacy within the community where it is supposed to hold sway. This article concerns apologies, which are an integral part of ordinary social life and civil society. When children are brought up they are taught how to appropriately apologise in order to smooth their way in society. What is regarded as an appropriate thing to apologise for may differ across cultures or communities and within families or micro-cultures/communities.<sup>6</sup> In all these situations it is recognised that apologies are significant as

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<sup>2</sup> See, for example, G H L Fridman, ‘Torts – Staying Alive’ (1997) 2(1) *Newcastle Law Review* 23 who says at 24: ‘Negligence has become the most important cause of action in the modern law of torts’; the possible categories of case where one can sue for negligence have expanded dramatically since 1932 when *Donoghue v Stevenson* [1932] AC 562 was decided. The expansion to include pure economic loss, (*Hedley Byrne v Heller* [1964] AC 465, *Rylands v Fletcher* (1868) LR 3 HL 330, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520) and occupiers’ liability (*Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479), to name only a few categories, illustrates the extent of its power.

<sup>3</sup> P Cane, *The Anatomy of Tort Law* (1997) 15.

<sup>4</sup> H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994)

<sup>5</sup> See Neil McCormick, *Legal Reasoning and Legal Theory* (1978), who says that ‘legal reasoning is a special, highly institutionalized and formalized, type of moral reasoning. Of course the very features of institutionalization and formality create important disanalogies between legal reasoning and moral reasoning in the deliberations of individuals, or the discourses and discussions of friends and colleagues, or whatever’: at 272. He goes on to reject the idea that an individual has moral autonomy, at least until they have been taught a moral system within a family or culture and later gone on to test it. Thus he accepts the idea that morality may be identified by a cultural group.

<sup>6</sup> I use the term culture/community loosely to mean a communicative group which identifies itself as a community. It can therefore be very small or very large and need not be geographical at all. Any one person could be a member of several such communities or cultures. In doing this I am following the argument of Anthony Cohen in *The Symbolic Construction of Community* (1985), discussed by Roger

part of a moral system which is recognised within those communities. Recent recognition of governmental wrongdoing, human rights abuses and so on has led to calls for apologies, some of which have been accepted, others of which have been ignored. More recently still, legislation protective of apologies in private law disputes (mostly negligence), has been developed on the basis that the legal system was damaging society by having a chilling effect on apologies.

Bringing the law to bear on apologies may affect the moral system of a community in some way. An examination of apologies in the private law context demonstrates some aspects of how and why this interaction occurs. Apologies, therefore, both in the absence of apology-protecting laws and in their presence, offer an interesting case-study of how social systems interact. The systems include the legal system and other community/ies which see themselves as having certain moral referents. Such communities might include religious groups, a family, an ethnic grouping, or a professional grouping. All these different groups (and any individual may participate in several of these) may have different accounts or views of the meaning and necessity of apologies which might interact in some way with the law. This article will draw to some extent on the work of systems theorists who consider how different social systems operate and work on each other. The theories which seem to offer some insight include on the one hand the autopoietic theories of Luhmann<sup>7</sup> and Teubner,<sup>8</sup> and on the other hand, Habermas who sees systems as more interpenetrative and who has been concerned at the extent that law ‘colonises’ other parts of the ‘lifeworld’.<sup>9</sup> It is beyond the scope of this paper to offer an authoritative account of any of these, but a brief sketch for now may be helpful. Autopoietic theories are theories which derive their insights from biological systems which help to ensure that an organism such as a cell can maintain its integrity. When considering the

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Cotterell in *Law, Culture and Society* (2006) where he says that ‘a community is best thought of not as a social structure but as a web of understandings about the nature of social relationships’: at 67.

<sup>7</sup> Including Niklas Luhmann, *Law as a Social System* (Alex Ziegert trans, 2004, original German ed 1993).

<sup>8</sup> G Teubner, A Bankowska, RM Adler and Z Bankowski, *Law as Autopoietic System*, (1993).

<sup>9</sup> Jurgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy trans, 1987, original German ed 1981), vol 2, 356 ff; Jurgen Habermas, *Between Facts and Norms* (William Rehg trans, 1996, orig German ed 1992).

extent to which systems interact, Luhmann saw autopoiesis as either existent or non-existent, while Teubner sees it as more a matter of degree.<sup>10</sup> For Luhmann, the legal system is closed because it cannot consider any matter except as either ‘legal’ or ‘illegal’, but this does not mean that the legal system can never be aware of facts or events outside it – it is ‘cognitively open’; but that openness is not an openness to direct communication from outside. A piece of information that is not legal first has to be turned into legal information.<sup>11</sup> This is significant because it means that whatever information has been transformed is now turned into something of a different character. So, if it was a moral view it now becomes legal. A question which remains is whether that has affected its meaning (given that in Luhmann’s theory, the moral system also can only consider meaning in its own terms), and if the reason that it was taken into the legal system was to maintain its meaning (as I think is the case with the apology legislation), whether that aim has or can be met. Habermas’s view in *The Theory of Communicative Action* was that the possible colonisation of the lifeworld depends on exactly how juridification operates on the lifeworld.<sup>12</sup> Where an area of law involves legal norms which can be legitimised in the positivistic sense by some rule of procedure it often will not matter (and he would not see it as colonisation) if the law takes over an area. Law becomes simply a steering medium. However, if the area of law is an area which cannot be legitimised in that way, it must be substantively justified. In this area Habermas puts constitutional principles, criminal law norms and matters close to morality – and tort law would fit in here. He calls these ‘legal institutions’. Where this area of law operates to not just supplement but to actually convert ‘socially integrated contexts’ over to the medium of law then ‘functional disturbances arise’<sup>13</sup> because the juridification disturbs the internal logic of the lifeworld matter. In this context the lifeworld matter is the moral community’s view of apologies. The question then, for both Luhmann and Habermas, is does the bringing of the apology into the legal domain by protecting it make the apology into a

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<sup>10</sup> See Michael King, ‘The “Truth” about Autopoiesis’ (1993) 20(2) *Journal of Law and Society* 218, 225-6

<sup>11</sup> Niklas Luhmann, ‘Operational Closure and Structural Coupling: The Differentiation of the Legal System’ (1992) 13 *Cardozo Law Review* 1419.

<sup>12</sup> Habermas, *The Theory of Communicative Action*, above n 9. He more or less dropped the distinction later in *Between Facts and Norms*, above n 9, but the distinction may still be useful.

<sup>13</sup> Habermas, *The Theory of Communicative Action*, above n 9, 369.

different sort of thing from what it is when it is merely part of the moral cultural subsystem of some particular community?

### **Public and Private<sup>14</sup> Apologies in Fashion**

There is a considerable literature discussing the rise of apologies in the public arena.<sup>15</sup> It generally focuses on the wrongs of governments. For example, one book begins<sup>16</sup>:

When a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to apologize and to make that apology believable by doing something tangible called a “reparation”.

Government apologies are by their nature very public – they are made in public, and they are made for public purposes rather than private purposes. In the last fifteen years there has been an increasing demand for and use of apologies in the public arena

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<sup>14</sup> I am here using the terms ‘public’ and ‘private’ to reflect legal dichotomies rather than social ones. So public refers to matters involving the state or governmental matters, and private refers to matters where private law would apply. So, an apology by a corporation to consumers on television would fit into the ‘private’ domain, even though given in public.

<sup>15</sup> In Australia much of it revolves around the treatment of Indigenous people: See the Prime Minister of Australia, Paul Keating’s Redfern Speech, reported in *The Age*, 11 December 1992, 17 where he did apologise and acknowledge past wrongs done to Aboriginal people; *The Reconciliation Statement*, Council for Reconciliation 27 May 2000 (call for a formal apology for Aboriginal people from Prime Minister Howard); (Australia holds National ‘Sorry Day’ on 26 May each year, although how long that will last in the current political climate is a good question); Robert van Krieken, ‘The “Stolen Generations” and Cultural Genocide: The Forced Removal of Australian Indigenous Children From Their Families and its Implications for the Sociology of Childhood’ (1999) 6(3) *Childhood* 297; see also Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998); Roy L Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (2004); Marina Warner, *Sorry* (2002) Open Democracy <<http://www.opendemocracy.net/content/articles/PDF/603.pdf>> at 10 January 2007; Eric A Posner and Adrian Vermeule, ‘Reparations for Slavery and Other Historical Injustices’ (2003) 103 *Columbia Law Review* 689; B Hamber, ‘Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland’ (2003) 26 *Fordham International Law Journal* 1074; K Asimal, ‘Truth, Reconciliation and Justice: The South African Experience in Perspective’ (2000) 63 *Modern Law Review* 1; J Thompson, ‘The Apology Paradox’ (2000) 50(201) *The Philosophical Quarterly* 470.

<sup>16</sup> Brooks, above n 15, lx.

in relation to governmental actions whether relating to war or treatment of Indigenous people or other matters. In Australia these demands have frequently been denied ‘for legal reasons’.<sup>17</sup> This has not satisfied the desire for an apology which to some is seen as the only morally responsible response to, for example, the treatment of Indigenous people.<sup>18</sup> The refusal to apologise because this might lead to a legal requirement to compensate has no force in the public domain in a country where parliament can ultimately decide such matters. In Australia the argument about apologising to Indigenous people is seen as part of reconciliation. Reconciliation means the healing of the relationship – an apology (and possible reparation) on one side and forgiveness on the other creating the healing. Thus an apology may not be an end in itself, but part of a larger sequence.

This paper considers apologies in the context of private law. The area of interest encompasses tortious wrongs rather than contractual breach, and because negligence is the dominant tort, it focuses very strongly on negligence.<sup>19</sup> In the last five years or so we have also seen legislation designed to enhance or protect the role of the apology in private litigation, particularly in negligence law. In some ways this is an expression of the same phenomenon as in the public domain, but the role of the apology in the civil liability arena (where the focus is on the relationship between two individuals) may be different from the role of the public apology. Public purposes could include political purposes, the prevention of disorder, reconciliation of two major social groups, and, more cynically, the manipulation of a large group of people into behaving in a particular way. In the private domain, people often want a relationship restored and feel emotional – angry, hurt or vengeful – if an apology is not forthcoming. What is clear is that apologies are seen at many different levels of

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<sup>17</sup> See for example, *Commonwealth Government Response to the Final Report of the Council for Aboriginal Reconciliation: Australia’s Challenge* (2002)

<[http://www.atsia.gov.au/Media/Reports/PDF/2609\\_reconcil.pdf](http://www.atsia.gov.au/Media/Reports/PDF/2609_reconcil.pdf)> at 11 January 2007.

<sup>18</sup> Marina Warner refers to Prime Minister Howard finding himself facing a sea of backs while making a speech after he had refused to apologise: above n 15, 15.

<sup>19</sup> Defamation law has traditionally used the apology both as a remedy and as an item in mitigation of damages, that is *after and independently of* the court’s determination of liability. By contrast in negligence the issue the apology is concerned with goes directly to the facts which give rise to the cause of action, that is to the question of whether the person has been negligent.

society – private relationships, the governmental sphere and even international levels<sup>20</sup> – as significant. It is also clear that different groups may see the need for apology differently.<sup>21</sup> The recent development of apology-protecting legislation in the common law world suggests that legislators at least see an important role for apologies in the civil liability arena. This article seeks to explore what that role is and how it connects with ideas of forgiveness and mercy in both civil society and legal norms with particular reference to the area of negligence in private law.

### **Defining Apologies and Forgiveness**

It is the premise of this paper that there is such a thing as a true apology, and whether public or private, an apology is not real unless it includes an acknowledgement of fault. Defining an apology is essential to determining its function in the community. Is saying ‘I’m sorry’ an apology? Many people would say that it is not. That is a mere expression of regret, which might operate as a soothing device for small hurts or where the person speaking has no responsibility. An apology does not exist unless the person who is expressing regret is also taking responsibility for a wrong which they have committed. This definition appears to apply whether we are considering an apology from a moral theory point of view<sup>22</sup> or from a psychological point of view.<sup>23</sup>

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<sup>20</sup> See, for example, United Nations *Basic Principles and Guidelines on the Right to Reparation of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and Proclaimed by the General Assembly Resolution 60/147 of 16 December 2005. This provides in paragraph 22 (e) for ‘Public apology, including acknowledgement of the facts and acceptance of responsibility’ in its list of reparations, <<http://www.ohchr.org/english/law/remedy.htm>> at 10 January 2007.

<sup>21</sup> The most obvious difference in the context of apologies can be seen in the literature comparing the American view of apology with the apology in Japan: For example, J Haley, ‘Apology and Pardon: Learning from Japan’ (1998) 41(6) *American Behavioural Scientist* 842; H Wagatsuma and A Rosett, ‘The Implications of Apology: Law and Culture in Japan and the United States’ (1986) 20 *Law & Society Review* 641. However, other communities will also have differing views of what constitutes something which should be apologised for and what the implications of an apology are.

<sup>22</sup> Paul Davis, ‘On Apologies’ (2002) 19(2) *Journal of Applied Philosophy* 169; Nick Smith, ‘The Categorical Apology’ (2005) 36(4) *Journal of Social Philosophy* 473; Kathleen Gill, ‘The Moral Functions of an Apology’ (2000) XXXI(1) *Philosophical Forum* 11; L Kort, ‘What is an Apology?’ (1975) 1 *Philosophical Research Archives* 78; E Levinas, *Totality and Infinity*, (Alphonso Lingis trans, 1969),; S Hand (ed), *The Levinas Reader* (1989).

This kind of apology is called a ‘full’ apology. A mere expression of regret is called a ‘partial’ apology. In the context of civil liability ‘partial’ apologies are also sometimes called ‘safe’ apologies. This is for two reasons – the first is that an apology which does not acknowledge fault runs no risk of legal liability. It is no different from saying ‘I’m sorry your grandfather died’ at a funeral. The second reason is that much of the legislation which protects apologies only protects this kind of apology. Thus the apology is doubly safe because it cannot amount to an admission of liability and it is protected from being an admission of liability by the legislation anyway.

Apologies and forgiveness often go together as part of a sequence leading to reconciliation, so it is useful to consider the definition of forgiveness here. Forgiveness is generally thought of as having three main elements:

First, forgiveness involves the suspension or overcoming of hostile feelings towards the wrongdoer. Second, it involves or fosters reconciliation and restoration of relationships. Third, forgiveness involves, in some sense, the removal or bracketing off of the wrong, or of the guilt created by the wrong – the wiping clean of the slate.<sup>24</sup>

Forgiveness is distinguishable from mercy in that mercy does not require any of these three elements – it simply allows punishment to be withdrawn. Again, forgiveness also involves an acknowledgement of the wrong and a reinforcement of the social norms – the ‘wiping clean of the slate’ is done only to allow a return to the moral or civil norms; not to expunge them. As Gehm says ‘[f]orgiveness is letting go of the *power* that the offence and the offender have over a person while not condoning or

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<sup>23</sup> J Robbenolt, ‘Apologies and Settlement Levers’ (2006) 3 *Journal of Empirical Legal Studies* 333 and ‘Apologies and Settlement: An Empirical Examination’ (2003) 102 *Michigan Law Review* 460; R Korobkin and C Guthrie, ‘Psychological Barriers to Litigation Settlement: An Empirical Approach’ (1994) 93 *Michigan Law Review* 107; Steven J Scher and John M Darley, ‘How Effective are the Things People Say to Apologise? Effects of the Realization of the Apology Speech Act’ (1997) 26 *Journal of Psycholinguistic Research* 127.

<sup>24</sup> Eve Garrard and David McNaughton, ‘In Defence of Unconditional Forgiveness’ (2003) 103(1) *Proceedings of the Aristotelian Society* 39, 41.

excusing the actor'.<sup>25</sup> The elements of the full apology are echoed in this description of forgiveness.

## **The Role of Apologies in Civil Society**

### *(i) Civil Norms With a Function*

Apologies are civil norms. Because they operate within societies, they reflect the culture of those societies. It is important not to assume that the cultural norms of apology in Japan will be the same as those in Australia or Britain. Amongst sub-cultures including families, there will be specific views about when a person should apologise and when they need not.

Apologies are fashionable because they are civil norms which perform social functions. Apologies are part of a system of civility in any society, culture or sub-culture. The apology reflects the norms of civility of that society, culture or sub-culture. Nicholas Tavuchis, who wrote the most complete sociological account of apologies yet in existence, regards an apology as part of a sequence – ‘event, call, apology, forgiveness, reconciliation’<sup>26</sup> – which is dynamic and interactive. He emphasises that it is a speech event because it is part of an interaction between two people. (He was writing in 1991 which was before email became ubiquitous). Although his insistence on speech ignores the possibility that one can apologise in writing or even non-verbally (consider the shrug, facial expression and hand signals one might use to apologise when driving), the communicative quality of an apology is clearly an essential part of it. One cannot apologise to no-one. The use of apologies can also create meaning for people out of events which otherwise seem utterly meaningless. This has been especially demonstrated in the literature on restorative justice.<sup>27</sup>

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<sup>25</sup> John R Gehm, ‘The Function of Forgiveness in the Criminal Justice System’ in G Johnstone (ed), *A Restorative Justice Reader* (2003), 281.

<sup>26</sup> N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991), 39.

<sup>27</sup> For example, B Toews and H Zehr, in ‘Ways of Knowing for a Restorative World View’ say: ‘What we are learning from restorative justice is that a fundamental element of justice has to do with the

(ii) *Human Need for Respect and Dignity, Anti-alienation*

According to Aaron Lazare, a psychiatrist,<sup>28</sup> apologies fill a human need for self-respect and dignity:

‘Apology ... is a method of social healing that has grown in importance as our way of living together on our planet undergoes radical change’.

He argues that as the planet’s interconnections become more global and increase in number the social networks any person is involved in expand in both number and scope. A community need no longer be geographically based to be a community which has cultural views of social relationships and social responsibility. There are therefore more interactions, more opportunities for discord and more need for ways of smoothing those interactions. Our ways of living together on the planet also include increasing alienation as, for example, individuals more often have to interact with large corporations and large bureaucracies. The increased use of technology also raises our capacity to harm people at a distance. Using the argument from evolutionary biology (discussed later) that apologies allow us to maintain a level of aggressiveness without destroying ourselves, all these factors may increase our need to use apologies and account for the increasing call for their healing and reconciliatory power.

(iii) *Identification With the Moral Community*

The literature on the use of apology in the criminal justice system<sup>29</sup> and the little sociological literature on apology emphasise that apologies acknowledging fault are:

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creation of meaning’, in E G M Weitekamp and H J Kerner, *Restorative Justice in Context: International Practice and Directions* (2003), 257. The apology process is part of that.

<sup>28</sup> Aaron Lazare, *On Apology* (2004).

<sup>29</sup> Much of this is in the restorative justice literature. See, for example, G Johnstone (ed), *A restorative Justice Reader* (2003); Declan Roche (ed), *Restorative Justice*, The International Library of Essays in Law and Legal Theory, Second Series (2004); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (2002).

‘... 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’.<sup>30</sup>

Apologies have a moral or ethical dimension which is an important part of their function for whichever community is determining the need for the apology. The available sociological and psychological literature on apologies is quite clear that an apology which does not include an acknowledgement of fault is not regarded as real by the vast majority of people.<sup>31</sup> As Lazare says, ‘[t]he most essential part of an effective apology is acknowledging the offense’.<sup>32</sup> The acknowledgement that there has been an offence or fault on the part of the apologisee is critical because of this moral dimension which is a vital part of a community’s creation of meaning for itself. It is important to note that one apologises for a wrong rather than for a loss.<sup>33</sup> (One may certainly express regret for any loss.) The loss may well be a problem for the victim, but the moral question to which the apology responds is whether there has been a wrong. The question of what is something for which one should apologise is a matter of those civil norms, which are mediated by culture or community and may therefore differ according to the micro- or macro-culture of the people concerned. When a person apologises and acknowledges a fault, that validates the civil norm which has been violated. That communication process adds meaning to the norm, clothes it in reality and anchors it to the people concerned. It fosters both the dyadic relationship and the sense of meaning and morality of the community within which the dyad operates.

When a person apologises with an acknowledgement of fault they also acknowledge responsibility for the wrong done. So an apology is not just a recognition that a wrong has been done, but an acknowledgement by the person that they are responsible for it. Again, this acknowledgement of responsibility is part of the community’s

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<sup>30</sup> S Bibas and R A Bierschbach, ‘Integrating Remorse and Apology into Criminal Procedure’ (2004) 114 *Yale Law Journal* 85, 109.

<sup>31</sup> See especially, Tavuchis, above n 26; Lazare, above n 28.

<sup>32</sup> Lazare, above n 28, 75.

<sup>33</sup> This point is made by Sandra Marshall in ‘Noncompensatable Wrongs, or Having to Say You’re Sorry’ in M Kramer (ed), *Rights, Wrongs and Responsibilities* (2001) 213 ff.

development of meaning. It is about what is regarded as causally significant in that community<sup>34</sup>. For example, in some communities a causal link would be accepted between adulterous or sinful behaviour and illness. In other communities it would not. A more subtle example would be the difference between a community which thought that only doing something active made one responsible, and another community which thought that passively allowing something to happen made one responsible.<sup>35</sup> Thus apologies as part of the attribution of responsibility will reflect the way a community makes sense of the world.

Levinas<sup>36</sup> saw apologies as an essential part of ethical responsibility and as ‘the archetypical act of human freedom, including the freedom to alter one’s identity across time’.<sup>37</sup> That identity could be changed from the identity as a person who has done wrong, to the identity as a person who has acknowledged the wrong and been forgiven and thus has moved to a different moral space. In his view apology was centrally important to a discourse of personal responsibility in ethics based on a view of the ‘other’ which recognised their proximity or ‘neighbourness’.<sup>38</sup> This is particularly interesting in view of the tests of negligence which rely on both those concepts. Levinas’ idea of ethics was very much focused on personal relationships and a personal sense of responsibility from one person to another and he distrusted any move of ethics from the personal to the political.<sup>39</sup> However, his view of personal

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<sup>34</sup> See, for example, Incheol Choi, Reeshad Dalad, Chu Kim-Prieto and Hyekyung Park, ‘Culture and Judgment of Causal Relevance’ (2003) 84(1) *Journal of Personality and Social Psychology* 46.

<sup>35</sup> The legal community itself can be given as an example of the former, since the ‘no duty to rescue rule’ is so well-recognised in tort law; while the moral community in most societies finds the rule abhorrent. Lesley Bender observes, ‘Each year that I teach torts I watch again as a majority of my students initially find this legal ‘no duty’ rule reprehensible’: ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 *Journal of Legal Education* 3, 33.

<sup>36</sup> Levinas, above n 22; Hand (ed), above n 22.

<sup>37</sup> Danielle Celermajer, ‘From the Levinasian Apology to the Political Apology: Reflections on Ethical Politics’, refereed paper presented to the Australasian Political Studies Association Conference, University of Newcastle, 25-27 September 2006.

<sup>38</sup> D Manderson, ‘The Ethics of Proximity’ (2005) 14(2) *Griffith Law Review* 295, 296 ff.

<sup>39</sup> Celermajer, above n 37. She notes that Levinas was concerned about the ‘dangers of translating individual ethical processes into politics’ (at 3) because the apology cannot make an ethical transformation in the political domain in the way it can in the personal domain: at 15.

responsibility was asymmetrical, since he did not accept the idea of responsibility as based on reciprocity or mutuality, simply as based in a profound ethical demand to meet the needs of the Other.<sup>40</sup> This is very different from most moral theorists and indeed from the psychological literature, and may be better thought of as the ideal than the actual position.

More commonly, moral theorists<sup>41</sup> argue that apologies are important moral devices – ‘morally rich acts’<sup>42</sup> – which operate to reinforce the moral norms in a community and to redress the moral balance between two parties. Offenders need to reposition themselves as moral beings in the community and with the victim. The apology thus operates as a moral transformation of the offender. Victims need respect paid to them as having been wronged and as being of moral worth. Kathleen Gill argues that apologising ‘is an act that displays a certain set of beliefs, attitudes etc experienced by the offender ...’. She argues that the psychological impact of the apology on the victim is related to moral status, so that the apology amounts to explicit recognition of the moral worth of the victim. She adds:

It is not only the victim who has an interest in whether or not an offender apologizes. The general public has an interest as well. A person who is incapable of ... empathizing with the pain of others, is a danger to society. Being able to apologize, even if the apology is not especially heartfelt, at least indicates that the offender has some of the basic moral capacities necessary for social life’.<sup>43</sup>

Thus the moral re-balancing that occurs is based on the shared moral norms of both offender and victim being restated and accepted as belonging to both. In Smith’s view, ‘[b]ecause an apology conveys a shared commitment to a moral value, the victim and offender should share a concomitant conception of how to respond to an

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<sup>40</sup> S Kepnes, ‘Ethics after Levinas: Robert Gibbs *Why Ethics? Signs of Responsibilities*’ (2003) 19 *Modern Theology* 103.

<sup>41</sup> Davis, above n 22; John Mackie, *Ethics: Inventing Right and Wrong* (1977); Gill, above n 22; Smith, above n 22.

<sup>42</sup> Smith, above n 22, 473.

<sup>43</sup> Gill, above n 22, 16.

offense of the norm'.<sup>44</sup> This immediately raises concerns that both the people concerned share a set of moral norms. This may be easy to do within a particular micro-culture, but across cultures it is more difficult.

*(iv) Social Psychology – Emotional Re-balancing*

The social psychology literature puts forward various hypotheses about the importance and function of apologies. Equity theory draws on some of the moral theorists' ideas to argue that harm done by one to the other creates a moral and emotional imbalance<sup>45</sup> which may be corrected by an apology. The apology forces the apologiser into a humbling position which rebalances the relationship by rebuilding the victim's self esteem and social status. Other social psychological arguments are that people apologise in order to look good to third parties; to look like a good person, or to restore their image or self-concept.<sup>46</sup> These views of apology are based on the idea that an apology which is given in public may be used by the apologiser to rebuild their image as a good person, and the literature suggests that people are more likely to see an apologiser as a good and moral person who is unlikely to do further wrong. Apologies given in private can do the same thing in that the person receiving the apology is more likely to see the apologiser positively. Erving Goffman saw the apologiser as needing to 'split [himself] in two' to distance himself from the earlier wrong-doing self. This has some resonance with Levinas' view of apologising as altering identity, but in Goffman's characterisation this may be done by the offender as a strategic action to re-position himself in the social community. The offender's apology re-states the norms of the community so that the offender can re-join it.<sup>47</sup>

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<sup>44</sup> Smith, above n 22, 487.

<sup>45</sup> Equity theory of psychology gives this account, (for example, E Walster and GW Walster, 'Equity and Social Justice' 31 *Journal of Social Issues* 21; E Walster, E Berscheid and GW Walster, 'New Directions in Equity Research' 25 *Journal of Personality and Social Psychology* 151), which is the psychological account closest to the corrective justice theory of tort law.

<sup>46</sup> Erving Goffman, *Relations in Public: Microstudies of the Public Order* (1971); Erin Ann O'Hara and Douglas Yarn, 'On Apology and Consilience' (2002) 77 *Washington Law Review* 1121, 1142 ff.

<sup>47</sup> Goffman, above n 46, 113.

Apologies are also a tool of communication and of emotion. Apologies may redress humiliation for the victim, shame the offender and help to heal the emotional wounds associated with a wrong. Apologies appear to dissipate anger in a way which is related to the severity of the harm, whether or not responsibility is high or low<sup>48</sup> and reduce aggression.<sup>49</sup> As the restorative justice literature tells us, the absence of the ability to apologise in the criminal justice system (because the victim is downgraded from party to witness) seems unnatural to victims.<sup>50</sup> Heather Strang argues that ‘acknowledgement of emotional harm and of the need for emotional restoration are central to the dynamics of a successful conference and that the apology-forgiveness transaction is of great significance in restorative justice *as it is in everyday life*’<sup>51</sup> (my italics).

Apologies and forgiveness may go together in that a successful apology may lead to forgiveness. (Note that Strang refers to ‘the apology-forgiveness transaction’.) Lazare and others, as we have seen, emphasise the healing nature of apologies. Others see apologies and forgiveness as part of a ‘redemptive sequence: transgression – repentance/apology – forgiveness – reconciliation – redemption [which] has long functioned as an archetypal narrative of healing or liberation in both religion and personal relationships’.<sup>52</sup> Forgiveness can stand alone, however. Some moral theorists object to forgiveness in the absence of remorse or apology precisely because they see

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<sup>48</sup> M Bennett and D Earwaker, ‘Victims; Responses to Apologies: The Effects of Offender Responsibility and Severity of Offense’ (1994) 134 *Journal of Social Psychology* 450.

<sup>49</sup> K Ohbuchi, M Kameda and N Agarie, ‘Apology as Aggression Control: its role in mediating appraisal of and response to harm’ (1989) 56(2) *Journal of Personality and Social Psychology* 219.

<sup>50</sup> For example, Heather Strang, ‘Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration’ in G Johnstone (ed) *A restorative Justice Reader*, (2003) 289; Strang, *Repair or Revenge*, above n 29.

<sup>51</sup> Strang, ‘Justice for Victims of Young Offenders’, above n 50, 290. See also the discussion of reparation by Lucia Zedner, ‘Reparation and Retribution: Are they Reconcilable?’ (1994) 57 *Modern Law Review* 228, where she argues that reparation includes apology and compensation. She argues reparative justice recognises social wrongs, contrary to people like Andrew Ashworth who have argued that reparation shifts the focus to harm and ignores the wrong. Given that reparation may well include apologies, I would argue that she is correct so long as an apology is a full apology which acknowledges the wrong.

<sup>52</sup> Celermajer, above n 37, 2. Celermajer considers the different issues raised by the political rather than the personal apology in her paper.

that as more likely to break down moral norms. Others, such as Garrard and McNaughton disagree, largely on the basis that they think the basis of the objection is the mistaken notion that forgiveness condones the wrong.<sup>53</sup> Psychological views of forgiveness also have a place. For example, using Gehm's definition of forgiveness as 'a process of ceasing to feel resentment'<sup>54</sup> one can see why forgiveness might promote healing in the victim, rather than merely releasing the wrongdoer from his or her wrongdoing. Thus in promoting healing in the victim and releasing the wrongdoer from his or her wrongdoing henceforth, forgiveness promotes a healthy relationship and allows the continuation of ordinary interactions, which would otherwise be blocked by resentment. But in ordinary life, such forgiveness will generally only be prompted by an apology. Thus every element in the sequence described by Tavuchis – 'event, call, apology, forgiveness, reconciliation' – is necessary for reconciliation to occur.

*(v) Evolutionary Adaptive Behaviour*

O'Hara and Yarn argue that a better explanation for apologies and forgiveness (or reconciliatory behaviour) may lie in evolutionary biology's view of apologies and forgiveness as useful adaptive behaviours. They refer to De Waal, who said: 'The fact that monkeys, apes and humans all engage in reconciliation behaviour means that it is probably over thirty million years old, preceding the evolutionary divergence of these primates'.<sup>55</sup>

This explains what many of the social psychology explanations do not – why people may desire apologies even if they are not public. However to argue that reconciliation behaviour may be evolutionarily adaptive does not explain *why* it is useful. Presumably it reduces bloodshed and keeps the gene pool going, but where we are talking about ordinary civil society, where the risk is not bloodshed but paying damages or shame, is it enough just to assume that the evolutionarily adaptive behaviour simply continues in another form and reduces lesser forms of risk? It could

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<sup>53</sup> Garrard and McNaughton, above n 24.

<sup>54</sup> Gehm, above n 25, 280.

<sup>55</sup> Frans De Waal, *Peacemaking Among Primates* (1989) 270-271, cited in O'Hara and Yarn, above n 46, 1158.

be argued that if beings are too aggressive they will breed their genes out leaving a species that is too passive to effectively hunt – could reconciliation behaviour be a way of maintaining the level of aggression in the species which is needed for hunting, without turning that same aggression on others of the same species? The adaptive part of apologies actually may lie in the ability to maintain aggressive behaviour without sacrificing the species.<sup>56</sup> For humans, the communication process of apology, forgiveness and reconciliation involves language and nuances presumably not available to other primates. Within any system, culture or sub-culture of civility, the insincere apology may actually unleash further aggression. We know that the credibility of an apology is very often considered in terms of the cost to the apologist,<sup>57</sup> and if the cost is not sufficient, the apology may be rejected. Forgiveness will not be given in return and there will be no reconciliation. There may be, therefore, a large social risk to an individual in giving an insincere apology. On the other hand, for the community a forced apology, even an insincere one, can have an educative function and operate as a sanction by shaming the offender. Garvey suggests that this can educate people about ‘the virtues of remorse, forgiveness and reconciliation’.<sup>58</sup>

*(vi) Conclusion – Functions Found*

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<sup>56</sup> K Lorenz, *On Aggression* (M Latzke trans, 1967), argues that aggression should be divided into intra-species and inter-species aggression. Inter-species aggression is essential, but humans have so comprehensively won this battle as to make it generally irrelevant. In relation to intra-species aggression, he notes that all vertebrate species have forms of appeasement behaviour involving submission (one way in which an apology can be characterised) which operate to stop one member of a species killing another. He suggests that ‘Aggressive behaviour and killing inhibitions [are an example of] phylogenetically adapted behaviour mechanisms (which) are thrown out of balance by the rapid change wrought in human ecology and sociology by cultural development: at 211. Perhaps the rising incidence of calls for apology is a response to this. See also, Ohbuchi, Kameda and Agarie, above n 49, which demonstrated the inhibiting effect of apologies on aggression.

<sup>57</sup> See J Cohen, ‘Advising Clients to Apologise’ (2002) 72 *Southern California Law Review* 1009. Although, in J Robbenolt’s studies, ‘participants consistently did not distinguish’ between apologies which were statutorily protected and those which were not. The difference did not affect plaintiffs’ willingness to settle nor their attribution of responsibility: ‘Apologies and Settlement: An Empirical Examination’, above n 23, 509-510.

<sup>58</sup> S P Garvey, ‘Can Shaming Punishments Educate?’ (1998) 65 *University of Chicago Law Review* 733, 794.

We have established several functions for apologies and forgiveness – a healing and re-balancing function for both victim and relationship, (and often for the offender as well), a moral, meaning-creative and educative function of reinforcing the sense of the norms of right, wrong and responsibility in the community and between victim and offender and possibly an underlying function of reducing aggression. Most of these functions require an apology to acknowledge fault rather than merely to express regret in order to be effective, that is in order to elicit the next stage in a reconciliation process. The communicative and balancing dynamic between the parties requires the acknowledgement of fault, because a mere expression of regret does not require anything from the other party – it does not recognise the same level of imbalance between the parties that an acknowledgement of fault does, and therefore it does not begin to re-balance the parties in the same way.

As Marina Warner observes:

Apology has come to seem a necessary addition to the ground in which new values can take root and grow into social and human rights for groups that identify themselves as wronged. It's a form of communication, in which the subjective self is implicated. When this is made in public, with its stress [on] the display of humility and the loss of authority of the apologist, it adopts a language of passionate and personal sincerity identified with degraded weak suppliants...with sinners like Augustine. In this way, its expressions of empathy help redeem the perpetrator of the wrong by association with the object of the apology.<sup>59</sup>

## **Apologies, Forgiveness and Corrective Justice in the Civil Liability Arena**

### *(i) Apologies in the Absence of Protective Legislation*

#### *Apologies and Negligence*

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<sup>59</sup> Warner, above n 15, 15.

There are a number of factors about negligence law which are significant when considering its interaction with apologies and forgiveness. We have already established that any community will have its own view about at what point of moral blameworthiness an apology should be given. This raises the question of when blame arises in the moral sense. Because negligence law is not about the intention of the perpetrator in the sense that the tortfeasor only has to fail to meet the standard of care of the reasonable person, it is not as obvious as it is with the criminal law that the tortfeasor has been morally as well as legally wrong. This distinguishes it from the area of restorative justice where apology can be very significant. Thus the congruence between the legal system's view of blameworthiness and the moral community's view of blameworthiness may not be absolute. The single most common type of negligence case arises from motor vehicle accidents, where a driver may have merely had a moment's inattention.<sup>60</sup> This is very important because apologies are civil norms which are based in ethical and moral ideas, as are the ideas underlying the law of negligence. Both use community standards.<sup>61</sup> Negligence is something which people often think of as less morally reprehensible than intentional harm; for example, Nick Smith argues that an apology for an accident rather than an intentional act is meaningless because he thinks an accident is not a morally culpable event;<sup>62</sup> but it is clear that negligence *is* regarded as morally culpable in some situations. It lies between the two situations of intention to create harm and pure coincidental accident. People clearly think of negligence as something for which people should apologise in that negligence arises where a person is seen as careless.

The law of negligence uses a calculus based on the behaviour of the reasonable person to determine whether behaviour is blameworthy (negligent) in the legal sense. One issue is how the extent of the blameworthiness calculation made for the purposes of determining whether an apology should be made intersects with the calculus of

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<sup>60</sup> See Jeremy Waldron, 'Moments of Carelessness and Massive Loss' in D Owen (ed), *Philosophical Foundations of Tort Law* (1995).

<sup>61</sup> For example, Brennan J in *Gala v Preston* (1991) 172 CLR 243 said 'once the facts are proved all that remains for the court to do in determining the standard of care is to apply community standards – the standards of a hypothetical reasonable person in the defendant's position': at 269.

<sup>62</sup> Smith, above n 22, 479.

negligence. In a previous paper I have argued that the best way to think about apology in the civil liability arena is as a form of corrective justice.<sup>63</sup>

Taking corrective justice to be the view based on Aristotle's *Nicomachean Ethics* that individual moral rights are the foundation on which negligence law is based, an account of apology can become part of the corrective justice approach to tort law. 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.<sup>64</sup> Fault is central to negligence law because of its connection to moral responsibility,<sup>65</sup> and in particular, to personal responsibility. 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.<sup>66</sup> Stephen Perry elaborates this by pointing out that although negligence law is outcome-responsibility based (that is, it takes the view that the wrongdoer must be responsible for the outcome of his or her actions rather than just the actions themselves) the fault principle is what operates to determine who should compensate.<sup>67</sup> Thus the central component of the apology, the acknowledgement of fault goes to the heart of negligence, and offers correction or reparation for the wrong.

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<sup>63</sup> Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 *Sydney Law Review* 483.

<sup>64</sup> See S Perry, 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449 and E Weinrib, 'The Special Morality of Tort Law' (1989) 34 *McGill Law Journal* 403 for accounts of corrective justice theory.

<sup>65</sup> For example, E Weinrib, 'Toward a Moral Theory of Negligence Law' in MD Bayles and B Chapman (eds), *Justice, Rights and Tort Law* (1983); J Coleman, 'Moral Theories of Torts: Their Scope and Limits' in MD Bayles and B Chapman (eds), *Justice, Rights and Tort Law*, (1983); Perry, above n 64; L Alexander, 'Causation and Corrective Justice; Does Tort Law Make Sense?' (1987) 6 *Law and Philosophy* 1-23; L Schwartz, 'Apportionment of Loss under Modern Comparative Fault: The Significance of Causation and Blameworthiness' (1991) 23 *University of Toledo Law Review* 141; C Schroeder, 'Corrective Justice and Liability for Increasing Risk' (1990) 37 *UCLA Law Review* 439; D Owen, 'The Fault Pit' (1992) 26 *Georgia Law Review* 703; T Honore, *Responsibility and Fault*, (1999) and many more.

<sup>66</sup> E Weinrib, *The Idea of Private Law* (1995) 57.

<sup>67</sup> Perry, above n 64, 497.

On this view the establishing of fault or responsibility (either by a finding of liability or possibly by an apology) is important because it recognises that any harm caused or loss 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'<sup>68</sup> is illuminating because it is what 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. Honore puts this slightly differently. He argues that corrective justice creates a 'claim to put things right'. His view, with which I agree, is that the claim to put things right can sometimes be satisfied only by the harm-doer, as when an apology is claimed, but other times such as where the claim is for money can be satisfied by someone else, such as an insurer.<sup>69</sup> In corrective justice terms an adequate apology may be seen as an equaliser of the relationship.

Liability in negligence generally results in damages. Damages operate as compensation, as a marker of wrongdoing and as acknowledgment that redress is needed. Apologies do some of this same work. Damages also address needs and many people regard this as the most significant aspect of damages. If damages are only about need then a no-fault scheme is the best way to deal with loss.<sup>70</sup> Apologies do not address need in the same way. Damages are often seen as the central vehicle of corrective justice in the sense that they operate to redress the balance between the parties by correcting the loss suffered by one party at the expense of the other who caused it. Apologies can be part of this corrective justice mix if one considers compensation as practical reparation and apology as reparation for the emotional and moral pain suffered by the victim. Some people have called this symbolic reparation, but this is only symbolic if one does not regard humiliation or emotional pain as real.

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

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<sup>68</sup> Perry, above n 64, 496.

<sup>69</sup> T Honore, 'The Morality of Tort Law' in D Owen (ed), *Philosophical Foundations of Tort Law*, (1995) 79.

<sup>70</sup> See, for example, H Luntz, 'Reform of the Law of Negligence: Wrong Questions – Wrong Answers' (2002) 8(2) *University of New South Wales Law Journal Forum: Reform of the Law of Negligence: Balancing Costs and Community Expectations* 18.

considering whether no-fault compensation schemes which incorporate the possibility of formal apologies (voluntary or coerced) might meet some of the objections of corrective justice theorists. Such a scheme would not require fault to be established for compensation, but where there was fault might require an apology. Similarly, an apology might be a mechanism which reinforces the moderation of damages, on the basis that the non-economic parts of the award, such as that for pain and suffering, might be better repaired by an apology than an award of money.<sup>71</sup>

The paradigm of negligence concerns a dyadic interaction between two private individuals. The state's interest theoretically exists only as the provider of facilities for settling the dispute between those two. However, as every private lawyer knows, the paradigm can be deceptive. One of the individuals might be a very large corporation with a global presence; or it might be a governmental organisation being sued for damages. The public/private division becomes highly problematic when groups such as these are being considered. However for the most part, this paper focuses on the paradigm dyad of two private individuals.

### *Apologies and Propensity to Sue or Settle*

Where the context is legal, including the possibility of suing, an apology may lead the victim to forgive. But what would be evidence of forgiveness in the context of civil liability? Does forgiveness mean that the victim takes on the entire burden of the wrong themselves? Do they take it back by denying themselves the possibility of compensation by deciding not to litigate? It is not so straightforward. They may be more likely to settle their case, thus saving themselves or the defendant large court costs and therefore settle for less. The fact that a person has been badly injured may mean that they have to pragmatically decide to sue since social security support will not be sufficient. Thus, it is possible that even a person who feels quite kindly towards a defendant may still feel obliged to sue them. What implications does this have for considerations of apology and forgiveness in the civil liability domain?

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<sup>71</sup> Stephen Waddams, 'The Price of Excessive Damages Awards' (2005) 27(3) *Sydney Law Review* 543.

Two areas of law where the apology has received attention are medical malpractice and restorative justice. Restorative justice as a general rubric refers to a range of ways of dealing with criminal offenders in order to restore their relationships. It usually involves getting the victim and the perpetrator together in some way to facilitate discussion of the offence and to allow the victim to express their grievance and the perpetrator to understand the impact of their actions on the victim. It often involves explanation and apology and sometimes forgiveness. However, in the civil domain we are mostly discussing negligent behaviour rather than behaviour which is conceived of as 'guilty' in the sense that mens rea is involved. The restorative justice literature, because it focuses on the criminal law, is predicated on a sense of blameworthiness that may not be available when we consider negligence. While we continue to think of negligent behaviour as blameworthy, we generally do not see it as blameworthy in the same sense as criminal behaviour. This may be significant both for the consideration of apologies and for the consideration of what is involved in forgiveness in each context. One thing restorative justice programs do, which means that they may be more useful than the formal criminal justice system for the purposes of considering justice in the civil liability arena is that they re-introduce the victim into the proceedings. As Nils Christie said, the property in the conflict is returned to the rightful owners<sup>72</sup> in a restorative justice situation, whereas in the formal criminal justice system the victim, as a mere witness, has no purchase over the conflict. However, in civil justice (if we disregard the insurer for a moment) the parties control the conflict. Thus restorative justice is a better comparator for the role of apologies in civil disputes than the formal criminal law.

Heather Strang<sup>73</sup> discusses the experiences of victims in the Canberra Reintegrative Shaming experiment, which involved victims and perpetrators of crime getting together with a facilitator and comparing the responses of both with the responses of victims and perpetrators who went through the court process. While this focuses on the criminal justice system it is still interesting to note that emotional harm was suffered by many of the victims. 88% of court victims and 91% of conference victims

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<sup>72</sup> Nils Christie, 'Conflicts as Property' (1977) 17(1) *The British Journal of Criminology* 1

<sup>73</sup> Strang, *Repair or Revenge*, above n 29.

said they should have received an apology from the offender ‘to compensate ... for loss and harm’. Three quarters of conference victims and 19% of the court victims had received an apology.<sup>74</sup> Other restorative justice literature emphasises that for restorative justice to work, the offender must acknowledge the wrong and express remorse.<sup>75</sup> Roche notes that ‘victims leave restorative justice meetings fearing revictimization less than do those victims whose cases are processed by a court’.<sup>76</sup>

Against the suggestion that most people want apologies, a Scottish survey showed that very few people mentioned a lack of apology as a motive for litigating, although about 11% saw the prevention of the same thing happening to someone else as their primary motivation. In fact people in the survey were not directly asked about apologies, merely being asked what their main objective in litigating was.<sup>77</sup> Similarly, in other studies about propensity to sue, apology has rarely been the object of study.<sup>78</sup> Kritzer argued that the factors which contributed to higher propensity to sue included more favourable treatment of plaintiffs by cost rules and the existence of jury trials, but that these were not so significant as ‘more general views of the role of adversity and misfortune ...’<sup>79</sup> which he attributed to culture. He did not discuss the role of apology at all.

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<sup>74</sup> Ibid, 115.

<sup>75</sup> Ibid; Declan Roche, *Accountability in Restorative Justice* (2003) 9; J Braithwaite and S Mugford, ‘Conditions of Successful Reintegration Ceremonies’ (1994) 34 *British Journal of Criminology* 139

<sup>76</sup> Roche, *Accountability in Restorative Justice*, above n 75, 11.

<sup>77</sup> Hazel Genn and Alan Paterson, *Paths to Justice in Scotland* (2001) 186. However, thinking of apology as a motive for litigating is not the same as litigating because someone has failed to apologise. The survey did not involve direct questioning about apologies and responses to them and it was actually undertaken as a way of focussing on people who had litigated rather than those who had not.

<sup>78</sup> The few include Kritzer’s study noted below; D Studdert et al, ‘Negligent Care and Malpractice Claiming Behaviour in Utah and Colorado’ (2000) 38 *Medical Care* 250; J Fitzgerald, ‘Grievances, Disputes and Outcomes: A Comparison of Australia and the United States’ (1983) 1 *Law in Context* 15; D R Hensler et al, *Compensation for Accidental Injuries in the United States* (1991); H R Burstin, W G Johnson, S R Lipsitz and T A Brennan, ‘Do the Poor Sue More? A case control study of malpractice claims and socioeconomic status’ (1993) 270(14) *Journal of the American Medical Association* 1697; D Harris et al, *Compensation and Support for Illness and Injury*, (1984); F Sabry, *The Propensity to Sue: Why Do People Seek Legal Action?* (2004).

<sup>79</sup> H M Kritzer, ‘Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases’ (1991) 18(4) *Journal of Law and Society* 400, 422.

One set of experimental studies which directly considered apologies in litigation<sup>80</sup> suggested that respondents were far more inclined to accept a settlement offer where a full apology was offered, less so for partial apologies and many fewer where no apology was offered. The report also noted that respondents saw the offender as more moral, more forgivable and as 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. There was also evidence that where an injury was severe a partial apology might actually be detrimental.

Studies in the medical context tend to support these conclusions. Medical malpractice generally concerns the law of negligence and there is a considerable literature now considering some of the examples of hospitals and medical practitioners who have moved to an increased use of apologies. To some degree apologies in medical malpractice have elements of the public rather than the private apology because sometimes the issue is a system in place in a hospital or some other health system. However, the private relationship between individual medical practitioner and patient remains a significant element of the way apologies are used in the medical context. The culture of denial is extremely strong in medical practice, rooted in medical norms based on the professional tradition of self-regulation and the traditional asymmetry of the relationship between doctor and patient.<sup>81</sup> In the medical situation the stumbling block for apology is therefore disclosure. Patients will not always know something has gone wrong, and when they do they often don't know whether it occurred because of some inevitable accident, systemic failure, or carelessness on the part of the doctor.<sup>82</sup> The culture of denial in the medical profession has been exacerbated by the

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<sup>80</sup> Robbenolt, 'Apologies and Settlement: An Empirical Examination', above n 23.

<sup>81</sup> Marilynn Wei, 'Doctors, Apologies, and the Law: An Analysis and Critique of Apology Laws (2007) *Journal of Health Law*, available at Social Science Research Network: <<http://ssrn.com/abstract=955668>>.

<sup>82</sup> Hence the push for open disclosure, and the development of the Open Disclosure Project in the Australian Healthcare system, carried out by the National Open Disclosure Consortium in 2001 and 2002 at the request of the Australian Council for Safety and Quality in Health Care. The project website is at <<http://www.nsh.nsw.gov.au>>.

traditional legal advice not to disclose and not to apologise, and above all, not to admit fault.

However, there is some evidence from medical practice suggesting that there may be a significant reduction in propensity to sue and an increase in willingness to settle early when an apology along with open disclosure (admission of fault, in other words) is made.<sup>83</sup> One commonly cited example is that of the Lexington Veteran Affairs Medical Centre in the USA, which after losing two very large malpractice suits, began to notify patients of adverse events even where 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 had ‘unanticipated financial benefits’<sup>84</sup> in that many more settlements were made and the hospital’s costs for malpractice claims dropped markedly. This surprising result is somewhat less surprising in the light of the suggestion that the relationship of trust between doctor and patient is most likely to be damaged by partial apologies which do not admit fault when something goes wrong, while full apologies are more likely to restore that trust.<sup>85</sup>

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

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<sup>83</sup> S Kraman and G Hamm, ‘Risk Management: Extreme Honesty May be the Best Policy’ (1999) 131(12) *Annals of Internal Medicine* 963; R Lamb, ‘Open Disclosure: The Only Approach to Medical Error’ (2004) 13(1) *Quality and Safety in Health Care* 3; J R Cohen, ‘Apology and Organisations: Exploring an Example from Medical Practice’ (2000) 27 *Fordham Urban Law Journal* 1447; D Schwappach and C M Koeck, ‘What Makes an Error Unacceptable? A Factorial Survey on the Disclosure of Medical Errors’ (2004) 16(4) *International Journal for Quality in Health Care* 317; Australian Health Ministers Advisory Council (AHMAC) Legal Process Reform Group, chaired by Professor Marcia Neave, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package*, 2002 (hereafter ‘AHMAC Report’).

<sup>84</sup> AHMAC Report, 49; the Lexington Centre’s experience is also discussed in Kraman and Hamm, above n 83 and in J R Cohen, above n 83.

<sup>85</sup> Robbenolt, ‘Apologies and Settlement: An Empirical Examination’, above n 23.; K Mazor, S Simon, R Yood, B Martinson, M Gunter, G Reed and J Gurwitz, ‘Health Plan Members Views About Disclosure of Medical Errors’ (2004) *Annals of Internal Medicine* 140; C Liebman and C S Hyman, ‘Disclosure and Fair Resolution of Adverse Events’ in W M Sage and R Kersh, *Medical Malpractice and the US Health Care System* (2006).

injury, '[m]ost 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.'<sup>86</sup> An Australian study of medical complaints showed that where 97% of complaints had resulted in an explanation and/or apology, none had proceeded to litigation.<sup>87</sup> However, some caution is urged by a more recent study which rejects the idea there is a simple relationship between disclosure and reduced litigation, particularly in the medical context.<sup>88</sup>

Determining how much of the decision to sue is affected by apologising is extremely difficult given the huge range of factors which seem to affect this decision, including costs and benefits of different courses of action, likelihood of compensation, other relationships involved, motivation and cultural attitude to blameworthiness etc.<sup>89</sup> The aspects of social life with which apologies and the civil liability regimes connect and the cultural norms available will include ideas such as whether it is 'manly' to sue for

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<sup>86</sup> Schwappach and Koeck, above n 83.

<sup>87</sup> K Anderson, D Allan and P Finucane, 'A 30-month Study of Patient Complaints at a Major Australian Hospital' (2001) 21(4) *Journal of Quality in Clinical Practice* 109. However, another Australian study showed that only 16% of complainants to the New South Wales Health Care Complaints Commission said they would have been satisfied by an apology: A Daniel, R Burn and S Horarik, 'Patients' Complaints about Medical Practice' (1999) 170 *Medical Journal of Australia* 598. It should be noted that only 6.4% 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.

<sup>88</sup> D M Studdert, M Mello, A Gawande, T A Brennan and Y C Wang, 'Disclosure of Medical Injury to Patients: An Improbable Risk Management Strategy' (2007) 26(1) *Health Affairs* 215 says that although there is a moral imperative to tell patients about unanticipated outcomes, doing so will not necessarily reduce litigation. They appear to be talking about telling patients about adverse events which they do not already know about, and their study focused on severe events and was a highly theoretical modelling rather than an empirical survey of actual patients. However, the complex nature of the propensity of people to sue is emphasised by this study and this remains one of the major reasons why one should not assume a simple relationship between disclosure or full apology and a reduction in litigation levels.

<sup>89</sup> Harris et al, above n 78, 157.

compensation for physical injury,<sup>90</sup> or for psychiatric harm,<sup>91</sup> for example. Harris et al also suggested that the likelihood of someone suing appears to be not so much based on their attribution of blame but on the balancing of all the factors, and, interestingly, that ‘the way in which accident victims attribute fault for their accidents and responsibility for compensating them is a reflection of, rather than reflected in, the law ... the defendant is in practice encouraged not to accept responsibility and pay compensation, but rather to deny responsibility and refuse to pay anything at all ... the evidence [is] that the present system [a legal system which does not recognise apologies, or at least, where there is advice given to people not to apologise or acknowledge responsibility] is divisive and creates more hostility than it dispels ...’.<sup>92</sup> In their view the law was impacting on the social/moral culture and changing it, thus colonising it in Habermas’ sense.

The Lexington experience which showed an increase in fast settlements with an extensive apology process (in the absence of protection for apologies) is significant. Settlements can occur for all sorts of reasons, including that delay has been used as a weapon, that people feel that they can forgive, that they have run out of energy. If apology is seen as significant to or affecting settlement timing, then it follows that the corrective justice basis of tort law must be seen as incorporating not just outcome responsibility but fault; that is that there must be not just a causal relationship between the harm and the person, but that the person must be seen as at fault in their act or omission. The question whether settlement weakens responsibility practices<sup>93</sup> cannot be answered by pointing to apologies because they are only one element of the set which leads to settlement or suit, but it is certainly an element that reinforces the idea

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<sup>90</sup> See David M Engel, ‘Injury and Identity: The Damaged Self in Three Cultures’ in David Theo Goldberg, Michael Musheno and Lisa C Bower (eds), *Between Law and Culture: Relocating Legal Studies* (2001).

<sup>91</sup> The action for psychiatric harm was of course for a long time conceived of as a ‘woman’s problem’ as a vast literature shows. See, for example, G Mendelson, ‘Posttraumatic Stress Disorder as Psychiatric Injury in Civil Litigation’ (1995) 2(1) *Psychiatry, Psychology and Law* 53; H W Smith, ‘Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli’ (1944) 30 *Virginia Law Review* 193; M Chamallas and L Kerber, ‘Women, Mothers and the Law of Fright’ (1990) 88 *Michigan Law Review* 814, 846.

<sup>92</sup> Harris et al, above n 78, 161.

<sup>93</sup> P Cane, *Responsibility in Law and Morality* (2002) 237.

of personal responsibility because apologies are a way for the wrongdoer to take on or accept responsibility. That is, the apologiser is personally and actively taking responsibility for his or her actions. This has a particular resonance in current Australian society where a huge media campaign about the 'litigation crisis' has used the term 'personal responsibility' as a mantra.<sup>94</sup> Declan Roche and John Braithwaite have argued that restorative justice has this function,<sup>95</sup> and this is perhaps true; but I would argue that it is the central role of apology that is driving this, and that this is extremely pertinent for the role of apology in relation to propensity to sue, because there is a strong argument that one of the major drivers of people to sue is their desire to be sure that the person who has done wrong knows that they have done wrong and is taking responsibility for that so that they will not do it again.<sup>96</sup> In this context deciding not to sue or to settle early might be evidence of forgiveness. When a victim decides whether or not to sue, do they consider residual blameworthiness (the value of the harm minus the value of the apology?), or continuing need (where the harm is very great,<sup>97</sup> for example), or whether responsibility has been taken sufficiently for them to be satisfied that the apologiser will not do further harm? The answer is probably all of the above.

### *Are Apologies Admissions of Liability?*

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<sup>94</sup> Newspaper reports and parliament; for example, the Act bringing in much of the tort reform in New South Wales was called the *Civil Liability (Personal Responsibility) Amendment Act 2002* (NSW) and in the second reading speech, the Premier, Bob Carr said '[P]ersonal responsibility will rightly assume a much higher profile in our law thanks to these reforms', New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764, <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20021023012>> at 29 April 2007.

<sup>95</sup> J Braithwaite and Declan Roche, 'Responsibility and Restorative Justice' in M Schiff and G Bazemore (eds), *Restorative Community Justice* (2000); J Braithwaite, 'In Search of Restorative Jurisprudence' in L Walgrave (ed), *Restorative Justice and the Law* (2002).

<sup>96</sup> Harris et al, above n 78.

<sup>97</sup> Robbenolt, 'Apologies and Settlement: An Empirical Examination', above n 23. The evidence from propensity to sue studies also suggests this: *ibid*; Studdert et al, 'Negligent Care and Malpractice', above n 78; Fitzgerald, above n 78; Hensler et al, above n 78; Burstin et al, above n 78; Sabry, above n 78.

Lawyers have traditionally advised their clients not to apologise because they fear the apology will be used as an admission of liability. This is compounded by the use of admissions and compromise clauses in insurance contracts. These are extremely common in medical indemnity insurance, which is one reason why the medical indemnity crisis had such a powerful effect on the process of tort reform in Australia.<sup>98</sup> 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,<sup>99</sup> (but if the liability would have existed regardless of the admission or compromise the exclusion does not apply).<sup>100</sup> The *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 difficulty arises in two ways – will an apology actually create a deeming of liability or will the fact of an apology be so comforting to a judge or jury that they will have no difficulty in deciding that a person is liable in negligence? In the United States, the case law about whether an apology can be admitted or amount to an admission of liability where it includes an admission of fault varies widely.<sup>101</sup> However, in Australia, the evidence is that, for negligence at least, a court will not accept that an apology of itself demonstrates liability in negligence. It is for the court to determine negligence, and even where a person makes an apology which acknowledges fault to the extent of saying ‘we have breached our duty of care’ this will not make them liable.<sup>102</sup> 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

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<sup>98</sup> P Cashman, ‘Tort Reform and the Medical Indemnity “Crisis”’ (2002) 8(2) *University of New South Wales Law Journal Forum: Reform of the Law of Negligence: Balancing Costs and Community Expectations* 51.

<sup>99</sup> *Terry v Trafalgar Insurance* (1970) 1 Lloyd’s Rep 524.

<sup>100</sup> *Broadlands Properties Ltd v Guardian Assurance Co Ltd* (1983) 3 ANZ Ins Cas 60-552, 708,304.

<sup>101</sup> See Wei, above n 81, 5 where she cites a range of cases from *Colbert v Georgetown Univ* (1993) 623 A 2d 1244 (apology was evidence of breach of duty) to *Phinney v Vinson* (1992) 615 A 2d 849 (physician’s apology and statement that he had performed an ‘inadequate resection’ was not enough to meet the standard of proof).

<sup>102</sup> *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139.

establish that conclusion, because that is the role of the court.<sup>103</sup> 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, and this applies even to an apology which admits some sort of fault. As is now well recognised, false confessions occur voluntarily as well 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.

### *Admitting Apologies as Evidence of Liability*

One major concern for a defendant is whether an apology which is admitted into evidence will have a prejudicial effect on their case. Evidence can be admitted, even though it is hearsay, if it is a statement which goes 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.<sup>104</sup> 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 general rule that statements of fact against the interest of the party may be admitted means that the more specifically fault is acknowledged the more likely it

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<sup>103</sup> *Rhone-Poulenc Agrochimie SA v UIM Chemical Services P L* (1986) 12 FLR 477 (in the context of s 52 *Trade Practices Act 1974* (Cth)); *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385. In the Northern Territory, Dr Toyne in the debate when the Northern Territory civil liability legislation was introduced recognised that the apology sections based on a partial apology probably did not change the law at all: '[Doctor's] fears [were] based on the misapprehension as to the law. An expression of regret that does not admit liability has no special significance at law. It does not prejudice the defendant at all ... At common law, such an expression would not be relevant to the issues of establishing a breach of the duty of care and would probably not be admissible on that basis', Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 February 2003, <<http://notes.nt.gov.au/lant/hansard/hansard9.nsf/WebbySubject/58DF3B92118FEAD069256D050009A710?opendocument>> at 29 April 2007.

<sup>104</sup> *Rhone-Poulenc Agrochimie SA v UIM Chemical Services P L* (1986) 12 FLR 477 (in the context of s 52 *Trade Practices Act 1974* (Cth)); *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385.

may be that an apology may be admitted into evidence. That is, if a party says “I’m sorry, I was going too fast”, that might not be admitted, but if the party says “I’m sorry I was travelling at 160 kph in a 50 kph zone” that might well be admitted as a specific statement of fact. The apology evidence would normally be evidence which is admitted as an exception to the hearsay rule, but keeping it out of the court may be particularly important in areas where juries remain fairly common, for example in medical negligence cases. In *Dovuro Pty Ltd v Wilkins*,<sup>105</sup> 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.

As to the impact of such admissibility, one survey of American judges and juries concluded that they understood that expressions of regret, remorse and apology were not necessarily admissions of responsibility and liability.<sup>106</sup>

*(ii) The Protective Legislation and its Aims*

The chilling effect of legal advice not to apologise is referred to by the proponents of the protective legislation as one of the major reasons to pass it. The second reading speeches and public statements made about the apology provisions in the various Australian civil liability Acts and similar statements made by politicians and legislators around the world show that legislators are generally of the view that allowing people to apologise freely will reduce litigation levels. They argue, mostly on the basis of anecdotal evidence, that people are less likely to sue if the tortfeasor apologises.<sup>107</sup> There is some evidence that this is at least partially true, but it is not

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<sup>105</sup> (2003) 201 ALR 139.

<sup>106</sup> P Rehm and D Beatty, ‘Legal Consequences of Apologising’ (1996) *Journal of Dispute Resolution* 115, 129, cited in R Carroll, ‘Apologising “Safely” in Mediation’ (2005) 16 *Australasian Dispute Resolution Journal* 12.

<sup>107</sup> For example, Mr Carr, Premier of New South Wales: ‘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’, New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764, <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20021023012>> at 29 April 2007; Mr Brown, Member for Kiama: ‘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

uncomplicated. After looking at some of the evidence, legal and empirical, it seems that not all the legislation will have the desired effect.

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. Little or no attention has been paid to the empirical evidence which is available and most of the provisions until very recently have been based on anecdotal evidence.<sup>108</sup> The desired aim of the legislation is to reduce litigation. If it reduces litigation it may be because some need or function which the tort system meets has already been met by the apology or it may be that the chilling effect which the tort system has had on apologies has led rather to people suing who would not have had they received an apology. The aims of the legislation draw on the idea of apology as part of the reconciliation process, so that forgiveness is its result. Such forgiveness in the minds of the legislators clearly takes the form of a lesser desire to litigate because conflict is better resolved by the apology.

There are now apology provisions in a number of jurisdictions around the common law world.<sup>109</sup> One which has just been adopted is the Apology Act 2006 of British Columbia. It is an extensive provision.<sup>110</sup> Its s 2 provides:

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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', New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002, 6244, <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20021030051>> at 29 April 2007.

<sup>108</sup> The British Columbia legislation has been the exception and now that more evidence is available it will be easier for subsequent legislatures to consider it.

<sup>109</sup> These include England and Wales: *Compensation Act 2006* (UK) s 2; Canada: Evidence Amendment Act 2006, 3d Sess, 25<sup>th</sup> Legis, Saskatchewan; Apology Act 2006, British Columbia; Australia: *Civil Law (Wrongs) Act 2002* (ACT) ss 12-14; *Civil Liability Act 2002* (NSW) ss 67-69; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 11-13; *Civil Liability Act 2003* (Qld) ss 68-72; *Civil Liability Act 1936* (SA) s 75; *Civil Liability Act 2002* (Tas) s 6-7; *Wrongs Act 1958* (Vic) s 14I-J; *Civil Liability Act 2002* (WA) ss 5AF-H.

- 2(1) An apology made by or on behalf of a person in connection with any matter
- (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,
  - (b) does not constitute a confirmation of a cause of action in relation to that matter for the purposes of section 5 of the Limitation Act,
  - (c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available to the person in connection with that matter, and
  - (d) must not be taken into account in any determination of fault or liability in connection with that matter.
- 2(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any proceeding and must not be referred to or disclosed to a court in any proceeding as evidence of the fault or liability of the person in connection with that matter.

Section 1 defines ‘apology’ as ‘an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate’.

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Many United States jurisdictions have now legislated various forms of protection for apology. The broadest provisions appear to be protection of statements of sympathy and fault in health care (Arizona: Arz Rev Stat 12-2605, 2005; Colorado: Colo Rev Stat Tit 13 25-135 (2003); Connecticut: Conn Gen Stat Ch 899 Tit 52 184d; Georgia: Ga Codes Ann Tit 24 Ch 3 37.1 (2005); Illinois 735 Ill Comp Stat 5/8-1901 (2005) (but only within 72 hours); Oklahoma: Okla Stat Ann Tit 63 1-1708 1 H (2004); Wyoming: Wyo Stat Tit 1 ch 1 130 (2005)). Vermont also has protection for oral expressions of apology within 30 days of learning of an error: Vt Stat Ann Tit 12 ch 81 1912 (2006). Some of the jurisdictions protect ‘statements of apology’ undefined, which may include fault. These include Utah; Oregon, North Carolina, Ohio, and South Dakota. Hawaii’s provision lapsed in 2006 and may be re-introduced in 2007. It was a full fault-based apology provision.

<sup>110</sup> See <[http://www.legisl.gov.bc.ca/38th2nd/1st\\_read/gov16-1.html](http://www.legisl.gov.bc.ca/38th2nd/1st_read/gov16-1.html)> at 30 September 2006.

British Columbia's Act is the most comprehensive apology provision in existence. It appears to have been modelled on that of New South Wales.<sup>111</sup> The *Civil Liability Act 2002* (NSW) provides as follows:

68 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(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

69(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.

Both these provisions use a 'full apology' – that is, they include an acknowledgment of fault. The earliest apology provisions arose in the United States.<sup>112</sup> California's 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.

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<sup>111</sup> Howard Kushner in *The Power of an Apology: Removing the Legal Barriers, A Special Report By the Ombudsman of the Province of British Columbia*, Special Report No 27 to the Legislative Assembly of British Columbia, February 2006, argued that the NSW provision was the most effective one. The British Columbia legislation was passed in April 2006. Note that the Law Commission of Canada had previously reported on this: Susan Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Consideration*, Law Commission of Canada Reports, May 1999.

<sup>112</sup> The earliest was passed in Massachusetts in 1986: Mass Gen Laws ch 233, s 23D.

This limits the relevant apologies to statements of regret and makes them inadmissible. Most of the United States jurisdictions now have some form of apology provision. The majority of the legislatures have chosen very limited forms of protection – either confined to expressions of regret, or confined to some subject matter area such as health care. The broadest provisions appear to be protection of statements of sympathy and acknowledgement of fault (that is, full apologies) but these tend to be confined to the area of health care.<sup>113</sup> Some of the jurisdictions protect ‘statements of apology’ undefined, which may include acknowledgement of fault, though most of these are also confined to health care.<sup>114</sup> The majority merely render such statements as inadmissible as evidence of liability.

*(iii) The Legal Effect of the Legislation*

The two major functions most often provided for in the legislation are to protect apologies (however defined) from being deemed to be admissions of liability or from being admitted into evidence as evidence of an admission of liability. Some legislation does both. Legislation preventing apologies being deemed as an admission of liability may in fact only be declarative of what the common law actually is anyway.<sup>115</sup> However, in light of the common advice not to apologise it seems useful to have the declaration made. This is particularly so for the purposes of insurance contracts, and may have a disproportionate effect in medical cases where a large

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<sup>113</sup> Arizona: Arz Rev Stat 12-2605, 2005; Colorado: Colo Rev Stat Tit. 13 25-135 (2003); Connecticut: Conn Gen Stat Ch 899 Tit 52 184d; Georgia: Ga Codes Ann Tit 24 Ch 3 37.1 (2005); Illinois 735 Ill Comp Stat 5/8-1901 (2005) (but only within 72 hours); Oklahoma: Okla Stat Ann Tit 63 1-1708 1 H (2004); Wyoming: Wyo Stat Tit 1 ch 1 130 (2005). Vermont also has protection for oral expressions of apology within 30 days of learning of an error: Vt Stat Ann Tit 12 ch 81 1912 (2006). Hawaii’s provision lapsed in 2006 but may be re-introduced in 2007.

<sup>114</sup> These include Utah, Oregon, North Carolina, Ohio, and South Dakota.

<sup>115</sup> In relation to negligence law it seems that a court will not accept admissions of liability because the nature of negligence law is such that breach of duty has to be determined by the court. This was the position in Australia in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 where the High Court decided 6:1 that an apology which had explicitly admitted fault could not be construed as an admission of legal liability.

amount of the legal advice doctors receive comes from their medical insurer.<sup>116</sup> If the aim is to reduce the chilling effect of the legal advice not to apologise, then legislation protecting apologies should be helpful and should allow them to do so, but this is subject to the definition of apology which is discussed below.

The admissibility provisions are directed at the fact that, although an apology may not be regarded as an admission of liability it may operate as more highly prejudicial than probative, making it psychologically easier for a jury or judge to determine that the person who has apologised is liable, than might be the case if they were not aware of the apology.<sup>117</sup> If the apology is not admissible at all it also should be asked in light of the arguments about the value of apology in civil society generally, whether a jury (in those jurisdictions where they assess damages) might not be especially harsh on a person they believe to be liable and who they have not been permitted to hear did apologise.

It is extremely important to define apologies before one begins to discuss how they affect civil liability. A consideration of the range of legal provisions about apologies shows that the vast majority of legislative provisions recognising apologies define them in the narrowest possible way, as mere expressions of regret or sympathy. In the United States any broader view of apology appears to be accompanied by a narrowing of the scope of protection to health issues.

The legislation which has been passed in the majority of jurisdictions protects partial rather than full apologies. That is, it protects expressions of regret rather than apologies which include an acknowledgement of fault. The apparent advantage of legislation doing this is that it is clean and clear. If a person says ‘I’m sorry that

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<sup>116</sup> For example, United Medical Protection, the largest Australian medical indemnity organisation produces the *Medico-legal Handbook: A Guide to Legal Issues In Medical Practice* (2003) which is issued to all members. At 142 this book says, ‘[w]hen dealing with complaints, UNITED members are advised to say sorry the incident occurred, but not to accept liability for action which could later become a matter for liability without first speaking to UNITED’s medico-legal advisers’.

<sup>117</sup> As with confessions: ‘A confession relieves doubts in the minds of judges and jurors more than any other evidence’: Richard P Conti, ‘The Psychology of False Confessions’ (1999) 2(1) *The Journal of Credibility Assessment and Witness Psychology* 14, 14.

happened' it cannot be taken to be an implied admission of fault and it will not be admissible as evidence of fault. In Australia it probably could not be anyway, as has been mentioned, but this is not so clear in some jurisdictions.

The legal change created by the protection of a partial apology is more rhetorical than real. Merely saying 'I'm sorry' could never amount to an admission of liability, nor could it be admissible as relevant to the question of liability in negligence. Perhaps it could be argued that 'I'm sorry' might *imply* an admission of fault, in which case the legislation clarifies the position, but otherwise it seems to create little legal change. If a full apology is protected from being an admission of fault, in jurisdictions where an apology can be an admission (some United States jurisdictions, for example) then it will have a significant effect. In those jurisdictions like Australia, it will have a mostly clarificatory effect; however, in all jurisdictions the protection of a full apology from admissibility may have a real impact.

There is a more significant problem with the protection of partial apologies. There is some evidence though, that because the normal meaning of apology in moral communities, including mainstream Australian views, is to include an acknowledgement of fault in it, the definition of apology as mere expression of regret in the legislation is leading doctors and others to be confused and afraid of offering any apology because they are not sure which is the 'safe' one.<sup>118</sup> If that is so, the legislation is not fulfilling its aims. In Australia, despite the existence of jurisdictions which protect full apologies as well, nation-wide bodies such as United Medical

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<sup>118</sup> Mr Clark, Member for Box Hill, Victoria '... [t]he 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 ... The problem with these provisions is that they do not seem to achieve that intention ... 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, 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.' Victoria, *Parliamentary Debates*, Legislative Assembly, 8 October 2002, 285, <<http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Spring%202002/Assembly%20Parlynet%20Extract%2008%20October%202002%20from%20Book%20.pdf>> at 29 April 2007.

Protection give their clients the advice that is safest for all the jurisdictions – that is to give a partial apology. Given that psychological evidence tells us that in cases of severe injury this may be the kind of apology most likely to enrage the victim and increase the chances of suing,<sup>119</sup> this ‘safe’ advice may paradoxically not be safe at all. In the legal system, the apology may not operate the way the legislators expect from their understanding of the moral system within which apologies usually operate.

### **Competing Norms – The Wider Effect of Legislating to Protect Apologies**

One of the issues about the use of the apology in the civil liability domain is the question of the competing norms which might govern any situation of conflict. Apologies are civil norms which as a general rule the legal system does not accept as determinative of any legal outcome. In Luhmann’s terms, or indeed Habermas’ terms,<sup>120</sup> law and the moral domain where apology normally is thought of are different systems. On the other hand it is clearly envisaged by those passing the apology provisions of the legislation that the apologies will have an effect on the legal outcome and they are hoping for the traditional moral outcome of reconciliation arising from an apology, in the form of reduced litigation. Here the question becomes one of how the law and the social norms impact on each other with constitutive effect. Clearly, especially once the apology is put into the legislation, there is a view that the apology impacts on the legal space. Similarly it is also true that the legal regime, even a possibly mistaken view of the legal regime has impacted on the civil norms in the past. The common legal advice not to apologise came out of an understanding that the apology had a legal significance – that of an admission of liability – which it probably did not have. Here is an excellent example of the constitutive process at work.

Corrective justice theory is the closest account of tort law to moral theories of apology. As such it might be thought that incorporating apologies into tort law would make no difference to how the apologies work. But the moral account of apology

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<sup>119</sup> Robbenolt, ‘Apologies and Settlement: An Empirical Examination’, above n 23.

<sup>120</sup> Habermas, *The Theory of Communicative Action and Between Facts and Norms*, above n 9.

focuses centrally on what was done, that is, on the moral wrongfulness of the action taken by the perpetrator, while tort law focuses on outcome responsibility.<sup>121</sup> What is important about outcome responsibility is that in negligence one can do something bad (morally wrong) but unless it causes harm to someone there is no liability. Thus the wrongness of behaviour is only significant if there is harm – usually in negligence law that harm is physical injury or economic loss. However, many moral communities (Christians being one) see the morality of an action as something to be confessed/apologised for and forgiven, whether or not it causes physical harm. On the other hand psychological studies have shown that the more serious the consequences are, the more likely there is to be attribution of responsibility to the person who caused them.<sup>122</sup> People are likely to attribute responsibility away from a person they identify with. If this conflicts with a desire for justice, the identification is what will prevail.<sup>123</sup> The assignment of responsibility is very complex.<sup>124</sup>

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<sup>121</sup> Honore, above n 55; S Perry, 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449.

<sup>122</sup> K Shaver, 'Redress and Conscientiousness in the Attribution of Responsibility for Accidents', (1970) 6 *Journal of Experimental Social Psychology* 100; E Walster, 'Assignment of Responsibility for Accidents' (1966) 3 *Journal of Personality and Social Psychology* 1973; D Kanouse, 'Language, Labelling and Attribution' in E E Jones et al (eds), *Attribution: Perceiving the Causes of Behaviour*, (1972).

<sup>123</sup> A Chaikin and J Darley, 'Victim or Perpetrator: Defensive Attribution of Responsibility and the Need for Order and Justice' (1973) 25 *Journal of Personality and Social Psychology* 268.

<sup>124</sup> The psychological studies of attribution show a number of things of interest to negligence theory, including first, that the assignment of moral responsibility is very complex and may be altered by very subtle semantic shifts, secondly that levels of generality of explanation beget explanations at similar levels of generality and thirdly that there is indeed a naive sense of moral responsibility. See S Lloyd-Bostock, 'Attributions of Cause and Responsibility as Social Phenomena' in J Jaspars, F Fincham and M Hewstone (eds), *Attribution Theory and Research* (1983); V Lee Hamilton, 'Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process' (1980) 39(5) *Journal of Personality and Social Psychology* 767; S Lloyd-Bostock, 'The Ordinary Man and the Psychology of Attributing Causes and Responsibility' (1979) 42 *Modern Law Review* 143; F Franco and L Arcuri, 'Effect of Semantic Valence on Implicit Causality of Verbs' (1990) 29 *British Journal of Social Psychology* 161; M Ross and D Ditecco, 'An Attributional Analysis of Moral Judgments' (1975) 31(3) *Journal of Social Issues* 91; E E Jones et al (eds), *Attribution: Perceiving the Causes of Behaviour* (1972).

It has been said that apologies are fashionable because they are civil norms which have a function. That function works through a moral or ethical dimension and is part of a social system of norms of civility. In the common law world, where, even now there continues to be an emphasis, at least amongst judges, on positivistic views of law, the idea that law and morality may be connected continues to surprise some people. For this reason, bringing apologies into the legal arena by protecting them is something some people have viewed as dangerous and possibly misplaced.<sup>125</sup> It is the purpose of this article to consider whether the legislative provisions in fact protect the civil norms and whether this interaction between the civil norms and the legal norms creates a cultural space in which to negotiate a dispute in a way which may be better for all parties or whether the interaction between the civil and legal norms creates something which changes the civil norms in a dangerous way.

When we consider apologies within the context of legal liability we are considering the interaction of one set of norms with another set of norms. (In the medical context they also interact with yet another set of norms, the norms of the profession). Apologies are civil norms with all the attributes that have been considered above. They are part of civil society and they have a particular function in maintaining its *civility*. The norms of civil liability in negligence are legal norms. Both these and the norms which apologies refer to include moral ideas and psychological ideas about both relationships and right and wrong. Either of these systems, in Luhmann's sense, can be thought about as a closed or autopoietic system. When an apology should be used and when it will be accepted and lead to forgiveness can be considered as a closed system which determines its own rules and what is inside or outside of that system. Whether an action is negligent in law is a question which has to be answered within the legal system, and cannot be answered by any other system. Although there are many other sets of norms which affect people's interactions, these two along with professional ethics and family or micro-cultural norms are the main ones of interest when we are considering the interaction of apologies and civil liability. What is interesting in that interaction is that the legislatures which we have considered have

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<sup>125</sup> See, for example, Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109 *Yale LJ* 1135; Dugald Christie, 'Will an "Apology" Satisfy Woodlands Survivors?' (2006) *Summer Transition* 24.

made a decision that the civil norms should be allowed to trump the legal norms. In order to do this, of course, because law is a closed system in Luhmann's terms, they have had to create a new set of legal norms to 'enclose' the civil norm. Luhmann argues that time is critical:<sup>126</sup> 'Operations are events without duration; they vanish as soon as they appear. Observed as single events, they can participate in different systems. A payment can be at the same time (but *only* at the same time) the fulfilment of a contractual obligation in the legal system and part of an economic transaction ... The same holds true for an act of legislation which may have both political and legal relevance'. This seems an unnecessarily clumsy way to try to explain the fact that matters outside the legal domain can and do affect and change the legal domain as the legal domain in its turn can affect and change other domains. Luhmann does not characterise it this way, though. He looks at it in terms of both domains (moral and legal) maintaining their own integrity by re-working whatever 'irritant' comes into them. Thus, in order for an apology to be a protected apology it must fit into the legislative definition of apology. All other apologies become irrelevant, but this is not how apologies work in the moral domain.

Habermas' view that law juridifies the lifeworld, or can colonise it seems absolutely vindicated by this view of the changing of the apology to fit the legal requirements. If the protected apology is changed in its substantive effect by being taken over by the law, it no longer operates in the way that the apology does in the lifeworld. Before the protective legislation arose apologies had a different legal effect, which was entirely separate from the possibly strategic effect of an apology. A person who made an apology made that apology regardless of its legal effect, and often in the face of knowledge that the moral impact of the apology, including the willingness to carry out reparations might have unmitigated force, in that it could include the whole of a damages award. This is the categorical, full, moral apology. It takes on board the full responsibility and risks the possibility that the responsibility will rest there, without forgiveness to mitigate its force. When full apologies are protected by the law, some of the force of this full apology's impact may be lost, at the same time as the legislatures are attempting to import the civilising and moral influence of the apology and reconciliation process into the legal process.

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<sup>126</sup> Luhmann, 'Operational Closure and Structural Coupling', above n 11, 1437.

However, the apology also and at the same time changes the legal world. Lee Taft argues that using the strategic apology actually ‘potentially corrupts’ the moral dialectic of apology.<sup>127</sup> The apology is therefore an excellent example of the social or moral domain having a constitutive effect on the law and vice versa. Here considering the insincere or strategic apology may be illuminating. What happens when someone apologises purely because they think the apology will prevent them from being sued or at least reduce their legal costs? We have seen that even forced apologies are regarded as of some moral value; insincere apologies are risky to individuals in a social way, but whether people can always recognise them as insincere is doubtful, as Robbenolt’s research showing that people did not distinguish between apologies which were statutorily protected and those which were not.<sup>128</sup> Thus insincere and strategic apologies will still contribute to the changed moral landscape created by the protection of apologies under the legislation. The apologies will have a legal function which is different from their moral function. It will approximate to that moral function, but the legal system itself changes it into a creature of its own, as Luhmann suggests. The fact that this appears to distort the moral regime of apologies ultimately does not matter to the legal system, which is only interested in its own universe. It is an irony that the legislature’s desire to incorporate the moral compass into the law may ultimately change that moral system in turn, in the same way that Harris et al argued that the tort system as it operated in the past changed people’s views of blameworthiness. Paradoxically this leads us to a situation where we can accept Luhmann’s view of time and systems and reject it at the same time. If we are to carry out law reform, we need to consider the changes in both systems at many times, as they interact with each other. There is a dynamic of such interactions which will be observable. Whether we ultimately call something ‘legal’ or ‘moral’ does not matter. What we are seeking is behaviour from individuals and communities which ultimately reduces aggression and conflict and where what is labelled ‘legal’ does not destroy the lives of people who attempt to use it. In the present analysis of how these systems affect each other, it seems likely that only those legal systems which protect the full

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<sup>127</sup> Taft, above n 125, 1156; Elizabeth Latif, ‘Apologetic Justice: Evaluating Apologies Tailored Towards Legal Solutions’ (2001) 81 *Boston University Law Review* 289.

<sup>128</sup> Robbenolt, ‘Apologies and Settlement: An Empirical Examination’, above n 23, 509-510.

apology are likely to be really effective in reducing the damage from legal conflict. Future analysis of further interaction will give us more information.

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