

Apologies, liability and the public sector

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'Full' apologies

What I will be talking about today are what are commonly referred to in the literature as 'full' apologies – apologies that include an admission and acceptance of responsibility or fault. Full apologies can be distinguished from 'partial' apologies – apologies that contain no admission of fault or acceptance of responsibility.

Apologies have statutory protection in NSW

In 2002 New South Wales was the first jurisdiction in the common law world to legislate to protect a 'full' apology by any person, followed by the ACT. The *Civil Liability Act 2002* contains protections for apologies that include an admission of responsibility, which is often referred to as a 'full' apology. Section 69(2) of the Act specifically provides that the making of such an apology "*is not admissible in any civil proceedings as evidence of the fault or liability*".¹

As stated in the Fact Sheet on apologies published by the NSW Ombudsman:

"The Act provides that an apology does not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind. Furthermore, evidence of an apology is not admissible in a court hearing as evidence of fault or liability (other than the categories of civil liability excluded by s.3B of the Act).

An apology is defined in the Act as:

*"...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."*² (s.68). [emphasis added]

The general effect of an apology on liability is set out in the Act in the following terms:

- "(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:*
- (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and*
 - (b) is not relevant to the determination of fault or liability in connection with that matter.*
- (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter."* (s.69)

In other words, in most circumstances people in NSW can make a full apology for any harm they have caused without prejudicing their legal position in any subsequent or related legal proceedings.

Where action is taken to rectify a problem, for example as part of a package of measures in a 'full' apology, the Act also provides that in proceedings relating to liability or negligence:

¹ *Civil Liability Act 2002 (NSW)*, s.69.

² Public Sector Agencies fact sheet No. 1 – Apologies, NSW Ombudsman, October 2006.

“the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk” (s.5C of the Act).

Of course the giving of the apology does not absolve the person or body from any potential liability – although it may help in mitigation of damages. Further, although an apology and information conveyed in an apology may not be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

It is important to note that the protections under the Act do not apply to all civil proceedings. Although in most cases the NSW legal system now can't make you sorry you've said sorry, there are still some circumstances where an apology might still be a problem. This could be in relation to, for example, traffic accidents, intentional violent acts intended to cause injury or death, sexual assault or other sexual misconduct, or workplace injuries.³ Although these exclusions appear at first glance to be extensive, apart from motor accidents, in practice they have little relevance to the vast majority of the day-to-day interactions affecting public officials or officials and members of the public.

Therefore, where a 'full' apology has been given, including a sincere admission of responsibility, any subsequent litigation will be limited to the quantum of damages. Even where compensation is sought, if a genuine effort has been made to offer an apology (including an acceptance of responsibility), this may act as a catalyst to make negotiations more cordial, less time consuming and less likely to end in formal proceedings.

It is unfortunate that the protection for apologies in NSW is subject to these exemptions because this adds unnecessary complications to what should be a simple matter. To cut through the current legal cultures of deny and defend, such statutory protections need to be comprehensive, simple and beyond doubt.

Six Canadian Provinces⁴ have now followed that lead and adopted legislation to protect full apologies, using a much simpler model that does not have any exemptions.

In the USA, while Massachusetts was the first common law jurisdiction to bring in statutory protection for apologies in civil liability generally in 1986, this was limited to mere expressions of sorrow or regret without any admission of responsibility or fault – in other words, protection of 'partial' apologies only. Statutory protections for 'partial' apologies were then introduced by Texas in 1999, California in 2000 and in at least another five US states since then. A number of other US states have introduced statutory protection for 'partial' apologies given by health care providers.

In 2003, Colorado was the first US state to introduce statutory protection for a 'full' apology, followed closely by Oregon. However, this protection is only available for apologies given by health care providers. Since then, a further 16 US states have introduced similar statutory protections for full apologies, but limited to such apologies given by health care providers only.

³ *Civil Liability Act 2002*, s.67(1) and s.3B. The types of civil liability that are not covered by the protection for apologies in the *Civil Liability Act* can be briefly summarised as liability for:

- (a) an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
- (b) the contraction of a dust disease, or for a personal injury allegedly caused by smoking or the use of tobacco products
- (c) the apology provisions of the Act do not apply to motor accidents, or to economic loss, non-economic loss or psychological/psychiatric injury to an injured person and liability for the compensation of relatives of a deceased person that arises from a motor accident (or transport accident as defined in the *Transport Administration Act 1998*) to which the *Motor Accidents Act 1998* applies, or from a motor accident or public transport accident to which the *Motor Accidents Compensation Act 1999* applies
- (d) damages payable by an employer for the injury or the death of a worker resulting from or caused by an injury, and compensation under various workers compensation legislation, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977*, or for the benefit payable under the *Sporting Injuries Insurance Act 1978*.

⁴ British Columbia 2006, Saskatchewan 2007, Manitoba 2007, Alberta 2008, Nova Scotia 2008 and Ontario 2009.

The NSW Ombudsman has recently completed a brief survey of NSW judgments over the last 10 years, concentrating on the period since the *Civil Liability Act* came into force. This work was centred on cases where some mention was made of an apology. The vast majority of these cases related to defamation, contempt of court and anti-discrimination matters. There does not appear to have been any change in the number of references to apologies in some form since the introduction of the *Civil Liability Act*.

The only case we were able to find that has cited s.69 of the *Civil Liability Act* to date is *T Wagstaff v Haslam & Anor* (2006) NSWSC 294. The nature of this case was negligence and it demonstrates the protective effect that s.69 has on apology and liability. In this case a bar manager after an altercation at his premises in which Mr. Wagstaff was assaulted by another drunken patron apologised to Mr. Wagstaff for the incident. The licensee and occupier of the hotel was sued for breach of duty of care to take reasonable measures to safeguard the plaintiff from foreseeable risk of harm from the conduct of intoxicated or unruly patrons on the hotel premises. However, in the proceedings s.69 had the effect of making the apology inadmissible as evidence of fault or liability of the bar manager. The Judge had regard to s.69 stating 'I remind myself that an apology is not to be taken as amounting to an admission of fault.' The effect of this meant that the Judge did not record what Mr. Wagstaff recounted as being the substance of the apology that was expressed by the bar manager.

Whilst the court did not take into account the bar manager's apology, the court still found that the defendants were negligent. Even though the apology was inadmissible as evidence, the outcome of the case was the same as if an apology had been admissible as evidence of liability of fault. This case demonstrates that even though s.69 protects apologies, it will not have the general effect, as feared by some, of protecting persons from liability for acts or omissions for which they are responsible.

There is case law to indicate that even if a person makes an apology that includes an acceptance or admission of fault or responsibility, this will not necessarily be regarded by the Australian courts as an admission that creates legal liability in civil proceedings:

*"...care...needs to be taken in identifying the precise significance of admissions, especially when made by someone who have a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made...And it is always necessary for the fact-finder to consider precisely what it is that is being admitted. If the driver of a motor vehicle says to an injured passenger: 'I am sorry, I let you down', that may not mean much, or anything. If the driver says: 'I am sorry, I was going too fast', that may be very significant. The statement that the appellant '[failed] in its duty of care' cannot be an admission of law, and it is not useful as an admission of failure to comply with the legal standard of conduct. There is no evidence that the author of the statement knew the legal standard."*⁵

*"It may readily be accepted that what is said after an event may constitute an admission of relevant facts. Tendering an apology for what has happened...may, in some cases, amount to such an admission. But there is always the risk that what is said after an event is informed only by hindsight, and the speaker's wish that the clock might be turned back."*⁶

While only NSW and the ACT have so far introduced protection for 'full' apologies in negligence, in 2005 all Australian States and Territories introduced protection for 'full' apologies in the context of defamation. The NSW *Defamation Act 2005* contains similar protection from liability as those in the *Civil Liability Act 2002*, without the limitations of s.3B (ss.20 & 38).

⁵ *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003), at para 25 (Gleeson CF).

⁶ *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003), at par 173 (Hayne & Callinan 33).

In defamation proceedings, the issue isn't about whether an apology can be admitted as evidence of liability, it is about the implications of a failure to apologise. In the defamation context Australian courts look favourably upon apologies, acknowledging that an appropriate apology, given at the right time, may mitigate the damages awarded.

Making apologies inadmissible in civil proceedings does not result in any detriment to the rights or interests of members of the public. In the absence of such a protection it is unlikely that public sector staff would give an apology in circumstances where this could be seen as an admission of liability. The practical consequence of this legislation should be that more public sector staff will be encouraged to say 'sorry' and more members of the public are likely to feel satisfied that their grievance has been taken seriously. An apology shows an agency taking moral, if not legal, responsibility for its actions and the research shows that many people will be satisfied with that.

In addition to reviewing court judgments that refer to apologies, the Ombudsman has continued to monitor media coverage as well as the actions of the public authorities to assess the impact of a statutory protection for apologies. This analysis has clearly demonstrated that there has been no detrimental impact on the rights of the public to pursue litigation, or any other impact, as a result of the inclusion of a statutory protection for apologies.

Insurance Issues

In a publication entitled *Apologies A practical guide*, the NSW Ombudsman addresses the insurance issues that arise in the context of apologies as follows:

"If something goes wrong, the person responsible or their employer may wish to rely on an insurance policy. These policies may contain provisions prohibiting the insured from making any admission, offer or promise either in relation to a 'claim' or, in any circumstances, without the written consent of the insurer. When confronted by such clauses in insurance policies, it is important to note that:

- *as evidence of an apology is not admissible in any civil proceedings (see s.69 of the Civil Liability Act) as evidence of fault or liability, it is therefore difficult to see how evidence of an admission made in the context of an apology could be admitted in any proceedings for a breach of a contractual obligation under an insurance policy.⁷*
- *if liability would have existed without the admission, such exclusion clauses have been held not to apply.⁸*

However, it would still be good practice to consult with any relevant insurer ... making an apology in circumstances where a demand or request has been made that will have significant financial implications.

In NSW the government is a self insurer. ... Insurance, public liability and professional indemnity issues in relation to the government as a whole ... are covered by the NSW Self Insurance Corporation (SI Corp, formerly the Treasury Managed Fund). SI Corp has recently published its new Contract of Coverage which include the following provision:

9.3(b) The TMF Agency ... shall not, without the consent of the Claims Managers, make any admission, offer, promise or payment in connection with any accident or Claim, proceedings, investigation or injury, **other than as part of an apology made in accordance with the Civil Liability Act 2002.** [Emphasis added]

⁷ s.69(2) specifically states that evidence of an apology is not admissible as evidence of fault or liability.

⁸ *Broadlands Properties Ltd and Broadlands Estates Ltd v Guardian Assurance Co Ltd* (1984) 3 ANZ Insurance Cases 60-552 at 78, 304 and the Commonwealth *Insurance Contracts Act 1984*, s.54.

[Note 18: Any admission of fault made as part of such an apology is not admissible in any civil proceedings as evidence of fault or liability. Please refer to Appendix 4 for the Public Sector fact sheet No. 1 produced by the NSW Ombudsman in relation to apologies.]"

The true cost of not apologising

Abraham Lincoln once gave some sage advice to a group of lawyers:

*"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. There will still be business enough."*⁹

By embracing the apology, legal practitioners could do much to address what is regularly reported to be the significant decline in the public esteem in which lawyers are held.

Where responsibility is reasonably clear, an agency or relevant official may be confronted by the need to decide whether to offer a 'full' apology (including the taking of reasonable steps to 'put things right') or do nothing and wait and see if a problem results in civil litigation, at which time liability is denied and the action defended.

In NSW and the ACT where there is a statutory protection for a 'full' apology, some of the differences between offering an apology as an alternative to the 'deny and defend' strategy commonly advocated by lawyers, are set out in **Annexure A**¹⁰ to this paper. For example, apologising allows people to do 'the right thing'. It allows for relationships of mutual trust to be restored when an injured party sees someone else accept responsibility for a mistake and take proactive steps to put it right. It also allows those injured to express their needs and negotiations towards settlement to be commenced in a non-adversarial setting. By contrast, legal action is by its very nature defensive. Individuals and/or agencies communicate as little as possible for fear of conceding liability. Apologising accepts that we all make mistakes and that those we serve generally understand this because they do too.

Some of the views set out in Annexure A are reflected in the May 22 Newsletter of the SorryWorks! Coalition, a US not-for-profit organisation that advocates for apologies in the health sector, in the following terms:

"...filing a lawsuit is difficult...cases have to be "valuable" to be accepted, and most patients/families have no idea how to present a potential case to a trial lawyer. Litigation often takes years to resolve and patients/families are forced to relive their tragedies day-in/day-out through this process. And even if the process produces a monetary award or settlement, patients/families still have a hollow feeling because apology, accountability, and yes, forgiveness are not traditionally part of the litigation process."

In another recent newsletter of the SorryWorks! Coalition, the two approaches to dealing with problems were contrasted as being the difference between the 3 As and the 3 Ds. Between the one hand:

⁹ Abraham Lincoln, *Draft of a Lecture on Practicing Law*, 1860, Abraham Lincoln Papers at the Library of Congress, transcribed and annotated by the Lincoln Studies Centre, Knox College, Galesburg Illinois.

¹⁰ NSW Ombudsman, *Apologies – A practical guide*, 2nd ed., May 2009, p.8.

<http://www.nswombudsman.nsw.gov.au/publication/PDF/guidelines/Apologies%20Guidelines%202nd%20edition%20March%202009.pdf>.

- Accessibility to those harmed;
- Addressing the problem; and
- Apologising.

And on the other hand:

- Distancing;
- Denying; and
- Defending.

Recent research in the United States has gone some way towards a possible explanation of the reluctance of lawyers in relation to offering apologies. In a paper discussing the results of certain research, Jennifer Robbennolt, Professor of Law and Psychology, University of Illinois College of Law included the following statements:¹¹

“...contemporary empirical research has ... generally found that apologies influence claimants’ perceptions, judgments, and decisions in ways that are likely to make settlements more likely – for example, altering perceptions of the dispute and the disputants, decreasing negative emotion, improving expectations about the future conduct and relationship of the parties, changing negotiation aspirations and fairness judgments, and increasing willingness to accept an offer of settlement.”

However, Professor Robbennolt went on to note that her research “...demonstrated that attorneys react differently to apologies than do claimants”. She noted that while “...apologies tend to lower claimants’ aspirations and estimates of a case’s fair settlement value...”, on the other hand “...apologies pushed attorneys’ aspirations and estimates of fair settlement values in a different direction...”. She noted that:

“Many commentators are concerned about the risk that attorneys’ focus on the relevant legal rules will dominate the negotiation process and the ultimate settlement of the dispute, to the exclusion of the non-legal interests of the parties.”

The importance of taking responsibility for problems

When things go wrong, the appropriate agency or official should accept responsibility and take ‘ownership’ of the problems for which they are responsible. This is what good management practice dictates, ethical conduct requires and the public expects.

Unfortunately, I am sure we have all seen occasions where organisations or individuals refuse to take responsibility and instead ignore a problem, deny its existence or deny responsibility for the problem or the harm it caused. When the problem is obvious and responsibility clear (or reasonably perceived to be so), denying its existence or denying responsibility are likely to be seen as more than mere blindness or ignorance – they can easily be seen as being wilful and deceptive. This can have serious detrimental effects on levels of trust and credibility. On the other hand, admitting fault and taking responsibility for a problem (ie, doing the right thing) is a prerequisite for forgiveness (analogous to a religious concept of confession and absolution).

¹¹ Robbennolt Jennifer K, Attorneys, Apologies and Settlement Negotiation, Social Science Research Network: <http://ssrn.com/abstract=1275419>.

Benefits that can flow from apologies

A 'full' apology – an apology that includes an admission or acceptance of responsibility or fault – can be remarkably effective in addressing the key needs of people who have experienced harm. Although they are not guaranteed to work in every case, the more an apology addresses the needs of the person harmed, the greater the likelihood it will be effective in reducing anger, restoring a damaged relationship, and helping the person to 'move on'.

Research in Australia and overseas supports the view that a timely, genuine and comprehensive apology avoids a sizeable amount of litigation. This can have a very positive impact, particularly in professions such as medicine where increasingly complex and delicate clinical procedures have developed, along with a society that is increasingly litigious, leading to upward pressure on the costs of medical insurance and a passage of this cost either to the consumer or the public health system.

For example, in the Ombudsman's recent second edition of *Apologies – A practical guide*, he highlighted further research of Jennifer Robennolt from the University of Illinois. She found that while 52 percent of claimants accepted settlement offers when no apologies were offered, this number jumped to 73 percent when settlement was offered along with an acknowledgement of fault and expression of regret.¹² The Ombudsman of British Columbia cited similar US research to show that an apology from a medical practitioner would have stopped 30 percent of negligence claims going to court.¹³

From the Ombudsman's own complaint handling experience, such figures are not surprising. Many people who come to the Ombudsman know that things can never be put back exactly as they were before. However, they complain seeking a degree of justice, fairness and validation of the wrong done in their case, as well as for altruistic motives of not wishing to see whatever happened to them being visited on another. Therefore, if people feel their concerns will not be heard or not be taken seriously by an agency, the Ombudsman has found that matters escalate "simply because of poor communication or because of inadequate publicity about the services and policies and procedures of (an agency)".¹⁴

Apologising addresses many human needs, from the moral urge to do the right thing, to the wish to restore a relationship, to the potentially more pragmatic aim of not wanting a matter to proceed to litigation. While saying sorry for a wrong may not prevent formal action, it will help to demonstrate that the organisation is honourable and trustworthy.

Important benefits that might flow to all parties from a 'full' and sincere apology include:

- firstly, *moral benefits* – from doing the right thing
- secondly, *emotional/psychological benefits*, including:
 - showing respect to the recipient
 - giving peace of mind to the recipient through the giver accepting responsibility for a problem and/or through giving an explanation as to what occurred and why
 - forgiveness, allowing both the giver and the receiver of an apology to 'move on'.

¹² Ibid, p.9.

¹³ Office of the Ombudsman of British Columbia, op. cit., p.13.

¹⁴ NSW Ombudsman, *Effective complaint handling*, June 2004, p.13.

http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Chapter%201_Effective%20complaint%20handling.pdf.

I think this is well illustrated in a quote from the former Prime Minister of Canada, Brian Mulroney: *“Most of us in our lives have had occasion to regret certain things we have done. Error is an ingredient of humanity, so too is apology and forgiveness. We all have learned from personal experience that as inadequate as apologies are they are the only way we can cleanse the past so that we may, as best we can, in good conscience face the future”*.

There are also *interactional benefits* that flow from ‘full’ apologies, including:

- repairing or laying the groundwork for a restored relationship, which is particularly important where there will be on-going interaction between the giver and receiver
- improving the credibility of the giver and the level of trust between the giver and receiver.

Let me give you an example that illustrates the interactional benefits that can potentially flow from an apology. This example illustrates how apologies can be highly effective in a range of circumstances, including serious cases of misadventure and even death. In his *Apologies, A practical guide*, the Ombudsman refers to a case where five of eleven cardiac patients died. The deceased people had been injected with a product to stop the heart beating during surgery, which was subsequently found to have been contaminated. Senior staff decided to contact the affected families, admit something had gone very wrong, apologise for the event and assume responsibility by restoring the survivors to health and not undertaking any further similar procedures until the source of the contamination was identified and rectified. None of the patients or their families initiated proceedings, but rather, the Chief Executive Officer of the NSW Clinical Excellence Commission was able to advise a parliamentary inquiry that:

“...Not only did none of those patients take legal action, but two of them came back to the same hospital and the same surgeons to have repeat surgery many years later because they had confidence that the clinicians were actually on their side and were empathic with them. And, surely, in this day and age we can allow our clinicians to be empathic with the people that, after all, they went to work to help...”¹⁵

This only worked because NSW Health was prepared to make unqualified, unreserved admissions, along with a commitment to put right that which could be fixed.

Further benefits that can flow from ‘full’ apologies include:

- *personal or operational benefits* – a reduction in the likelihood and/or severity of negative outcomes

Recent research has highlighted certain interesting characteristics of the people who are more likely to apologise than others. A US study involving 7,590 Americans was conducted by pollsters Zogby for The Pearl Outlet, which commissioned the poll after noticing that a growing number of customers were buying pearls as a way to say “sorry”.

The study found that married people say “sorry” to their partners almost twice as readily as do single people. Even when they feel they are not to blame, married people are twice as likely as single, divorced or separated ones to apologise after an argument.

This same study found that high earners apologise twice as often as low earners. The study found a near perfect correlation between income and the rate of apology.

Arguments that have been put forward to explain this situation include:

¹⁵ Proceedings before the General Purpose Standing Committee No. 2 Inquiry into Review of Complaints Handling within New South Wales Health, 14 September 2006, NSW Parliament.

- that successful people are willing to learn from their mistakes and keen to mend relationships
- that higher earners tend to be both brighter and more secure
- or that maybe higher earners apologise more because it's easy to apologise afterwards then to ask permission beforehand – and high earners ask permission less [the view put forward by the President of the Pearl Outlet as his own theory].

There are also:

- *financial benefits* – a reduction in the chances of on-going difficulties that can seriously impact on time and resources, including litigation; and
- *systemic benefits* – the transparency that goes with a 'full' apology, which includes an admission that there is a problem, increases the chances that mistakes or other problems will then be properly addressed. If people don't admit there is a problem, they are unlikely to fix it!

The potential impact of apologies in resolving problems

If a mistake or error led to harm, an appropriate apology is often seen by complainants as an essential part of the proper resolution of their complaint – an appropriate apology is often the main thing they really want. The greater the harm, the greater the likely value of an appropriate apology to the person harmed. As one American writer put it – *'An apology is the superglue of life. It can repair just about anything'*.*

It seems that not a week goes by without another article reporting somebody saying something along the lines of *"All I wanted was an apology"*.

Let me give you just a few examples:

- An article about a dispute between the Olympic great, Glynis Nunn-Cearns and the controversial sprinter John Steffersen relating to an alleged tirade directed at the 1984 Olympic Gold Medallist.

Athletics Australia held a hearing to which Steffersen turned up with a QC.¹⁶

After four hours of legal argument, Athletics Australia was forced to dismiss the charge on a legal technicality. Following this Glynis was reported as saying: *"All I wanted was an apology and instead John went and hired a Queen's Counsel"*.

- An article about a Pilbara woman who was 'tricked' into a murder confession and was seeking \$35 million from the WA government for being wrongly convicted 18 years ago of murdering her stepmother. In the 902 days she spent in prison, her three year old son died of a brain infection.

She is reported as saying she wanted something more than dollars and cents – she wanted an apology:

"The Government should say sorry to me for what happened."

*"Someone should tell me that it was wrong what happened to me. I still get angry about it all."*¹⁷

* Quote attributed to the comic strip writer Lynn Johnston.

¹⁶ Nick Walshaw, 'Running Scared' *Daily Telegraph* 18 January 2008

¹⁷ Tony Barass, 'Pilbara Woman "tricked" into murder confession' *The Australian* 6 December 2007

- An article about a former RAF officer sacked for suffering depression. After a decade and a half of legal action costing taxpayers an estimated \$15 million, Defence was finally forced to concede and make a generous settlement. The former officer wanted an apology from Defence for the suffering it caused him, and is reported to have said:

*"I think that an apology is the very least they owe me."*¹⁸

- An article about a fifteen year legal battle between Bluescope steel and a former employee over psychiatric injury, in which Bluescope is now seeking special leave to appeal to the High Court. The legal battle has cost both parties millions of dollars, with the former employee selling his house to meet the costs. He commented recently that:

*"Basically, I would like an apology. That's what I would like."*¹⁹

When things go wrong, many of the people who experience harm or have otherwise been wronged want no more than to be listened to, understood, respected and – if appropriate – given an explanation and apology. A prompt and sincere apology for any misunderstanding is likely to work wonders. It will often avoid the escalation of a dispute and the significant cost, time and resources that can be involved. Apologies can also start a process that can lead to the resolution of a conflict or dispute, particularly if there's an on-going issue that needs to be dealt with. Apologies can help to build trust – a necessary first step to a better understanding in a damaged relationship.

When something goes wrong, the injured party or their family will generally want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also will want to know that they will be properly cared for or compensated for damage or loss.

If things then become difficult, the problem often isn't the event that caused the damage or injury – it is the way that person was treated afterwards. This could be, for example, due to a failure to communicate or acknowledge that something went wrong and to admit error.

Experience in many fields indicates that people who have been harmed don't immediately seek retribution, revenge or vindication. There is usually a two stage process – between the original issue or problem and a very negative response there is usually some intervening event or conduct. Experience indicates that this intervening event or conduct will usually relate to how the problem was dealt with, how the person was treated or how the person's initial expression of concern was handled.

In a Sunday New York Times article it was reported that:

*"Malpractice lawyers say that what often transforms a reasonable patient into an indignant plaintiff is less an error than its concealment, and the victim's concern that it will happen again."*²⁰

If the response to the individual's concerns is respectful, positive and constructive (which can include an apology if appropriate), those concerns can often be resolved satisfactorily, enabling the person to 'move on'. If the response is rude, dismissive, negative, defensive or misleading, this is likely to result in an escalation of the problem with consequences that are detrimental to the interests of all the parties concerned.

¹⁸ Paul Daley, 'Defence loses \$15m fight' *The Sun-Herald*

¹⁹ Richard Ackland, 'Like the Dickens – seven years in court at \$15m, in search of an apology' *The Sydney Morning Herald* 17 July 2009

²⁰ 18 May 2008

If answers are not forthcoming, if there is a failure to acknowledge the problem or the harm it has caused, or in particular if the person suspects a cover-up, this is likely to result in resentment and anger.

This is also a central theme in articles published by the US Sorry Works! Coalition, for example, in one newsletter²¹:

“Like defence lawyers, personal injury lawyers know that the vast majority of med-mal cases - meritorious as well as non-meritorious - are rooted in anger; anger that is generated when patients and families believe they cannot get information or the truth from their providers.”

When people are angry they often want to lash out – to get revenge, to cause pain or to force those they see as responsible to explain what happened. When up against powerful organisations or individuals, the best way for individuals to fight back is to go to a lawyer or the media. This is when they are likely to start thinking seriously about money, which they may see as a way to measure the pain they want to cause, or at a minimum to get enough money to be able to pay the lawyer!

As noted in another Sorry Works! Coalition newsletter²²:

“A growing body of evidence in the peer – reviewed medical literature shows that patients and families primarily file lawsuits against doctors because of anger, not greed.”

The essential elements of a ‘full’ apology

To be effective, an apology must usually include an express acceptance or admission of responsibility or fault for the actions or inaction that caused harm (that is, a ‘full’ apology). Research indicates that a ‘partial’ apology – an apology that does not include such an acceptance or admission – can do more harm than good.

The idea of an apology is relatively simple – that expressing sincere sorrow, regret or remorse for wrong doing and/or the harm it caused can be an effective way to help resolve a problem and restore the relationship between the giver and the receiver. However, this simple idea tends to mask the complexities involved in its implementation.

The content and delivery of an apology is a particularly good example of the old adage that ‘the devil is in the detail’. In particularly complex, sensitive or serious situations, for an apology to be effective a wide range of issues will usually need to be considered. The most appropriate content and method of communication of an apology will depend on the circumstances of the particular case and what is hoped to be achieved by giving the apology. For example this could be restoration of reputation, acknowledgement of the wrong done, reconciliation, or an assurance that a problem has been addressed and will not happen again.

What is required for an apology to be effective comes down in the end to what is important to the person harmed, which might be one of more of the following:

- the fact of the making of the apology
- the content of the apology (for example an admission of responsibility or an explanation of why something occurred), or
- the feelings that motivated the apology.

²¹ 19 August 2009

²² 7 July 2009

Where these prerequisites are met, not only is an apology likely to be effective in relation to the person harmed, it can also be effective to prevent or lessen adverse media comment or intervention by some watchdog bodies.

Other than in the more simple situations, in principle, to maximise effectiveness an apology should incorporate the following elements:

Firstly *recognition*. This includes:

- *a description of the wrong* – an honest and fulsome description of the relevant problem, act or omission to which the apology applies. In relation to how much is disclosed, in a recent article in The Australian newspaper discussing how Malcolm Turnbull has responded to the ‘ute affair’ email fiasco, a senior Liberal MP was reported to have said: “*Sometimes you have to bare all to be forgiven*”.²³ In relation to honesty, as two former politicians from the Victoria recently wrote: “*People do forgive mistakes. What they don’t forgive is being misled*”.

- *a recognition of the wrong* – an explicit recognition that the action or inaction that resulted in the problem was wrong – for example where Pope Benedict recently said in Sydney:

“Here I would like to acknowledge the shame which we have all felt as a result of the sexual abuse of minors by some clergy and religious in this country. These misdeeds, which constitute so grave a betrayal of trust, deserve unequivocal condemnation.”

- *an acknowledgement of the harm* – an acknowledgement that the affected person has suffered harm, eg, embarrassment, hurt, pain, damage or loss – for example where the Prime Minister said in his sorry speech to the stolen generation:

“I offer you this apology without qualification. We apologise for the hurt, the pain and suffering that we, the Parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied.”

Secondly *responsibility* – an acceptance or acknowledgement of responsibility for the wrong and harm caused - for example where the Prime Minister said in his apology to the stolen generation:

“To the stolen generations I say the following: As Prime Minister of Australia I am sorry. On behalf of the Government of Australia I am sorry. On behalf of the Parliament of Australia I am sorry.”

Thirdly *reasons* – an explanation of the cause – of the reasons for the problem, or a promise to investigate the cause, but not excuses which are merely an attempt to deflect responsibility.

Fourthly *regret* - the core element of the apology, being a statement expressing sincere sympathy, sorrow, remorse and/or contrition. The sincerity of this communication will generally be absolutely essential, and whether or not it is present will be closely analysed by the recipient of the apology. I have set out some thoughts on the issue of sincerity in **Annexure B** to this paper.

I should note here that sincerity is not always an essential requirement – it depends on the needs of the recipient of the apology. Sometimes the mere fact of an apology will be enough, particularly if the harm caused was to reputation – to ‘face’.

²³ “Walking Wounded”, Peter Van Onselen, The Australian, 7 August 2009

I think a case in 2002 amply illustrates this point. It involved a magistrate suing a newspaper for defamation arising out of an article which implied the magistrate was soft on crime and unfit to be a magistrate. She was reported on several occasions as saying that all she wanted was an apology – clearly sincerity wasn't an issue, just public acknowledgement. When it was not forthcoming she sued and was awarded \$250,000.²⁴

It is relevant to note here that while generally speaking, common law courts will not compel apologies (merely taking the fact of an apology into account when assessing damages):

- in some exceptional circumstances, equity may order a person to apologise²⁵
- courts will make orders to apologise, or to correct or retract a statement when a statute confers that power on the courts, and
- various anti-discrimination statutes confer power on tribunals to order a respondent or complainant to apologise.

So, it appears there are circumstances where a court or tribunal may order an apology to fulfil a legal requirement, rather than as a statement of genuinely held feelings.²⁶

The fifth element of a full apology is *responsiveness* or *redress*, which would include:

- a statement of the *action taken or proposed* to put things right
- *a promise not to repeat* – a promise or undertaking that the action or inaction will not be repeated – of course if it is repeated, that will severely damage the credibility of the apologisee in relation to any subsequent attempt at an apology
- *timeliness* – no undue delay – as one writer said: “*When you realise you have made a mistake, make amends immediately. It’s easier to eat crow while it’s still warm*”, or as another two wrote: “*The longer you wait to apologise, the sooner your weakness is perceived as wickedness*”.

Finally *release* – a request for forgiveness or a release from blame. A request for forgiveness is an optional but important element in an apology as forgiveness can have immense power, for example to heal emotional wounds and sooth anger allowing people to move on with their lives. I am not talking here about forgetting, but about understanding and acceptance – about no longer feeling resentment.

While the inclusion of each of the above elements in an apology will not guarantee that the apology will be successful, their exclusion is likely to decrease the chances of success.

Things to be avoided

The things that should be avoided in an apology can be summarised under the headings of subject matter, content and delivery²⁷:

²⁴ Law Report, ABC Radio National, 11 June 2002

²⁵ *Summertime Holdings Pty Ltd v Environmental Defenders Office Ltd* (1998) 45 NSWLR 291 (at 297)

²⁶ See eg. *Summertime Holdings Pty Ltd v Environmental Defenders Office Ltd* (1998) 45 NSWLR 291, *Burns v Radio 2UE Sydney Pty Ltd & Ors* (No2) 2005 NSWADT 24

²⁷ Taken from: *Apologies, a practical guide*, published by the NSW Ombudsman in May 2007. Several of the problems are referred to by Dr Aaron Lazare in ‘*On Apology*’, Oxford University Press, 2004.

Subject matter

- *Inaccurate apologies* – apologies that incorrectly identify the issues of primary concern to the recipient.
- *Misguided apologies* – apologies for action/inaction or harm for which there was in fact no obvious responsibility.
- *Generalized apologies* – apologies that fail to identify the relevant problem, fault or mistake eg 'I am sorry for what occurred', or the classic 'mistakes were made'.

Content

- *Avoidance apologies*:
 - apologies that try to excuse or avoid responsibility eg, 'I am sorry for what I said, but...' (although excuses should be avoided, an explanation may be appropriate)
 - apologies that focus on the action or reaction of the recipient rather than the conduct of the person giving the apology eg, 'I am sorry you took offence at what I said'
 - apologies that question whether there was a problem eg, 'A comment was made that may have caused offence'.
- *Conditional apologies*:
 - apologies that question whether the recipient was harmed eg, 'If you were offended by what I said, then I am sorry'
 - apologies that are untargeted and conditional eg, 'If somebody was offended by what I said, then I am sorry'
 - apologies that question whether any harm was done eg, 'If what I said was offensive, then I am sorry'.
- *Partial apologies*:
 - apologies that fail to include an admission of responsibility for the problem and the harm caused, eg, mere expressions of regret, sympathy, sorrow, etc
 - apologies that use the passive voice without taking 'ownership' of the problem eg, 'An offensive comment was made'.

Delivery

- *Impersonal apologies* – eg, apologies in form letters.
- *Untargeted apologies* – written apologies that do not identify the recipient eg, 'To whom it may concern ...'.
- *Delegated apologies* – apologies by a person who does not have direct or reasonably perceived responsibility for what occurred eg, 'On behalf of... I would like to apologise for the offensive comments he made...'
- *Misdirected apologies* – apologies made to the wrong person, or apologies made to people indirectly affected but not to the person directly affected.
- *Selective apologies* – apologies made to only some of the people who were affected.
- *Serial apologies* – the same person apologising too often for different things.
- *Repeat apologies* – a series of apologies for the same reoccurring problem.

'Apology' is a simple concept, but there can be many pitfalls in implementation

While apologies are a simple concept, there can be many pitfalls in implementation due to the large number of potential variables that can impact on their effectiveness. The more complex the situation and the more reprehensible the action or inaction that led to harm, the more care that is likely to be required in crafting and delivering an apology. Conversely, too much 'care', or too much choreography – the less the perceived humility and sincerity. It is often best to see an apology as part of a 'package' of actions, and as part of a 'process' – not just a quickly delivered statement of regret.

Failure is not an option

If an apology fails – for example because of a failure to accept responsibility or because it is not seen as sincere – it is unlikely that any further attempt at apologising will be effective.

Conclusions

In conclusion, I want to leave three thoughts with you today:

- firstly, an appropriate 'full' apology can be remarkably effective in resolving problems in ways that are fair and reasonable
- secondly, where a problem has caused harm, a 'full' apology will consist of a 'package' of actions including admissions of responsibility, explanations of cause, actions to put things right (where possible) and expressions of sorrow and remorse, and
- thirdly, where a problem has caused harm, a 'full' apology may also be the culmination of a 'process' of communication, investigation and negotiation.

ANNEXURE A

Voluntary 'full' apologies	Defended civil action (where liability is denied)
Objective: <ul style="list-style-type: none"> To resolve a problem To do the 'right thing' 	<ul style="list-style-type: none"> To avoid or limit liability
Focus: <ul style="list-style-type: none"> Focus on the cause (the wrong done – <i>'I am at fault'</i>) 	<ul style="list-style-type: none"> Focus on the effect (the harm caused – <i>'You are responsible'</i>)
Ethical considerations: <ul style="list-style-type: none"> Involves an ethical/moral judgement by the 'responsible' party 	<ul style="list-style-type: none"> Does not involve an ethical/moral judgement by either party
Ownership and control: <ul style="list-style-type: none"> Action initiated by 'responsible' party Outcome decided by the 'injured' party Not enforceable – voluntary acceptance of responsibility 	<ul style="list-style-type: none"> Action initiated by 'injured' party Outcome decided by a third party Enforceable – imposition of responsibility by the 'State'
Approach: <ul style="list-style-type: none"> Proactive Risk management Communication 'Responsible' party accepts responsibility and tries to rectify the problem (admit and rectify) 	<ul style="list-style-type: none"> Reactive Reliance on legal rights Silence or guarded communication 'Responsible' party makes no admissions or denies responsibility ('deny and defend')
Outcomes: <ul style="list-style-type: none"> A relatively short process Both parties can be winners Can 'cure' mental anguish, emotional suffering, stress and trauma Can properly address humiliation/loss of face Can establish trust, restore a relationship and improve reputation Can resolve the conflict May lead to forgiveness 	<ul style="list-style-type: none"> A lengthy process – can take years A winner and a loser Very unlikely to 'cure' mental anguish, emotional suffering, stress or trauma May properly address humiliation/loss of face Will not establish trust, restore a relationship or improve reputation May not resolve the conflict Very unlikely to lead to forgiveness
Costs and other impacts: <ul style="list-style-type: none"> Little or no legal costs Harm can be addressed in a range of ways (not just financial compensation) Impacts on staff time and stress likely to be short-term 	<ul style="list-style-type: none"> Significant legal costs Harm reduced to monetary terms (often on a very artificial basis) Impacts on staff time and stress likely to be significant and on-going (particularly where responsibility/liability is denied)
Accessibility: <ul style="list-style-type: none"> Available to all (need not involve a lawyer) 	<ul style="list-style-type: none"> Only available to those with legal representation (generally)

ANNEXURE B

Factors impacting on perceived sincerity of apologies

	More Sincerity	Less Sincerity
WHY <ul style="list-style-type: none"> Objective 	To assist recipient [to respond to pain and suffering, to address needs, to allow recipient to move on]	To assist apologiser [to appease recipient, to justify action looking for exoneration or release from blame]
WHAT <ul style="list-style-type: none"> Focus Responsibility: <ul style="list-style-type: none"> Cause Culpability Response: <ul style="list-style-type: none"> Redress Rectification 	On consequences for the recipient [to try to address the recipient's needs] Acknowledged by apologiser [responsibility for the wrong and the harm caused] On apologiser [recognition the action on inaction was wrong and caused harm] Offered by apologiser [compensation voluntarily offered or paid, or other action taken or proposed to put things right] Action by apologiser [reasonable steps voluntarily taken or proposed to prevent repeat]	On consequences for the apologiser [on apologiser's relationship with the recipient, on apologiser's reputation, etc] Not acknowledged by apologiser [responsibility ignored, denied or placed on recipient] Not on apologiser [culpability ignored, denied or discounted] Not offered by apologiser [insufficient or no compensation offered or paid, or other action taken voluntarily] Not by apologiser [little or no action taken or proposed voluntarily]
WHO <ul style="list-style-type: none"> Delivery 	By person responsible [either by the person directly responsible or by a person seen as responsible for that person or for the organisation]	By unconnected person [by a person with little or no connection to the cause of the harm]
WHEN <ul style="list-style-type: none"> Timing 	Soon after event [or as soon as facts are clear]	Unreasonably delayed [for no good reason]
HOW <ul style="list-style-type: none"> Communication 	Face to face	Impersonal form letter

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