

## Justice Committee

### Apologies (Scotland) Bill

#### Written submission from Professor Prue Vines, University of New South Wales

I would like to thank the Justice Committee for the opportunity to present a written submission on the Apologies (Scotland) Bill.

My preliminary remark is that apology-protecting legislation is intended (and the Apologies (Scotland) Bill is no different) to prevent law from 'chilling' the normal use of apologies in society. It is not intended to prevent all litigation and, while there is evidence that protecting apologies may reduce the level of litigation overall, litigation will and must continue to happen for those grievously injured who need compensation. What apologies seem to do in relation to law is to increase the likelihood and timeliness of settlement rather than make all litigation go away.

I would like to commend Margaret Mitchell for taking up the question of apologies and developing and presenting this Bill. Unlike some of the early apology protecting legislation in the United States and Australia, this Bill does take account of the research on the impact and effect of apologies both legally and psychologically. In particular, the definition of apology as including an acknowledgement of fault is vitally important in creating apology-protecting legislation which is effective. The evidence is that apologies which do not include an acknowledgement of fault may backfire and increase the anger of the victim, particularly where injury is severe.

The principle that underlies this legislation is the furtherance of civil behaviour in the form of apologising. This is based on the idea that an apology alone, even including an acknowledgement of fault, should never be the sole basis of liability. Other evidence should always be required because an apology is extremely prejudicial compared with its probative value.

#### Definitions

'...any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains –

- (a) An express or implied admission of fault in relation to the act, omission or outcomes,
- (b) A statement of fact in relation to the act, omission or outcome, or
- (c) An undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence'

Defining an apology in this way does raise the issue of the status of apologies as admissions as the submission from the Association of Personal Injury Lawyers points out. I would suggest that their argument about the importance of admissions, that they 'are very likely to be true' is based on a fallacy. Admissions against interest have traditionally been treated this way in most common law countries, as confessions have been also. However, we know that apologies as a category of admissions against interest do not necessarily have the same level of likelihood of truth because of their moral and psychological dimension. Thus a person may

apologise where there is no legal wrong; they may feel there is a moral wrong and that may or may not be true.

The real problem with such apologies is that they make it a great deal easier for the tribunal of fact to decide on liability – that is, they are more prejudicial than probative. Excluding apologies from admission as evidence of liability means that the plaintiff must use other evidence. The example given by the Association of Personal Injury Lawyers is just an unfortunate example where the only evidence is based on the mind of the alleged perpetrator. In such a case excluding the apology may mean there is no other evidence. If that is so, then the burden of proof has rightly not been met and liability will not arise. (I leave aside the question of the adequacy of negligence law for determining compensation.)

The Apologies (Scotland) Bill does go further than the Compensation Act 2006. In other writing<sup>1</sup> I have criticised the Compensation Act as inadequate to deal with apologies because it does not define apology at all and in fact does nothing to alter the common law.<sup>2</sup> However, most other jurisdictions which have enacted apology legislation have gone much further than the Compensation Act.

The distinction between the apology part of a statement and the acknowledgement of fault part (ie what might be an admission) and the extent to which these can be severed is the basic dilemma with this legislation. If courts can completely sever the words acknowledging fault then there is no point in the legislation because an expression of regret doesn't need protection anyway. On the other hand, if the apology can be extended to any words, however connected, this may create a situation where important evidence is excluded. As Professor Robyn Carroll from University of Western Australia has pointed out<sup>3</sup>, in *Robinson v Cragg*, a case from Alberta, Canada, the Master ordered that words of apology that incorporated an admission of fault in a letter be redacted but that admissions of fact were not protected by the apology legislation in that jurisdiction (Alberta). The definition in this Scottish legislation does go further than any other similar legislation. Clause 3 extends the protection beyond express and implied admissions of fault to a *statement of fact in relation to the act, omission or outcome that the person is sorry about* (cl 3(b)), and to *an undertaking to look at the circumstances giving rise to the act etc with a view to preventing a recurrence* (Cl 3(c)).

I am not entirely sure about extending the protection to any 'statement of fact' unless it is made clear that it must have a link with the apology – that is, that the person included the statement as *part of the apology*. I would like to see this made clearer because otherwise one runs the risk that in a case like *Robinson v Cragg* the entire letter would be excluded. I think the outcome in *Robinson v Cragg*, which left some of the letter intact and admissible is the correct outcome. In that case the letter included a sentence 'I assure you that our registration of the Discharges was through inadvertence and I apologise for doing so'. The letter also contained some other

<sup>1</sup> Vines, 'Apologies and Civil Liability in the UK: a view from Elsewhere' (2008) 12(2) *Edinburgh Law Review* 200-230

<sup>2</sup> Vines, 'Apologies and Civil Liability in the UK: a view from Elsewhere' (2008) 12(2) *Edinburgh Law Review* 200-230; 'The protected apology as the modern response to the moral question at the heart of *Donoghue v Stevenson*: What if Stevenson had apologised?' (2013) 3 *The Juridical Review* 483.

<sup>3</sup> Robyn Carroll 'When "Sorry" is the Hardest Word to Say, How might apology legislation assist?' (2014) 44(2) *Hong Kong Law Journal* 491 at pp 507-509.

admissions of fact. The Master redacted the sentence and the admissions of fault but retained the admissions of fact and held they were admissible because they were not combined with the apology. The definition of apology in the Alberta Evidence Act 2000 included (s 26) ‘an expression of sympathy or regret, a statement that one is sorry or 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’. This is not significantly different in substance from the definition in the Scottish bill. The Alberta Act then provides that such an apology does not constitute admission of fault and ‘...shall not be taken into account in any determination of fault or liability’ and prevents it from being admissible. Again, this is very similar to s 1(a). Section 1(b) is broader and very protective. It would protect I think against voiding of insurance contracts, for example, which I think is a very important matter.

Opinions differ on where the balance should be struck and the best way to ensure the intention that the words connect with the apology.

Although there is no legal need to protect a mere expression of regret, the Australian experience shows the reason both forms of apology (expression of regret and apology acknowledging fault) should be protected. The Australian experience shows that differentiating between mere ‘expression of regret’ and ‘apology’ causes confusion which in the medical profession has been shown to make people anxious about giving any kind of apology and therefore the chilling effect of not apologising remains. So although there is legally no particular reason to protect expressions of regret, putting them together in the definition has practical value.

## Scope

I do not have the expertise to determine why the Fatal Accidents legislation should be exempted, but in general in my opinion it is preferable for the apology legislation to apply as broadly across the civil liability sphere as possible. This will give it the best chance of developing a jurisprudence that is consistent and coherent, as well as preventing confusion in the general population. The Australian experience in the medical sphere where there are differences in definition in different states shows the danger of confusion<sup>4</sup> – where people are confused, apologies are less likely.

Because defamation is a fairly tightly defined sphere of legal activity where apology has had a mitigatory function up to now, I am reasonably happy to see it excluded from the legislation at least at present.

## Apology and litigation rates

There is now quite a large literature on apology-protecting legislation and the evidence suggests that litigation budgets will go down.<sup>5</sup> This is substantially because

<sup>4</sup> Vines, P ‘The Apology in Civil Liability: underused and undervalued? (2013) 115 *Precedent* 28-31.

<sup>5</sup> Vines, P, ‘Apologising for Personal Injury in Law: Failing to Take Account of Lessons from Psychology in Blameworthiness and Propensity to Sue’ (2014) *Psychiatry, Psychology and Law* DOI: 10.1080/13218719.2014.965295 1-11; B Ho and E Liu ‘Judgment by the numbers: converting qualitative to quantitative judgments in law (2011) 8 (1) *J of Empirical Legal Studies* (note that this is based entirely or almost entirely on American data so should be approached cautiously in other jurisdictions)

the evidence suggests that plaintiffs settle earlier and, despite some concerns about the amount of compensation paid, it seems likely that the amount paid on settlement without costs of litigation is likely to be on a par with the amount paid in compensation less the legal costs. This means pursuers do not lose out to the extent that is sometimes argued by plaintiff lawyers.

### **Comparison with other jurisdictions**

All the Australian and Canadian jurisdictions have now passed apology legislation, most USA states have, Hong Kong is in the process of considering it and seems likely to proceed and there is a suggestion that New Zealand is likely to follow. The Canadian jurisdictions' legislation is in my opinion, the best model, and I prefer that of British Columbia. It is mostly stand-alone legislation which in my opinion is most likely to have the educative effect hoped for. Even so, some educational campaign seems to me to be important to ensure that all - medical practitioners, lawyers, litigants, insurers and the general public – are aware that the protection exists. It has taken some time in Australia for this awareness to develop, partly because the legislation is buried in the Civil Liability legislation of each State.

In my opinion this legislation is consistent with the best of the Canadian legislation in most respects.

### **Insurance contracts**

A major concern is admissions clauses in insurance contracts. Traditionally, despite little evidence that an apology is always to be regarded as an admission, insurers have told clients that an apology will make the insurance void. I hope clause 1(b) '...cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made' will be sufficient to deal with this. I would prefer to see a clause like that in the British Columbia legislation, '...will not void an insurance contract 'to make it absolutely clear and to reduce the possibility of litigation to clarify the position.

### **Overall**

This is an opportunity for Scotland to protect its civil society and its litigants on both sides. This legislation is drafted widely, but its scope is clearly confined to civil liability. It is not intended and will not operate as a magic wand to reduce litigation, but it will help to prevent the chilling effect of lawyers advising their clients not to apologise. The critical point, it seems to me, is the balance between excluding the apology and acknowledgement of fault and allowing other evidence in, including admissions of fact not connected to the apology. In this way justice will best be served. I commend the Bill to you.

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