University of New South Wales Law Research Series

APOLOGIES AS 'CANARIES' — TORTIOUS LIABILITY IN NEGLIGENCE AND INSURANCE IN THE TWENTY-FIRST CENTURY

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In Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017)
[2018] *UNSWLRS* 78

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Apologies as 'Canaries'—Tortious Liability in Negligence and Insurance in the Twenty-First Century

PRUE VINES

I. Introduction

For most of the twentieth century and into the twenty-first, tort law and insurance have been inextricably intertwined. This can be seen partly by looking at what injuries are commonly compensated in personal injury, which is the subject of this chapter. The kind of insurance considered in this chapter is liability insurance;[1] that is, insurance taken out by a potential defendant which will pay damages if the insured is found liable. People are most commonly compensated for car accidents, work accidents, when professionals have injured them[2] or in cases of product liability. It is not coincidental that these are also the areas in which insurance is most likely to exist,[3] and in some cases, such as liability for professionals and car accidents, where it is compulsory.[4]

[1] For a comprehensive account of liability insurance in the United States, see K Abraham, *The Liability Century; Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge MA, Harvard University Press, 2008). He likens the relationship between tort law and insurance to a binary star: 'Neither star could remain where it is without the other' (at 1) and that insurance is the principal way in which tort law spreads risk (at 2). For a different sort of account of the relationship between tort law and insurance see R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013).

[2] See C Sappideen, P Vines and P Watson, *Torts: Commentary and Materials*, 11th edn (Sydney, Thomson Reuters, 2016) [1.25].

[3] T Baker 'Insurance in Socio-Legal Research' (2010) 6 *Annual Review of Law and Social Science* 433; R Lewis 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85, 90. In common law countries it is relatively rare for ordinary people to have liability insurance, other than motor vehicle third party personal injury insurance; but in some civil law countries, such as Germany and the Netherlands, it is far more common. This does not seem to relate to litigiousness, however, as the Netherlands and Germany are at different ends of the litigiousness scale: E Blankenburg,'Patterns of Legal Culture: the Netherlands Compared to Neighbouring Germany' (1998) 46 *The American Journal of Comparative Law* 1, 3. We also need to distinguish between Legal Expenses Insurance (LEI) or BTE (Before the Event Insurance) and ATE (After the Event insurance). BTE provides cover for costs incurred by a claimant in bringing proceedings. There is evidence that without BTE insurance, many successful claimants would not have brought actions: Merkin and Steele (n 1) 386; R Lewis, 'Litigation Costs and Before-the-Event Insurance: the Key to Access to Justice?' (2011) 74 *MLR* 272. See also W van Boom, *Juxtaposing BTE and ATE: The Role of the European Insurance Industry in Funding Civil Litigation,* OUCLF, 26 March 2010: http://ouclf.iuscomp.org/articles/vanboom.shtml and P Stewart and A Stuhmcke, 'Lacunae and Litigants: a Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond' (2014) 38 *Melbourne University Law Review* 151.

[4] Lawyers and medical practitioners are required to have liability insurance as a requirement for registration or accreditation. See, eg, Health Care Liability Act 2001 (NSW), s 19(3). In Australia a medical practitioner cannot be registered without evidence of insurance cover.

The protection provided by insurance is a vitally important matter in relation to tort law in general and negligence in particular. It is important to distinguish the consideration of insurance within cases (that is, when a court is considering whether to impose liability) from consideration of insurance at a policy level, external to the question of liability in the case. Such external consideration includes government policy and legislation concerning the use and existence of liability insurance. In this chapter, I argue that, where insurance is compulsory, it is reasonable for courts to consider it in determining liability; but that where insurance is voluntary, it is not. However, both where it is voluntary and where it is compulsory, it is vitally important for insurance to be considered externally and regularly by legislatures, public bodies (such as the Australian Prudential Regulatory Authority), and law reform bodies for its impact on litigation and access to justice.

In this chapter, I consider a very specific issue which arises where public liability insurance includes a compromise clause in its contractual arrangements. The issue is whether apologies constitute admissions which make that insurance void, by triggering the clause. This issue is significant because the common advice given by lawyers not to apologise after an accident is often triggered by the concern that an admission will have precisely this effect.

While I argue for the protection of apologies, it must be emphasised that apologies should not be treated as creating a magic safety net around the apologiser—a person should not be held responsible in law if they are not legally liable. However, a person should not be held liable where the only evidence for liability is an apology he or she has made, and, in particular, an apology should not prevent a person from being able to argue his or her case in court. If insurance is voided at this stage, as seems often to happen, it may prevent a proper hearing of the issues. This is the kind of issue which external, socio-legal consideration of insurance should pick up and deal with.

This chapter attempts to disentangle some of the confusion surrounding these issues, arguing that, as a matter of policy, apologies should be statutorily protected from being treated as admissions of liability such as would render void an insurance contract. It also suggests that the reason we should do this is systemic—a matter of access to justice—rather than internal to the question of liability.

II. The Relationship Between Tort Law and Insurance

A. Background

In considering the relationship between apologies, tort law and insurance, it is useful to consider first some more general issues relating to the relationship between tort law and insurance, in order to set out the background. Insurance can be considered within a case, as a factor which might affect liability, or it can be considered as a matter of the design of the legal system as a whole, socio-legally, externally to the individual case.

B. Insurance Considered Within the Cases

Seemingly paradoxically, in most cases, liability in tort (mostly negligence) continues to be determined as if insurance does not exist, even though the insurer is most often the mover of the action and, indeed, the one who pays—since both plaintiff and defendant are normally subrogated to insurers.[5] For many years, tort law cases, and especially negligence cases, were decided while ostensibly ignoring the existence of insurance. Courts either expressly disapproved its relevance, or pretended to do so. So, to consider a selection of examples, in *Davie v New Morton Board Mills Ltd*[6] Viscount Simonds said that a court of law should not 'fasten on the fortuitous circumstances of insurance to impose a greater burden on the defendant than would otherwise be the case'. The same judge repeated that view in *Lister v Romford Ice Storage Co Ltd.*[7] Lord Wilberforce in *Morgans v Launchbury* said that it was dangerous to alter the basis of liability on the basis of insurance arguments without knowing the impact on the insurance system.[8] In *Hunt v Severs*,[9] Lord Bridge took a similar view. Stephen J in *Caltex Oil v The Dredge 'Willemstadt'*[10] said:

> The task of the courts remains that of loss fixing rather than loss spreading and if this is to be altered [that is, by consideration of insurance in liability] it is, in my view, a matter for direct legislative action rather than for the courts. It should be undertaken, if at all, openly and after adequate public inquiry and parliamentary debate and not worked towards covertly, in the course of judicial decision, by the adoption of policy factors which assume its desirability as a goal and operate to further its attainment.

Justice Gummow in *Vairy v Wyong Shire Council* also thought consideration of insurance was impermissible for the purpose of determining liability in a negligence case.[11] Similarly, where a pregnant mother's negligent driving injured her foetus, the Supreme Court of Canada held that compulsory insurance should not be used to counter the policy view that a pregnant woman should not be held liable to her child, as that would be to determine liability on the basis of insurance alone.[12] Indeed, when juries were used in civil cases, informing the jury that the defendant had insurance could see the jury discharged.[13]

Those who argue that the existence of insurance should not affect liability in a particular case generally argue that the existence of liability insurance may be prejudicial to the defendant, in that it may make it so much easier for the judge or jury to impose liability that it becomes unfair. Thus it may almost completely eliminate the fault requirement.[14]

[5] Lewis (n 3); Merkin and Steele (n 1).
[6] *Davie v New Morton Board Mills Ltd* [1959] AC 604 (HL) 627.
[7] *Lister v Romford Ice Storage Co Ltd* [1957] AC 555 (HL) 576.
[8] *Morgans v Launchbury* [1973] AC 127 (HL) 137.
[9] *Hunt v Severs* [1994] 2 AC 350 (HL) 361.
[10] *Caltex Oil v The Dredge 'Willemstadt'* (1976) 136 CLR 529 (HCA) 581.
[11] *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [2005] HCA 62 [53].
[12] *Dobson v Dobson* [1999] 2 SCR 753 (SCC).
[13] Lewis (n 3) 100; M Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 *Legal Studies* 67, 81. See also M Duffy, 'Disclosure by Defendants of their Insurance Details' (2010) 18 *Torts Law Journal* 257.
[14] A Smith, 'The Miscegenetic Union of Liability Insurance and Tort Process in the Personal Injury Claims System' (1969) 54 *Cornell Law Review* 645, 667.

Underlying this argument is the assumption that, where a defendant has liability insurance, this may influence a judge or jury to impose liability where they otherwise would not do so. As Spigelman J has observed, judges may balk at bankrupting a defendant.[15] Where insurance is an extra factor in the tort duty-and-breach matrix, it is likely to overbear other factors which have more legitimacy—the factors going to responsibility and fault. Furthermore, the court's evidence and understanding of insurance may be incomplete and taking it into account may undermine some of the aims of tort law, such as corrective justice or deterrence.[16]

Recently there has been evidence of increasing acceptance by judges that insurance may, or should, be taken into account in determining liability. Martin Davies has argued that the 'modern concept of duty was shaped by the introduction of virtually unlimited liability insurance in the late nineteenth century.'[17] This is significant because of the dominance of negligence in the law of torts. In the United Kingdom, Canada, Australia and New Zealand, the duty of care has a very real role in defining the limits of the tort of negligence. Davies argues that the 'sphere of risk' approach to duty (which is more characteristic of United Kingdom and Australian law than of United States law)[18] is particularly suited to a system based on liability insurance, because insurance is 'all about risk'.[19] In the United States, the duty of care seems to have a slightly lesser role, being stated often at a higher level of abstraction and the work often being done by breach of duty. Liability insurance is no less common in the US, so the argument that there is an inherent connection between duty and insurance seems less than convincing. However, there is evidence that insurance has had an impact on legal rules, particularly in relation to duty of care and breach of duty.[20] Merkin and Steele agree with Davies' view that insurance has had a significant impact on legal rules, arguing that it has been more of an influence than many have realised.[21] Stapleton disagrees with the proposition that insurance alters the rules, but she concedes that judges may, and do, refer to it as a back-up policy factor; a 'makeweight'. She does acknowledge that it may well affect the question of who sues, and that judges are aware of it in the background and may well have been influenced by it.[22] Carver[23] argues that it is time for the courts to take a more nuanced approach to the consideration of insurance in determining liability, and has shown that such an approach may be emerging. In *Lynch v Lynch*,[24] a case with facts very similar to *Dobson v Dobson,* Clarke JA held that, at least where there was compulsory third party personal injury insurance, a child born alive was able to sue her mother for negligently caused injuries sustained while she was unborn. Cases which acknowledge

[15] Hon JJ Spigelman, 'Negligence: the Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432, 438.

[16] J Stapleton 'Tort, Insurance and Ideology' (1995) 58 *MLR* 820.

[17] Davies (n 13) 68.

[18] J Goldman and B Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 *Vanderbilt Law Review* 657.

[19] Davies (n 13) 79.

[20] Merkin and Steele (n 1); R Lewis, 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85; J Morgan, 'Tort, Insurance and Incoherence' (2004) 67 *MLR* 384; Abraham (n 1); Davies (n 13); T Carver 'Insurance and the Law of Negligence: an Influential or Irrelevant Persuader' (2011) 22 *Insurance Law Journal* 51.

[21] Merkin and Steele (n 1) [3.4.4].

[22] Stapleton (n 16) 827.

[23] Carver (n 20).

[24] *Lynch v Lynch* (1991) 25 NSWLR 411 (NSWCA).

the importance of insurance include *Morris v Ford Motor Co Ltd*,[25] *Gwylliam v West Hertfordshire NHS Trust*,[26] and *Vowles v Evans*.[27] The latter two cases go almost so far as to say that to hire an independent contractor who is uninsured is negligent.[28] Lord Hoffmann took the view that insurance could be considered in *Dimond v Lovell*.[29] In *Imbree v McNeilly*[30] Kirby J thought insurance needed to be taken into account, but Gleeson CJ thought it irrelevant. Many of McHugh J's judgments, including those in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)*[31] and *Perre v Apand Pty Ltd*[32] discuss insurance as a factor. Kirby J has frequently argued that insurance should be taken into account.[33]

Where judges have discussed insurance within the context of the duty of care, they have often considered it as a policy factor. Thus, in the United Kingdom, insurance has been considered as a factor in the context of asking whether it is 'fair, just and reasonable' to impose a duty of care.[34] In Australia, if insurance is to be taken into account in establishing the duty of care, the most coherent way in which this could be done is by considering it as an aspect of the plaintiff's vulnerability, which is one of the major, 'salient factors' taken into account in Australia in determining the duty question.[35] Insurance may affect vulnerability, in that the power of a plaintiff to protect himself or herself by insurance may be quite significant. In *Perre v Apand* the relevant insurance would have been against income loss. However, to assume that insurance against income loss, or indeed liability insurance, is an available choice for a plaintiff may not always be reasonable.[36] Even if it is a matter of choice, should such a choice absolve the defendant of any duty to take care? As McHugh J said in *Perre v Apand*,[37]

> Whether the plaintiff has purchased, or is able to purchase, insurance is, however, generally *not* relevant to the issue of vulnerability. In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, I pointed out that courts often wrongly assume that insurance is readily obtainable and that the increased cost of an extension of liability can be spread among customers by adding the cost of premiums to the costs of services or goods. In *Caltex* Stephen J rejected the contention

[25] *Morris v Ford Motor Co Ltd* [1973] QB 792 (CA).
[26] *Gwylliam v West Hertfordshire NHS Trust* [2002] EWCA Civ 1041, [2003] QB 443 [14]–[20] (Lord Woolf CJ).
[27] *Vowles v Evans* [2002] EWHC 2612 (QB) 12 (Lord Phillips).
[28] See also *Smith v Eric S Bush* [1990] 1 AC 831 (HL) 858 (Lord Griffiths).
[29] *Dimond v Lovell* [2000] 2 All ER 897 (HL) 907.
[30] *Imbree v McNeilly* (2008) 236 CLR 510 (HCA) [107], [112] (Kirby J), [14] (Gleeson CJ).
[31] *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241 (HCA).
[32] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (HCA).
[33] See, eg, *Northern Sandblasting v Harris* (1997) 188 CLR 313; *Johnson v Johnson* [1991] NSWCA 159 [6]; *Pyrenees Shire Council v Day* (1999) 198 CLR 180; [1998] HCA 3 [253]; *Neindorf v Junkovic* [2005] HCA 75, (2005) 222 ALR 631 [65]; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 [83], [107]; *McNeilly* (n 30) [107]. He argued in *McNeilly*, at [112], that it was time to dispel the fiction created by not considering insurance, at least where insurance was compulsory, or universal.
[34] See, eg, *Vowles v Evans* [2003] 1 WLR 1607.
[35] *Pyrenees* (n 33); *Re Pan Pharmaceuticals Ltd (in liq): Australian Natural Care Products Pty Ltd v McGrath* [2006] FCA 1403, (2006) 237 ALR 389; and see n 39.
[36] Every year when there is a disaster in Australia (flood, bushfire, cyclone etc), we are reminded that not everyone has house insurance. In Australia, public liability insurance is often, but not always, bundled with house insurance. So we cannot assume householders have public liability insurance. Does this mean insurance should be ignored or investigated in cases of occupiers' liability?
[37] *Perre* (n 32) 230 (McHugh J).

> that the existence of insurance or the more general concept of 'loss spreading' were valid considerations in determining whether a duty of care existed. I agree with his Honour. They do not assist but rather impede the relevant inquiry. Loss spreading is not synonymous with economic efficiency—which will sometimes be a relevant factor in determining duty. Australian courts, however, have not accepted that loss spreading is the guiding rationale for the law of negligence or that it should be.

This is a cogent argument for not considering insurance within the question of liability. It is even more cogent in relation to liability insurance if a plaintiff's capacity to insure becomes an issue.

But the arguments against considering insurance within the liability question go beyond loss-spreading or loss-shifting. The tests for the duty of care, breach and causation are all normative tests. What we do not want to develop is a situation where, if the facts are all the same except for the fact that defendant B is insured while defendant D is not, insurance will make the difference, so that B is found liable and D is not. If that were the case, it would make a nonsense out of all the other normative factors considered.

When Stapleton argues that insurance is an 'illegitimate' factor to be considered in respect of the duty of care (or indeed in breach),[38] in my opinion she is right, but only where the insurance is not compulsory.

The prevalence of liability insurance varies. This is one reason why the courts have often ignored it. Where insurance is voluntary, the court has three choices: to assume insurance, to universally ignore it, or to investigate whether it is either available in the marketplace at a reasonable price, or whether the plaintiff has it, in each and every case. The real danger is that assumptions may be made and not checked. Government departments may insure themselves, meaning that, if they have to pay damages, this impacts on their budgetary requirements. If this is the case, it is the very kind of thing that gives rise to arguments that their decisions should be non-justiciable, but we do not see it discussed in that way. Rather, the presence or absence of insurance is ignored, or it is commonly assumed that self-insurance is how governments and public authorities manage liability. As long ago as the 1960s, Lord Denning was saying that the courts were assuming insurance in tort cases.[39] It may also not be possible for a person to insure, as was argued in the period before the civil liability legislation was brought on to the Australian scene.[40] Premiums may be too high, or insurers may refuse to insure.

When this is the case and insurance is considered in determining liability, there is a danger that issues relating to insurance may be considered in a piecemeal way, or that only limited evidence will be presented, while some matters are simply assumed. Because of the adversarial process and the fact that counsel are unlikely to raise the insurance issue themselves and argue it thoroughly, there is a significant risk that not all the information

[38] Stapleton (n 16).

[39] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363.

[40] P Vines 'Tort Reform, Insurance and Responsibility' (2002) 25 *University of New South Wales Law Journal* 842; Trowbridge Consulting, *Public Liability Insurance: Practical Proposals for Reform* (2002), Report to the Insurance Issues Working Group of Heads of Treasuries, 30 May 2002; Australian Health Ministers Advisory Council Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package* (2002), released on 18 September 2002; Australian Competition and Consumer Commission, *Second Insurance Industry Market Pricing Review* (2002) www.accc.gov.au/pubs/publications/industry/Insurance%20report_Sept2002.pdf; Senate Economics Committee, Parliament of Australia, *Report on the Impact of Public Liability and Professional Indemnity Insurance Cost Increases* (2002), released 22 October 2002.

available will be considered. The fact that most cases scarcely mention liability insurance means that assumptions regarding insurance's role are untested in the courts and it is difficult to know how insurance law does affect tort law. The variable extent to which parties hold liability insurance suggests that the better approach when determining liability is to ignore it, at least where it is not compulsory.

Where liability insurance has been considered to be most relevant has been in the context of compulsory insurance. Thus, in *Lynch v Lynch*[41] the existence of compulsory third party personal injury insurance was allowed to influence the finding of the existence of a duty of care. A similar situation applied in *Imbree v McNeilly*,[42] in which Kirby J emphasised that compulsory insurance was at issue. In the context of compulsory insurance, there is less likelihood that considering it 'would … lead to the development of a "distorting principle" the application of which might result in a different or unfair, answer being given in a personal injuries case where there was no compulsory insurance.'[43] Where compulsory insurance does not exist, so that it may be the luck of the draw for the plaintiff whether the defendant is insured or not, allowing insurance to affect the court's determination of liability is bringing impermissible elements into the matrix. Stephen J set out the opposing views:[44]

> An opposing view, that loss should, in the case of involuntary torts, lie where it falls, there to be spread by recourse to the relatively efficient device of loss insurance (more efficient, for various reasons, than liability insurance) may have much to be said for it. Particularly is this so in areas in which insurance of one sort or another in fact becomes universal, whether or not as a result of governmental intervention. But there is, I think, no justification for the courts, when deciding actions in tort between private litigants, to make use of such views as policy determinants in the absence of any independent opportunity to test their soundness and without parliamentary sanction for the departure from pre-existing goals of the law of torts which their espousal involves.

Where insurance is compulsory, it is entirely proper that the court should pay attention to it. This would mean motor vehicle accidents, medical malpractice and other professional malpractice would be areas where the court can be sure that insurance exists and therefore that it will not alter the matrix of norms applying to one defendant as opposed to another. Where insurance is compulsory, it is reasonable to assume it and to assume that it is possible for the judiciary to know what the parameters of the insurance are. It is reasonable to assume this precisely because its compulsory nature means that the same situation applies to everybody. It is not reasonable to assume such things where insurance is not compulsory.[45] It is quite true that the duty of care is assessed by including policy factors, but the existence of liability insurance is currently too patchy to make it fair to consider it when individuals are at the mercy of insurers to determine whether or not they are insured. If it is to be considered in each case, judges would have to consider how high the premiums were and how affordable; why one defendant is insured, and another is not.

[41] *Lynch* (n 24).
[42] *McNeilly* (n 30).
[43] Carver (n 20) 8.
[44] *Caltex* (n 10) 581.
[45] This applies in the same way that the collateral source rule excludes insurance against accident or injury, which was taken out by the plaintiff, from benefiting the defendant: *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1; *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569; Carver (n 20).

C. External or System-Level Consideration of Insurance

Although I have argued that insurance should not be considered as a factor in determining liability in tort, this does not mean that the socio-legal impact of insurance is not vitally important and that it should not be considered at an external, or systemic level. When Stapleton says 'it is not inconsistent with the traditional view of the irrelevance of insurance to liability, to acknowledge the clear relevance of insurance to the operation of tort law in daily life', she is referring to such analysis. This has given rise, in some cases, to no-fault schemes, such as that administered by the New Zealand Accident Compensation Commission.[46] Consideration of the role of insurance varies from those who support it and see it as a vitally important matter sustaining the legal system, to those who see it as antithetical to the goals of tort law.[47]

The goals of tort law are frequently in conflict with each other and tort law rarely meets them all adequately. The goal of compensation is frequently defeated by the fault principle and, when it is not defeated, the compensation is rarely adequate.[48] The goal of corrective justice is often regarded as the central goal of tort law, but if it is overemphasised, it is 'worryingly restrictive';[49] and distributive justice, while not precisely a goal of tort law, needs to be considered too. The goal of deterrence is often seen as being in conflict with the presence of insurance, on the basis that insurance promotes the moral hazard of fraudulent claims, or that policy holders will be less careful.[50] I will return to these issues later.

We now have some substantial socio-legal considerations about how insurance interacts with tort law. This form of 'external' consideration is systemic, policy consideration rather than consideration of the issues within the case. It takes place in academic writing, in policy documents and in law reform documents. Although there are good reasons for insurance to continue to be ignored in assessing fault at the individual case level, it is vitally important

[46] See, in Australia, works by Harold Luntz including 'Reform of the Law of Negligence: Wrong Questions—Wrong Answers' (2002) 25 *University of New South Wales Law Journal* 836; Woodhouse Committee, *National Committee of Inquiry into Compensation and Rehabilitation in Australia 1974* (AGPS 1974); P Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn (Cambridge, Cambridge University Press, 2013). The New Zealand legislation is now the Accident Compensation Act 2001 (NZ).

[47] J Fleming, Jr, 'Accident Liability Reconsidered: the Impact of Liability Insurance' (1948) 57 *Yale Law Journal* 549; S Stoljar, 'Accidents, Costs and Legal Responsibility' (1973) 36 *MLR* 233; *The Pearson Report: Royal Commission on Civil Liability and Compensation for Personal Injury* (UK, 1978); G Schwartz, 'The Ethics and the Economics of Tort Liability Insurance' (1989–90) 75 *Cornell Law Review* 312; Merkin and Steele (n 1); Lewis (n 3); Morgan (n 20); Abraham (n 1).

[48] See, eg, C Sappideen, P Vines and P Watson (n 2) ch 1; D Dewees, D Duff, and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (New York, Oxford University Press, 1996); R Abel, 'A Critique of Torts' (1990) 37 *University of California Los Angeles Law Review* 785; H Luntz, *Assessment of Damages for Personal Injury and Death*, 3rd edn (Sydney, Butterworths, 1990) [1.1.11] (where he discusses surveys of quadriplegics in Australia); T Ison, *The Forensic Lottery: A Critique of Tort Liability as a System of Personal Injury Compensation* (London, Staples Publishing, 1967); NSW Law Reform Commission, *Report on A Transport Accident Scheme for NSW* (1984) LRC 43; P Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997); *The Woodhouse Report: National Committee of Enquiry, Compensation and Rehabilitation in Australia* (AGPS, 1974).

[49] Morgan (n 20) 396.

[50] C Parsons, 'Moral Hazard in Liability Insurance' (2003) 28(3) *Geneva Papers on Risk and Insurance.* Cf contra: O Ben-Shahar and K Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) *Chicago Institute for Law and Economics Working Paper No 593 (2D Series)* 7 (arguing that insurers regulate the risky behaviour of their insureds).

that, at the systemic level, insurance is considered and at times protected, for reasons of access to justice in particular.

Before insurance became so common, a personal injury claim could be catastrophic for one side or the other. Insurance has changed the landscape of liability tremendously, even while the courts have pretended it is not there. The truth is that insurance is the decisive and most significant aspect of the tort liability system in its processes and functions, and often makes the difference between litigation, or no litigation; or compensation, or no compensation. Lewis has said that 'Without insurance it is doubtful whether the tort system would survive at all.'[51] In many cases, the whole process is run by insurance companies, and the named plaintiff and defendant have little or no control over the process at all. It is quite possible to track the relationship between liability in particular areas of law and the development of insurance—there is a close connection, and not always with insurance following, rather than leading, legal expansion.[52] The close connection exists for the reason that certain areas of law are profitable for insurance companies to insure and that, at times, certain classes of defendant become aware that it is in their own interest to take out liability insurance.

The differences between insurance and the tort law process seem more apparent than the similarities. Insurance is based on risk-assessment, carried out by statistical analysis of groups and populations. Premiums are calculated on the basis of the risk assessed to exist in relation to the individual as a member of a group. By contrast, tort law focuses (mostly) on the interaction between two individual parties, and in the common law systems (and indeed in the civil law systems as well) it actually allows the two parties to control the process, with the judge acting more like a 'referee', than an investigator. This focus on the individual parties means that the law deals quite badly with areas of law or fact which depend on the evaluation of evidence about populations—for example, epidemiological evidence for aetiology in medicine used for causation in personal injury cases.[53] Although this difference between emphasis on populations or individuals is evident, it is also true that both insurance and tort law allocate risk and manage uncertainty.[54] In recognising this, it is important that there is some relationship or congruence between the insurance and the tort law.

As I have observed elsewhere[55] it can be argued that there are direct conflicts between the aims of tort law and insurance. One area where this is often argued is in the way responsibility is considered. It is true that tort and insurance do this differently, but both tort and insurance operate to allocate responsibility, giving an outcome. It has often been argued that insurance is completely incongruent with tort law, in that it prevents the deterrent function of tort law from operating by preventing the damages flowing from the wrongdoer. That is, because the wrongdoer doesn't pay the damages, the deterrent effect is lost.[56]

[51] R Lewis, 'How Important are Insurers in Compensating Claims for Personal Injury in the UK?' (2006) 31(2) *The Geneva Papers On Risk And Insurance* 323.

[52] Abraham (n 1) ch 6.

[53] For example, epidemiological evidence about causation of asbestosis or cancer: see G Edmond and D Mercer 'Rebels without a Cause?: Judges, Medical and Scientific Evidence and the Uses of Causation' in I Freckelton and D Mendelson (eds), *Causation in Law and Medicine* (Aldershot, Ashgate, 2002).

[54] Merkin and Steele (n 1) 38.

[55] Vines (n 40).

[56] See n 32.

This suggests that insurance law, because it prevents the tortfeasor from paying damages, creates a situation where the deterrent effect is completely lost. However, this ignores two things. One is that any deterrent effect[57] may also flow from the fact of being blamed and bad publicity associated with such blame. There is also the question of increased premiums, which may operate as a more effective deterrent simply because they reappear every year to remind the insured of the desired behaviour. A further view is that insurance law adds another dimension to tort law which is not inconsistent with its function. Abraham, for example, argues that insurance allows tort law to add a distributive justice function to its corrective justice function.[58] Honore puts this slightly differently. He argues that corrective justice creates a 'claim to put the matter 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 that, at other times, such as where the claim is for money, it can be satisfied by someone else, such as an insurer.[59]

Insurance may have another effect on negligence law that is rarely discussed. That is, it may remediate the disproportion that often exists between the wrong that has been done and the reparation that has to be made. Negligence differs from committing a crime in that it does not involve intention to harm and therefore may seem relatively blameless; but sometimes the damage caused by a moment's inattention, in a motor vehicle for example, can cause catastrophic loss for which the defendant should pay. In that situation, insurance may actually equalise the level of proportionality between the wrongful act and the amount to be paid.[60] This is so particularly where premiums are affected by the track record of the insured.

All of this goes to show that insurance is vitally important to the tort system as it stands at present, and that problems with insurance are likely to either come from, or lead to, problems in the tort system. The arguments above (ie, that insurance equalises the level of proportionality between the wrongful act and the amount to be paid; that tort law does not necessarily affect deterrence; that insurance actually makes much of the tort possible) demonstrate the importance of the relationship between tort law and insurance. In particular, it seems clear that insurance makes the tort system workable in practice.

In many jurisdictions, it is common for lawyers to advise clients not to apologise because they fear that such an apology will be treated as an admission of liability, which voids the insurance. In the next section, I argue that treating apologies as admissions of liability is wrong in law, but, more importantly, that treating apologies as admissions of liability which render insurance clauses void simply further punishes victims, and may remove the possibility of a proper determination of liability. The lack of insurance generally means the defendant is not sued because litigation is too expensive and unlikely to result in any

[57] If there is any deterrent effect at all. See Schwartz (n 47).

[58] Abraham (n 1) 2, 229–32.

[59] T Honore, *Responsibility and Fault* (Oxford, Hart Publishing, 1999) 73.

[60] Although the evidence appears to be that the outcome affects the perception of moral blameworthiness a great deal: J Robbenolt, 'Apologies and Settlement Levers' (2006) *3 Journal of Empirical Legal Studies* 333 and 'Apologies and Legal Settlement: An Empirical Examination'(2003) 102 *Michigan Law Review* 460; M Bennett and D Earwaker, 'Victims' Responses to Apologies: The Effects of Offender Responsibility' (1994) 134 *Journal of Social Psychology* 450.

payment. This is a major policy reason for protecting apologies from amounting to admissions, and indeed for protecting insurance from being voided for that reason.

III. Insurance Contracts, Apologies and Admissions

A. Defining Apologies for this Purpose

For the purpose of this chapter, an apology is defined as a communication by speech or writing, which expresses regret or sympathy and acknowledges fault. The evidence is that most people do not regard a mere expression of regret ('I'm sorry your father died') as an apology. The bare minimum required by most people is the expression of regret and acknowledgement of fault.[61] For our purposes, we need to distinguish several possible types of apology. I divide them into two major groups. First, there are apologies which are expressions of regret alone (eg 'I'm so sorry you are hurt'). These I call 'partial apologies'. Secondly, there are apologies which include an acknowledgement of fault, and these can be divided into two further groups (a) apologies which express regret and acknowledgement of fault but add no further facts (for example, 'I'm sorry, it was my fault' ('full apologies')) and (b) apologies which express regret and acknowledge fault and add further facts ('I'm sorry, it was all my fault, I left the retractor inside the opening' (Full apologies with further facts)). I will use this terminology in this chapter.

B. Compromise Clauses in Insurance Contracts

The insurance contract regulates the relationship between the insured and the insurer with the insurer promising to meet the insured's liability, subject to the contract. Insurance contracts are, in most cases, standard contracts in which the terms are given on a 'take it or leave it' basis. Freedom to come to mutual minds has nothing to do with it. The dominant issue is good faith.

Commonly, insurance contracts include a clause providing that, if the insured acknowledges liability, or makes an admission, the contract will be void. Admissions and compromise clauses are common in insurance contracts all over the world. They are particularly

[61] There is now quite a rich literature on the meaning of apology: N Tavuchis, *Mea Culpa: a Sociology of Apology and Reconciliation* (Stanford CA, Stanford University Press, 1991); A Lazare, *On Apology* (New York, Oxford University Press, 2004); N Smith, *I was Wrong* (Cambridge, Cambridge University Press, 2008). I have written about this in the past: P Vines, '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 and 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena' (2007) *1 Journal of Public Space* 1 (available at http://epress.lib.uts.edu.au/ojs/index.php/publicspace/home).

common in medical indemnity contracts, which is one of the reasons why apologies and disclosure are a big issue in medical law. Here is an example:

> 4.1 You must not make any admission, offer or promise in relation to any claim covered by this policy without our prior written consent.[62]

Lawyers in most jurisdictions are concerned that an apology may amount to an admission and therefore either directly, or indirectly, create liability and consequently breach the insurance clause, leaving the insured unprotected.[63] There is reason to doubt this, because it is so rare for courts to regard apologies as admissions of liability, but, in Australia, generally, if the liability were to have existed regardless of the admission or compromise, the exclusion does not apply.[64]

The concern that an admission might also make an insurance contract void is real. To consider this issue we need to consider whether an apology is an admission.

C. Are Apologies Admissions?

An admission is a statement that goes against the interest of the speaker. Admissions may be formal or informal. Formal admissions are binding. We are concerned here with informal admissions. The basic rule in civil liability is that where someone makes an informal admission which is against their interest, it can be received as proof of the truth of the contents, as an exception to the rule against hearsay, unless it is more prejudicial than probative. This is so unless the admission is explained away, or contradicted by the maker and then the tribunal of fact determines the weight to give the admission.[65]

Admissions may be admissions of fact, or admissions of liability. Whether an apology is an admission of liability is not absolutely clear. Here we need to revisit the distinction between partial and full apologies, and full apologies with further facts. Cases have gone either way, although the preponderance of evidence in all jurisdictions seems to be not to treat apologies—even full apologies—as admissions of liability.

In the United States, a number of civil cases have rejected the idea that an apology is an admission of liability: *Phinney v Vinson*[66] concerned an apology for the poor outcome of a medical procedure (a full apology with no further facts) and *Senesac v Associates in Obstetrics and Gynecology*[67] concerned an apology for penetrating the uterus during an abortion.

[62] United Medical Protection's AMIL policy: Corrs Chambers Westgarth, *Open Disclosure Project: Legal Review* (2003) 30.

[63] *Terry v Trafalgar Insurance* (1970) 1 Lloyd's Rep 524 is the classic case where a motorist hit another motorist, apologised, and wrote and admitted liability. The admissions were held to have voided the insurance contract. The contract is breached whether or not there is prejudice to the insurer.

[64] *Broadlands Properties Ltd v Guardian Assurance Co Ltd* (1984) 3 ANZ Ins Cas 60-552, 78,304 (Chilwell J). In Australia, 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.

[65] *Heane v Rogers* (1829) 9 B & C 577, 586, 109 ER 215, 218; *Voulis v Kozary* (1975) 180 CLR 177, 193 (Jacobs J); *Merick v Dickinson* [1924] VLR 131; *Aikman v Arnold* (1934) 51 WN (NSW) 205; *Smith v Smith* [1957] 2 All ER 397.

[66] *Phinney v Vinson* 605 A 2d 849 (Vt 1992).

[67] *Senesac v Associates in Obstetrics and Gynecology* 449 A 2d 900 (Vt 1982).

This apology was a statement by the doctor that she was sorry and that she had made a mistake and it had never happened before. Again, this apology was held not to be an admission of liability.[68] This approach is consistent with the United Kingdom and Australian approach, in which the courts have generally taken the view that an apology, and even a statement like 'I was wrong', is not an admission of liability and cannot create liability because it refers to the person's own perception of their behaviour, rather than a court's determination.[69] A statement against interest has been found not to be an admission of liability by the court in relation to the breach of the duty of care in several negligence cases.[70] Similarly statements against interest have not been accepted as admissions establishing contravention of a range of other civil matters.[71] The basic reason for this is that, when the person is making the admission, they are not a court and cannot establish liability.[72] As Glass JA said in *Grey v Australian Motorists & General Insurance Co Pty Ltd*:[73]

> By extorting from a party an admission that he was negligent, or that he was not provoked, or that his grandfather possessed testamentary capacity, there is added to the record something which is, not merely of dubious value, but by definition valueless, owing to the witness' unfamiliarity with the standard governing his answer.

In Australia, it seems likely that an apology will not be treated as an admission of liability in negligence, even with further facts, although the further fact may be treated as an admission of fact. The case of *Dovuro* illustrates this.[74] In that case, the defendants took out advertisements and wrote letters, which not only said sorry, but also said that the defendants had 'breached our duty of care'. The court in that case said, again, that even statements of this type do not amount to admissions of liability.

A partial apology—that is, an apology which does not include an acknowledgement of fault—can never be a problematic admission because it cannot be an admission against interest. It says nothing about the apologiser, except that they are sympathetic. This is not a problem. However, as we said before, most people do not regard such a statement as an apology. In order for it to be regarded as such, the bare minimum seems to be that, along with the expression of regret or sympathy, there must be an acknowledgement of fault.[75]

[68] For federal matters in the US it is more difficult because the Federal Rules of Evidence r 408 provides that an apology made outside settlement negotiations may not be protected and may be admissible evidence; and the argument based on r 403, that the apology is more prejudicial than probative, has rarely been accepted: N Saith and S Hodge, Jr, 'Physician Apologies' (2011) *The Practical Lawyer* Nov 30 (SSRN abstract= 1966533). This is a significant problem.

[69] *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139.

[70] ibid. See also *Nominal Defendant v Gabriel* [2007] NSWCA 52, (2007) 71 NSWLR 150; *G v Armelin* [2008] ACTSC 68, (2008) 219 FLR 359 [110]–[113].

[71] Regarding the Trade Practices Act 1975 (Cth), s 46, see: *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43, 68. Regarding misleading or deceptive conduct, see: *Rhone-Polenc Agrichimie SA v UIM Chemical Services Pty Ltd* (1985) 10 FCR 567 (affirmed (1986) 12 FCR 477, 487–8); *Baxter v British Airways plc* (1988) 82 ALR 298; *Re Le Meilleur Pty Ltd* [2011] NSWSC 1115, (2011) 256 FLR 240; *Swick v Leroi* [2015] WASCA 35 [156]–[158]. Regarding liability for trespass to land, or conversion, see: *Hardie Finance Corporation Pty Ltd v Ahern [No 3]* [2010] WASC 403.

[72] According to *Cross on Evidence*, there is still a dispute about whether admissions may be made of mixed law and fact 'The Place of Informal Admissions in Common Law' (LexisNexis Online) [33420] (accessed 20 March 2016).

[73] *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669, 676. See also *Hardie Finance Corporation Pty Ltd v Ahern [No 3]* [2010] WASC 403 [168]–[169], [333]–[344].

[74] *Dovuro* (n 69).

[75] See Vines, 'Apologising for Personal Injury' (n 61) and 'The Power of Apology' (n 61).

In most jurisdictions, this seems unlikely to be regarded as an admission of liability, at least where the acknowledgement of fault is something like 'it was all my fault'—that is, without the statement of any further facts beyond the general acknowledgement of fault. However, if the person says 'I'm sorry, it was all my fault, I was looking in the wrong direction', then we would have a full apology with a further fact, and this further fact might be an admission of fact that might, possibly, void an insurance contract.

D. If the Apology is an Admission, Will it Void an Insurance Contract?

Terry v Trafalgar Insurance[76] is the classic United Kingdom case, where a motorist hit another motorist, apologised, and wrote and admitted liability; and where it was held that these were admissions of liability which voided the insurance contract. The court regarded the contract as breached, whether or not there was prejudice to the insurer. It seems doubtful that this case will continue to be followed. However, in Australia, *Broadlands Properties Ltd v Guardian Assurance Co Ltd*[77] held that the Insurance Contracts Act 1984 (Cth),[78] s 54 applies:

> S54 Insurer may not refuse to pay claims in certain circumstances
>
> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
> (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.
> (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.
> (5) Where: (a) the act was necessary to protect the safety of a person or to preserve property; or (b) it was not reasonably possible for the insured or other person not to do the act; the insurer may not refuse to pay the claim by reason only of the act.
> (6) A reference in this section to an act includes a reference to: (a) an omission; and (b) an act or omission that has the effect of altering the state or condition of the subject matter of the contract or of allowing the state or condition of that subject-matter to alter.

Section 54 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.

[76] *Terry v Trafalgar Insurance* (1970) 1 Lloyds Rep 524.
[77] *Broadlands Properties Ltd v Guardian Assurance Co Ltd* (1984) 3 ANZ Ins Cas 60-552, 78,304 (Chilwell J).
[78] This Act does not apply to workers compensation insurance, nor to compensation for personal injury or death caused by a motor vehicle accident: s 9.

Of course, this could be the whole sum in some circumstances. The Act does not apply to workers' compensation insurance, nor to death caused by a motor vehicle accident, so it would not relieve the problem in *Terry's* case, but in other areas of personal injury it might alleviate the burden of treating an apology as an admission of liability.

Naturally, if an apology is not an admission, it will not avoid the insurance contract, but because the status of the apology as an admission is still unclear, there is a very strong argument for apology-protecting legislation to make it so.

IV. Applying the Apology-Protecting Legislation—a Balancing Act

As is well known, many common law countries, or their constitutive states or provinces, have now enacted legislation protecting apologies from being treated as admissions of liability or fault[79] and from being admitted into court. Some have specifically protected them from voiding insurance contracts.[80] The vast majority of instances of apology-protecting legislation protects a limited sphere of matters (often medical), and only protects partial apologies. However, a growing number of legislatures have begun to take heed of the psychological and other literature, and are passing legislation with wider scope, which protects apologies defined more broadly. The widest definitions of apology include those of British Columbia's Apology Act 2006 and the Alberta Evidence Act 2000, both of which define an apology as:

> 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.[81]

In New South Wales, an apology is defined 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.[82]

A narrower definition is that used in Western Australia, which provides that 'apology' means an expression of sorrow, regret or sympathy by a person that does not contain an

[79] See, eg, Civil Liability Act 2002 (NSW), ss 69–71; Evidence Act 2000 (Alberta), s 26. For a comprehensive table setting out the scope and operation of legislation in Australia, US, Canada and England and Wales as at 2008, see P Vines, 'Apologies and Civil Liability in the UK: a View from Elsewhere' (2008) 12 *Edinburgh Law Review* 200. All Australian jurisdictions have apology legislation. Canadian apology legislation has been enacted in British Columbia (Apology Act 2006), Alberta (Evidence Act RSA 2000, s 26), Ontario (Apology Act 2009); Saskatchewan (Evidence Act 2006, s 23.1); Manitoba (Apology Act 2007); Nova Scotia (Apology Act 2008); Prince Edward Island (Health Services Act 1988, s 32); Newfoundland and Labrador (Apology Act 2009); Nunavut (Legal Treatment of Apologies Act 2010) and Northwest Territories (Apology Act 2013).

[80] See, eg, Apology Act 2006 (British Columbia), s 2(c); Alberta Evidence Act RSA 2000, s 26(2)(c) (s 26 was inserted in 2008).

[81] Apology Act 2006 (British Columbia), s 1; Alberta Evidence Act RSA 2000, s 26(1).

[82] Civil Liability Act 2002 (NSW), s 68.

'acknowledgement of fault by that person'.[83] This adds nothing to the common law, as it merely refers to expressions of regret, or partial apologies.

Where there is an acknowledgement of fault, there is a real apology and a possibility that there is an admission. We have established that an apology will not create liability, even where there is a general acknowledgement of fault. But where the apology includes a statement of extra facts as well, things become more complicated. And they are most complicated in respect of compromise clauses in insurance contracts. This is because, depending on the definition of apology, it may be possible to sever the extra statements of fact from the statements of fault. If so, the extra statements of fact might constitute admissions of fact, which might, possibly, void the insurance.

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. In *Robinson v Cragg*,[84] a case from Alberta, Canada, the plaintiffs made loans to a developer, which were secured by a mortgage against the land. The plaintiffs alleged that the defendant lawyers, in mistakenly filing discharges of security, created a substantial increase in prior encumbrances, which caused the plaintiffs to lose their entire investment. The defendants applied for a declaration that a letter written by the defendant was inadmissible as an apology. The plaintiff argued that there were statements in the letter that were not apologies. The letter read as follows:

> I have forwarded your correspondence of February 27, 2009 on to Mr Eden. It only came to my attention that we have *mistakenly* filed discharges of Mr Robinson's security when I received an e-mail from Mr Jaeger in late February wishing to confirm the registration order of the Jaeger et al mortgage and Mr Robinson's mortgage at Land Titles. *I assure you that our registration of the discharges was through inadvertence and I apologize for doing so.* As you are aware, Mr Robinson's original security was registered in August of 2005 and June of 2006. The Jaeger et al security was registered in August of 2007. Clearly the Jaeger et al mortgage was behind Mr Robinson [sic] security and it was only through the inadvertence of my office that the situation has now changed. I sent the postponement of the Jaeger et al mortgage to Mr Eden in September of 2007 to be executed by Jaeger et al and returned to my office for registration. The document was never returned to us. I am preparing another postponement and forwarding same to Mr Jaeger with a request to sign and return. [Emphasis added by the judge.]

The Master ordered that words of apology that incorporated an admission of fault in the letter be redacted, but that other admissions of fact in the letter were not protected by the apology legislation of the jurisdiction. I think the proper approach is to sever extra admissions of fact from the initial statement of apology acknowledging fault. That is, I think that in *Robinson v Cragg*, the Master got the balance right in redacting the sentence beginning 'I assure you…', but wrongly allowed all the words of the second sentence 'It only came to my attention…' (except the word 'mistakenly') to remain. It seems to me that, in general, a sentence, or at the very least a clause, should be the smallest unit removed because of the

[83] Civil Liability Act 2002 (WA), s 5AF.
[84] *Robinson v Cragg* (2011) 41 Alta L R (5th) 214.

even greater risk of prejudice to the defendant if only one word is removed from a sentence. In *Cormack v Chambers*,[85] the judge said:

> Clearly any evidence of an apology as defined is inadmissible. The question raised is whether an otherwise admissible relevant admission coupled to an apology is admissible. This requires a contextual analysis of the words used. The statements in question each convey separate and distinct thoughts or messages. There are statements of fact and statements of regret…. I am satisfied that the anticipated evidence contains separate sentences, with each sentence a separate thought.

In that case the relevant words were:

> A spoke with SP and ER. *S told A that she was sorry and she could not forgive herself.* She said that she always tells people not to swim behind the dock and has told her father not to go swimming there. *Shannon regretted not telling [the Plaintiff].*

The judge redacted the italicised words.

I am doubtful about extending the protection to 'any statement of fact' for the purposes of liability 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*. If it is inextricably intertwined with the apology, so that it is in the same clause of a sentence, I think that is a very clear link. 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. 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.[86] The critical issue here is how connected the apology words need to be with facts to make them inadmissible. Opinions differ on where the balance should be struck and the best way to ensure the intention that the words connect with the apology. In the absence of legislation, this will have to be resolved by judicial reasoning.

Here is the apology canary. The apology issue is making us look at what should and should not be covered by a liability insurance policy and whether the internal question of liability should be dealt with the same way as the external question of whether the insurance cover should be void. In many ways, the apology's effect on liability is a small issue. But it sends a signal in that insurance is what creates access to justice and it shows that, if the insurance is cut off, there may be no access to a determination of responsibility at all. Because the interaction between the plaintiff and defendant and the insurer's determination of whether the insurance applies or not happens well before any court process, there is little or no opportunity to challenge the insurer's decision. The gate to legal determination closes early. If the only object is to reduce litigation, this does not matter. But if the object is to have justice done, and it is clear that apologies including admissions of fault are often

[85] *Cormack v Chambers* [2015] ONSC 5599 (CanLII).

[86] The definition of apology in the Alberta Evidence Act 2000 includes (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' (italics added). The Act then provides that such an apology does 'not constitute admission of fault … shall not be taken into account in any determination of fault or liability' and prevents it from being admissible and from making void an insurance policy.

made in complete ignorance of the rules of liability,[87] allowing the insurer to end the insurance at that point precludes the proper administration of justice.

It is important that evidence be admitted into court which is relevant to the corrective justice goal of tort law—personal responsibility established by fault—but it is also important that insurance not be removed from the picture precipitately, because allowing an apology to make an insurance contract void is likely to remove the possibility of establishing any level of responsibility at all. Legislatively protecting insurance from being made void by an apology, would effectively remove this particular barrier to access to justice. I am aware that the insurance industry would object to the removal of compromise clauses, despite the evidence that the benefits to it of the practice of liability insurance as a whole greatly outweigh the burdens. However, removing compromise clauses is unlikely to destroy the industry. In the Netherlands, apologies are protected by the Civil Code provision that there is to be no infringement of freedom of expression,[88] and compromise clauses in insurance are regarded as such an infringement. The Netherlands insurance industry in relation to liability appears to be thriving.

For common law countries, it seems to me that British Columbia has shown the way by providing for the protection of insurers in relation to their apologies under its Apology Act 2006:

> s 2 (1) An apology made by or on behalf of a person in connection with any matter
>
> … (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…

The motivation for the Apology Act (as for many others) was, ironically, to reduce litigation by protecting apologies. However, the importance of insurance for access to civil justice is implicitly recognised by this clause.

V. Bringing the Issues Together

I have argued that we should distinguish between dealing with insurance at the individual, doctrinal and evidentiary level (within the case) and dealing with it at the systemic level. If we deal with this question at the systemic level, I suggest that a number of things become clear. First, it is vitally important to maintain liability insurance, if there is to be any hope of guaranteeing access to damages in the current system. Secondly, this form of insurance can be, and is in fact, congruent with personal injury tort law in a way which can alleviate our concerns that insurance cuts across the aims of tort law. There is little force in the argument that insurance ruins the deterrent effect of tort law, and similarly there is good evidence that adding distributive justice to the outcome yielded by corrective justice through insurance

[87] And for a range of reasons including attempting to maintain social relationships: A Orenstein, 'Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Least Expect It' (1998–1999) 28 *Southwestern University Law Review* 221, 250–51.

[88] Dutch Civil Code: 2.1; 3.11; 3.12; 6.2.

does not undercut that corrective justice outcome, but supports it by making the practical operation of the corrective justice system possible.

Treating apologies as admissions of liability which void insurance clauses simply further punishes the victim. In most cases, it will simply remove the possibility of bringing an action in tort. Insurance is what makes litigation damages possible in the vast majority of cases. The lack of insurance generally means the defendant is not sued, because it is too expensive and unlikely to result in any payment. This is a major policy reason for protecting insurance and in particular, for protecting apologies from being treated as admissions of liability which void an insurance policy. Even though it is arguable that apologies do not fit into this category anyway, making this patently clear through legislation is likely to send the message to insurers in a way which is unmistakeable. Hitherto, this has not happened. Considering insurance at the systemic level will usually mean using legislation to deal with the issues. This has the advantage of drawing on the power of parliament to draw on information before passing legislation. Although, in the US, the Brandeis Brief exists, elsewhere it is very difficult for a court to be confident that it has all the information on a topic underlying the individual case at hand.

It is in this way that the apology is operating like the canary in the coalmine. Just as the canary that collapses signals to the miners that there is something wrong, the apology (which could well be seen as a small issue in the scheme of things) is operating as a signal that we should look at the way in which tort law is operating. In the twentieth century, the process of tort law has become more and more inextricably intertwined with insurance. The fear that an apology might trigger liability has become a major driver of behaviour in areas which also happen to be areas where insurance is prevalent—medical practice/professional liability and motor accident law being prominent examples. This is no coincidence. The fear of apology has been inculcated into medical practitioners and drivers, for example, by lawyers who fear the voiding of insurance because of compromise clauses, and who thus continue to advise clients not to apologise. This is extremely unfortunate because of the evidence that apologies actually tend to lessen the likelihood of suit[89] and because of the importance of apologies in civil society.[90]

This chapter has tried to show that, although it is reasonable to consider insurance at the level of the individual case when the insurance is compulsory or universal, the relationship between tort law and insurance is better considered at the systemic level than at the level of the assessment of liability in court. Once we look at the systemic level, the vital importance of liability insurance in creating access to justice in the form of compensation becomes apparent. Having seen that, it becomes clear that allowing apologies to be treated either as admissions of fact, or admissions of liability, is problematic in that they might be treated as having voided an insurance contract. Apology-protecting legislation has been developed to help protect civil society. Ensuring that that legislation also protects apologies from making insurance contracts void is a very important part of that endeavour and of ensuring access to civil justice.

[89] Robbenolt, 'Apologies and Settlement Levers' (n 61) and 'Apologies and Legal Settlement' (n 61); M Bennett and D Earwaker, 'Victims' Responses to Apologies: the Effects of Offender Responsibility and Offence Severity' (1994) 134 *Journal of Social Psychology* 457.

[90] Vines, 'The Power of Apology' (n 61). See also Tavuchis (n 61); Lazare (n 61); E Goffman, *Relations in Public: Microstudies of the Public Order* (New York, Basic Books, 1971); Smith (n 61).