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APOLOGIES AS CORRECTIVE JUSTICE IN TORT LAW: REPARATION AND COMPENSATION AS (PARTIAL) REDEMPTION IN A TORTS SYSTEM

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APOLOGIES AS CORRECTIVE JUSTICE IN TORT LAW: REPARATION AND COMPENSATION AS (PARTIAL) REDEMPTION IN A TORTS SYSTEM

PRUE VINES*

ABSTRACT:

Apologies have become very fashionable both within and outside the legal systems of the world. The common law world has attempted to encourage apologies by the use of protective legislation which aims to reduce litigation. Apologies can also be used as remedies and this article argues that the tort system, and in particular the law of negligence, can benefit from using apologies as part of the arsenal of compensation. This requires consideration of the nature of loss. The article argues that recognition of a broader view of loss is of benefit and that apologies can assist in recognition of fault (a corrective justice goal) alongside monetary damages to create compensation which better addresses human needs by acting as a bridge between wrong and loss.

I Introduction

Everyone knows that apologising is a good thing to do. It is fashionable at the moment. Not only is it fashionable to apologise for past wrongs including breaches of human rights, war atrocities and other political wrongs[1], but jurisdictions all over the common law world have introduced legislation which protects apologies. Most of this legislation has been introduced in order to reduce litigation, (including by the encouragement of early settlement), in order to reduce costs.[2] That aim means that the apology as seen as something *outside* the legal transaction. There is a space between the legal transaction involving the establishing of fault and the awarding of compensation to make up for it. Nothing is ever so simple, of course. This article seeks to explore some of the reasons why it may be useful to see apologies as having a compensatory role which is consistent with corrective justice views of tort law

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[1] For example, the apology by the Pope to people affected by priestly paedophiles; Queen Elizabeth II's apology to the Maoris of New Zealand; German Government's apology to Jews who survived the Holocaust; see M Nobles, *The Politics of Official Apology,* (Cambridge UP, 2008)

[2] See Vines, 'Apologising to avoid liability: cynical civility or practical morality?' (2005) 27 (3) *Sydney Law Review* 483-505; Vines, Prue, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena' (2007) 1(1) *Public Space: the journal of law and social justice;* Vines, Prue, 'Apologies and civil liability in the UK: the view from elsewhere' (2008) 12 (2) *Edinburgh Law Review* 200.

outside the law of defamation. It also seeks to establish a model for the optimum way to deal with tortious wrongs. The article focuses on negligence because it is the dominant tort in most areas, and most exemplifies the fault basis of much of tort law. In doing this it is useful to re-examine the nature of loss as it operates in tortious negligence What this suggests is that while the arguments that the role of tort law as a compensatory mechanism is deeply flawed are correct and we clearly should be moving to no-fault compensation schemes to deal with injury, we should not be ignoring the importance of corrective justice and that a reparation scheme based on corrective justice needs to exist alongside and parallel to any compensation scheme; indeed articulated to it. Such a scheme should include apologies.

A great deal of the common law world has passed legislation protecting apologies in the hope that this will reduce propensity to sue. This article draws on some of the literature regarding apologies consider one aspect of the apology as remedy. The role of the apology in relation to propensity to sue is very much a forward looking one (from the point of view of the legislature anyway). The hope is that if an apology is made that future litigation will be reduced or disappear. However, that forward looking mechanism is only possible if we think of it in terms of its backward looking mechanism – that is the power of the apology to heal and exactly what it is that heals.

The article proposes a way in which we might meet both the objectives of compensation and corrective justice, and that part of the arsenal of reparation which is important for doing this is for the law to incorporate apology into its systems in a way which it has not yet done.

When Australian Prime Minister Kevin Rudd apologised to the Stolen Generations in February 2008, the press was much exercised about whether there was a necessary connection between apologising and claiming compensation in a negligence or other claim. This was based on the acknowledgement of fault, but also on certain assumptions – that it is easy to apologise; that it is meaningless to apologise without compensating in some way; that symbols are not real, that acknowledging moral fault is the same as acknowledging legal fault, and so on.

In fact, in 2007 the first Australian case which awarded compensation to an Aboriginal person for being removed from their family was decided. The *Trevorrow* [3] case concerned a man who was removed from a functional Aboriginal family when he was a baby, placed in a dysfunctional white family and clearly had his life destroyed. In negligence a major barrier to such litigation was the fact that this was government policy but in *Trevorrow's* case it was clear that the government department had been advised before his removal that they had no right to remove Aboriginal children. Therefore there was no policy barrier. There was no apology in Trevorrow's case until after the case had been decided. This shows that there is no *necessary* legal connection between an apology and compensation in this context. I have argued elsewhere[4] that there is no necessary or automatic connection between apology and

[3] *Trevorrow v State of South Australia (No 5)* [2007] SASC 285

[4] Prue Vines, 'Apologies and Civil Liability in the UK: a view from Elsewhere' (2008) *12 (2) Edinburgh Law Review* 200-230; 'Apologising to avoid liability: cynical civility or practical morality?' (2005) *27 Sydney Law Review* 483

liability in negligence as demonstrated by cases such as *Dovuro Pty Ltd v Wilkins* [5] where an apology (including saying that they were in breach of duty) was not regarded as creating liability in negligence.

However, the fact that jurisdictions all over the world have developed apology-protecting legislation for use in civil liability shows the importance of this transaction. This paper argues that an apology might be seen as part of corrective justice and that this might help to meet the aims of tort law in general. It may be that any reduction or lack of litigation might occur because one of the aims of tort law, that of corrective justice has been met by the apology itself. This requires us to consider the nature of loss as it is felt by the person and as it is recognised by the legal system in tort.

II The nature of apologies

The word 'apology' covers a range of things. It is useful to consider the links between apology and morality, and indeed religion. Apologies are part of a cycle recognised in moral and religious writing as the redemption cycle, consisting of wrongful act or thought, apology or confession, penance, forgiveness and redemption. In psychological thought and the literature of reconciliation, the apology is part of a reconciliation cycle involving wrongful act, apology recognising fault, forgiveness and reconciliation. In criminal law an apology is seen as part of restorative justice. In the context of tort law this background is more significant than it may at first appear.

This paper mostly discusses a 'full apology'. That is an apology which includes an acknowledgement of fault along with an expression of regret. The moral/religious and psychological cycles above rely on the full apology. The reason they do is that they depend for meaning on the existence of fault. Apologies can also be 'partial' in that they only include an expression of regret, as in, 'I'm sorry your grandmother died'. This does not include any recognition of fault; it is merely an expression of sympathy. Such apologies are used quite extensively in the protective legislation which has been passed across the common law world since 1986,[6] but it is clear that that is a significant flaw in such legislation. Other things which might accompany an apology include compensation or reparation of the monetary kind. In response there may be forgiveness and/or reconciliation. Nicholas Tavuchis[7] has referred to the 'apology sequence' which includes all these elements. The reason why the full apology is the only one worth discussing in relation to tort law is that the connection between an apology and the fault basis of tort law can only be real if the apology acknowledges fault.

The use of apology as a remedy or mitigator in defamation law is familiar. This article argues that the apology actually operates in a remedial or compensatory way – that is,

[5] (2003) 215 CLR 317; 201 ALR 139. See also *Phinney v Vinson* 605A 2d 849 (Vt) 1992), although there are occasions when an apology has been regarded as an admission of fault leading to liability in the US. Australia, UK and Canada are clearer that it will not be.

[6] See Prue Vines 'Apologising for Personal Injury in Law: Failing to Take Account of Lessons from Psychology in Blameworthiness and Propensity to Sue' (2015) I 22(4) *Psychiatry, Psychology and Law*, 624-634;

[7] N Tavuchis, *Mea Culpa: a sociology of apology and reconciliation*, (Stanford University Press, 1991). See also Nick Smith, *I was Wrong: the meanings of Apology* (Cambridge University Press, 2008) for a long list of elements making up the 'categorical' apology of which acknowledgement of fault is only one.

that when an apology is made to the claimant before they sue, they have already received some reparation, and this is the mechanism that reduces their desire to sue. That reparation is largely psychosocial, but it is nevertheless real. Its reality is recognised by the fact that an apology in defamation can be used to reduce the amount of damages awarded.[8] Thus it is certainly possible to see apologies as a remedy, even though apologies are not very often ordered as such a remedy.[9]

Although as a version of verbal shorthand and in some legal areas the word apology means merely saying 'I'm sorry' few people actually regard that as a true apology. Apologies have a moral or ethical dimension which is an important part of their function for whichever community is determining the need for the apology. The available sociological and psychological literature on apologies is quite clear that an apology which does not include an acknowledgement of fault is not regarded as real by the vast majority of people. [10] As Lazare says, 'The most essential part of an effective apology is acknowledging the offense'.[11]

The acknowledgement that there has been an offence or fault on the part of the apologiser is critical because of this moral dimension which is a vital part of a community's creation of meaning for itself. One apologises for a wrong rather than for a loss.[12] (One may certainly express regret for any loss.) The loss may well be a problem for the victim, but the moral question to which the apology responds is whether there has been a wrong. The question of what one should apologise for is a matter of those civil norms,[13] which are mediated by culture or community and may therefore differ according to the micro- or macro-culture of the people concerned. When a person apologises and acknowledges a fault that validates the civil norm which has been violated. That communication process adds meaning to the norm, clothes it in reality and anchors it to the people concerned. It fosters both the dyadic relationship and the sense of meaning and morality of the community within which the dyad operates. The dyad here might be two individuals or it might be two collectives where a public apology is being made.

Critics of those calling for apologies sometimes regard apologies as cheap:

> 'Apologies absolve the conscience of the group making the apology. They can be given at little cost, as they invariably involve a disclaimer of particular conduct no longer engaged in…Unless an apology is accompanied by action designed to address the underlying causes, it will not prevent similar harm being occasioned by different means'[14]

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[8] *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291.
[9] Gijs van Dijck, 'The Ordered Apology' (2016) https://ssrn.com/abstract=2896884
[10] See especially, Nicholas Tavuchis, *Mea Culpa: a sociology of apology and reconciliation,* (Stanford University Press, 1991); Aaron Lazare, *On Apology,* (Oxford University Press, New York, 2004)
[11] Lazare, p 75.
[12] Sandra Marshall , 'Noncompensatable Wrongs, or Having to Say You're Sorry' in M Kramer (ed) *Rights, Wrongs and Responsibilities,* (2001) at p 213 ff.
[13] This part of the article is based on a previous article by the author, 'The Power of Apology: mercy, forgiveness or corrective justice in the civil liability arena?' (2007) 1 *Public Space: the journal of law and justice* 1-51. Available at : http://epress.lib.uts.edu.au/ojs/index.php/publicspace/home
[14] Desmond Sweeney, 'Aboriginal Child Welfare: thanks for the apology, but what about real change?' (1995) 3 (76) *Aboriginal Law Bulletin* 4-9 at 5.

They would add to the sequence 'corrective behaviour/reparation' of some kind. However, the critique is too simple. In some situations an apology may be reparation itself; in others it may accompany some compensation.

Apologies seem to have a strong evolutionary basis in that they are useful adaptive behaviours which can be identified in all the primates[15] and have existed for some thirty million years. This suggests one reason why people may desire apologies even if they are not public. That is, apologies operate to reduce aggression,[16] while maintaining a sufficient level of aggression in the species to ensure hunting of other species can continue. Psychological studies also show that apologies dissipate anger in a way which is related to the severity of the harm, whether or not the level of responsibility for the harm is high or low.[17] This appears to be an effect outside morality. It is parallel to outcome responsibility as it has been discussed by Steven Perry and Tony Honore[18] and it is significant in negligence because of the way in which negligence focuses on a wrong only if the wrong causes damage.

Apologies connect to the human need for respect and dignity; and they operate to allow identification and re-invigorate or strengthen the moral community within which they are made. This is one reason why the acknowledgement of fault is such an important part of apologies. An apology can amount to explicit recognition of the moral worth of a victim and thus can be empowering. At the same time the making of an apology by an offender shows the community that that person is capable of recognising the moral norms of the community and has sufficient empathy (essential for social functioning) to be allowed to belong. This moral re-balancing is connected to the emotional re-balancing which psychological studies have identified as an important role of apologies.

An apology can force the apologiser into a humbling position which rebalances the relationship and heals the victim by rebuilding the victim's self-esteem and social status. This rebalancing can occur even if the apology is forced on the wrongdoer or is insincere. On the other hand when an apology is voluntary, an apology which is perceived as sincere appears to be more powerful than an insincere one in the extent to which the wronged party will accept it as healing and re-balancing. This makes sense because an insincere apology which is voluntary is clearly an attempt to manipulate. On the other hand an insincere and involuntary apology involves humiliation for the apologiser and is therefore equalising in a different way. The emotional re-balancing of apology identified by psychologists is part of its healing quality, which is something drawn on quite significantly by restorative justice theorists.[19]

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[15] E O'Hara and D Yarn,'On Apology and Consilience' (2002) 77 *Washington Law Review* 1121. They refer to the work of Frans de Waal, *Peacemaking among Primates* , (1989).

[16] Psychological studies demonstrate this effect: see, for example, K Ohbuchi, M Kameda and N Agarie, 'Apology as Aggression Control: its role in mediating appraisal of and response to harm' (1989) 56(2) *Journal of Personality and Social Psychology* 219.

[17] M Bennett and D Earwaker, 'Victims' Responses to Apologies: the effects of offender responsibility' (1994) 134 *J Soc Psychology* 450.

[18] S Perry, 'The Morality of Tort Law' (1992) 77 *Iowa Law Journal 449-514;* T Honore 'The Morality of Tort Law' in Owen (ed) *Philosophical Foundations of Tort Law*, (Clarendon Press, 1995)

[19] For example, Heather Strang, *Repair or Revenge: victims and restorative justice* (Clarendon Press, Oxford, 2002)

People may also apologise in order to look good to third parties,[20] and hence, the public nature of apology may be important. Some moral theorists, in contrast, have argued that only private apologies can be meaningful for the same reason – that the public apology becomes political rather than moral[21] and yet the argument that apologies enforce and strengthen the moral norms of a community seems to suggest that public apologies have a moral strength that private apologies do not.

Because of these qualities, apologies can be seen, not just as leading to compensation, but as compensation or reparation in themselves. The United Nations has acknowledged this when it states in its list of reparations for violations of human rights law, 'Public apology, including acknowledgement of the facts and acceptance of responsibility.'[22] Lucia Zedner has also argued that an apology can be part of reparation and that reparative justice recognises social wrongs. In certain situations an apology can *be* compensatory, particularly if humiliation or loss of dignity is the wrong done to a person. In that situation the public giving of an apology may be essential. It is the quality of reparation within the apology itself which is important for corrective justice.

The law of damages for negligence recognises consequential or other losses once the loss is recogniseable for the purpose of establishing liability. That is why one can get damages for mental distress consequent on physical injury, but one cannot get damages for mere mental distress which are not consequent on some other recogniseable type of harm. Apologies can both recognise the wrong and by doing so compensate for some of these types of harm which are either unrecognised or currently fit into 'general damages'.[23]

III Aims of tort law

The aims of negligence law are usually described as three-fold: deterrence, compensation and corrective justice. There is competition between these three aims, and different people consider their ranking differently. Some have argued strongly that we should replace the tort system with a social insurance non-fault compensation scheme, because the tort system fails to compensate people adequately.[24] Others argue that corrective justice is the major aim of tort law and thus reject the social insurance scheme because it does not deal adequately with finding of fault and people's naive sense of justice. Yet others argue that deterrence is the major aim of

[20] For example, Erving Goffman, *Relations in Public: Microstudies of the Public Order*, (Basic Books, New York, 1971)
[21] Nicholas Tavuchis is one of these. See also Danielle Celemajer, 'From the Levinasian apology to the political apology; reflections on ethical politics' Refereed paper presented to the Australasian Political Studies Association Conference, University of Newcastle, 25-27 September, 2006.
[22] *Basic Principles and Guidelines on the Right to Reparation of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and Proclaimed by the General Assembly Resolution 60/147 of 16 December 2005, paragraph 22(e).
[23] See Windeyer J in *Skelton v Collins* (1966) 115 CLR 94
[24] P Atiyah, *The Damages Lottery*, (Hart, 1997); Ison *The Forensic Lottery: a critique of tort liability as a system of personal injury compensation*, (Staple Press, 1967); JLR Davis 'Damages for Personal Injury and the Effect of Future Inflation' 56 *ALJ* 168 ; Luntz and Hambley, *Torts, Cases and Commentary*, 5th ed, Butterworths, 2002 ch1; But contra see Gordley, 'The Aristotelian Tradition' in Owen (ed) *Philosophical Foundations of Tort Law*, (Oxford: Clarendon Press, 1995)

tort law but the evidence is patchy and seems to be confined to particular areas such as product liability and medical negligence (where it may create over-servicing rather than mere deterrence).

The aims of tort law to which we usually refer seem at times to be in conflict with each other, leading to a situation where either the goals are not met, or they are only partially met. Assuming that these are good goals, if this is the case, there is a problem. Of the three, two are concerned with loss already suffered – compensation and corrective justice. Deterrence alone looks forward. Deterrence is not discussed further here because we are concerned with remedies and the aims of tort law as considered in terms of past loss.

The corrective justice theory of tort law is the view based on Aristotle's *Nichomachaean Ethics* that individual moral rights are the foundation on which tort law is based. The theory focuses strongly on the connection between law and morality by arguing that there is a specific obligation against the individual who causes harm to correct that harm in some way [25] Michael S Moore's definition of the corrective justice goal of tort law is:

> 'On my view, the best goal for tort law to serve is that of corrective justice. Such a corrective justice view of tort law asserts that we all have primary moral duties not to hurt others; when we culpably violate such primary moral duties, we then have a secondary moral duty to correct the injustice we have caused. Tort liability rules are no more than the enforcement of these antecedently existing moral duties of corrective justice.' [26]

Fault is central to negligence law because of its connection to moral responsibility,[27] and in particular, to personal responsibility. Ernest Weinrib has been a leading proponent of corrective justice theory in tort law. He draws on Aristotle's account of corrective justice, emphasising the transactional nature of the relationship between victim and wrongdoer.[28] Stephen Perry elaborates this by pointing out that although negligence law is outcome-responsibility based (that is, it takes the view that the wrongdoer must be responsible for the outcome of his or her actions rather than just the actions themselves), the fault principle is what operates to determine who should compensate. [29] In my view Perry's emphasis on outcome-responsibility is a significant improvement on the 'pure' theory of corrective justice in tort law because it better reflects the law of negligence, the dominant tort.

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[25] See S Perry, 'The Moral Foundation of Tort Law' (1992) 77 *Iowa Law Review* 449 and Weinrib, E 'The Special Morality of Tort Law' (1989) *34 McGill LJ* 403 for accounts of corrective justice theory.
[26] 'Causation and responsibility' in (1999) *16(2) Social Philosophy and Policy* 1 at 4.
[27] For example, E Weinrib, 'Toward a Moral Theory of Negligence Law' in MD Bayles and B Chapman (eds), *Justice, Rights and Tort Law,* (Reidel, Dordrecht, 1983); J Coleman 'Moral Theories of Torts: their scope and limits' in MD Bayles and B Chapman (eds) above; S Perry 'The Moral Foundation of Tort Law' (1992) 77 *Iowa Law Review* 449; L Alexander 'Causation and Corrective Justice; does tort law make sense?' (1987) 6 *Law and Philosophy* 1-23; L Schwartz 'Apportionment of Loss under modern comparative fault; the significance of causation and blameworthiness' (1991) 23 *U Toledo Law Review* 141; C Schroeder 'Corrective Justice and Liability for Increasing Risk' (1990) 37 *UCLA Law Review* 439; D Owen 'The Fault Pit' (1992) 26 *Georgia Law Review* 703; T Honore, *Responsibility and Fault*, Hart Publishing, Oxford, 1999 and many more.
[28] E Weinrib, *The Idea of Private Law*, (Harvard University Press, Cambridge, Massachusetts, 1995) at p 57
[29] Perry, S 'The Moral Foundation of Tort Law' (1992) *77 Iowa Law Review* 449 at 497

Compensatory damages also address needs and many people regard this as the most significant aspect of damages. If damages are only about need then no-fault schemes are the best way to deal with loss.[30] The problems of tort used as a compensation scheme will not be considered here in detail, but to summarise, the evidence is that using torts as the mechanism for compensation creates the following problems with the compensation in the form of damages:

- Compensation awarded is insufficient to deal with the real injuries suffered[31] - that is, it doesn't meet the need created by the wrong
- Compensation only goes to those who prove fault leaving equally needy people uncompensated[32]
- Compensation using torts principles gives more to wealthy people and less to poor people, thus maintaining and entrenching social inequity[33]

This is all familiar, but it does not mean that the answer is not to have compensation. What is the nature of this compensation? Compensation in the form of damages is both symbolic and real. That is the reason that nominal damages are used. Damages are real in the sense that they are monetary and can be used to buy 'the things that you need money for '.[34] The rule that compensatory damages are given to put the person back in the position they would have been in if the wrong had not happened is only an approximation of true compensation, because money simply cannot buy everything. The traditional rules reject the idea of compensation as punishment (hence the arguments about exemplary or punitive damages' availability in negligence) but compensation is traditionally seen as the 'corrective' aspect of 'corrective justice'. Corrective justice, then, lies in between compensation and punishment in some way.

To talk about apologies as having a corrective justice role in negligence law requires a consideration of the nature of loss. But first it is useful to point out how the compensation goal and the corrective justice goal are diluted and hamstrung by the current tort system in most common law systems.

It seems clear that when people are injured and develop needs because of that that they need to be compensated. It is also clear that when someone is at fault that it creates a different need, which appears to be a felt moral need in both the community and in the individual. Sometimes these two things happen together. When they happen together the tort system works quite well. But they often happen separately and they often happen in disproportion to each other. Negligence is particularly interesting in

[30] See, for example, H Luntz, 'Reform of the law of negligence: wrong questions – wrong answers' (2002) 8(2) *UNSWLJ Forum: Reform of the Law of Negligence: balancing costs and community expectations* 18

[31] G Grant, K Burns, R Harrington, P Vines, E Kendall and A Maujean 'When lump sums run Out : Disputes at the Borderlines of Tort Law, Injury Compensation and Social Security' in K Barker, K Fairwether and R Grantham, *Private Law in the 21st Century* (Hart Publishing, 2017)

[32] Eg H Luntz, 'Reform of the law of Negligence: wrong questions – wrong answers' (2002) 8(2) *UNSWLJ Forum: Reform of the Law of Negligence: balancing costs and community expectations* 18

[33] Eg Abel 'A Critique of Torts' *(*1990) 37 *UCLA L Rev* 785

[34] As defined by a Vanuatu taxi –driver who told me that he could live quite well without money for everything except 'the things that money you need money for' by which he meant only his children's school fees

this regard, because it is quite common for someone to be catastrophically injured by another person who has only done a very small thing which would often not be regarded as morally wrong or not very morally wrong. When this happens we sometimes get outcries that negligence has got out of control- eg the headline 'Toddler's rabbit bite leads to claim for $750,000' which appeared in a newspaper in 2002. The disproportionate nature of damages which can be payable when someone has merely had a moment's inattention in a motor vehicle similarly creates disquiet about the legal process.[35]

Related to this is a further problem of disproportionality caused by the way the legal system assesses damages. Corrective justice's goal of equality between the parties and co-relativity between the wrong and the righting of the wrong requires proportionality between the wrong/harm and the compensation. Compensation according to need does not do this, despite some of the rhetoric of corrective justice, because the compensation theory of corrective justice assumes that the loss is the same as the wrongfulness. But this is not so in the mind of the community. This is particularly so in negligence as compared with criminal law, for example. The distinction between loss and wrong and the possible disproportion between the wrong and what is seen as redressing the wrong cause major problems in dealing with negligence. We turn to consider the nature of loss.

IV The nature of loss

In tort law we recognise loss in relation to liability in two different ways. One is the recognition of the loss suffered by a person when a tort has been committed regardless of whether the existence of the loss is required for the action to stand. This kind of loss can be recognised in relation to all torts, but I differentiate that recognition from the recognition of loss required for liability in an action on the case such as negligence, where damage is the gist of the action. I am going to concentrate on negligence because damage (loss) in negligence lies at the heart of liability. In the end we compensate for the first kind of loss, but in the case of negligence we do not compensate at all unless the kind of loss is regarded as capable of founding an action, or as being recogniseable for that purpose by the courts. However, the legal system can recognise wrong regardless of damage in some torts, such as in trespass.

The law is capable of recognising a range of harms and the feminist literature,[36] among others, has demonstrated the extent to which the construction of harm has power and can change over time. The recognition of loss for the purposes of negligence has developed over time from the purely physical eg personal injury and

[35] J Waldron 'Moments of carelessness and massive loss' in D Owen (ed), *Philosophical Foundations of Tort Law*, (Oxford: Clarendon Press, Oxford, 1995)

[36] Leslie Bender 'Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities' (1990) *Duke LJ* 848; L Bender, ' A Lawyer's Primer on Feminist Theory and Tort' *(1988) 38 J Leg Education* 3; Lucinda Finlay, 'Breaking the silence: including women's issues in a torts course' (1989) *1 Yale JL & Feminism* 41; M Chamallas and L Kerber, 'Women, Mothers and the Law of Fright: a history' (1990) 88 *Michigan Law Review* 814; Prue Vines, Mehera San Roque and Emily Rumble, 'Is "nervous shock" a Feminist Issue? The duty of care and psychiatric injury in Australia ' (2010) 18(1)*Tort Law Review* 9-32

property damage,[37] to economic loss and mental harm. The latter is still fairly restricted in Australia (but not everywhere else) to psychiatrically recogniseable harm and distinguished firmly from 'distress or sorrow'.[38] However, in other domains loss includes injury to personhood – reputational torts being the obvious example. A loss may occur which is felt subjectively as an injury to personhood or personal dignity but which also can be characterised as a normative loss separate from the physical and psychological realm. It is important to recognise this sort of loss theoretically, in terms of corrective justice, because it helps us with the problem that if fault is not acknowledged, some litigants will remain unsatisfied, even if they do obtain some form of compensation. It is this type of loss for which an apology may be able to compensate.

Thus it is possible to change what the law recognises as loss and it is arguable that the recent emphasis on apologies is a recognition that loss is broader in negligence than we have been recognising; and that apologies are capable of equalising wrongs by compensating loss in the corrective justice sense, even though they may not be sufficient in every case.

One of the difficulties with situating apology in the legal domain rather than confining it to the moral domain from which it comes[39] is that the moral domain seems to see wrongs <u>as</u> losses, while the legal system differentiates between wrongs and losses, particularly in the case of actions such as negligence where damage must be proved. The theoretical account of corrective justice discussed above refers to both moral rights and responses to their breach, but in most cases only the declaration of fault is the vindicating mechanism. This has implications for using apologies as corrective justice. An apology used in a legal arena may offer a bridge between these two conceptions, in that in itself it offers both vindication/corrective justice and compensation or reparation.

The argument is that the combination of apology and compensation in various combinations may address both the aims of corrective justice and compensation better and more comprehensively than the declaration of fault or liability in a judgment with damages awarded does at present. This is because the nature of loss needs to be considered more broadly than the legal system normally allows. To extend the idea of loss in personal injury to consideration of humiliation and loss of dignity for which an apology might be a better response than monetary compensation would allow the apology to be used as a remedy to better meet the claims of corrective justice.

V Corrective Justice and Apologies

[37] For example, in *Donoghue v Stevenson* [1932] AC 562, Mrs Donoghue sued for personal injury (gastro-enteritis) and nervous shock (psychiatric harm). It is doubtful whether she could have sued for nervous shock had she not had the physical injury as well. Until *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 it was assumed that pure economic loss was the domain of contract and that one could not sue for it in negligence, and so on.

[38] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 per Windeyer J at 403 and much repeated.

[39] Elsewhere I have discussed the problem of putting a moral matter (apology) into a legal field (civil liability): 'The Power of Apology: mercy, forgiveness or corrective justice in the Civil Liability Arena' (2007) 1(1) *Public Space: the journal of law and social justice* 1-51 (available at http://epress.lib.uts.edu.au/ojs/index.php/publicspace/home)

Aristotelian notions of corrective justice focus on the dyad where one party hurts the other, and then the balance between the parties must be corrected or equalised. A jumping off point here lies in the issue considered by Weinrib in 'The Gains and Losses of Corrective Justice'. [40] He talks about the problem that Aristotle talked about the correlative relationship between the parties in terms of gain and loss. This would appear to be a problem for tort law (especially negligence law) as corrective justice because there appears to be no gain, only loss in most cases – otherwise we might be talking about restitution or unjust enrichment. That is, the person who has been injured has suffered a loss, and then when the wrongdoer pays compensation to equalise that loss for the plaintiff the wrongdoer in turn suffers loss with no apparent gain at any stage. Weinrib does not see this as problematic, but rather as a problem of terminology and that it is 'normative gain or loss' which is at issue rather than (implicitly) real gains and losses. What he means by 'normative gain or loss' is not perfectly clear. It seems that he doesn't require the gain on the part of the defendant when he or she does the wrong nor the loss when they pay compensation to be real. But this view of loss ignores an important dimension of the law of torts. That is that it is the application of morality or ethics to the real world in a real way, and it is indeed the application of that normativity to situations involving real people. It thus has more dimensions than are ordinarily recognised. Thus, to say that the correlativity is 'only' normative may miss a great deal of the moral richness of tort law. It may be that there *is* a gain when someone negligently inflicts injury on another – that gain is a gain in power, a gain which we mostly pay little attention to, but nevertheless a gain which needs to be countered by a loss of power. It is arguable that an apology being given, which is necessarily humbling, reduces that gain and that this is one of its corrective justice 'moves'. The idea of 'normative loss' might reflect Aquinas' view that ' a person striking or killing has more of what is evaluated as good, insofar, that is, as he fulfills his will, and so is seen to receive a sort of gain'.[41] Indeed, Beever points out that when Aristotle referred to gains and losses he was using terms which did not fit previous ideas and his use of terms such as 'gain' or 'profit' (in Greek with all the problems of translation for us) was probably an extension of the way those words were normally used then.

The generally accepted view is that corrective justice theory in law is about the rights people have in relation to each other, and what should be done when those rights are violated. Beever refers to this as an 'area of interpersonal morality'.[42] Similarly, Michael Moore refers to 'primary moral duties not to hurt others'. This is interesting because such primary moral duties are often couched in terms of intention, but in tort law generally the action (for example, in trespass) and/or the outcome (as in negligence) is what counts and the intention is relatively reduced in importance. That is 'intention' means something qualitatively different in tort law from what it means in criminal law.[43] Negligence exemplifies this in the most extreme way because it is about accidental damage.

[40] 'The Gains and Losses of Corrective Justice' (1994) 44 *Duke Law Journal* 277-97.
[41] As quoted in Gordley 'The Aristotelian Tradition' in Owen (ed) *Philosophical Foundations of Tort Law* (1995) at p 138
[42] A Beever, *Rediscovering the Law of Negligence,* (Hart Publishing, 2007) p 56
[43] See for example, *Carrier v Bonham* [2002] 1 Qd R 474

Liability in negligence generally results in damages. Damages operate as compensation, as a marker of wrongdoing and as acknowledgment that redress is needed. Apologies do some of this same work although apologies do not address need in the same way as damages do. However, damages are often seen as the central vehicle of corrective justice in the sense that they operate to redress the balance between the parties by correcting the loss suffered by one party at the expense of the other who caused it. The obvious problem for compensation as a goal is that the requirement of a finding of fault in negligence (which meets a corrective justice need) means that a large number of people who have needs created by injury do not get those needs met. The existence of damages focused largely on fault caused outcomes, means that when wrong is done which does not result in harm, there may be no declaration or recognition of it and there will be a felt moral loss which is not corrected. Apologies can be part of this corrective justice mix if one considers compensation as practical reparation for need created and apology as reparation for the emotional and moral pain suffered for the victim. Some people have called this symbolic reparation, but this is only symbolic if one does not regard humiliation or emotional pain as real; indeed, the loss created by a wrong may indeed be a normative loss felt by a moral community.

Corrective justice theory is the closest account of tort law to the moral theories of apology which are discussed above. As such it might be thought that incorporating apologies into tort law would make no difference to how the apologies work. But the moral account of apology focuses centrally on what was done, that is, on the moral wrongfulness of the action taken by the perpetrator, while tort law focuses on outcome responsibility.[44] Outcome responsibility (that is that what we hold someone responsible for is the outcome of an action) is important because in negligence one can do something bad (morally wrong) but unless it causes harm to someone there is no liability. Steven Perry has argued (correctly, in my view), that the individualised sense of fault which is the focus of Weinrib's corrective justice theory should be modified by outcome responsibility to better reflect the law of negligence. However, he argues that people can (while negligent) be outcome responsible in the absence of fault. This makes no sense in respect of Australian law where to be negligent is to be at fault. The fault lies in the failure to take care where there is a duty to take care.

Perry's emphasis on 'degradation of some aspect of human well-being' is illuminating because it is what can allow us to consider that the balance of the relationship between the two parties is disturbed not just in terms of money or injury, but also in terms of human dignity. Honore puts this slightly differently. He argues that corrective justice creates a 'claim to put things right'. His view, with which I agree, is that the claim to put things right can sometimes be satisfied only by the harm-doer, as when an apology is claimed, but other times such as where the claim is for money can be satisfied by someone else, such as an insurer.[45] In corrective justice terms an adequate apology may be seen as an equaliser of the relationship.

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[44] T Honore, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999); S Perry 'The Moral Basis of Tort Law' (1992) 77 *Iowa Law Review* 449

[45] T Honore, 'The Morality of Tort Law' in D Owen, *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford,1995) p 79

In negligence the wrongness of behaviour is only legally significant if there is harm. Usually that harm is physical injury, property damage or economic loss. This distinguishes the moral compass of negligence law from theories of morality which are entirely based on intention. At the same time, in torts such as trespass the only intention required does not involve intention to hurt but merely the intention to voluntarily move the body. Again this view of intention, although closer to the moral theories still differs from that of most theories of morality which are concerned with issues such as malice, intending to cause harm or do wrong etc. Many moral communities (Christians being one) see the morality of an action (even of thought) as something to be confessed/apologised for and forgiven, whether or not it causes physical harm. This is similar to the recognition of fault in trespass, but very different from the recognition of fault in negligence.

On the other hand psychological studies have shown that the more serious the consequences are, the more likely there is to be attribution of responsibility to the person who caused them.[46] That is, harm does seem to psychologically increase people's perception of fault. At the same time, people are likely to attribute responsibility away from a person they identify with. If this conflicts with a desire for justice, the identification is what will prevail.[47] The assignment of responsibility is a very complex part of human behaviour[48] of which the law partakes in a significant way.

VI Apology as a bridge connecting wrong and loss

The account of apologies given so far should show that apologies can have a range of roles, including compensation, reparation and redemption,[49] and that these are a

[46]K Shaver 'Redress and Conscientiousness in the Attribution of Responsibility for Accidents', (1970) 6 *J Expt'l Soc Psych* 100; E Walster 'Assignment of Responsibility for Accidents' (1966) 3 *J of Pers and Soc Psych* 1973; D Kanouse 'Language, Labelling and Attribution' in EE Jones et al (eds) *Attribution: perceiving the causes of Behaviour* , (NJU, Morristown, 1972)

[47] A Chaikin and J Darley 'Victim or Perpetrator: defensive attribution of responsibility and the need for order and justice' (1973) 25 *J of Personality and Soc Psych* 268.

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

[49] .Definitions:
compensation OED: compensate ' 1.something to reduce or balance the bad effect of loss, suffering or injury, 2. make up for (something undesirable) by exerting an opposite force or effect' From Lat *compensare* 'weigh against'
Reparation : OED: '1. the making of amends for a wrong 2. compensation for war damage paid by a defeated state. 3 (archaic) the action of repairing'

significant part of the role of negligence law as corrective justice. (The redemptive need may be less significant for our purposes). Till now this article has been concerned to establish that apologies can have a corrective justice function. Now we turn to how this might be used to create a 'tort' system which meets both the corrective justice and compensation needs (and thereby distributional justice function) by linking the corrective justice and distribution functions through addressing the problem of disproportion. The argument here is that the problems with the systems we put forward generally are that they seem to be able to either meet the corrective justice function (because they declare fault and award damages only if the harm doer is at fault) OR the compensation function (awarding damages regardless of fault). Corrective justice responds to the attribution of fault, but compensation should respond to need. In fact it is desirable to have both functions met. It is also desirable to have those met without complete disconnection. A proper consideration of apologies suggests that it might offer a kind of bridge (because it has both reparative and vindicatory functions) between these two so that we can indeed have both goals met with a more or less coherent system.

The psychological needs of individuals and communities, and the needs of moral communities are part of the society in which tort law operates; it is a mistake to ignore them altogether. It is important to have some kind of link between the legal and the moral/psychological universes, and indeed, the concept of the reasonable person and the concepts of reasonable care assume the traversing of all those universes in which people live.

Corrective justice's goal of equality between the parties and co-relativity between the wrong and the righting of the wrong requires proportionality between the wrong/harm and the compensation. Compensation according to need does not do this, despite some of the rhetoric of corrective justice, because the compensation theory of corrective justice assumes that the loss is the same as the wrongfulness. But this is not so in the mind of the community. This is particularly so in negligence as compared with criminal law, for example. The distinction between loss and wrong and the possible disproportion between the wrong and what is seen as redressing the wrong cause major problems in dealing with negligence. To my mind this is one of the problems caused by any system of pure outcome responsibility. The fact that apologies focus on moral wrong and that they have a healing and reparative function of their own may be used to redress this disproportion in some cases. It is important to be able to avoid a punitive response and to be able to focus on the co-relativity. Robyn Carroll [50]shows that in cases where apologies have been ordered judges have emphasised that such apologies are ordered for redress not punishment.[51]

Retribution : OED 'Punishment inflicted in the spirit of moral outrage or personal vengeance' From Lat *retribuere* – 'assign again'
Redemption: OED' a thing that saves someone from error or evil'
Reconciliation: OED reconcile: 'restore friendly relations between'.

[50] Robyn Carroll, 'Beyond compensation: apology as a private law remedy' in J Berryman and R Bigwoods (eds) *The Law of Remedies: new direction in the Common Law*, (Toronto: Irwin Law, 2008)
[51] She refers to *De Simone v Bevacqua* (1994) 7 VAR 246 (a harassment case); *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625; *Ma Bik Yung v Ko Chuen* [2002] HKLRD 1.

The distinction and/or the disproportion between the wrong and the loss can be addressed to some extent by apologies. This is particularly likely when the wrong has not led to very large losses; but apologies may also be useful when the loss is large. They may well redress the wrongfulness, leaving the loss to be met by compensation. An apology used in a legal arena may offer a bridge between these two conceptions, in that in itself it offers both vindication and compensation or reparation.

It is worth considering how these might be brought together. To meet both goals no-fault compensation schemes might be developed which are linked to the possibility of formal apologies (voluntary or coerced) which might be independently assessed. Such a linkage would not require fault to be established for compensation, but where there was fault would require or recognise an apology. An apology might also reinforce the moderation of damages, on the basis that the non-economic parts of the award, such as that for pain and suffering, might be better repaired (at least partially) by an apology than an award of money.[52]

The arguments for no-fault compensation systems seem unanswerable if we can find a way to deal with the need for corrective justice. This may seem to be re-arguing Coleman's conception of corrective justice[53] in particular in the attempt to distinguish loss from wrong. However, the problem with such theories of corrective justice is that they attempt to incorporate two goals into one scheme and become too complex. I propose not a scheme but a linkage, so that where there is fault there is apology plus compensation and where there is not there is still compensation. Gordley argues that nothing in traditional Aristotelian theory prevents this : [54]

> 'nothing in the traditional Aristotelian theory would prevent people from establishing such a plan, for example, because they wished to avoid the costs and errors of litigating questions of fault. In the Aristotelian theory…the defendant's gains do not have to be canceled as long as the plaintiff is compensated. The citizens are free to assume voluntarily a burden that would otherwise rest on defendants as a matter of corrective justice'

The compensation plan would therefore rest on alternative or complementary bases – corrective justice and need, depending on the level of fault. This should be done on a social security or insurance basis, according to need (as in the scheme run by the New Zealand Accident Compensation Corporation), with a loose linkage to the corrective justice system which would separately assess fault where the victim wished and determine the need for the apology or recognition of an apology already given. There might also be the possibility of a punitive damages, some of which might be reduced if the apology is given.

VII Conclusion: Towards meeting the (multiple) aims of tort law

[52] Stephen Waddams, 'The Price of Excessive Damages Awards' (2005) 27(3) *Sydney law Review* 543.This, of course, assumes that the amount of damages given for the harm is adequate. In the context of tort reform caps on damages which are significant in Australia and many US jurisdictions, this is unlikely to be the case.

[53] Jule Coleman , *Risks and Wrongs* (Cambridge University Press, 1992)

[54] 'The Aristotelian Tradition' in Owen (ed) *Philosophical Foundations of Tort Law*, p 139-40

This article has demonstrated that many of the aims of tort law cut across each other. Corrective justice proponents have rejected the idea of no-fault schemes on the basis that they neglect the necessary moral recognition of responsibility. And compensation proponents have noted that the fault basis of liability leaves many injured people uncompensated. The system of tort liability in play at present in most of the common law world does not resolve these contradictions. In this article the apology is suggested to be a significant mechanism which might be used to reconcile these conflicting aims.

This proposal is very much an initial attempt to reconcile the conflicting aims of tort law. The apology provides a unique mechanism to create a system of dealing with accidental wrongs which works in a civilised way to meet the moral requirements of corrective justice while also ensuring that people’s physical needs are properly supported.