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Apologising “Safely” in Mediation

Robyn Carroll
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Apologies are often given during mediation. Expressions of regret, remorse, sorrow or sympathy may go some way to resolving the conflict between parties in mediation. Parties and mediators will benefit from understanding how the law and lawyers view apologies. What are the legal implications of making an apology? Why are parties sometimes advised by their lawyers not to apologise? What benefits are there from a legal perspective for a party to make an apology in mediation? Is it possible to apologise “safely”? This article explores the answers to these questions and the meaning of “apology” in the legal context.

INTRODUCTION

Apologies are often given during mediation. Expressions of regret, remorse, sorrow or sympathy may go some way to resolving the conflict between parties in mediation. Of particular significance for parties, and therefore for lawyers and mediators, is an appreciation of the complex psychological and ethical issues pertaining to apologies during mediation. Similarly, parties and mediators may need an appreciation of how an apology is viewed in law and by lawyers. This article explores the legal significance of apology and the concept of a “safe” apology, largely in the context of civil disputes. “Safe” is used here to refer only to the legal consequences of apologising, and does not attempt to explore the myriad of factors that will determine whether an apology is “safe” in other ways.

It needs to be acknowledged that an apology is not always an appropriate or sought-after response to a situation in which harm or loss has occurred. This article proceeds on the understanding that there are benefits of making, and receiving, an apology, and these are not confined to where there is a legal dispute. It also accepts that there are risks associated with making an apology in the context of a potential or actual legal dispute. Like all risks, being informed allows one to manage the risk. One aim of this article is to assist mediators to understand and manage aspects of the risk involved in apologising.

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† Senior Lecturer, Law School, The University of Western Australia.

What is an apology?

Everyone has their own view about what constitutes an apology. In broad terms, and put simply, it is when we say “sorry”. Once we look at it more closely, however, it becomes apparent that complexity, rather than simplicity, surrounds the meaning of apology.

The components of an apology

A review of the definitions found in leading dictionaries indicates that an apology can consist of several components:

(a) an admission of fault,
(b) an expression of regret for injurious action, or
(c) an expression of sympathy for another person’s injury.

The first component is relevant to liability for wrongdoing, although depending on how the expression of regret is phrased, the second component may also relate to liability. The second two components relate to the feelings of the person making the apology. An apology therefore conveys a mixture of feelings and facts. However, not all definitions of apology include an admission of fault.

What is an apology without an admission of fault or wrongdoing, and is it an apology at all? There will be many situations where an expression of regret and sympathy is called for but where the person receiving it is not seeking an admission of fault. We all know that unfortunate and sad things happen where no fault is involved or necessarily helpful. In looking at the legal implications of apology, however, the concept of fault will not be far below the surface.

Apologies as distinct from admissions of fault

An admission is “a voluntary acknowledgment of the existence of facts relevant to an adversary’s case”. An apology is likely to be argued to be an admission where it contains an admission of fault or where it is said to be an acknowledgment of a material fact that is adverse to the person’s position as a litigant. Whether or not an admission has been made is a question of fact. An admission made by a person out of court may be submitted as evidence in legal proceedings. Evidence of a third party who heard the admission can be relied upon as an exception to the hearsay rule. A judge will then have to weigh the evidence to decide whether the evidence justifies the conclusion that an admission was made. Even if it is found that an admission was made, it does not follow that it proves the issue in question, for example fault. Consequently, while not all apologies will contain an admission,
an apology can constitute an admission and be used as evidence in subsequent legal proceedings.8

Two meanings of “safe” apology

Where the concept of fault is involved and legal liability is a potential outcome of a claim by an injured party, there is scope for a “safe” apology. I suggest that there are two ways in which an apology might be described as “safe”. The first, which I will call the “no admission” apology, is when a person expresses sympathy, regret or sorrow but does not admit fault or accept responsibility for any loss or harm for which they may be legally responsible.9 The second way in which an apology might be understood to be “safe” is when it is given in circumstances in which the law treats the apology, including an admission of legal responsibility, as a privileged communication; that is, as inadmissible evidence in subsequent court proceedings. I will refer to this as the “inadmissible” apology. Of course, whether one subscribes to the belief that these are legitimate forms of apology is entirely another matter.10

Legislative definitions

Recent legislative provisions have made clear that in relation to many claims for damages, the law distinguishes between expressions of sorrow, regret or sympathy and admissions or an acknowledgment of fault.

For example, s 5AF of the Western Australian Civil Liability Act 2002 provides that:

“apology” means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.

Section 5AH(1) provides that an apology in connection with any incident giving rise to a claim for damages first does not constitute an express or implied admission of fault or liability by the person in connection with that incident, and second is not relevant to the determination of fault or liability in connection with that incident.

By s 5AH(2), evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

These and equivalent provisions in other jurisdictions11 make it clear that in the context of civil liability the law considers an apology as an expression of regret, sorrow, or sympathy that does not contain an acknowledgment or admission of fault. In this way, it can be described as a “safe” no-admission

8 For application of these principles to a hypothetical conflict see Walsh S, “The Role of an Apology in Crisis Management” (2000) 19 AMPLJ 215.
9 Cohen, n 1, refers to this as a “partial” apology, at 1015.
10 Some writers argue that a safe apology is a hollow form of apology, “at least where the injured person has suffered a clear economic loss and when the actor has the capacity to make compensation”, Wagatsuma H and Rosett A, “The Implications of Apology: Law and Culture in Japan and the United States” (1986) 20, Law & Society Review, 461, at 487.
11 See also, Civil Liability Act 2002 (NSW) s 69; Civil Liability Act 2002 (Tas) s 7; Civil Liability Act 1936 (SA) s 75; Civil Liability Act 2003 (QLD) s 71; Civil Law (Wrongful) Act 2002 (ACT), s 13; Wrongs Act 1958 (Vic), s 14.
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apology. Interestingly, these legislative definitions do not say anything more than an expression or sympathy, regret, or sorrow is not an admission of fault. Do we need Parliament to tell us that? The answer to that question should be no, but the very fact that it has been considered necessary that the legal position be clarified suggests the contrary.

**Why does definition matter?**

Clearly, there is a concern that an expression of sympathy, regret or sorrow will be regarded by an injured party as an implicit, if not explicit admission of fault and may therefore encourage that party to take legal action to recover compensation and other legal remedies. In turn, parties who might otherwise wish to express sorrow, regret, or sympathy, may fear that their “apology” will be misconstrued as an admission, or regardless, will be used as evidence to build a case against them. It is fear and uncertainty as to what can be said safely and appropriately that often leads a party who is involved in some way in a situation where loss or harm has been suffered by another to say nothing, or regret that they did say something. It is not difficult to see why legal advisers urge caution in these circumstances. This, in turn, has the unfortunate effect of stifling apologies, and perpetuates the view that lawyers encourage a litigation culture and are anti-settlement. It may be that the legislative definition of apology in the context of civil wrongs will serve a clarifying and educative function, even though it represents no change in the law.

The purpose of identifying “safe” apologies is to see what scope there is for people to meet two needs simultaneously: to make an apology and to avoid it being used against them afterwards. In what follows I proceed on the basis that a person who wishes to make an apology wishes to do so in a way that is “safe”.

**WHAT ARE THE LEGAL IMPLICATIONS OF AN APOLOGY?**

**Some dangers of generalisation**

There are dangers in seeking to discuss in isolation the legal implications of an apology – whether made in mediation or elsewhere. First, there is the danger that it might be taken to suggest that there are legal implications of every apology, which is not true. Second, there is a danger that it might be taken to suggest that legal implications take precedence over other implications, which is not the case. Another danger when discussing the legal implications of apology is generalisation about the law. A number of legal incidents of apology are specific to particular areas of law. Most notably, at least with respect to civil disputes, apologies are more significant to the law of defamation than other areas of the common law. Clearly though, there is increasing awareness of the importance of clarifying the legal status of an apology in the area of negligence.

**The law applies competing principles**

The law applies a number of principles that will impact on a party’s willingness to apologise in circumstances where they may or may not be legally liable for some form of wrongdoing. On the one hand, the law encourages settlement of disputes by conferring legal privilege on certain communications. Legal professional privilege and the privilege that attaches to offers and admissions made between parties during settlement negotiations are examples of this. The result is that evidence of offers and admissions is not admissible in later court proceedings. On the other hand, the law seeks to obtain the best evidence
available where it is required to make a determination, in this context, of wrongdoing. To that end, admissions of liability or guilt will generally be regarded as evidence that should be available to the court.

It becomes immediately apparent that there is a tension between the best evidence rule and the privilege rules. The law seeks to achieve a balance between these principles in the exceptions it has created to the privilege afforded both to settlement negotiations and mediation communications.

A further tension is apparent between the principle that a party to an agreement (for example an agreement to apologise) should be held to their agreement and the law’s reluctance to compel parties to perform acts that are personal in nature. While this tension is most apparent in the enforcement of contractual obligations, there is less reluctance to make such orders where it is to remedy unlawful conduct such as harassment and discrimination.

**Why do lawyers sometimes advise their clients not to apologise?**

Indications are that lawyers do not want their clients to make an apology that can be construed as an admission of fault, expressly or impliedly. To do so may affect settlement negotiations (particularly if compensation is sought) and the defence of any action at trial. Lawyers also do not want their clients to act in any way that will disqualify them from claiming on their insurance policy.

It is not difficult to find highly publicised examples of the impact of these concerns. Politicians have declined to apologise on behalf of the government, Prime Minister John Howard’s refusal to apologise to the stolen generation being one example. Former Archbishop and Governor General of Australia Peter Hollingworth is reported to have declined to apologise to a victim of child sex abuse, for “legal and insurance reasons”. More recently, in Western Australia, the Managing Director of Western Power expressed regret for the death of two women in a fire caused by fallen power lines, but refused to apologise. His refusal was based on concerns that his apology would be seen as an admission of liability for the damage caused by the fire.

Further reasons that have been suggested as to why lawyers might not advise their clients to apologise include:12

- The lawyer does not think about it.
- They are unaware that there are “safe” apologies.
- If they believe there has been no wrongdoing, they might consider an apology inappropriate.
- By suggesting that a client make an apology, the lawyer might appear disloyal to the client and sympathetic to the other party.
- The lawyer may believe that the expectation of their role is that they give legal advice, not counselling to their client.
- They may consider it too late to make an apology by the time they become involved.
- “Macho” lawyering, that is: “don’t show a soft side”.

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12 See for example, Cohen, n 1, at 1042-1046.
An aversion to loss may lead a client to prefer to take a gamble that they will not make a loss, rather than suffer the certain, even if small, loss of making an apology.

A pattern of denial may have been established early on in the dispute.

There may be a divergence in the interests of the lawyer and the client, in that early settlement of a dispute might be seen by the lawyer to reduce their income from representing the client in relation to the dispute.

While many of these points raise important issues about legal education and legal ethics, the focus in what follows is on how mediators can assist the parties and their lawyers to understand when and why to encourage apology in mediation.

### The legal significance of an apology

#### The apology as a remedy

Where a party claims to have been the victim of legal wrongdoing, for example negligent conduct, breach of contract, improper use of power or breach of trust, the function of the courts is to decide whether the wrongdoing has been proved, and if it has, to award an appropriate legal remedy. While there is a range of remedies that a court can order, the most commonly ordered judicial remedies are compensatory damages and orders for performance of specific obligations or acts. Where the wrongdoing involves a contravention of a statute, the statute will usually provide for remedial orders.

The circumstances in which an apology will be ordered and can therefore be seen as a legal remedy are very limited. Other than where a statute has clearly conferred the power upon a court to order a party to apologise the courts will not make such an order. An illustration of the court’s reluctance to order a party to apologise and some insight into the reasoning behind the court’s approach is provided by *Summertime Holdings Pty Ltd v Environmental Defender’s Office Ltd* (1998) 45 NSWLR 291.

In this case, an application was made to enforce an agreement to publish an apology. The apology was sought in respect of statements said by the plaintiff to be defamatory of them. The application required the court to decide first whether there was such an agreement and second, whether the court should grant an order akin to specific performance requiring the defendant to publish the apology.

Young J concluded that there was an agreement between the parties to settle their dispute. As to the second question, his Honour stated at 296:

> A court hearing an action in defamation cannot order a defendant to give an apology. All that the court can do is order damages if it finds the defendant liable, though it can take into account the fact that an apology has been given when assessing damages.

While acknowledging that in some circumstances, equity will order a person to make a statement, Young J considered at 297:
[I]t needs to be an exceptional case before the courts should exercise their discretion to grant an order like specific performance to compel a person to give an apology.\(^{13}\)

Despite acknowledging that there would be no difficulty carrying out an order to publish the apology in the agreed terms, and therefore that it was possible for the court to grant the order sought by the plaintiffs, his Honour concluded that it was not appropriate to make the order. As a consequence of his findings, the plaintiffs were entitled to damages for the failure to have the apology published as promised.

The action in this case arose at common law rather than as an action involving conduct that contravened a statute. While common law principles mean that an apology rarely will be a court ordered remedy, the courts will make orders to apologise or retract statements where a statute confers the power on courts to do so. For example, a court may order “that the defendant make a public apology for the infringement” of an author’s moral rights in respect of a work under the *Copyright Act 1968* (Cth).\(^{14}\) Anything done by the defendant to mitigate the effects of the infringement may be taken into account by the court in exercising its discretion as to the appropriate relief.\(^{15}\)

Various anti-discrimination statutes confer power on tribunals to order a respondent or complainant to apologise and make such retractions as considered appropriate by the tribunal. It may also be ordered that the apology or retraction be published and made in such manner as thought fit.\(^{16}\) Other anti-discrimination legislation does not expressly confer the power to order an apology or retraction, but does authorise orders that specific acts be performed.\(^{17}\) This has been held to confer the power to order that an apology be made.\(^{18}\)

In addition, there are situations where orders similar in effect to an apology can be made, including correction and retraction. Examples of this are where there has been misleading or deceptive conduct or false representations made to consumers.\(^{19}\)

Outside the exercise of statutory powers, the law will recognise the terms of a settlement agreement as legally binding under the law of contract. In other words, it is always open to the parties to decide that an apology is a satisfactory term on which to settle a dispute, and the terms on which it is given and received. In this sense, an apology is an outcome of negotiation that is always available to the parties to a dispute which can be agreed upon at any time, regardless of whether litigation has been commenced. As we have seen in

\(^{13}\) *Summertime Holdings Pty Ltd v Environmental Defender’s Office Ltd* (1998) 45 NSWLR 291 at 297.

\(^{14}\) Section 195AZA(1)(d).

\(^{15}\) Section 195AZA(2)(d).

\(^{16}\) For example *Anti-Discrimination Act 1977* (NSW) s 113, see *Western Aboriginal Legal Service Limited v Jones* [2000] NSWADT 102; *Anti-Discrimination Act (NT)* s 89, which confers powers on the Anti-Discrimination Commissioner; *Anti-Discrimination Act 1991* (Qld) s 209.

\(^{17}\) *Equal Opportunity Act 1997* (Vic) s 136(a)(iii); *Equal Opportunity Act 1984* (SA) s 96; *Equal Opportunity Act 1984* (WA) s 127; *Anti-Discrimination Act 1998* (Tas) s 89.

\(^{18}\) *De Simone & De Simone Consulting Group Pty Ltd v Bevacqua* (1995) 69 LIJ 668n.

\(^{19}\) For example s 87 *Trade Practices Act 1974* (Cth) confers a wide range of powers that the court can make to compensate and avoid further loss resulting from wrongful conduct.
Summertime Holdings, however, there are significant limitations to the enforceability of such an agreement.

To mitigate the consequences of wrongdoing

There are practical ways in which an early apology can mitigate loss and avoid protracted legal proceedings. There is published research and abundant anecdotal evidence that shows that people would not have taken legal action if there had been some early acknowledgment that something had gone wrong, resulting in their loss and suffering. Another obvious saving when an issue or dispute is resolved early rather than late, possibly assisted by the offer of an apology, is the financial and emotional costs associated with litigation.

Where legal liability is established in actions where there is compensation for injury to feelings, an early apology will be significant, assuming of course that it is a genuine apology and that it is an appropriate form of solace. This will be relevant where the damages are intended to compensate for injury to feelings. Where a person has been defamed, for example, injury to feelings is presumed and damages are intended to compensate for that. An apology can mitigate the amount of damages awarded against a defendant. The publication of an apology does not of itself constitute a common law defence to an action for defamation. The court has stated that it is:

the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm [the defamatory publication] has done or the hurt that it has caused.

In civil actions, where the damages can be aggravated by the manner in which the wrong is committed and by the conduct of the wrongdoer until the time of judgment, the offer of a genuine apology will also be significant to a court’s decision to award aggravated or exemplary damages. In this way an assessment of damages will take into account a refusal to make an apology, and the manner in which an (in)adequate apology is given.

Examples of actions where an apology will be relevant to an assessment of damages are wrongful arrest, false imprisonment, trespass, deprivation of liberty, harassment and discrimination. In assessing damages a court will take into

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20 The Literature Review by Associate Professor Merrilyn Walton compiled for the Open Disclosure Project, established by the Australian Council for Safety and Quality in Health Care, reports on studies that show that parties often only brought proceedings because they could not obtain information about an adverse incident, and no explanation or apology was forthcoming. See: http://www.nsh.nsw.gov.au/teachresearch/cpiu/open_disclosure.shtml#Legal%20Review last viewed 8/12/2004.

21 A mere refusal or failure to apologise is relevant to general compensatory damages and is capable of being included as a component of damages in proceedings for defamation, Clark v Ainsworth (1996) 40 NSWLR 463.

22 This is not to say that offering an apology cannot have any legal effect. In defamation cases, a party can plead in mitigation of damages that an apology was offered before proceedings were commenced (the relevant statutory provisions are based on s 1 of Lord Campbell’s Libel Act 1843, 6 & 7 Vic c 96).

23 The timing of an apology is significant. It may have little impact if it is “too little too late”, eg Carson v John Fairfax and Sons Ltd (1993) 178 CLR 44; 67 ALJR 634; 113 ALR 577; [1993] Aust Torts Reports 81-227.

account all conduct of the wrongdoer up to the time of the verdict which may have increased the injury to the victim’s feelings, including anxiety and uncertainty in litigation and the absence of apology.25

In criminal proceedings, an expression of remorse by a defendant, including an apology, will be a factor that can be pleaded in mitigation of sentence.26 In some jurisdictions an apology will be specified as a factor to be taken into account in sentencing.

In many other civil actions, for example negligence or breach of contract, the law does not seek to protect against injury to feelings in the same way, and therefore the fact that an apology has or has not been offered by a wrongdoer is not relevant to an assessment of damages.27

As a defence

The offer or making of an apology is not generally recognised by the common law as a defence to liability. This is because it cannot detract from the wrongdoing in a legal sense, but can only be significant to the impact of that wrongdoing. Even in defamation cases, an apology is often only capable of being a complete defence if it is accompanied by a payment into court. There have been legislative developments and law reform proposals in Australian jurisdictions to introduce a defence of prompt correction. It is thought that a defence of this nature might go a long way to overcoming the current impediments to the prompt offer of a retraction and apology.

In relation to criminal conduct, in particular conduct by juveniles, an apology may be regarded as grounds for no further action to be taken. The Juvenile Justice Act 1992 (Qld), for example, provides that the administration of a caution to a child for an offence may involve the child apologising to the victim of the offence.28

An apology may be protected as a “benevolent gesture”

The benefits of “benevolent gestures” have been recognised in legislation. An apology is one form of benevolent gesture. The following provision from the California Evidence Code is an American example of “benevolent gesture” legislation:

The portion of statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.29

26 For example, see Murphy J in Neal v The Queen (1982) 149 CLR 305 at 315.
27 Although apology is not relevant to the assessment of negligence, it may become relevant if exemplary damages are available.
28 Section 16. For comment see Editorial Note: ‘Relevance of an Apology in the Sentencing Process’ (1997) 18 Qld Lawyer 80.
29 Section 1160.
A recently enacted Australian example of “benevolent gesture” legislation was introduced into the Victorian *Coroners Act 1985* in 2002.\(^{30}\) Section 18A provides that the giving of an apology or reducing or waiving fees that are payable for service to the person who has died does not constitute an admission as to how death occurred or the cause of death. This does not prevent a coroner from taking an apology into account for a purpose other than determining the cause of death nor does it affect the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue. For example, a statement may provide evidence as to whether a person was in a location immediately before their death, where the location is in dispute.\(^{31}\)

Consistent with the new civil liability provisions,\(^{32}\) for example s 5AF *Civil Liability Act 2002 (WA)* set out above in “Legislative definitions”, the intent behind these “benevolent gesture” provisions is to clarify the “safe” legal status of expressions of sorrow, regret, or sympathy. These are examples of what is referred to in this article as “no admission” apologies. These efforts to encourage the use of apologies and other benevolent gestures can be seen in part as an attempt to encourage the settlement of disputes by protecting a party who seeks to convey sympathy and regret in circumstances where they do not mean to accept legal liability for events that have occurred.

**An apology is not necessarily an admission of liability of wrongdoing**

There is no precise wording for what will constitute an apology that does not constitute an admission of fault. “I am sorry this has happened” is an example of what would be seen by most people as an apology that could not be construed as an admission of fault. As we have seen above, expression of sorrow, regret, or sympathy, of itself, is not an admission of fault. There is, of course, a danger that the party receiving an apology couched in these terms might perceive it to be an admission, and that itself may encourage them to commence legal proceedings to use it to build a case for liability. What is clear is that it is possible to offer an apology that is not an admission of liability.

A comprehensive review of the law impacting on the handling of adverse events in hospitals and medical practice was conducted as part of the Open Disclosure Project in NSW.\(^{33}\) In the Review, the following points are made about apologies in the context of concerns about liability for medical negligence. As stated in the Review, with negligence (a common form of liability for loss and injury), even if an apology does amount to an admission, there are other elements to be established.

- Saying “it was my fault” does not prove causation conclusively. A defendant could lead evidence to show that they did not cause the accident. Very few incidents that cause harm or may warrant an apology are caused by negligence, as that term is understood in law. It

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\(^{30}\) Section 18A was inserted by s 12 of the *Wrong and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic).


\(^{32}\) Above, n 12.

is often difficult to prove all the elements necessary to make out negligence in law.
  
  • Even if causation is established, other elements of the action must be proved, eg breach of the requisite standard of care.

Further points made in the *Open Disclosure Legal Review* that are relevant here are:
  
  • A correctly worded apology may help manage an adverse event without damaging one’s legal position, and
  
  • An explanation of the facts is different from an admission of liability for negligence.

In one survey of three different areas of American law, it was concluded that judges and juries understand that expressions of regret, remorse, and apology, are not necessarily admissions of responsibility or liability. The authors conclude that this attitude serves the public interest because such expressions have the potential to reduce the number of lawsuits, rather than attract litigation.\(^{34}\)

**The benefits of an insurance policy will not necessarily be lost**

A party may be concerned that they will invalidate their insurance cover by making an apology. It is common for insurance policies to forbid admissions of liability. This is particularly the case with professional indemnity insurance. Where indemnity is provided against claims by third parties, often a policy will state that an assured is forbidden to settle or compromise a claim made by a third party, or to make an admission of liability or a payment in respect of such a claim without the written consent of the insurer.\(^{35}\)

While a term of this type in an insurance contract is enforceable, an insurer denying liability must act in good faith as required by the *Insurance Contracts Act 1984* (Cth). This duty of good faith includes the granting of consent to the making of admissions and to the compromise of claims in appropriate cases.\(^{36}\)

Where the insurance policy has a clause providing that no admission of liability may be made without consent and no settlement may be made without consent, that clause has no effect if the insurer denies liability to indemnify or refuses to make a decision one way or the other despite a request to do so under s 41.\(^{37}\) In other words, an assured can require the insurer to elect whether to admit that the contract applies to a claim or to conduct negotiations or legal proceedings in respect of the claim. If the insurer does not do so in a reasonable time the claim cannot be reduced because the assured breached the contract by admitting liability or consenting to settlement.

Even where there is a breach of the insurance contract because of breach of such a clause, s 54(1) of the *Insurance Contracts Act 1984* (Cth) provides that the insurer’s liability is only reduced to the extent that its interests have been prejudiced by breach of a condition. This is an important limitation on the effect of such clauses.


\(^{36}\) Section 41(1).

\(^{37}\) Section 41 *Insurance Contracts Act 1984* (Cth). For discussion see Walsh, n 8 at 221-222.
The authors of the Open Disclosure Project Legal Review, following a review of the legal commentary on the effect of terms limiting the liability of an insurer and ss 41 and 54 of the Insurance Contracts Act 1984 conclude that:

[A]bsent an express admission of liability, apologies will not compromise an entitlement to indemnity.\(^{38}\)

Of course, for these provisions to become relevant there must be an admission of liability. If there is no admission of liability there is no breach of the contract. A “safe” apology in the form of a “no-admission” apology will not be in breach of the insurance contract and therefore will not invalidate a claim. If an admission were made in privileged circumstances, that is an “inadmissible apology”, it may be inadmissible as evidence to prove that an assured had breached a term of their insurance policy.

**WHAT ARE THE BENEFITS, FROM A LEGAL PERSPECTIVE, OF MAKING OR RECEIVING AN APOLOGY IN MEDIATION?**

Mediation provides both an opportunity and a safe process for parties to look for ways to resolve their dispute. From a legal perspective, the circumstances in which an apology is offered can be very significant. First, parties may wish to use a confidential process. Second, when an apology is offered in the course of settlement negotiations or mediation, it will attract legal privilege. In these circumstances an apology that constitutes an admission of fault or liability may still be “safe”. These features are not unique to mediation, as it is common for parties who have negotiated a settlement agreement to enter into a confidentiality agreement to keep the terms of their settlement confidential, and common law privilege applies to “without prejudice” settlement negotiations. However, the privilege conferred on mediation communications in some circumstances is wider than common law privilege.

**Confidentiality**

The confidential nature of mediation is conducive to apologising. A party who would be unwilling to admit wrongdoing in legal proceedings may well be prepared to apologise in mediation for suffering and harm that has obviously occurred. To the extent that a party is willing to apologise but is concerned that this will be seen by the other party, or others, including the press, as an admission of wrongdoing, the confidentiality that mediation offers will be significant.

It needs to be noted though that if an apology or any other communication contains factual information that is independently provable, the fact that the mediation communications are confidential (either by statute or agreement between the parties) will not necessarily prevent those facts being proved and relied upon in subsequent proceedings.\(^{39}\)

Thus there are limits to the protection provided by confidentiality agreements. The remedies available against a person who breaches confidentiality are limited in scope and effectiveness. Even if damages can be shown to result from a breach of confidentiality, a damages remedy may fall short of compensating from the harm resulting from the breach. Further, a party

\(^{38}\) See n 33, at 32.

\(^{39}\) AWA Ltd v Daniels (1992) 7 ACSR 463.
to mediation or a mediator may be compelled in certain circumstances to make disclosure of what was said in mediation or to give evidence in later court proceedings. It is here that the tension between confidentiality and admissibility of evidence is most pronounced.

Privilege

The common law privilege attaching to “without prejudice” communications is potentially available to the parties using mediation. Privilege attaches to “without prejudice” communications, either by common law principles or by statute. An example is s 131 of the Evidence Act 1995 (Cth), which applies to settlement negotiations. Legal professional privilege will extend to documents and other communications that come into existence for the purpose of either legal proceedings or obtaining legal advice and can be claimed by the parties. There is, however, no common law privilege for mediators and there is no authority for extending the “without prejudice” privilege to mediators who assist negotiations between the parties. This means that, without statutory or effective contractual privilege, a mediator can become a compellable witness.

In some areas of mediation, communications between parties during mediation are privileged by statute. Privilege can also be conferred by agreement between the parties. While an agreement will have contractual force between the parties, however, a party to mediation, including a mediator, may still be compelled to give evidence in court proceedings.

An example of statutory privilege is s 19N of the Family Law Act 1975 (Cth), which provides in subs (2) that evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible. An important exception inserted in 2003 as subs (3) provides that privilege does not apply to an admission or disclosure by an adult that indicates that a child has been abused or is at risk of abuse unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

Therefore, in family counselling and mediation, a party may safely make an apology in mediation that goes beyond a “no admission” apology that is still “safe” as an “inadmissible” apology. As seen in subs (3) however, there are exceptions to the privilege. Case law on s 19N has confirmed that anything said or any admission made in confidential marriage counselling is immune to admission into evidence and from pre-trial production and inspection.

It is now standard for statutory privilege to be conferred on court annexed mediation communications. For example, s 71 of the Supreme Court Act 1936 (WA) applies to court directed mediation, and states that anything said or done, any communication, whether oral or in writing, or any admission made, in the course of or for the purposes of an attempt to settle a proceeding by mediation under direction is to be taken to be in confidence and is not admissible in any

40 See for example s 72 Supreme Court Act 1936 (WA).
41 For example recently amended s 19N Family Law Act 1975 (Cth).
proceedings before any court, tribunal or body. A mediator cannot be compelled to give evidence of privileged communication or document or to produce a document or a copy of a privileged document.

There are certain exceptions to the statutory privilege and in certain circumstances a mediator may disclose information obtained in the course of or for the purpose of carrying out mediation under direction. 44

In addition to statutory privilege, a public interest immunity argument may be made, as in Centacare v AG [1998] Fam CA 109 and Anglicare WA v Department of Family and Children’s Services [2000] WASC 47. In neither of these cases was it necessary for the court to decide the public interest argument, as the issue was determined on the basis of s 19N.

The important point here for mediators is that while the privileged nature of mediation should encourage full and meaningful apologies, there is a need to be aware of applicable statutory provisions and the legal limits within which that privilege operates.

CONCLUSION

It is possible to conclude that, contrary to popular belief, the law does provide a safe way for parties to a dispute to apologise. There are clear indications that the law does not regard expressions of regret, sorrow, or sympathy as admissions or fault or liability. Thus there is scope for apologies to be made that do not constitute an admission of fault. There are also legal principles that recognise that an apology has the capacity to reduce certain types of hurt, just as a failure or refusal to apologise can aggravate that hurt. Where statutory privilege is attached to mediation, there is also scope for safely offering an apology that acknowledges some wrongdoing. For mediators and the parties to a dispute, there are many factors that will influence whether and when they will make or receive an apology. Mediators who have a clear understanding of the way that the law views apologies will be able to assist the parties to appreciate the consequences of their choice.

44 See Supreme Court Act 1936 (WA) ss 71 and 72.