

Special issue on Apologies: Introduction

ROBYN CARROLL*
PRUE VINES*

Carroll, R., Vines, P., 2017. Special issue on Apologies: Introduction. *Oñati Socio-legal Series* [online], 7 (3), 365-369. Available from: <https://ssrn.com/abstract=3013381>



Abstract

What is the place of apology in law? What is the meaning of apology in a complex landscape of meanings based on a socio-legal appreciation of legal concepts? This special issue explores the place of apology in the legal system within three broad inter-related themes: the meaning of apologies; the effectiveness of laws protecting apologies and the role of apologies as remedy, redress and reparation. The articles focus on apologies within the legal system and encompass what happens when a person apologises and how the legal system responds to that apology, the impact of an apology and its use in the criminal justice system and on civil liability, how this differs across different legal systems and societies, and what legal systems can learn from sociology, philosophy, psychology and economics in relation to apology.

Key words

Apology; law; legal system; socio-legal

Resumen

¿Cuál es el lugar de la disculpa en el derecho? ¿Cuál es el significado de la disculpa en el complejo paisaje de significados basado en una comprensión sociojurídica de los conceptos jurídicos? Este número analiza el lugar de la disculpa en el sistema legal, a partir de tres temas generales interrelacionados: el significado de las disculpas; la efectividad de las leyes que protegen las disculpas y el papel de las disculpas como remedio, compensación y reparación. Los artículos se centran en las disculpas dentro del sistema jurídico e incluyen qué ocurre cuando una persona pide perdón, y cómo el sistema jurídico responde a esa disculpa, el impacto de una disculpa y su uso en el sistema de justicia penal, y en la responsabilidad civil, cuáles son las diferencias entre los diferentes sistemas legales y sociedades, y qué

* Robyn Carroll is a Professor of Law at the University of Western Australia. Robyn teaches and researches civil remedies, dispute resolution, contracts and family law and has published extensively on apologies in the law. Robyn can be contacted at the Law School, The University of Western Australia. UWA Law School, M253, 35 Stirling Highway, Crawley, Perth, Western Australia, 6009. robyn.carroll@uwa.edu.au

* Prue Vines is Professor and Co-director of the Private Law Research and Policy Group at UNSW Law School, Sydney, Australia. Her research interests lie in the law of torts (in which she focuses on attribution of responsibility) and the law of succession (in which her major interest is the impact of succession laws on Indigenous people in Australia). She is the author of numerous articles and books on torts and succession law. Professor, UNSW Law School, University of New South Wales, Sydney NSW 2052, Australia. p.vines@unsw.edu.au



pueden aprender los sistemas jurídicos de la sociología, filosofía, psicología y economía, en lo que respecta a las disculpas.

Palabras clave

Disculpas; derecho; sistema jurídico; sociología del derecho

Apologies are part of a wide range of behaviour which takes place in response to harm suffered by a person as a consequence of the actions of another. What is the place of apology in law? The notion of 'place' creates multiple spaces in which the apology may be situated, from within and outside legal systems, within the law, set against the law, situated within dyads or across larger groups. Place can refer to actual sites or to metaphorical places such as systems hierarchies and structures. What is the meaning of apology in a complex landscape of meanings based on a socio-legal appreciation of legal concepts?

The focus on apologies within the legal system is a relatively new area of socio-legal research. Although there has been some discussion of matters relating to apologies in the context of restorative justice and defamation damages, focus on the place of apologies from a socio-legal perspective has been rare. Interest in the place of apology in law has gained impetus from the development of apology-protecting laws in the common law world in the past three decades. In particular, the focus on the apology in all areas of law, going beyond the criminal law and defamation to issues of propensity to sue in private law areas such as the law of negligence, and the possibility of treating the apology as an alternative remedy in private and public law, invites a far more systematic approach to the apology in law than has been considered before. At the same time, interest in the effectiveness of apologies for the purposes of law has created an opening for extensive sociological and psychological research to contribute to our understanding of the place of the apology in law.

The articles collected in this special issue were originally presented at the first international workshop to bring together scholars whose work focusses on apologies within the legal system from different disciplines including law, sociology, criminology, philosophy and psychology. The workshop themes and the articles draw on justice theories including corrective justice and restorative justice, stopping short of transitional justice. Some reference is made at times, however, to the use of apology in political domains.

This special issue focuses on apologies within the legal system and encompasses what happens when a person apologises and how the legal system responds to that apology, the impact of an apology and its use in the criminal justice system and on civil liability, how this differs across different legal systems and societies, and what legal systems can learn from sociology, philosophy, psychology and economics in relation to apology. Comparisons are drawn between different legal systems, particularly civil law and common law systems. There is a focus in the articles on the legal systems of Australia, Canada, England and Wales, the Netherlands, Scotland, Spain and the USA.

The articles consider the place of apology in the legal system within three broad inter-related themes. First we consider the meaning of apologies. Philosophers, moralists and psychologists have argued about whether a 'true' apology requires acknowledgement of fault, an offer of redress, and forgiveness. Theory and evidence from these disciplines has illuminated our understanding of the ordinary use of apologies in everyday life. In their article, psychologists Alfred Allan, Maria Allan and James Strickland argue that knowing how apologies work is vital to the use of apologies in the legal system. In their article they review the research literature and present a psychological perspective of how interpersonal apologies might work in law. James Strickland's article, with Alfred Allan and Maria Allan, considers in detail the acceptance of apologies and conceptualises the acceptance of an apology as an additional, discrete step distinct from forgiveness. Mandeep Dhimi presents an empirical study of how people perceive a partial apology within the context of victim –offender mediation. Dhimi's research addresses a gap in the literature by examining the association between each of five specific components of apology identified as an acceptance of responsibility for the wrongful behaviour and harmful outcomes, an acknowledgement of the harm done and that it was wrong,

an expression of regret or remorse for the harm done, an offer to repair the harm done or make amends, and a promise not to repeat the behaviour in the future (i.e., forbearance) and to work towards good relations. Carrie Petrucci revisits the apology literature and reviews some of the recent research primarily in social psychology, criminology, and criminal justice research. Petrucci argues that the context-specific idiosyncratic nature of apology, with a multitude of variables that have been found to impact its effectiveness at both the contextual and individual levels, lead to the recommendation that apology be implemented with a “less is more” approach to be most effective for youth in juvenile justice.

Prue Vines’ article emphasises the importance of defining apology in legal settings and argues for a stronger emphasis on the idea of the moral community as a method of enhancing the likely effectiveness of apologies in the legal context. Vines regards the moral community as the referent for both apologiser and the person apologised to, recognising that in each case the moral community may well be the determinant of that person’s view of what should or should not be apologised for. This therefore means that the most effective apology in any legal process is likely to be one where the moral community of each party is similar or the same.

The second area of inquiry concerns the effectiveness of laws protecting apology and is a significant aspect of the research on apologies in the law in recent decades. In many jurisdictions in the common law world there is legislation preventing apologies from being relied upon to prove fault or liability in legal proceedings and sometimes providing additional legal protection for an apology. John Kleefeld examines what progress has been made in using the law to promote and protect apologetic discourse and what principles or lessons can be drawn from that experience. Kleefeld summarises apology legislation around the world, overviews the case law that considers that legislation and makes some recommendations on the interpretation of existing laws and drafting of apology legislation. An important and interesting question is whether apology legislation enacted in common law jurisdictions would be valuable in other legal systems. Andrea Zwart-Hink addresses this question in the context of health care disputes in the Netherlands’ legal system. As in many other jurisdictions, although healthcare providers are expected to be open and honest to their patients and to apologise for any medical mistakes, in practice they are still not always completely open about mistakes that have been made. Zwart-Hink argues that advice to exercise caution is not only socially undesirable but also is not substantiated in law.

The third theme explored in this issue is the role of apologies as remedy, redress and reparation in legal systems. Gema Varona Martinez examines the Spanish provisions in criminal law that apply post-sentencing that request an apology by offenders in organized crime, including terrorism. Under these provisions apology is required in order for parole to be granted to an offender. The article explores the gap between the legal provisions and victims’ and offenders’ experiences in cases of terrorism. Jeff Berryman identifies another gap - that between the laws’ historical use of damages to compensate for non-pecuniary losses suffered by tort victims and new research on how hedonic losses are experienced by a victim. This provides an opportunity to review how non-pecuniary losses should be compensated and to consider whether the law can incentivize tortfeasors to offer an apology as an element in mitigating compensatory damages for non-pecuniary loss.

While scholars in both law and moral philosophy frequently grapple with questions surrounding the appropriate responses to harm resulting from unlawful conduct, the category of lawful harm doing has received much less sustained attention. Colleen Murphy, Jennifer Robbennolt and Lesley Wexler consider the place of apology in the context of responding to lawful harm in the context of war. They explore the justifications for offering amends to victims of lawfully caused harm and the nature of amends, including apologies, in this context. Finally, Robyn Carroll, Alfred Allan and Margaret Halsmith consider the place of apologies in mediation and law. The

article reviews the benefits and concerns associated with apologies in mediation and psychological research that reveals the complexity of apologies. The authors provide case examples that illustrate this complexity and indicate ways that mediators working with parties in mediation who have indicated that apologies are important to them might apply this research.