Intention, Negligence and the Civil Liability Acts

Peter Handford
Intention, Negligence and the Civil Liability Acts

The Ipp Report made recommendations designed to limit liability for personal injury resulting from negligence, but the Civil Liability Acts in some jurisdictions are wide enough to cover at least some cases of intentional wrongs. In New South Wales, Victoria and Tasmania, the legislation in the main adheres to the spirit of the Ipp Report’s recommendations by being limited to harm resulting from negligence. In the Northern Territory, the Australian Capital Territory and Queensland, on the other hand, the legislation appears to cover at least some cases of intentional wrongs as well as negligence. South Australia and Western Australia are different again and cannot be placed in either of the main groups. Whether created as a matter of deliberate policy, or simply the product of drafting differences, the disunity produced by the Civil Liability Acts is a complication that the law of torts could well have done without.

Introduction

In a previous article I suggested that the tort of negligence had assumed a perhaps unexpected role in the area of compensation for personal injury.\(^1\) Negligence is a tort which we traditionally associate with careless conduct, whereas trespass to the person has generally been seen as the primary remedy for personal injury intentionally inflicted. However, the position seems to be more complicated than this. Trespass has never been limited to cases where the plaintiff suffers personal injury: as Holt CJ said three hundred years ago, “the least touching of another in anger is a battery”;\(^2\) and trespass remains the only tort available for the protection of these kinds of dignitary invasions. In addition, trespass has never been limited to

---


\(^2\) Cole v Turner (1704) 6 Mod 149.

---
injuries caused intentionally: whatever Lord Denning MR might have said to the contrary in Letang v Cooper [1965] 1 QB 232 at 239,\(^3\) as reflective of the current position in England, in Australia it is quite clear that trespass remains available for cases of harm inflicted directly but negligently.\(^4\) The direct/indirect distinction was the traditional boundary between trespass and case. Negligence, which originated as a form of action on the case, originally lay only for harm caused indirectly. However, in the early nineteenth century the action on the case was extended to injury caused immediately, so long as it was not caused wilfully\(^5\) – so giving the plaintiff a choice of remedies in a case of negligent but direct harm and turning negligence into a general remedy for carelessly caused injuries.

The thesis of the earlier article was that this is not the only case of overlap in the area of fault-caused personal injury. It was argued that negligence has now extended into the area of intentional wrongs\(^6\) – perhaps rational enough if one assumes that the reasonable person would not only avoid unintended injuries by taking reasonable care but also refrain from causing deliberate harm. The argument that negligence embraces intentional wrongs is supported, in Australia at any rate, by a number of leading examples, notably Wilson v Horne (1999) 8 Tas R 363, where the plaintiff was able to sue in negligence for harm resulting from sexual abuse when the running of the limitation period had barred a potential trespass action, and also by various decisions and dicta of the High Court.\(^7\) A final area of overlap is provided

---

\(^3\)“Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage) we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. … If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care.”

\(^4\)Williams v Milotin (1957) 97 CLR 465; McHale v Watson (1964) 111 CLR 384.

\(^5\)Williams v Holland (1833) 10 Bing 112.

\(^6\)A term used in this article to mean cases where the defendant’s conduct is wilful rather than negligent, whether or not the resulting injury is intended in all cases. The cause of action may be trespass to the person, negligence in its extended intentional role, or Wilkinson v Downton [1897] 2 QB 57.

\(^7\)Gray v Motor Accidents Commission (1998) 196 CLR 1 at [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ); New South Wales v Lepore (2003) 212 CLR 511 at [162] (McHugh J) (though see the contrary dictum of
by the doctrine of *Wilkinson v Downton* [1897] 2 QB 57 that a wilful act calculated to cause physical harm is tortious if physical harm results. Some modern authorities suggest that this cause of action has now in effect been subsumed by negligence, others that it retains its distinctive existence, in particular as a remedy for intentional *indirect* harm. The article put forward the view that though the mere existence of a cause of action in negligence for psychiatric injury did not necessarily threaten *Wilkinson v Downton*, the principle of that case might be duplicated by the tort of negligence in its extended intentional role.

Does all this have any practical significance? The aim of the present article is to argue that as tort becomes increasingly dominated by statutes such as the *Civil Liability Acts*, it becomes vitally important to identify the limits of these provisions, especially in the area of harm caused intentionally rather than negligently, and that the relationships between the three torts referred to above play a key part in this process. Statutory modification of the common law of tort is no new thing: ever since the coming of railways in the early nineteenth century, the *Fatal Accidents Acts* have extended the common law by giving a right of action to the relatives of those killed by the wrong of another, and a century later the increasing problem of road accidents resulted in statutory reforms allowing causes of action to survive against

---


9 Eg *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 at [71]-[72] (Spigelman CJ). The authorities in each category were discussed in *Carter v Walker* (2010) Aust Torts Reports ¶82-076 at [270]-[271] (Buchanan, Ashley and Weinberg JJA). *Carter v Walker* held that a person not himself or herself the subject of attack, but who suffers psychiatric injury as a result of an attack on someone else, cannot sue for battery. The plaintiff’s pleadings and argument were very confused. As a result the court came to the conclusion that the case on which the plaintiff principally relied, *Battista v Cooper* (1976) 14 SASR 225, stated a cause of action in battery. However, it is clear from Bray CJ’s reference to Fleming JG, *Law of Torts* (4th ed, Sydney, Law Book Co, 1971) at 32-35 that he was suggesting that the facts of the case (which were not dissimilar to *Carter v Walker*) gave rise to a cause of action under *Wilkinson v Downton*. The Victorian Court of Appeal ultimately considered whether there would be a cause of action under *Wilkinson v Downton* on the facts of *Carter v Walker*, but concluded that it did not extend to cover such a case.

10 See *Carrier v Bonham* [2002] 1 Qd R 474 at [26]-[28] (McPherson JA).

deceased tortfeasors (and also for the benefit of the estates of deceased plaintiffs). But in each case, these very familiar statutes did not attempt to distinguish between different tort causes of action. The *Fatal Accidents Acts* simply refer to a “wrongful act, neglect or default”\(^\text{12}\) and the survival of actions statutes to “all causes of action”.\(^\text{13}\) The *Civil Liability Acts* are different, because they seek to limit their ambit to particular areas of tort law.\(^\text{14}\) The results may not always be what was intended, and are not uniformly satisfactory.

**The Civil Liability Acts**

As is well known, the *Civil Liability Acts* were enacted in each Australian jurisdiction in 2002 and 2003 following the “insurance crisis” and the Report of the Commonwealth Review Panel chaired by Justice David Ipp.\(^\text{15}\) It all happened very quickly. The Panel was set up on 30 May 2002, with a brief to report on some terms of reference by 30 August 2002 and the remainder by 30 September 2002. Three days after the final Report was published, the Finance Ministers of each state and territory met and agreed to implement its recommendations. By this time, the New South Wales *Civil Liability Act* had already been enacted, and similar legislation followed in the other jurisdictions soon afterwards. Further provisions were added by later

---

\(^{12}\) Compensation to Relatives Act 1897 (NSW), s 3(1); Compensation (Fatal Injuries) Act 1974 (NT), s 7(1); Supreme Court Act 1995 (Qld), s 17; Civil Liability Act 1936 (SA), s 23; Fatal Accidents Act 1934 (Tas), s 4; Wrongs Act 1958 (Vic), s 16; Fatal Accidents Act 1959 (WA), s 4(1); cf Civil Law (Wrongs) Act 2002 (ACT), s 24 (“wrongful act or omission”). A “wrongful act, neglect or default” can also include a breach of contract: Woolworths Ltd v Croity (1942) 66 CLR 603.

\(^{13}\) Civil Law (Wrongs) Act 2002 (ACT), s 15(1); Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 2(1); Law Reform (Miscellaneous Provisions) Act 1956 (NT), s 5(1); Succession Act 1981 (Qld), s 66(1); Administration and Probate Act 1935 (Tas), s 27(1); Administration and Probate Act 1958 (Vic), s 29(1); Law Reform (Miscellaneous Provisions) Act 1941 (WA), s 4(1); cf Survival of Causes of Action Act 1940 (SA), s 2(1) (“a cause of action”).

\(^{14}\) The contributory negligence statutes also seek to limit their ambit to particular areas of tort law, while the *Limitation Acts* apply a range of provisions to different torts. These statutes are dealt with in another article on the same theme: see Handford P, “Intention, Negligence and Some Statutory Conundrums” (2010) 18 Tort L Rev 140. The first three paragraphs of this article appear in substantially the same form in the present article.

amendments. Unfortunately, the Acts show all too clearly the signs of having been drafted in a hurry. Moreover, despite the Ipp Report’s strong recommendation for uniform legislation, complete uniformity has not been achieved. No doubt some of the differences are due to policy decisions in each jurisdiction about how much of the Report should be implemented. Other differences have resulted from attempts in each jurisdiction to make the new provisions consistent with that jurisdiction’s own drafting style, or to improve on the models from which they were working. As a result, as the Australian law of torts has become more statute-based, it has become much less uniform.

The particular problem to be examined in this article is the extent to which the Civil Liability Acts cover intentional wrongs as well as harm caused negligently. It is quite clear that the Ipp Report’s aim was to make recommendations which were limited to the law of negligence, consistently with its terms of reference, which required it to “inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death”. Its “overarching recommendation” was that the proposed legislation “should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury and death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action”. In discussing the scope of the review, the Ipp Report said:

---

16 In this article, this legislation is referred to collectively as the Civil Liability Acts. For the major statutes in each jurisdiction, see Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA) (the major civil liability reforms were added, and the title changed from the Wrongs Act to the Civil Liability Act, by the Law Reform (Ipp Recommendations) Act 2004 (SA)); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic) (the major civil liability reforms were added by the Wrongs and Other Acts (Law of Negligence) Act 2003 (Vic)); Civil Liability Act 2002 (WA). The adoption of the civil liability reforms has been more limited in the Northern Territory: see Personal Injury (Liability and Damages) Act 2003 (NT).
17 Ipp Report, n 15 paras 2.1-2.2 and recommendation 1.
18 Ipp Report, n 15 at ix (emphasis added).
19 Ipp Report, n 15 recommendation 2 (emphasis added).
In conformity with the Panel’s Terms of Reference, our reports focus primarily on liability for negligently-caused personal injury and death. We have not considered the law governing liability for negligently-caused property damage and economic loss (although some of our broader proposals and recommendations have implications beyond personal injury law). Nor have we considered liability for intentionally or recklessly caused personal injury and death.20

In spite of this clear limitation, the resulting legislation, at least in some jurisdictions, appears to cover some cases of intentional wrongs as well as negligence. Analysis suggests that the jurisdictions can be divided into three groups. In New South Wales, Victoria and Tasmania, the legislation in the main adheres to the spirit of the Ipp Report’s recommendations by being limited to harm inflicted negligently, in the sense of failure to conform with the normal objective standard of care and skill, and by containing a general exclusion for intentional acts done with intent to cause injury or death. In the Northern Territory, the Australian Capital Territory and Queensland, on the other hand, there is no equivalent general exclusion and the legislation appears to cover at least some cases of intentional wrongs – although this group is nowhere near as homogenous as the first group. This leaves South Australia and Western Australia, two jurisdictions where the drafting of the legislation is so different from that of any other jurisdiction (and from each other) that they cannot meaningfully be placed in either of the two previous categories. Each of these legislative groups will now be considered.

**New South Wales, Victoria and Tasmania**

The Statutory Provisions

Each Part of the Civil Liability Act 2002 (NSW) contains a provision dealing with its application. Part 1A (Negligence), which sets out the general statements as to breach of duty, causation and so on recommended by the Ipp Report, applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise. “Harm” means harm of any kind, including personal injury or death, damage to property and economic loss. Negligence means failure to exercise reasonable care and skill. Part 2, which applies to and in respect of an award of personal injury damages, introduces caps, thresholds and other limitations on the scope of personal injury damages at common law: again it applies regardless of whether the claim for damages is brought in tort, in contract, under statute or otherwise. However, these Parts do not apply to civil liability that is excluded from the operation of these Parts by s 3B, which provides that the provisions of the Act do not apply to or in respect of civil liability and awards of damages in a number of particular instances, including – to use the original wording of s 3B(1)(a) – civil liability in respect of an intentional act done with intent to cause

---

21 This article is confined to an examination of the general provisions on negligence (or breach of duty, or fault) and on personal injury damages. It does not attempt to discuss the ambit of other provisions such as those on mental harm.
22 Civil Liability Act 2002 (NSW), s 5A(1).
23 Id s 5.
24 Id s 11A(1).
25 Id s 11A(2).
26 The section lists a few exceptional provisions which continue to apply.
27 Id ss 5A(2), 11A(1).
28 In New South Wales v Corby [2010] NSWCA 27, Basten JA at [15] said that the statement in s 3B(1)(a) that the provisions of the Act do not apply cannot be read literally or it would exclude its own operation: giving s 3B a sensible construction, in accordance with its apparent purpose, exclusion of the whole Act should not be read as including exclusion of the application of Part 1 (in which s 3B appears).
injury or death or that is sexual assault or other sexual misconduct.\textsuperscript{29} In this article, this category is referred to as the “intentional wrongs exclusion”.\textsuperscript{30}

So, in respect of New South Wales, the Act applies to claims for damages for harm resulting from negligence, but it does not apply to civil liability in respect of intentional acts done with intent to cause injury or death, and the other wrongs covered by the intentional wrongs exclusion. The question we will be asking is whether the restriction to claims for harm resulting from negligence excludes some cases of deliberate wrongdoing not covered by the intentional wrongs exclusion. First, however, we need to look at the statutory provisions of the other two jurisdictions which have been placed in this category.

The equivalent provisions in Victoria are basically similar to those in New South Wales. Rather than enact a \textit{Civil Liability Act}, the legislation implementing the Ipp Report was grafted onto the existing \textit{Wrongs Act 1958} (Vic). Part X contains the negligence provisions equivalent to Part 1A of the New South Wales Act, including definitions of harm and negligence in the same terms as in New South Wales\textsuperscript{31} and a statement that Part X applies

\textsuperscript{29} In 2006, extra words (italicised) were inserted: s 3B(1)(a) now refers to “civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person”. The amendment resulted from the first instance decision in \textit{Bujdoso v New South Wales} [2006] NSWSC 896, which held that the negligent failure by prison authorities to prevent intentional assaults on an offender in custody fell within the intentional wrongs exclusion, so allowing the offender to claim damages free of the limitations imposed by the \textit{Civil Liability Act}. The decision was subsequently reversed on appeal sub nom \textit{New South Wales v Bujdoso} (2007) 69 NSWLR 302. For the earlier proceedings in this case, see \textit{Bujdoso v New South Wales} (2004) 151 A Crim R 235, where the New South Wales Court of Appeal held that the prison authorities had breached a duty of care owed to the offender, and \textit{New South Wales v Bujdoso} (2005) 80 ALJR 236, in which the High Court dismissed the appeal.

\textsuperscript{30} Some other Parts of the \textit{Civil Liability Act 2002} (NSW) also create exceptions to the general rule that intentional conduct falls outside the ambit of the Act. Part 2A, which contains special provisions for offenders in custody, applies to and in respect of an award of personal injury damages (s 26B(1)) and contains no intentional wrongs exclusion, which means that in this respect that Act does apply to intentional acts: \textit{New South Wales v Corby} [2010] NSWCA 27, Basten JA at [25]-[28]. Another Part which is exceptional in this respect is Part 7 dealing with self-defence and recovery by criminals, which has been held to apply to a security guard who shot and wounded a burglar who broke into a sports club: \textit{Presidential Security Services of Australia Pty Ltd v Brilley} (2008) 73 NSWLR 241. Ipp JA at [79] confirmed the trial judge’s understanding that this Part applied to intentional acts. Though according to s 51(3) Part 7 does not apply to civil liability excluded from the operation of this Part by s 3B, s 3B(1) says that Part 7 is exempted from the intentional wrongs exclusion.

\textsuperscript{31} \textit{Wrongs Act 1958} (Vic), s 43.
to any claim for damages resulting from negligence regardless of whether the claim is brought in tort, in contract, under statute or otherwise.\textsuperscript{32} Part VB, which applies to an award of personal injury damages,\textsuperscript{33} imposes limitations of a similar kind to those in New South Wales. According to s 28C(2), Part VB does not apply to certain awards of personal injury damages, including an award where the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct\textsuperscript{34} - an “intentional wrongs exclusion” defined in the same terms as in New South Wales.

Tasmania completes the trio of states which adopt the New South Wales approach. One difference which may be more apparent than real is that Part 6 of the \textit{Civil Liability Act} 2002 (Tas) is entitled “Breach of Duty” rather than “Negligence”, and is stated to apply to “civil liability of any kind for damages for harm resulting from breach of duty”.\textsuperscript{35} in other contexts, “breach of duty” has been held to include trespass.\textsuperscript{36} However, “duty” is defined as a duty of care in tort, or a duty of care under contract that is co-extensive with a duty of care in tort, or another duty under statute or otherwise that is co-extensive with either of these duties,\textsuperscript{37} and the section which defines when a breach of duty has been committed\textsuperscript{38} is in the same terms as the New South Wales provision which determines when a person is negligent.\textsuperscript{39} “Harm” is defined in the same terms as in New South Wales and Victoria.\textsuperscript{40} Part 7, which contains the damages limitations, “applies in relation to an award of damages for personal

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{32} Id s 44.
\item \textsuperscript{33} Id s 28C(1).
\item \textsuperscript{34} Id s 28C(2)(a).
\item \textsuperscript{35} \textit{Civil Liability Act} 2002 (Tas), s 10.
\item \textsuperscript{36} For example, limitation periods limited to cases of “negligence, nuisance or breach of duty” have been held to include trespass: see \textit{Stingel v Clark} (2006) 226 CLR 442; \textit{A v Hoare} [2008] 1 AC 844.
\item \textsuperscript{37} \textit{Civil Liability Act} 2002 (Tas), s 3.
\item \textsuperscript{38} Id s 11.
\item \textsuperscript{39} \textit{Civil Liability Act} 2002 (NSW), s 5B (contained in a Division headed “Duty of Care”; the Tasmanian equivalent is entitled “Standard of Care”, which seems much more accurate).
\item \textsuperscript{40} \textit{Civil Liability Act} 2002 (Tas), s 9.
\end{enumerate}
\end{footnotesize}
injury or death resulting from a breach of duty”. However, neither Part 6 nor Part 7 applies to civil liability which is excluded from the Act by s 3B. One of the cases thus excluded from the Act is civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct - the intentional wrongs exclusion also found in New South Wales and Victoria.

Some potentially significant differences emerge from the way these provisions are drafted. It seems clear that the negligence provisions in the three jurisdictions are confined to claims for damages for harm resulting from negligence. If this is so, cases where the harm does not result from negligence will be excluded: this category includes not only those cases falling within the intentional wrongs exclusion, but also any other cases (if there are any such) where the harm does not result from negligence.

In Tasmania, the same must be true of the damages provisions, because Part 7 is stated to apply in exactly the same circumstances as Part 6, namely civil liability of any kind for harm resulting from breach of duty. However, the position may be different in New South Wales and Victoria. In New South Wales, while Part 1A is clearly confined to claims for harm resulting from negligence (as defined), Part 2 is not in terms so confined and may be capable of including some cases where personal injury results from an intentional wrong. Part 1A and Part 2 are both subject to the limitations imposed by s 3B, which means that neither Part applies to cases falling within the intentional wrongs exclusion. However, the more extensive scope of Part 2 may mean that it can apply to cases where the harm does not result

41 Id s 24.
42 Id ss 10, 24.
43 Id s 3B(1)(a).
44 Civil Liability Act 2002 (NSW), Part 1A; Wrongs Act 1958 (Vic), Part X; Civil Liability Act 2002 (Tas), Part 6.
45 As noted above (text to n 24) it applies to and in respect of an award of personal injury damages: Civil Liability Act 2002 (NSW), s 11A(1).
from negligence but which do not fall within the intentional wrongs exclusion - which would have the important consequence that the damages limitations imposed by Part 2 would apply to such cases.46 In Victoria, there is again an apparent difference between Part X, which is limited to negligence claims, and Part VB, which may not be so limited.47 The scope of Part VB is limited by the intentional wrongs exclusion, but there may be cases where the harm does not result from negligence but which are not covered by the intentional wrongs exclusion, to which Part VB may therefore apply, again with the consequence that the limitations on damages imposed by that Part may be applicable.48 (Though there is no intentional wrongs exclusion applying to Part X, the fact that it is limited to negligence claims probably means that there is no need for it.)

This analysis suggests that it is important to know the scope of the intentional wrongs exclusion. This will enable us to ascertain the extent of the category that lies beyond it - the cases where the harm does not simply result from negligence, but which do not involve an intentional act done with intent to cause injury or death, or that is sexual assault or other sexual misconduct.

46 It is noteworthy that s 21 of the Civil Liability Act 2002 (NSW) (which is in Part 2) provides that a court cannot award exemplary or aggravated damages in a personal injury action where the act or omission that caused the injury was negligence, rather than simply saying that a court cannot award such damages in a personal injury action. Alternatively, the scope of Part 2 may be limited by the long title of the Civil Liability Act 2002 (NSW), which says that it is “An Act to make provision for the recovery of damages for death or personal injury caused by the fault of a person …” (emphasis added).

47 As noted above (text to n 33), Part VB applies to an award of personal injury damages: Wrongs Act 1958 (Vic), s 28C(1).

48 The purpose of the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic) (which added Part VB to the Wrongs Act 1958) was (inter alia) “to limit the amounts that may be recovered as damages for death or personal injury caused by the fault of a person” (s 3) (emphasis added).
The Intentional Wrongs Exclusion

In New South Wales, there is now a substantial body of authority on the interpretation of s 3B(1)(a).\textsuperscript{49} In the first case, \textit{McCracken v Melbourne Storm Rugby League Football Club} [2005] NSWSC 107, where the plaintiff sued for injuries caused by a dangerous tackle during a first grade rugby league match, Hulme J held that the exception was not limited to criminal conduct: the tackle was an intentional act done with intent to cause injury, even if the opposing players had not intended an injury as severe as that which had resulted. Because the case fell within the intentional wrongs exclusion, the limitations on damages contained in Part 2 of the \textit{Civil Liability Act} were not applicable.\textsuperscript{50} In other cases involving intentional acts done with intent to cause injury, courts have been able to award exemplary and aggravated damages\textsuperscript{51} – damages which are excluded by the \textit{Civil Liability Act} in cases where the act or omission which caused the injury was negligence.\textsuperscript{52}

Section 3B(1)(a) has a number of elements. It requires, first, the doing of an intentional act. On general principles, this should cover a voluntary act desired by the actor, but where the act is voluntary but not desired the position is less certain.\textsuperscript{53} It has been suggested that the notion of an intentional act is wide enough to include recklessness.\textsuperscript{54}

\textsuperscript{49} For the sake of simplicity, the discussion in this section refers only to s 3B(1)(a) of the \textit{Civil Liability Act 2002} (NSW), though s 28C(2) of the \textit{Wrongs Act 1958} (Vic) and s 3B(1)(a) of the \textit{Civil Liability Act 2002} (Tas) will presumably be interpreted in the same way.

\textsuperscript{50} The plaintiff was subsequently awarded general damages and damages for future expenses, but it was held that he had not suffered any loss of earning capacity: \textit{McCracken v Melbourne Storm Rugby League Football Club} (2007) Aust Torts Reports ¶81-925.


\textsuperscript{52} \textit{Civil Liability Act 2002} (NSW), s 21.


Section 3B(1)(a) is not limited to those who commit assault or other intentional acts in person, but also covers vicarious liability, for example the employer of an over-enthusiastic security guard who assaulted a patron outside a pub.\textsuperscript{55} This is because the liability of the employer is derivative from and not in substance different from that of the employee.\textsuperscript{56} However, negligent failures to prevent assaults by third parties are not within the exception: a first instance decision to the contrary permitting a prisoner assaulted in prison due to negligent supervision by prison authorities to claim full common law damages\textsuperscript{57} was overturned on appeal,\textsuperscript{58} but not before the legislature had enacted the first of several amendments to the Act designed to close this loophole.\textsuperscript{59} In the words of Hodgson JA, the liability itself must be in respect of an intentional act; it is not enough that the liability is for an injury caused by such an act.\textsuperscript{60} The correctness of this approach is confirmed by a case where the licensee and occupier of a pub were sued in negligence for failing to prevent an assault on a patron: Basten JA said that the damages that would have been awarded if negligence had been proved would not have escaped the limitations of the \textit{Civil Liability Act}.\textsuperscript{61} Consistently with these cases, it has also been held that it would be anomalous if corporate plaintiffs bringing an action for loss of the services of their employees could escape the damages limitations of the \textit{Civil Liability Act} to which the employees were subject, even though such actions were not covered

\textsuperscript{55} \textit{Zorom Enterprises v Zabow} (2007) 71 NSWLR 354; see also the High Court Appeal in \textit{New South Wales v Ibbett} (2006) 81 ALJR 427 (the vicarious liability issues were not discussed at any length in the Court of Appeal (2005) 65 NSWLR 445).


\textsuperscript{57} \textit{Bujdoso v New South Wales} [2006] NSWSC 896.

\textsuperscript{58} \textit{New South Wales v Bujdoso} (2007) 69 NSWLR 302.

\textsuperscript{59} \textit{Crimes and Courts Legislation Amendment Act 2006} (NSW); see also \textit{Civil Liability Legislation Amendment Act 2008} (NSW).

\textsuperscript{60} \textit{New South Wales v Bujdoso} (2007) 69 NSWLR 302, at [2].

\textsuperscript{61} \textit{Wagstaff v Haslam} (2007) 69 NSWLR 1, Basten JA at [75] upholding the first instance decision on this point: [2006] NSWSC 294 at [76] (Studdert J).
by any express provision; the companies were in no better position than their human equivalents.  

The intentional act must be done with intent to cause injury or death (or must be sexual assault or other sexual misconduct). It is not necessary to show that the defendant intended to cause the exact injury which occurred: a generalised intention to cause an injury of some sort to the plaintiff, or an intention to cause some injury but not an injury of the severity that occurred, is sufficient to bring the case within the intentional wrongs exclusion. The courts have avoided determining how minor the hurt must be in order to constitute an “injury”, instead deciding the issue on the facts of each case. It is clear that “injury” is not limited to bodily injuries. In *Houda v New South Wales* (2005) Aust Torts Reports ¶81-816, a solicitor in attendance at court to consult with clients was arrested following an altercation with a police officer. He was subsequently successful in an action for false imprisonment, malicious prosecution and assault. Cooper AJ affirmed that the case fell within the intentional wrongs exclusion, since “injury” was not limited to bodily injury but extended to all forms of injury including those inflicted by the police officer in this case. In *New South Wales v Ibbett* (2005) 65 NSWLR 168, where a police officer attempting to arrest the plaintiff’s son briefly pointed a pistol at the plaintiff, Spigelman CJ held that “injury” in

---

63 See eg *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107; *New South Wales v Ibbett* (2005) 65 NSWLR 168; *Williamson v New South Wales* [2010] NSWSC 229. Compare *Coyle v New South Wales* [2006] NSWCA 95, where the trial judge found that the defendant’s assault was an intentional act, but there was no intention to cause injury, and so the requirements of s 3B(1)(a) were not satisfied.
64 *Faz v Carter* [2006] NSWSC 771.
66 But an intention to cause injury to someone else may not be sufficient to bring the case within the intentional wrongs exclusion. In *Drinkwater v Howarth* [2006] NSWCA 222, where D pushed X towards P, causing P to fall and injure his ankle, the trial judge had ruled that the case did not come within the intentional wrongs exclusion. Basten JA at [10] left the point open.
67 Eg *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107.
s 3B(1)(a) should be given its natural and ordinary meaning, and covered the harm caused by apprehension of physical violence.\textsuperscript{69}

It is not necessary to establish that the intentional act was done with intent to cause injury or death if it is sexual assault or other sexual misconduct. In cases of sexual assault, it is likely that there will in any case be an intention to cause injury.\textsuperscript{70} It has been held that “other sexual misconduct” is wide enough to cover an improper sexual relationship between doctor and patient.\textsuperscript{71}

Independently of s 3B(1)(a), intentional wrongs will escape the \textit{Civil Liability Act} if they involve infringements of interests that do not relate to personal injury. Part 2 of the Act “applies to and in respect of an award of personal injury damages”.\textsuperscript{72} It follows that Part 2 will not apply if the damages claimed are not damages that relate to the death or injury of a person. In \textit{Houda v New South Wales}, Cooper AJ ruled that the defendants, by falsely imprisoning the plaintiff, had done an intentional act intended to cause injury to the plaintiff in the sense of depriving him of his liberty; but he also said that false imprisonment and malicious prosecution involve abuse of the process of the system of justice and injuries to reputation, which were injuries of a kind which could not be described as personal injury, and that this was an additional reason why the damages limitations in the Act did not apply.\textsuperscript{73}

\textsuperscript{69} \textit{New South Wales v Ibbett} (2005) 65 NSWLR 168 at [11]-[12]. Ipp JA at [123]-[124] agreed that “injury” in s 3B(1)(a) was not confined to personal injury as defined by the Act. Ipp JA also suggested that anxiety and distress could be an impairment of a person’s mental condition and so come within the \textit{Civil Liability Act} definition of personal injury, but Spigelman CJ (at [22]) took a different view. Basten JA did not consider any of these issues.

\textsuperscript{70} See \textit{Koh v Ku} [2009] NSWDC 264.

\textsuperscript{71} \textit{Lee v Fairbrother} [2009] NSWDC 192.

\textsuperscript{72} \textit{Civil Liability Act} 2002 (NSW), s 11A(1).

\textsuperscript{73} \textit{Houda v New South Wales} (2005) Aust Torts Reports ¶81-816, Cooper AJ at [348]-[358]; see also \textit{Craftsman Homes Australia Pty Ltd v Channel Nine Pty Ltd} [2006] NSWSC 1297.
Intentional Wrongs not falling within the Intentional Wrongs Exclusion

Are there some other cases of wrongs which have an intentional element, but which do not come within the intentional wrongs exclusion, and to which some parts of the civil liability legislation in New South Wales and Victoria\textsuperscript{74} may therefore apply? It is suggested that this question can usefully be approached by looking at the various potential causes of action for intentional and negligent harm to the person which were noted in the introduction to this article. It goes without saying that the \textit{Civil Liability Acts}, and specifically the Parts of the New South Wales, Victorian and Tasmanian Acts dealing with negligence and breach of duty, apply to the standard action in negligence for carelessly caused personal injury. There seems no reason why such provisions should not also apply to an action for negligent trespass, because this action, like negligence, is based on a failure to exercise reasonable care and skill, and it is clear that the form of action is immaterial.\textsuperscript{75} Though there are reasons why a plaintiff might prefer to sue in trespass in certain circumstances, for example because of the more favourable burden of proof,\textsuperscript{76} it would be anomalous to allow a plaintiff to evade the \textit{Civil Liability Acts} just because the harm was directly caused.

Actions for trespass to the person normally involve intentional conduct.\textsuperscript{77} Trespass to the person is an appropriate cause of action in cases of assault and battery causing personal

\textsuperscript{74} See above, text to \textit{nn} 45-48.

\textsuperscript{75} See eg \textit{Civil Liability Act} 2002 (NSW), s 5A(1), providing that Part 1A applies to all claims for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise. In \textit{New South Wales v Ibbett} (2005) 65 NSWLR 168, a case of trespass and assault by two police officers, it was argued that the case did not fall within the intentional torts exclusion because it was possible to sue in trespass on the basis of negligent conduct. Spigelman CJ (at [19]) rejected this submission because the case had been conducted on the basis that the officers had acted intentionally; presumably he would not have accepted an argument that the availability of trespass for harm caused negligently but directly would take the case out of the \textit{Civil Liability Act}.

\textsuperscript{76} In trespass, it is generally held that the burden is on the defendant to disprove negligence: \textit{McHale v Watson} (1964) 111 CLR 384.

\textsuperscript{77} Though there is no need for the consequences of the conduct to be intended; see eg Trindade F, Cane P and Lunney M, \textit{The Law of Torts in Australia} (4th ed, Melbourne, Oxford UP, 2007) at 38-44; see also Cane P.
injury.\textsuperscript{78} In such a case, because there is an intentional act done with intent to cause injury or death, the \textit{Civil Liability Acts} will not apply. The most important consequence of this is that an action in trespass for personal injury will not be caught by the damages restrictions imposed by Part 2. Trespass to the person is actionable without proof of damage and such actions often involve infringements of interests which are different from personal injury, such as freedom from unwanted touching. According to Spigelman CJ in \textit{New South Wales v Ibbett}, such cases also come within the intentional wrongs exclusion,\textsuperscript{79} though there is no clear endorsement of this point by the other judges.\textsuperscript{80}

Trespass to the person is not the only cause of action available for intentionally caused personal injuries. Recent authorities confirm that an action in negligence may lie in respect of intentional conduct,\textsuperscript{81} and it appears that a wilful act calculated to cause physical harm continues to give rise to a discrete cause of action under the rule in \textit{Wilkinson v Downton}.\textsuperscript{82} Do these instances suggest the existence of a category where the harm can be said to have been caused intentionally rather than negligently, and yet not amount to an intention to cause injury or death, so falling outside the intentional wrongs exclusion? If the plaintiff sues in negligence for harm caused intentionally, it may be difficult to escape the negligence provisions of the \textit{Civil Liability Acts} by arguing that the action is not one for damages for harm resulting from negligence in the sense of failure to exercise reasonable care and skill: a reasonable person strives not only to avoid causing harm by carelessness, but also to avoid

\textsuperscript{78} Eg \textit{Lane v Holloway} [1968] 1 QB 379. In \textit{King v Greater Murray Area Health Service} [2007] NSWSC 914 it was held that a claim for injuries resulting from assault and battery was a personal injury claim for costs purposes under the \textit{Legal Profession Act 1987} (NSW).

\textsuperscript{79} (2005) 65 NSWLR 168 at \textsuperscript{11}-\textsuperscript{12}.

\textsuperscript{80} See above, n 69.

\textsuperscript{81} See above, text to nn 6-7.

\textsuperscript{82} See above, text to nn 8-10.
intentional injury. On the other hand, an action under Wilkinson v Downton alleges that injury results from conduct calculated to cause physical harm, and the survival of this as an identifiable principle of tort liability depends on it being seen as distinguishable from merely careless behaviour.

Some of the cases in which negligence was utilised as a cause of action for an intentional wrong clearly fall within the scope of the intentional wrongs exclusion. For example, in cases such as Gray v Motor Accidents Commission (1998) 196 CLR 1 and Cusack v Stayt (2000) 31 MVR 517, where the defendant deliberately drove a car at the plaintiff, and Lamb v Cotogno (1987) 164 CLR 1, where the defendant veered from side to side in an attempt to shake the plaintiff off the front of his car, there was clearly an intention to injure, and Wilson v Horne was an action for sexual abuse. However, there are other cases where actions were brought in negligence in respect of acts which were intentional rather than negligent, and yet it may not have been possible to say that there was an intention to cause injury or death. For example in Hayward v Georges Ltd [1966] VR 202, the plaintiff was thumped on the back by a fellow-employee, boisterously but without hostile intent, while standing on a stool inspecting a tea-urn: it was held that all the elements of negligence were present. In Poland v John Parr & Sons [1927] 1 KB 236, the well-known case in which a servant saw a small boy attempting to steal a sack of sugar from his master’s wagon and administered a cuff on the ear, which caused the boy to fall under the wheels of the wagon, it

---

83 In Drinkwater v Howarth [2006] NSWCA 222, Basten JA (at [13]) suggested that s 5B of the Civil Liability Act 2002 (NSW), setting out the test for when a person is negligent, may apply to a deliberate act taken without due care.
84 See Handford, n 1 at 54-61; Peter Handford, Mullany and Handford’s Tort Liability for Psychiatric Damage (2nd ed, 2006) pp 683-691.
85 (2000) 31 MVR 517. In Zorom Enterprises v Zabow (2007) 71 NSWLR 354, a case of assault by a security guard, which was held to fall within the intentional wrongs exclusion, the trial judge rejected an alternative claim in negligence: Basten JA at [6].
86 In Lee v Fairbrother [2009] NSWDC 192 (above n 71), a case of sexual abuse falling within s 3B(1)(a) of the Civil Liability Act 2002 (NSW), the action was brought in negligence.
87 Though this may depend on the interpretation of “injury”: see the discussion of New South Wales v Ibbett (2005) 65 NSWLR 168, above, text to n 69.
is possible that there may not have been an intention to injure: an action was brought in negligence and the employer was held vicariously liable. In *Hackshaw v Shaw* (1984) 155 CLR 614, another well-known case, the plaintiff’s boyfriend had driven his car onto the defendant’s land at night and was filling the tank from a petrol bowser when the defendant, who had been lying in wait, fired at the car to discourage him, not knowing that the plaintiff was in the passenger seat. He clearly had no intention to injure the plaintiff and if the gun was directed well away from the boyfriend he may perhaps not have had the intention to injure anyone, though his conduct could clearly be regarded as reckless. Building on earlier authorities on occupiers’ liability to trespassers, the High Court held that the defendant was liable in negligence. 88 There are some cases in which it has been held that exemplary damages could be awarded in a negligence action because the defendant had acted in contumelious disregard of the plaintiff’s rights: 89 again, it might be difficult to establish an intention to injure in such cases.

All these cases can perhaps be compared with *McCracken v Melbourne Storm Rugby League Football Club*, the first case on the intentional wrongs exclusion in the New South Wales *Civil Liability Act*, where it was held that the tackle was an intentional act done with intent to cause injury, though the defendants had not intended an injury as severe as that which occurred. Since the case fell within the intentional wrongs exclusion, the negligence provisions of the *Civil Liability Act* did not apply, and the limitations on damages in Part 2 were not applicable. It is interesting to note that the action was brought in negligence. On appeal, there was some discussion as to whether the action should have been in trespass, but it appeared that the parties did not wish to take up the issue whether the plaintiff’s claim had

88 Compare *Revill v Newbery* [1996] QB 567, where it is more likely that there was an intention to injure (defendant fired gun through hole in door of his shed to discourage intruders on his allotment, and must have realised there was a risk of hitting one of the intruders).

89 Eg *Midalco Pty Ltd v Rabenalt* [1989] VR 461; *Coloca v BP Australia Ltd* [1992] 2 VR 441.
been based on an incorrect cause of action. This seems to have been wise, because it would have made no difference to the ultimate decision.

Similarly, cases invoking the rule in *Wilkinson v Downton* may provide instances where the act is intentional and yet may not involve an intention to cause death or injury, which would mean that they would remain outside the intentional wrongs exclusion and so might be subject to the damages provisions of the New South Wales and Victorian Acts. *Wilkinson v Downton* itself is a good example. When he told the false tale about Mr Wilkinson being injured in an accident, the defendant’s intention was merely to play a practical joke: he did not intend the serious consequences to Mrs Wilkinson’s health that resulted. Wright J held that the defendant’s act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed, and it was no answer to say that more harm was done than was anticipated. This suggests that the case could not be classified as one involving an intentional act done with intent to cause injury or death. The same could be said of many of the cases in which this principle has been followed, where the conduct takes the form of false statements, threats, harassment and the like.

What conclusion can be drawn from this examination of the complex provisions dealing with the scope of the negligence and damages provisions of the civil liability legislation of these three states? In all three, cases falling within the intentional wrongs

---


91 [1897] 2 QB 57 at 59.

92 Eg *Janvier v Sweeney* [1919] 2 KB 316 (threats); *Rahemtulla v Vanfed Credit Union* (1984) 51 BCLR 200 (false accusations); *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 (racial abuse and harassment). For other cases, see Handford, n 84 at 679-683.
exclusion are outside the ambit of the Acts. However, as respects cases which are not based on negligence but which do not satisfy the requirement that there be an intentional act done with intent to cause injury or death, the position may not be uniform. In Tasmania, because Part 7 on damages, like Part 6 on breach of duty, is limited to civil liability for harm resulting from breach of duty, there is no scope for the Act to apply. However, in New South Wales and Victoria, the damages provisions may be wider in scope than those on negligence, and may therefore reach out to cover any action for harm to the person involving some element of intention, provided it does not fall within the intentional wrongs exclusion.

Northern Territory, Australian Capital Territory and Queensland

In the jurisdictions so far dealt with, the Civil Liability Acts have in most respects attempted to implement the basic philosophy of the Ipp Report that the reforms should be limited to claims for damages for personal injury and death resulting from negligence. While the personal injury damages provisions in New South Wales and Victoria may perhaps reach out a little further than this, the spread of the reforms into the area of intentional injuries is controlled by the intentional wrongs exclusion. In the next group of jurisdictions, there is no equivalent of this category. This may suggest that the reforms have a wider reach, and apply to many cases of intentionally caused personal injury.

The Statutory Provisions

The Northern Territory provides the simplest starting point. Wisely, the Northern Territory has adopted fewer recommendations from the Ipp Report than anywhere else. The Personal Injuries (Liabilities and Damages) Act 2003 (NT) contains no statutory statements of the law
on breach of duty, causation and so forth, so in the Northern Territory the basic principles of negligence continue to be regulated almost exclusively by the common law. However, Part 4 of the Act does impose some limitations on the scope of damages awards. The Act applies in relation to all civil claims for damages for personal injuries, other than those claims which are excluded by s 4 of the Act – but there is no exclusion for intentional torts on the lines of the New South Wales s 3B(1)(a).

In the Australian Capital Territory, the civil liability reforms have been consolidated into the Civil Law (Wrongs) Act 2002 along with older statutory provisions on torts. The provisions in the earlier chapters of the Act apply generally to all wrongs, but Chapter 4, which contains the codification of the general principles of negligence relating to breach of duty, causation and so on, is stated to apply to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise. As in other jurisdictions, “harm” is defined to mean harm of any kind, and includes personal injury, damage to property and economic loss, and negligence means failure to exercise reasonable care and skill. In contrast, the provisions limiting the scope of the damages which can be awarded in personal injury actions, which are in Part 7.1 in Chapter 7, apply to all claims for damages for personal injury. The scope of Chapter 4 and Part 7.1 closely mirrors the equivalent provisions in New South Wales – except for the absence of the intentional wrongs exclusion.

In Queensland, there are some important differences. Subject to exceptions not relevant to the present discussion, the Civil Liability Act 2003 applies to any civil claim for

---

93 Eg claims for death or injury resulting from a motor accident, or for damages for dust-related conditions.
94 This also happened in Victoria (see above, text to n 31) and South Australia (see below, text to n 122).
95 Civil Law (Wrongs) Act 2002 (ACT), s 41(1).
96 Id s 40.
97 Id s 93(1).
damages for harm. 98 “Harm” is defined in the usual way to mean harm of any kind, including personal injury, property damage and economic loss. 99 A “claim” is a claim for damages based on liability for personal injury, damage to property or economic loss, whether the liability is based in tort or contract or in another form of action, including breach of statutory duty. 100 Chapter 2, entitled “Civil Liability for Harm”, is not limited to tort, or to negligence. Division 1 deals with the general standard of care. Whereas such provisions in most other jurisdictions define when a person is negligent, the equivalent provision in the Queensland Act states when a person breaches a duty to take precautions against a risk of harm. 101 “Duty” means a duty of care in tort, or a duty of care under contract that is concurrent and co-extensive with a duty of care in tort, or an equivalent duty under statute. 102 In contrast to Division 4 on dangerous recreational activities, which is expressly limited to liability in negligence, 103 Division 1 and the other divisions in Chapter 2 do not contain any express application provisions. Chapter 3 deals with the assessment of damages for personal injury and as in other jurisdictions imposes limitations on the scope of the damages that may be awarded. It applies only in relation to an award of personal injury damages. 104 There is no intentional wrongs exclusion. 105

98 Civil Liability Act 2003 (Qld), s 4(1).
99 Id Sch 2.
100 Ibid.
101 Id s 9(1).
102 Id Sch 2.
103 Id s 17(1).
104 Id s 50.
105 Except in s 52 on exemplary and aggravated damages, considered below, text to nn 116-121.
Application of the Legislation to Intentional Wrongs

On the face of it, the civil liability legislation in these three jurisdictions would seem to apply to all sorts of personal injury claims, including claims for intentional wrongs, because of the absence of any intentional wrongs exclusion equivalent to the New South Wales s 3B(1)(a).

The personal injury damages provisions in all three Acts would seem capable of application to any case involving personal injury, whether intentionally or negligently inflicted, and whether the cause of action is trespass to the person, negligent trespass, or negligence (including its extended application in cases of harm caused intentionally). In the absence of a provision limiting the scope of the Acts in cases of intentional acts done with intent to cause injury or death, or that constitute sexual assault or other sexual misconduct, there would seem to be nothing to prevent the application of the provisions limiting the scope of personal injury damages to cases involving the deliberate use of a motor vehicle to cause injury such as Gray v Motor Accidents Commission and Cusack v Stayt, cases of sexual abuse such as Wilson v Horne, and other cases which in jurisdictions such as New South Wales fall under the intentional wrongs exclusion; in addition, it has been suggested above that there is a category of cases which involve conduct which is more than merely negligent but where the intention falls short of an intent to cause injury or death, and it would seem that the damages limitation provisions in the Northern Territory, the Australian Capital Territory and Queensland must also apply to such cases.

The negligence provisions in the Australian Capital Territory may have a more limited application. The relevant definitions and application provisions are the same as in New South
and it would seem that the result must be similar. However, the position in Queensland is more uncertain. The general application provision in s 4(1) suggests that the Act in general, and Chapter 2 in particular, apply to all civil claims for damages for harm, whether intentionally or negligently inflicted. As far as Chapter 2 is concerned, the only limiting factor is the definition of duty, which limits the ambit of provisions such as s 9 on the test of breach of duty to duties of care.

Cockburn and Madden have argued that despite appearances, the Queensland Act should be interpreted as being limited to claims for personal injury caused negligently. Their starting point is the clear indication in the Ipp Report, which the Civil Liability Act 2003 (Qld) purported to implement, that the reforms were to apply to personal injury caused by negligence and not to intentional torts. They suggest that when s 4(1) of the Act says that it applies to any civil claim for damages for harm, the word “claim” is ambiguous, an argument which they support by comparing the wide-ranging definition of “claim” in the Dictionary section of the Act with s 4(2) and (4), according to which particular provisions of the Act apply only to “a breach of duty” happening on or after a given date. Given that “claim” is ambiguous, they argue that under s 14B of the Acts Interpretation Act 1954 (Qld), a court should be allowed to refer to extrinsic materials such as the Ipp Report and the Explanatory Notes on the Civil Liability Bill which support the view that the Act should be limited to negligence. They note that if it is not possible to adopt this interpretation, the restrictions on

106 See above, text to nn 21-23.
107 There are no negligence provisions in the Northern Territory: see above, text to n 91.
108 Civil Liability Act 2003 (Qld), Sch 2 (above n 102).
110 See above, text to nn 17-19.
111 See above, text to n 100.
112 The Acts Interpretation Act 1954 (Qld), s 14B(3), like similar legislation in other jurisdictions, lists the major categories of extrinsic material to which reference may be made in cases of ambiguity. They include “a report of a royal commission, law reform commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly before the provision concerned was enacted”. The Ipp Report was never
damages will apply to intentional tort cases, as argued above. They suggest that for intentional torts, there is little justification in not making the defendant accept full responsibility for his wrong, and awarding unlimited damages accordingly.

Arguments can be advanced to support the contrary view. Most importantly, it seems that Chapter 3 must apply to all sorts of claims for personal injury damages, including intentional tort claims, because s 52 says that a court cannot award exemplary or aggravated damages in relation to a claim for personal injury damages, but then provides that this restriction does not apply to a claim for personal injury damages if the act that caused the personal injury was an unlawful intentional act done with intent to cause personal injury or an unlawful sexual assault or other unlawful sexual misconduct. If the Civil Liability Act only applied to claims in negligence there would be no need to state such an exception. More generally, the facts that trespass is not limited to intentional conduct, and that the tort of negligence is available for acts committed intentionally,113 show that it is not quite as easy to make a clean separation between intentional torts and negligence as Cockburn and Madden suggest.

Exemplary and Aggravated Damages

As noted in the preceding paragraph, the Queensland Civil Liability Act contains a restriction on the award of exemplary and aggravated damages in a personal injury claim. Two other jurisdictions – New South Wales and the Northern Territory – have imposed a similar limitation, but each of the three operates in different circumstances. The Northern Territory

---

laid before the Queensland Legislative Assembly. However, the listed materials are merely examples of relevant material, so presumably the Ipp Report could be referred to even though it does not fall into any of the listed categories.

113 See above, text to nn 6-7.
restriction is absolute: a court may not award such damages in respect of a personal injury.\footnote{114} Since the Northern Territory legislation applies to all claims for personal injury damages, including those which result from intentional conduct, without any limitation, this absolute prohibition on the award of exemplary and aggravated damages has substantially cut down the scope of the damages available in an intentional tort claim at common law. New South Wales, on the other hand, only prohibits the award of exemplary or aggravated damages where the act or omission that caused the injury or death is negligence.\footnote{115} Queensland occupies a middle position, since it bars the award of exemplary and aggravated damages in relation to a claim for personal injury damages except where the act which caused the personal injury was an unlawful intentional act done with intent to cause personal injury or an unlawful sexual assault or other unlawful sexual misconduct.\footnote{116} As discussed above, there is now a substantial body of case law on the legislative formula found in s 3B(1)(a) of the \textit{Civil Liability Act 2002} (NSW) and similar provisions in Victoria and Tasmania, which requires an intentional act done with intent to cause injury or death, or sexual assault or other sexual misconduct,\footnote{117} but without the extra limitation that it be unlawful. It is not clear which cases held to come within s 3B(1)(a) would be excluded from the Queensland provision because of the need for the act to be unlawful. For example, an affair between a doctor and his patient was held to be “sexual misconduct”,\footnote{118} but could it be said to be \textit{unlawful} sexual misconduct?\footnote{119} It has been suggested that the major effect of the requirement that the conduct be unlawful may be to shift the burden of proof in a trespass action to the plaintiff;\footnote{120} under the current rule, once the elements of the tort have been established, the burden lies on the

\footnotesize\textit{Personal Injuries (Liabilities and Damages) Act 2003} (NT), s 19.\footnote{114} \textit{Civil Liability Act 2002} (NSW), s 21.\footnote{115} \textit{Civil Liability Act 2003} (Qld), s 52.\footnote{116} See above, text to nn 49-73.\footnote{117} \textit{Lee v Fairbrother} [2009] NSWDC 192, above n 71.\footnote{118} The meaning of “unlawful” in this context is not clear. For example, would it cover conduct contrary to codes of ethics or good medical practice guidelines?\footnote{119} Cockburn T and Madden B, “Intentional Torts and the Civil Liability Act 2003 (Qld)” (2005) 25 Qld Lawyer 310 at 320; Cockburn T and Madden B, “Intentional Tort Claims in Medical Cases” (2006) 13 JLM 311 at 323.\footnote{120}
defendant to establish that the plaintiff consented and therefore the defendant’s actions were lawful.\textsuperscript{121} The variations between jurisdictions as to the right of plaintiffs to claim exemplary and aggravated damages in personal injury cases are just one among many examples of the disunity in the law of torts which has been created by the civil liability legislation.

\textbf{South Australia}

In South Australia, the drafting of the \textit{Civil Liability Act} provisions is so different from those of any other state or territory that it cannot safely be placed in either of the groups so far identified. As in Victoria and the Australian Capital Territory, the civil liability provisions have been added to an older Act containing statutory provisions on torts. In recognition of the importance of the changes, the \textit{Wrongs Act} 1936 was renamed the \textit{Civil Liability Act} when the reforms recommended by the Ipp Report were enacted.\textsuperscript{122}

By virtue of s 4(1) the Act applies to the determination of liability and the assessment of damages for harm arising from an “accident”.\textsuperscript{123} “Harm” is defined to include loss of life, personal injury, damage to property, economic loss and loss of any other kind.\textsuperscript{124} “Personal injury” means bodily injury and includes mental injury and death.\textsuperscript{125} An “accident” is an incident out of which personal injury arises and includes a motor accident.\textsuperscript{126} “Motor accident” means an incident in which personal injury arises out of the use of a motor

\textsuperscript{121} See \textit{Secretary, Department of Health and Community Services v JMB and SMB (Marion’s Case)} (1992) 175 CLR 218 at 210-211 (McHugh J).
\textsuperscript{122} By the \textit{Law Reform (Ipp Recommendations) Act} 2004 (SA).
\textsuperscript{123} Section 4(1) goes on to provide that the Act applies to accidents in South Australia, “to the exclusion of inconsistent laws of any other place”, presumably an attempt to overcome any suggestion that the law applicable to an accident in South Australia might be anything other than the \textit{lex loci delicti}.
\textsuperscript{124} \textit{Civil Liability Act} 1936 (SA), s 3.
\textsuperscript{125} Ibid. This means that the reference to “loss of life” in the definition of “harm” may be superfluous.
\textsuperscript{126} Ibid.
vehicle. There is nothing in these provisions to limit “accidents” to cases where personal injury was occasioned negligently rather than intentionally.

Part 6, entitled “Negligence”, contains the provisions on negligence added in 2004. These include the general statement of the standard of care, which as in some other jurisdictions is included in a Division inappropriately named “Duty of Care”. Part 6 does not contain any express application provisions, but is presumably limited to negligence, which is defined to mean failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care. In addition to actions brought in the tort of negligence (or for breach of a contractual or statutory duty of care), the definition of negligence should ensure that Part 6 applies to actions for negligent trespass, and probably also to actions of negligence in its extended application to intentional conduct, by virtue of the application of the standard of reasonable care and skill, since the reasonable person attempts to avoid not only causing harm by carelessness, but also intentionally.

Part 8, which sets out the statutory restrictions on the scope of awards of personal injury damages, applies where damages are claimed for personal injury arising from a motor accident (whether caused intentionally or unintentionally) or an accident caused by negligence or some other unintentional tort or a breach of a contractual duty of care. This Part makes a clear distinction between motor accidents and other cases. In respect of motor accidents, the Act deliberately includes intentional torts, with no intentional wrongs exclusion on the lines

---

127 Ibid.
128 Id s 31(1).
129 Id s 3.
130 Id s 51.
of that in New South Wales, Victoria and Tasmania, whereas in the case of any other kind of accident the damages restrictions in Part 8 only apply to cases of negligence.\textsuperscript{131}

The damages limitation provisions would therefore apply to a case such as \textit{Cusack v Stayt} where the car was deliberately driven at the plaintiff, whether the action was brought in negligence (as happened) or in trespass (which Heydon JA suggested would have been available).\textsuperscript{132} The same applies to other cases involving the use of motor vehicles where the defendant’s actions were more than merely negligent, for example cases in which exemplary damages were available such as \textit{Lamb v Cotogno} and \textit{Gray v Motor Accidents Commission}. However, in other cases where the conduct was intentional but did not involve a “motor accident”, full damages will be available. These include cases such as the sexual assault in \textit{Wilson v Horne} and the rugby tackle in \textit{McCracken v Melbourne Storm Rugby League Football Club}, where the result would be the same in New South Wales by virtue of the intentional wrongs exclusion; but also would appear to include cases which may not fall within that exclusion, such as the boisterous slap on the back in \textit{Hayward v Georges Ltd}. There will be some interesting borderline cases: for example, in \textit{Poland v John Parr & Sons}, if the cart laden with sugar had been propelled by a motor rather than a horse, would the clip on the ear causing the boy to fall under the cart’s wheels have been a motor accident, so bringing it within the Act? The same question could be asked in respect of an old case, \textit{Ward v General Omnibus Co} (1873) 42 LJCP 265, where the driver of a horse-drawn bus aimed his whip at the employee of another company who had jumped onto the bus and struck a

\textsuperscript{131} The \textit{Civil Liability Act 2002 (NSW)} applies to “motor accidents” by virtue of s 3B(2)(e). In \textit{Sheehan v SRA} (2009) Aust Torts Reports ¶82-028, a claim for mental harm suffered by two police officers who acted as rescuers after a major train crash, McColl JA commented (at [84]) that though it was agreed that the case fell to be decided under the \textit{Civil Liability Act} by virtue of s 3B(2)(e), this could only be achieved by regarding the train as a motor vehicle, in that it was propelled by a motor. The decision of the New South Wales Court of Appeal was reversed by the High Court sub nom \textit{Wicks v State Rail Authority (NSW)} (2010) 241 CLR 60, without comment on the issue raised by McColl JA.

\textsuperscript{132} In \textit{Zorom Enterprises v Zabow} (2007) 71 NSWLR 354, a case of assault by a security guard, which was held to fall within s 3B(1)(a) of the \textit{Civil Liability Act 2002 (NSW)}, the trial judge rejected an alternative claim in negligence (Basten JA at [6]).
passenger. These issues arise only because the damages provisions of the South Australian
Civil Liability Act, unlike those in any other jurisdiction, make a distinction between motor
and non-motor accidents.

Western Australia

The Civil Liability Act 2002 (WA) is again so different that it cannot safely be put in the same
category as any other. There are no general application provisions, but instead each Part states
the cases to which it applies. Part 1A is headed “Liability for Harm Caused by the Fault of a
Person” and contains the general provisions which in most other jurisdictions are found in
Parts or Chapters dealing with negligence. Section 5A states that Part 1A applies to any claim
for damages for harm caused by the fault of a person unless the section states otherwise, even if the damages are sought to be recovered in an action for breach of contract or any other
action. “Harm” means harm of any kind, including personal injury, damage to property and
economic loss. Section 5B sets out the circumstances in which a person is liable for harm
caused by that person’s fault. As with the equivalent general statements about breach of duty
in some other jurisdictions, this is contained in a Division rather inappropriately entitled
“Duty of Care”.

Part 2 on awards of personal injury damages contains restrictions on the scope of such
awards generally in line with those recommended by the Ipp Report and now in force in other
jurisdictions. Section 6 provides that Part 2 applies to the awarding of personal injury

133 Civil Liability Act 2002 (WA), s 5A(1).
134 Civil Liability Act 2002 (WA), s 5A(1). Compare Part 1B (mental harm), which applies to any claim for
personal injury damages for mental harm (s 5R(1)); Part 1C (liability relating to public function), which applies
to any claim for damages for harm caused by the fault of a person (s 5V(1)); Parts 1D (good Samaritans) and 1E
(apologies), which apply to civil liability of any kind (ss 5AC(1), 5AG(1)).
135 Civil Liability Act 2002 (WA), s 3.
damages unless the section states otherwise,\textsuperscript{136} even if the damages are sought to be recovered in an action for breach of contract or any other action.\textsuperscript{137} The emphasis on fault is confirmed by the definition of “personal injury damages”, which are damages which relate to the personal injury of a person caused by the fault of another person.\textsuperscript{138}

Parts 1A and 2 are both subject to s 3A,\textsuperscript{139} which provides that these Parts do not apply to damages relating to personal injury caused by an unlawful intentional act that is done with an intention to cause personal injury to a person, whether or not a particular person, or an intentional act the doing of which is a sexual offence as defined,\textsuperscript{140} or sexual conduct that is otherwise unlawful. The effect of s 3A is that the fault provisions in Part 1 and the damages limitations in Part 2 will not apply to such cases.

There is a superficial resemblance to the legislation in New South Wales, in that the general provisions on negligence and on the assessment of personal injury damages are both subject to an intentional wrongs exclusion. However, one feature of the Western Australian legislation which marks it out as different is that it is drafted in terms of liability for fault, rather than negligence. Nothing in the Ipp Report compelled the drafter to adopt this formulation, and it may be unfortunate for a number of reasons. For example it has been suggested that, read literally, s 5B(1), by providing that a person is not liable for harm caused by that person’s fault in failing to take precautions against a risk of harm unless the risk was foreseeable and other stated conditions are satisfied (as compared with equivalent provisions

\textsuperscript{136} Civil Liability Act 2002 (WA), s 6(1).
\textsuperscript{137} Civil Liability Act 2002 (WA), s 6(2).
\textsuperscript{138} Ibid. There may be a few cases in which it is possible to award personal injury damages in cases where no fault is involved, eg for injuries inflicted by animals. In Western Australia strict liability for such injuries is limited to cases where the damage is caused other than by animals straying onto a highway: Highways (Liability for Straying Animals) Act 1983 (WA), s 3(3); Clarke P, “Liability for Animals on the Highway: Legislative Reform in the Commonwealth” (1985) 34 ICLQ 786 at 795-799.
\textsuperscript{139} Civil Liability Act 2002 (WA), ss 5A(1), 6(1).
\textsuperscript{140} By the Evidence Act 1906 (WA), s 36A.
in other jurisdictions which provide that a person is not negligent in failing to take precautions against a risk of harm),\textsuperscript{141} may have made it unnecessary to establish the existence of a duty of care,\textsuperscript{142} perhaps confirming the view expressed long ago by Buckland that duty was “an unnecessary fifth wheel on the coach”\textsuperscript{143}.

The drafting of the relevant provisions in terms of liability for fault suggests more clearly than the equivalent legislation in any other jurisdiction that the general provisions in Part 1A are capable of application in cases involving intentional harm (subject to the intentional wrongs exclusion to be dealt with below). The same can be said of Part 2 on Damages, since “personal injury damages” are defined as damages relating to personal injury caused by the fault of another. In principle, there is no relevant cause of action which cannot be accommodated under the umbrella of fault. Trespass to the person, whether intentional or negligent, negligence (including cases where negligence is used for intentional wrongs), and the Wilkinson v Downton action for acts calculated to cause physical harm – all are forms of fault liability.

The major limitation on the application of the Western Australian provisions in cases of intentional torts is the intentional wrongs exclusion in s 3A, which resembles the equivalent provision in New South Wales, Victoria and Tasmania but contains the extra requirement that the intentional acts listed must be unlawful. The insertion of the unlawfulness requirement means that the most direct parallel is s 52(2) of the Civil Liability Act 2003 (Qld), which however does not function as a general intentional wrongs exclusion

\textsuperscript{141} Eg Civil Liability Act 2002 (NSW), s 5B(1).
\textsuperscript{143} Buckland WW, “Duty to Take Care” (1935) 51 LQR 637 at 639.
but only as a qualification to the banning of exemplary and aggravated damages in personal injury cases.\textsuperscript{144}

**Conclusion**

The foregoing analysis shows that there are considerable differences between the Australian Civil Liability Acts as respects the extent to which they apply to intentional torts.\textsuperscript{145} These differences may have been created as a matter of deliberate policy, but it seems more likely that many of them result from the efforts of parliamentary counsel attempting to improve on the original model with which they were presented – which would have been either the Ipp Report recommendations or the Civil Liability Act 2002 (NSW), which was the first of the Civil Liability Acts to be enacted.\textsuperscript{146} The problems that have been created cannot be solved except by the enactment of truly uniform legislation, which was not allowed to happen in 2002 and seems impossible now. This simply leaves the courts to do their best to interpret the meaning and application of the legislative provisions through the ordinary process of statutory interpretation. Decisions from other jurisdictions may assist, but only if the provision in question is exactly the same.\textsuperscript{147} The problems created by the Civil Liability Acts are

\textsuperscript{144} On the likely interpretation of the Queensland provision, see above, text to nn 118-121.


\textsuperscript{146} The Second Reading speeches on the Civil Liability Acts give no insights about the interpretation of the provisions under discussion in this article.

\textsuperscript{147} On the legitimacy of interpretation by reference to the differences between a statute in another jurisdiction and one’s own, see Sheehan v SRA (2009) Aust Torts Reports ¶82-028 at [66]-[72] (Beazley JA), [145] (McColl JA).
fascinating for academic lawyers and are already creating new problems to be litigated. But they represent a complication that the law of torts could well have been spared.