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**THE RE-EMERGENCE OF INTENTIONAL TORTS IN THE  
WAKE OF THE *CIVIL LIABILITY ACTS***

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## I INTRODUCTION

Actions in tort can be divided into actions in trespass and actions on the case, such as negligence. Although historically the distinction has been based upon whether the act of the defendant is direct or indirect,<sup>1</sup> a trend towards fault based categorisation of the law of torts has been recognised by a majority of the High Court in *Northern Territory v Mengel*:<sup>2</sup> ‘liability in tort depends on either the intentional or negligent infliction of harm’.<sup>3</sup>

The tort of trespass emerged in the 13<sup>th</sup> Century with the primary objectives of keeping the peace and deterring wrongful interference with bodily integrity, honour and dignity. These functions were considered to be so important that the trespass action was actionable per se and prima facie wrongful. Over time as the law of torts developed, negligence became the primary remedy for accidental injury. Thus, Trindade and Cane have commented that:

...this tort of relatively recent origin [negligence] has so quickly acquired such immense stature and strength that, as one writer puts it ‘one could be forgiven for wondering whether there was any room left for any other tort at all.’<sup>4</sup>

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<sup>1</sup> As to the distinction between direct and indirect interferences see *Scott v Shepherd* 96 ER 525 at 526 and *Hutchins v Maughan* [1947] VLR 131 at 133. The usual example of the distinction is that if a person going along a road is hit by a log which has been thrown, the interference is direct; whereas if he or she trips over a log which had earlier been thrown onto the road, the interference is indirect: *Reynolds v Clarke* (1725) 1 Stra 634; 93 ER 747.

<sup>2</sup> (1995) 129 ALR 1.

<sup>3</sup> Ibid 14, [18] (Mason CJ and Dawson, Toohey, Gaudron and McHugh JJ); See also Brennan J at [52].

<sup>4</sup> Frances Trindade and Peter Cane, *The Law of Torts in Australia* (3<sup>rd</sup> ed, 1999) 20, citing Tony Weir, *A Casebook on Torts* (4<sup>th</sup> ed, 1979) 257.

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In 2002, triggered by an 'insurance crisis',<sup>5</sup> a review of the law of negligence in Australia was conducted by a panel of eminent persons.<sup>6</sup> The Review proceeded on the basis of the following assumptions which were contained in its terms of reference:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method of reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.<sup>7</sup>

The Review of the Law of Negligence Final Report (known as the Ipp Report)<sup>8</sup> was published in September 2002. The Ipp Review Panel made the following overarching recommendation:

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action. Here, and throughout our reports, we use the term 'negligence' to mean 'failure to exercise reasonable care and skill.' We use the term 'personal injury' to include (a) any disease, (b) any impairment of a person's physical or mental condition, and (c) pre-natal injury.<sup>9</sup>

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<sup>5</sup> Discussed The Hon Paul de Jersey, Chief Justice Supreme Court of Queensland, 'Recent Australian Tort Law Reform: was it necessary and did it go too far?' (Paper presented at Lawasia Downunder 2005, Gold Coast Convention and Exhibition Centre, 23 March 2005)

<<http://www.courts.qld.gov.au/publications/articles/speeches/2005/dj230305b.pdf>> at 27 March 2007; See also The Hon James Spigelman, Chief Justice Supreme Court of New South Wales, 'Negligence: Is Recovery for Personal Injury too Generous?' (Paper presented at Lawasia Downunder 2005, Gold Coast Convention and Exhibition Centre, 23 March 2005) at <[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_Spigelman140905](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_Spigelman140905)> at 27 March 2007.

<sup>6</sup> The panel (known as the Ipp Review Panel) was chaired by The Honourable David Ipp (Acting Judge of Appeal, Court of Appeal, Supreme Court of New South Wales); its other members were Professor Peter Cane (Professor of Law, Australian National University), Associate Professor Donald Sheldon ((Chairman of Council of (Medical) Procedural Specialists)) and Mr Ian Macintosh (Mayor of Bathurst City Council).

<sup>7</sup> Commonwealth of Australia, *Review of the Law of Negligence Report* (2002)

<<http://revofneg.treasury.gov.au/content/Report/PDF/LawNegFull.pdf>> at 27 March 2007.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid Recommendation 2 [2.2-2.3]; See also [1.28].

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This recommendation should be read in the context of the following statement by the Ipp Review Panel in relation to the scope of the review:

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.<sup>10</sup>

This accords with the terms of reference of the Review Panel, as set out in the introduction to the Ipp Report as follows:

In developing a consistent national approach, the Panel has been asked to develop, evaluate and recommend options for reform of personal injury law (*by which we mean the law governing liability and damages for personal injury and death resulting from negligence*) that address the concerns set out above and that take due account of the interests of both plaintiffs and defendants.<sup>11</sup> (emphasis added)

Although 'mental states are often difficult to prove'<sup>12</sup> and insurance against liability for intended harm may not be available,<sup>13</sup> given the recent legislative changes to the law of negligence which were introduced following the Ipp Report recommendations, and particularly the 'limitations on damages awards' and the 'increasingly limited circumstances in which liability does arise',<sup>14</sup> it may be that intentional torts may be destined to become a more important ground of liability in tort law in the future. This is particularly so because the legislative limitations contained in the various Civil Liability Acts may not apply to intentional tort claims. There may also be other advantages of pleading trespass to the person as trespass is actionable per se; the

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<sup>10</sup> Ibid [1.14].

<sup>11</sup> Ibid [1.10].

<sup>12</sup> Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533, 533.

<sup>13</sup> John G Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) 41; Discussed Julie Warrington 'Intentional Torts: Are they covered by insurance?' (2005) 25(4) *Proctor* 21: for a recent judicial discussion see *Hawley v Luminar Leisure* [2006] EWCA Civ 18.

<sup>14</sup> de Jersey, above n 5, 8.

defendant bears the onus of proof; the rules of causation and remoteness which relate to negligence actions may not apply to trespass actions; and exemplary and aggravated damages may be available in respect of such claims.<sup>15</sup>

In the context of recent decisions concerning trespass to person, this paper considers the extent to which the legislative changes contained in the various Civil Liability Acts may apply to intentional torts and the consequences of this for claimants.

## **II APPLICATION OF CIVIL LIABILITY ACTS TO INTENTIONAL TORTS**

Intentional torts to the person are those torts which involve direct, 'intentional or wilful invasions of the physical and mental integrity of the person', such as intentional trespass<sup>16</sup> (battery and assault), and can be distinguished from 'negligent or careless invasions'.<sup>17</sup> There are three nominate torts involving trespass to the person, namely an apprehension of imminent physical interference to the person (assault); actual physical interference with the person (battery)<sup>18</sup> and unlawful constraint on freedom of movement (false imprisonment).<sup>19</sup>

In intentional torts cases, there is little justification for not requiring the wrongdoer to accept full responsibility for his or her own actions.<sup>20</sup> This is because 'in ethical

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<sup>15</sup> See generally Fleming, above n 13; Tina Cockburn and Bill Madden, 'Intentional Torts in Medical Cases' (2006) 13(3) *Journal of Law and Medicine* 311.

<sup>16</sup> It should be noted, however, that in Australia a plaintiff may also generally bring an action in trespass where the direct physical interference to the plaintiff has been caused by the negligence or carelessness of the defendant (unintentional or negligent trespass): *Williams v Milotin* (1957) 97 C.L.R. 465; Cf. *Wilson v Horne* H6/1999 (19 November 1999): an unsuccessful special leave application which raised the question as to whether negligence lies for direct intentional acts or whether intentional trespass is the sole remedy in such cases. See the discussion in Stanley Yeo, 'Comparing the Fault Elements of Trespass, Action on the Case and Negligence' (2001) 5 *Southern Cross University Law Review* 142, 148-50.

<sup>17</sup> Trindade and Cane, above n 4.

<sup>18</sup> In Queensland the courts have simply assumed that the s245 *Criminal Code* applies to civil actions: discussed in Amanda Stickley and Frances McGlone, *Australian Torts Law* (2005) Ch 3.

<sup>19</sup> *Collins v Wilcock* [1984] 1 WLR 1172 (Goff LJ) 1177-78.

<sup>20</sup> Fleming, above n 13, 6; See generally Bill Madden and Tina Cockburn, 'Civil Liability, Intentional Torts and Public Policy' (2005) 2(2) *Australian Civil Liability Bulletin* 1.

terms, intention is widely felt to be the clearest and strongest basis for the attribution of personal responsibility for conduct and outcomes'.<sup>21</sup>

Although it seems that the Ipp Report recommendations were not meant to apply to intentional torts to the person<sup>22</sup> and its recommendations were meant to be incorporated in uniform legislation across Australia,<sup>23</sup> this has not happened. Each Australian state introduced its own legislation; the legislation is not uniform, nor does it consistently follow the Ipp Report recommendations.

Intentional torts are exempted from the legislative changes introduced by the legislative changes contained in the various Civil Liability Acts to various degrees across the various Australian jurisdictions. There are three main legislative approaches, which are set out below.

***A Legislation applies to negligence or unintentional torts only***

In South Australia, the provisions which limit damages in the *Civil Liability Act 1936* (SA) apply to 'accidents caused wholly or in part by *negligence* or some other *unintentional tort* on the part of a person other than the injured person'.<sup>24</sup> This approach would seem to be most consistent with the Ipp Review Report recommendations.

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<sup>21</sup> Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533, 533.

<sup>22</sup> Commonwealth of Australia, above n 7, Recommendation 2, [2.2] – [2.3]; [1.10], [1.14], [1.28].

<sup>23</sup> Commonwealth of Australia, above n 7, Recommendation 1, [2.1].

<sup>24</sup> *Civil Liability Act 1936* (SA) s 51(a)(ii). Section 3 provides that 'negligence' means failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care'. In relation to the South Australian legislation, Zipser has commented: 'Where an accident is caused by an act or omission which is negligent but does not constitute a battery, it is clear that the legislative scheme applies. Where an accident is caused by an act which is both negligent and constitutes a battery, it is unclear whether the legislative scheme applies.' See Ben Zipser 'Intentional Torts and the Civil Liability Acts' (2003) 58 *Plaintiff* 6, 9 citing *Wilson v Horne* (1999) 8 Tas R 363 at 380-81 and *Carrier v Bonham* [2002] 1 QdR 474 at [27]. See also Yeo, above n 16.

***B Legislation applies to any civil claim for damages for harm***

In Queensland,<sup>25</sup> unless a narrow interpretation is adopted as to the meaning of the word ‘claim’, the provisions of the *Civil Liability Act 2003* (Qld) (*‘CLA Qld’*) may apply to intentional torts as s 4(1) *CLA Qld* provides that ‘subject to s 5, this Act applies to any civil claim for damages for harm’ and although s 5 states that the *CLA Qld* does not apply to certain types of claims, intentional torts are not expressly excluded.<sup>26</sup>

‘Claim’ is defined in schedule 2 Dictionary to mean ‘a claim, however described, for damages based on a liability for personal injury, damage to property or economic loss, whether that liability is based in tort or contract or in or on another form of action, including breach of statutory duty and, for a fatal injury, includes a claim for the deceased’s dependants or estate’. ‘Damages’ is defined so that it ‘includes any form of monetary compensation’.

Section 4(1) of the *CLA Qld* provides that ‘subject to s 5, this Act applies to any civil claim for damages for harm’. ‘Harm’ is defined in the schedule 2 dictionary to mean ‘harm of any kind, including the following – (a) personal injury; (b) damage to property; (c) economic loss’. ‘Personal injury’ is defined to include ‘– (a) fatal injury; and (b) pre-natal injury; and (c) psychological or psychiatric injury; and (d) disease’.<sup>27</sup>

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<sup>25</sup> A similar legislative approach has been adopted in the Australian Capital Territory and the Northern Territory: see *Civil Law (Wrongs Act) 2002* (ACT) s 93; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 4(1). The Queensland provisions will be considered in this paper by way of illustration of this legislative approach.

<sup>26</sup> Section 5 provides that the Act ‘does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes (a) an injury as defined under the *WorkCover Queensland Act 1996*, other than an injury to which s 36(1)(c) or 371 of that Act applies; or ... (b) an injury as defined under the *Workers’ Compensation and Rehabilitation Act 2003*, other than an injury to which s 34(1)(c) or 352 of that Act applies; or (c) an injury that is a dust-related condition; or (d) an injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke’. Section 7(5) provides that ‘this Act is not a codification of the law relating to civil claims for damages for harm’.

<sup>27</sup> The Queensland definition can be contrasted with the following statement in the Ipp Report: ‘We use the term ‘personal injury’ to include (a) any disease, (b) any impairment of a person’s physical or mental condition, and (c) pre-natal injury’ ([2.3]). The Ipp Review meaning of ‘personal injury’ has been adopted in New South Wales: *Civil Liability Act 2002* (NSW), ss 5, 11.

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However, a construction of s 4 of the *CLA Qld* and the meaning of 'claim' which has the consequence of the *CLA Qld* applying to intentional torts is not consistent with either the Ipp Review Panel recommendations,<sup>28</sup> or the Explanatory Notes<sup>29</sup> to and the commencement provisions of the Queensland legislation.

According to s 14B of the *Acts Interpretation Act 1954* (Qld) it is permissible to refer to extrinsic material<sup>30</sup> to assist in the interpretation of legislative provisions which are 'ambiguous or obscure',<sup>31</sup> or where 'the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable'.<sup>32</sup> The effect of ss 4(2) and 4(4) *CLA Qld*, by limiting the commencement of certain damages provisions to claims involving a 'breach of duty',<sup>33</sup> when the definition of claim for the purposes of s 4 is not so limited, gives rise to some ambiguity as to the interpretation of the application

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<sup>28</sup> Commonwealth of Australia, above n 7, Recommendation 2 ([2.2–2.3]); See also *Ibid* [1.14], [1.28].

<sup>29</sup> The Explanatory Notes in relation to the application of the Civil Liability Bill 2003 provide: 'Clause 4 sets out the application of the Act. It applies to all claims for damages for harm. Harm is defined to include all possible types of loss, including personal injury, damage to property and pure economic loss other than those excluded by cl 5. The clause is drafted to include, through the definition of 'claim', all breaches of a duty of care in tort, those duties in contract that, whether express or implied, can be considered of the same effect as a duty to take reasonable care at the same time as would be found in tort, and any other duty, whether expressed under statute or otherwise, that likewise can be considered of the same effect as a duty to take reasonable care': Civil Liability Bill 2003 (Qld), Explanatory Notes  
<<http://www.legislation.qld.gov.au/Bills/50PDF/2003/CivilLiabB03Exp.pdf>> at 27 March 2007. The definition of 'claim' contained in the Dictionary to Sch 2 does not reflect this statement in the Explanatory Notes as it is not limited to duties to take reasonable care and breaches of duty of care in tort.

<sup>30</sup> Extrinsic material is defined in s 14B(3) *Acts Interpretation Act 1954* (Qld) to include *inter alia* (b) 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; and (e) an explanatory note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given to the members of, the Legislative Assembly by the member bringing the Bill before the provision was enacted.

<sup>31</sup> *Acts Interpretation Act 1954* (Qld) s 14B(1)(a).

<sup>32</sup> *Acts Interpretation Act 1954* (Qld) s 14B(1)(b). For a discussion of s 15AB *Acts Interpretation Act 1901* (Cth), which is substantially the same as s 14B of the *Acts Interpretation Act 1954* (Qld), see *Re Australian Federation of Construction Contractors; ex parte Billing* (1986) 68 ALR 416 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>33</sup> Schedule 2 dictionary defines 'duty' to mean '(a) a duty of care in tort; or (b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or (c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b)'.

section;<sup>34</sup> this may provide a basis for having reference to the Ipp Report and explanatory notes as aids in construction pursuant to s 14B. It would seem, therefore, that, as a matter of statutory interpretation, it is open for a Court to find that the *CLA Qld* does not apply to intentional torts.<sup>35</sup>

***C Legislation does not apply to an intentional act done with intent to cause injury or death***

In New South Wales,<sup>36</sup> s 3B(1)(a) of the *Civil Liability Act 2002* (NSW) ('*CLA NSW*') specifically excludes 'civil liability in respect of an intentional act that is done with intent to cause injury or death' from the operation of the *CLA NSW*:<sup>37</sup>

The 'intentional torts' exclusion has two limbs: the act itself must be intentional; and it must be done with intent to cause injury or death.<sup>38</sup> Thus there must be intention both as

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<sup>34</sup> See Warrington, above n 13, 21. She says: 'Although Queensland does not have an equivalent exclusion to s 3B(1)(a) in its CLA, ss 4(2) and (4) of the *CLA Qld* identify certain provisions in chapter 3 "Assessment of Damages for Personal Injury" which do not operate unless a "breach of duty" has occurred'. A 'duty' is defined in schedule 4 of the *CLA Qld* to mean a duty of care in tort, or another duty (including that under a contract) that is concurrent with a duty of care in tort. Accordingly, it seems that despite the absence of a specific exclusion for intentional torts, certain damages provisions of the *CLA Qld* - particularly those capping the damages allowable - will not be applicable in a case involving an intentional tort given that a 'duty' is not an element of that cause of action. (The footnote says: This position is reinforced by the fact that other provisions within chapter 3 of the *CLA Qld*) such as ss 53, 61 and 62 do not require a 'breach of duty' to have occurred, therefore, will arguably be applicable in a case involving an intentional tort. Conversely it could be argued that s50 of the *CLA Qld* supports the view that all provisions of the *CLA Qld* are meant to apply in relation to 'personal injury damages' irrespective of a 'breach of duty'.

<sup>35</sup> For a detailed discussion see: Tina Cockburn and Bill Madden, 'Intentional acts and the *Civil Liability Act 2003* (Qld)' (2005) 25 *Queensland Lawyer* 310.

<sup>36</sup> A similar legislative approach has been adopted in Tasmania, Victoria and Western Australia. See: *Civil Liability Act 2002* (Tas) s3B(1)(a); *Wrongs Act 1958* (Vic) s28C(2)(a), s28LC(2)(a); *Civil Liability Act 2002* (WA) s3B(1).

<sup>37</sup> In New Zealand intentional torts are excluded from the New Zealand Accidents Compensation scheme; decisions in that jurisdiction might provide some guidance for Australian courts in relation to the intentional torts exclusion. See, eg, *Re Firmstone* (1983) 4 NZAR 62 where a claim for damages for unlawful arrest was held not to be barred by the *Accident Compensation Act 1982* (NZ) as the claim was in respect of an invasion of the plaintiff's personal rights rather than for personal injury suffered: discussed in John Miller, 'The Accident Compensation Act and Damages Claims (II)' [1987] *New Zealand Law Journal* 184.

<sup>38</sup> Prior to considering the mental element, it must be established that the act must be voluntary, that is a conscious act: Trindade and Cane, above n 4, 30 citing *Hogan v Gill* [1992] Aust Torts Rep 81-182 at 61,584 (Sheperdsen J); See also *Carrier v Bonham* [2002] 1 Qd R 474 (absent automatism, unsoundness of mind does not prevent a finding of voluntariness: at [30]-[32], [37], (McPherson JA); at [17] (McMurdo P agreeing); at [42] (Moynihan J agreeing).

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to the act (based on the idea of choice<sup>39</sup>) and its consequences (based on the concepts of aim, purpose and objective).<sup>40</sup>

The legislative approach to intention for the purposes of the 'intentional torts' exclusion in s 3B(1)(a) of the *CLA NSW* can be contrasted with the intention requirement of common law trespass to person. In common law trespass to person actions, 'what is required is intentional contact not an intention to do harm'.<sup>41</sup>

Several cases have now considered the construction of the New South Wales intentional torts exclusion.

The first case, *McCracken v Melbourne Storm Rugby League Football Club*,<sup>42</sup> concerned a claim made by Jarrod McCracken, a professional rugby league football player, against the team Melbourne Storm and two of its players.<sup>43</sup> In that case Justice Hulme of the New South Wales Supreme Court held that an illegal spear tackle performed during a rugby league football match was 'intentional and done with intent

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<sup>39</sup> The defendant must have meant to do the act: *McNamara v Duncan* (1979) 26 ALR 584, 587; Cf Yeo, above n 16, 144: who has commented that this aspect of intention should be described as 'voluntariness'.

<sup>40</sup> Cane, above n 21, 534. Intention as to consequences requires consideration of the aim, purpose, objective. 'A person intends a particular consequence of their conduct if their purpose is to produce that consequence by their conduct. A person is reckless in relation to a particular consequence of their conduct if they realise that their conduct may have that consequence, but go ahead anyway.'; Ibid 535; As to whether recklessness suffices for the intention element see *Hall v Fonceca* [1983] WAR 309 at [40]-[45], 313 (Smith and Kennedy JJ). 'It is unnecessary to consider whether recklessness, where the assailant adverts to the consequences of his conduct, suffices for this purpose [eg to satisfy the requirement of intention], although there is strong support for the view that it does.'

<sup>41</sup> Frances A Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 *Oxford Journal of Legal Studies* 211, 220; *Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714, 743; *Wilson v Pringle* [1987] QB 237, 249; Trindade and Cane, above n 4, 31. At common law the act will still be regarded as intentional even in cases of mistake or where the consequences were not intended: *Ranson v Kimer* (1888) 3 Ill App 241 (defendant shot plaintiff's dog believing it to be a wolf – liable in trespass); *Law v Visser* [1961] St R Qd 46 (defendant ran over plaintiff mistakenly believing the object was not a person – liable in negligence); *Public Transport Commission v Perry* (1976-1977) 14 ALR 273 (defendant ran over plaintiff mistakenly believing she was a large piece of brown paper); see Trindade and Cane, above n 4, 30-31.

<sup>42</sup> [2005] NSWSC 107 ('*McCracken*').

<sup>43</sup> Ibid: discussed Bill Madden, 'An intentional tort under the Civil Liability Act' (2005) 43 *NSW Law Society Journal* 76.

to cause injury<sup>44</sup> and therefore that the plaintiff's claim for damages for intentional trespass was not within the damages restrictions imposed by the *CLA NSW*. His Honour held that the intentional torts exclusion was not limited to criminal conduct.<sup>45</sup>

*Houda v The State of New South Wales*,<sup>46</sup> arose out of a wrongful arrest by a police officer. The plaintiff initially sued three police officers<sup>47</sup> and the State of New South Wales alleging malicious prosecution, false imprisonment, wrongful arrest and assault, and claimed compensatory damages, special damages, aggravated damages, exemplary damages, costs and interest. Damages were awarded in the sum of A\$145 000, which were comprised of A\$100 000 compensatory damages, A\$20 000 aggravated damages and A\$25 000 exemplary damages.<sup>48</sup> His Honour held that the plaintiff had established the torts of malicious prosecution, false imprisonment, wrongful arrest and assault by Constable Stebbing and that the State of New South Wales was vicariously liable for all causes of action pleaded.<sup>49</sup> Acting Justice Cooper held that depriving the plaintiff of his freedom, forcibly restraining his mobility, causing him humiliation, damaging his reputation, causing him the emotional upset of undergoing these experiences and having the criminal charge hanging over his head and the costs and trauma of contesting the charge all amounted to injury.<sup>50</sup> In particular, His Honour considered that for the purposes of the intentional torts exclusion 'injury' is not limited to bodily injury and included the forms of injury identified as having been suffered by the plaintiff.<sup>51</sup>

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<sup>44</sup> His Honour found that some injury was intended, albeit minor, but not so minor so as to be regarded as an inappropriate use of the term ([42]).

<sup>45</sup> [2005] NSWSC 107, [41].

<sup>46</sup> [2005] NSWSC 1053 ('*Houda*'); discussed Tina Cockburn and Bill Madden, 'Application of the Civil Liability Act NSW to Intentional Torts Claims: *Houda v NSW*' (2005) 2(7) *Australian Civil Liability Bulletin* 81.

<sup>47</sup> By a consent order, the proceedings against the police officers were subsequently dismissed pursuant to s 9D of the *Law Reform (Vicarious Liability) Act 1983* as amended.

<sup>48</sup> In New South Wales the statutory prohibition on awards of exemplary and aggravated damages is limited to negligence actions: *CLA NSW* s 21. In Queensland, exemplary and aggravated damages are prohibited, subject to exceptions including an 'unlawful intentional act done with intention to cause personal injury': *CLA Qld* s 52. By contrast, in Northern Territory there is a general prohibition on exemplary damages in personal injury claims with no exceptions: *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19.

<sup>49</sup> *Houda*, above n 46, [305]; [508].

<sup>50</sup> *Ibid* [336], [346].

<sup>51</sup> *Ibid* [346].

*New South Wales v Ibbett*<sup>52</sup> concerned a claim for assault and trespass to land arising out of the police pursuit of the plaintiff's son, who resided with her, in circumstances where he was suspected of a speeding offence. When the suspected offender pulled into the plaintiff's garage and started to lower the garage door, the police-officer dived under the closing door and subsequently pointed his gun at the plaintiff. The Court of Appeal held that the damages restrictions imposed by the *CLA NSW*, especially those relating to exemplary and aggravated damages, did not apply. For the purposes of the exclusion, 'injury' was considered to 'encompass the harm occasioned by an apprehension of physical violence'.<sup>53</sup> In addition, Spigelman CJ considered that the trial judge's finding that the police officer behaved in a 'reactive and impulsive' way by pointing his handgun at the plaintiff and demanding that she engage in a course of action was 'a finding of 'conscious wrongdoing', at least at the level of recklessness' so as to satisfy the intention requirement in the intentional torts exclusion.<sup>54</sup>

By contrast, in *Coyle v State of New South Wales*<sup>55</sup> it was held that the plaintiff's claim was not within the s 3B(1)(a) exclusion. In that case the defendant was arrested while boarding a train, pushed to the ground and detained for two and a half hours. He was subsequently acquitted of all charges and commenced proceedings against the police officers alleging assault, wrongful arrest, false imprisonment and malicious prosecution. The trial judge held that the claims in assault, wrongful arrest and false imprisonment were made out, but not malicious prosecution as he was not satisfied that there was an absence of reasonable or proper cause or actual malice in laying and prosecution of the charges. In respect of the assault, damages were assessed in accordance with the provisions of the *CLA NSW* as although the assault was an

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<sup>52</sup> [2005] NSWCA 445 ('*Ibbett*'). Special leave to appeal to the High Court from the New South Wales Court of Appeal decision of *Ibbett* was granted on 16 June 2006 to consider issues relating to the awards of aggravated and exemplary damages in the case, though not, it seems, as to the construction of s 3B(1)(a) *CLA NSW*. For a transcript of the High Court proceedings of 31 August 2006 see <<http://www.austlii.edu.au/au/other/HCATrans/2006/463.html>> at 27 March 2007.

<sup>53</sup> *Ibbett*, above n 52, [11]; See also [122]-[126] (Ipp JA), especially [124]; See also [218] (Basten JA).

<sup>54</sup> *Ibid* [33], [43]; See also [129] (Ipp JA); Cf [210] (Basten JA).

<sup>55</sup> [2006] NSWCA 95 ('*Coyle*').

intentional act, there was no finding that there was an intention to cause injury (the injuries were an ‘unintentional consequence of the wrongful arrest’) so the s 3B(1) exclusion was not made out.<sup>56</sup> Damages were assessed at 25 per cent of a most extreme case, equating to A\$26 000.<sup>57</sup> In respect of the wrongful arrest and false imprisonment claims, exemplary damages were awarded in the sum of A\$35 000 and there was no compensatory damages award. On appeal to the Court of Appeal, it was held that the malicious prosecution claim was made out; A\$5 000 compensatory and A\$5 000 exemplary damages were awarded.<sup>58</sup> Further, in addition to the awards made at trial, additional damages in the sum of A\$10 000 compensatory damages, assessed according to common law principles,<sup>59</sup> were awarded in respect of the wrongful arrest and false imprisonment claims.<sup>60</sup>

Most recently, *Drinkwater v Howarth*,<sup>61</sup> concerned a claim in negligence for damages for an injury sustained by the plaintiff. The injury occurred when a security guard who, while escorting the plaintiff’s friend from a hotel, pushed the friend towards the plaintiff, and caused the plaintiff to fall and break his ankle. The plaintiff was awarded damages at trial. The defendants appealed on the basis that the trial judge did not apply s 5B *CLA NSW* in assessing the breach of duty. Basten JA, with whom Hodgson JA and Tobias JA agreed,<sup>62</sup> considered that it was ‘open to some doubt’ whether s 5B applied in the circumstances.<sup>63</sup> As s 5B deals with whether a person has been negligent ‘in failing to take precautions against a risk of harm’, Basten JA considered that ‘(i)t may be that where a deliberate act had caused harm that section did not apply’.<sup>64</sup> Further, although the trial judge rejected an argument that s 3B applied so as to exclude the claim from the provisions of the *CLA NSW* because she

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<sup>56</sup> *Coyle*, above n 55 at [43].

<sup>57</sup> *Ibid* .

<sup>58</sup> *Ibid* [86].

<sup>59</sup> The claims were not subject to the *CLA NSW* damages restrictions as they were not claims in respect of personal injury: see [41]; [44].

<sup>60</sup> *Coyle*, above n 55 at [100].

<sup>61</sup> [2006] NSWCA 222 (*‘Drinkwater’*).

<sup>62</sup> *Ibid* 222, [24] (Hodgson JA), [26] (Tobias JA).

<sup>63</sup> *Ibid* [10].

<sup>64</sup> *Ibid*. Hodgson JA went further: ‘I would add that in my opinion there may be a question as to the application of s 5B of the *Civil Liability Act*, not only to intentional acts, but also to positive negligent acts: there may be a question whether a positive negligent act is fairly described as failing to take precautions’ ([24]).

found that in the circumstances the defendants did not intend to injure the plaintiff, Basten JA noted that ‘an intentional act may of course be intentional in the sense that it is intended to injure someone without necessarily being directed towards the plaintiff: an issue may arise as to the application of s 3B in that situation’.<sup>65</sup>

In relation to the construction of the intentional torts exclusion contained in s 3B(1)(a) *CLA NSW*, after *McCracken*<sup>66</sup>, *Houda*<sup>67</sup>, *Ibbett*<sup>68</sup>, *Coyle*<sup>69</sup> and *Drinkwater*<sup>70</sup>, the following can be said:

- The exclusion is not limited to criminal conduct;<sup>71</sup>
- There has been judicial reluctance to impose a threshold level of impairment;<sup>72</sup>
- For the purposes of the section, ‘injury’ is to be given its ordinary meaning<sup>73</sup> and is not limited to bodily injury.<sup>74</sup>
- An intentional act is a voluntary act, in the sense that the defendant meant to do it;<sup>75</sup>
- The element ‘intention to cause injury’ may be satisfied if it is satisfied that there was an intention to cause injury to someone, though not necessarily the person who was injured.<sup>76</sup> Following on from this, where injury arises out of

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<sup>65</sup> *Drinkwater*, above n 61, at [12].

<sup>66</sup> *McCracken*, above n 42.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibbett*, above n 52.

<sup>69</sup> *Coyle*, above n 55.

<sup>70</sup> *Drinkwater*, above n 61.

<sup>71</sup> *McCracken*, above n 42, [41] (Hulme J).

<sup>72</sup> In *McCracken*, above n 42, Hulme J regarded the injury as ‘not so minor that it could be regarded as perhaps an inappropriate use of the term’ (at [42]); In *Houda*, above n 46, Cooper AJ did not have to decide this given his finding that ‘injury is not limited to bodily injury and extends to all forms of injury’ (at [346]) and his comment that: ‘However, if one has regard to a most extreme case of injury or loss arising out of actions for wrongful arrest, false imprisonment and malicious prosecution, then the damages in the present case would clearly exceed 15 per cent’ ([374]).

<sup>73</sup> *McCracken*, above n 42, [41] (Hulme J); *Houda*, above n 46, [338], [345] (Cooper AJ); *Ibbett*, above n 52, [5] – [11] (Spigelman CJ).

<sup>74</sup> *Houda*, above n 46, [346] (Cooper AJ); *Ibbett*, above n 52, [11] (Spigelman CJ); [122-26], [124] (Ipp JA); [218] (Basten JA).

<sup>75</sup> *McNamara v Duncan* (1979) 26 ALR 584; *McCracken*, above n 42.

<sup>76</sup> *Drinkwater*, above n 61.

an intentional act with intention to cause injury, the act may not apply even where the plaintiff's claim is in negligence.

- It is arguable that the term intention extends to reckless indifference.<sup>77</sup>

### **III CLAIMS FOR DAMAGES OTHER THAN PERSONAL INJURY DAMAGES**

Where an intentional tort gives rise to a claim for damages other than personal injury damages, the legislative changes which limit damages recoverable<sup>78</sup> may not apply, even in the absence of an intentional torts exclusion in the legislation or the prerequisites for any such exclusion being satisfied.

According to Cooper AJ in *Houda*,<sup>79</sup> personal injury damages are limited to damages for bodily injury.<sup>80</sup> He said:

It needs to be borne in mind that the purpose of *The Civil Liability Act* was to restrict the damages which courts could award. If the legislation was intended to restrict the damages which flow from the torts pleaded in this case, then the legislature could have expressly said so. It could have included within the definition of 'injury' such matters as injury to reputation, injury to feelings for indignity, humiliation and disgrace. It has not done so.<sup>81</sup>

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<sup>77</sup>*Ibbett*, above n 52, [33], [43] (Spigelman CJ); [129] (Ipp JA); Cf [210] (Basten JA). Professor Cane has said that: 'A person intends a particular consequence of their conduct if their purpose is to produce that consequence by their conduct. A person is reckless in relation to a particular consequence of their conduct if they realise that their conduct may have that consequence, but go ahead anyway': Cane, above n 21, 535; See *Hall v Fonceca* [1983] WAR 309 (Smith and Kennedy JJ) [40-45], 313; See also *Banditt v The Queen* [2005] HCA 80.

<sup>78</sup> Contained in Part 2 *CLA NSW*; See also ch 3 *Civil Liability Act 2003* (Qld) In Queensland, ch 3 (Assessment of Damages for Personal Injury) is expressed to apply 'only in relation to an award of personal injury damages: s 50 *CLA Qld*. In s 51 injury is defined to mean personal injury. The sch 2 appendix defines personal injury to include 'fatal injury; and prenatal injury; and psychological or psychiatric injury; and disease'.

<sup>79</sup> *Houda*, above n 46.

<sup>80</sup> *Ibid* (Cooper AJ) [328], [367], [369]; Discussed Bill Madden and Tina Cockburn, 'Intentional Torts Injury further defined' (2006) 44(4) *New South Wales Law Society Journal* 64.

<sup>81</sup> [369]. Cooper ACJ also considered how s 16 'Determination of damages of non-economic loss' might apply to claims of this nature [371– 375] concluding [375] that 'this anomaly provides yet a further ground for holding that Part 2 of the Act does not apply to damages for the causes of action pleaded in this case'.

His Honour considered that the heads of damage claimed in *Houda v The State of New South Wales*<sup>82</sup> were not personal injury damages, as they did not arise ‘out of any injury to the body of the person affected’, but rather they arose ‘out of the injury to a person’s reputation and the emotional upset, anxiety and distress caused by the commission of the particular torts’, and the ‘injury to the plaintiff’s civil rights’.<sup>83</sup>

It would seem therefore, that where a claim can be categorised as in respect of damages for an invasion of the plaintiff’s civil rights rather than for personal injury damages,<sup>84</sup> it is open for a court to find that the damages provisions in the legislation do not apply. In the case of false imprisonment and malicious prosecution, the interests being protected are the ‘plaintiff’s civil rights and in particular the right not to be unlawfully arrested or wrongfully imprisoned or to be the subject of a malicious prosecution’, rather than bodily injury.<sup>85</sup> In relation to the other intentional trespass to the person actions, assault and battery, these torts developed, not only to protect bodily integrity but also honour and dignity.<sup>86</sup> In *New South Wales v Ibbett*<sup>87</sup> Spigelman CJ lends some support to this argument. He said:

The concept of ‘personal injury’ is reasonably well established in Australian legal practice. It has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition (eg *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-363.) An award for the emotional harm involved in apprehension of personal violence would not generally be regarded as an award for ‘personal injury damages’.<sup>88</sup>

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<sup>82</sup> *Houda*, above n 46.

<sup>83</sup> [359]. This approach to statutory interpretation has been followed in New Zealand. See, eg, in *Re Firmstone* (1983) 4 NZAR 62, 67, a claim for damages for unlawful arrest was held not to be barred by the *Accident Compensation Act* as the claim was in respect of an invasion of the plaintiff’s personal rights rather than for personal injury suffered: discussed Miller, above n 37.

<sup>84</sup> In *Houda*, above n 46. Cooper AJ considered that personal injury damages were limited to damages for bodily injury: [328], [367], [369].

<sup>85</sup> *Houda*, above n 46, [359].

<sup>86</sup> Fleming, above n 13, 29-30.

<sup>87</sup> *Ibbett*, above n 52.

<sup>88</sup> *Ibid* [21–22]. See also Basten JA [211]. Ipp JA did not consider this issue directly but see His Honour’s comments at [116-119]. See also *Coyle*, above n 55, [41].

#### IV CONCLUSION

In the context of commenting on legislative changes introduced by the *CLA Qld*, which impose 'limitations on damages awards, meant to ensure that in the increasingly limited circumstances in which liability does arise, the extent of that liability remains at what may be perceived to be a reasonable level',<sup>89</sup> Chief Justice de Jersey of the Supreme Court of Queensland said:

In the course of the debate, much was said about reasserting a need for people to accept responsibility for their own actions. That must however work both ways. A difficulty about these provisions, arguably, is that they suggest the wrongdoer is to a degree being protected.<sup>90</sup>

In intentional torts claims, there is little justification for not requiring the wrongdoer to accept full responsibility for his or her own actions.<sup>91</sup>

Despite the difficult issues which may arise in intentional tort claims such as proof of intention,<sup>92</sup> the extent to which insurance is available,<sup>93</sup> and whether vicarious liability

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<sup>89</sup> de Jersey, above n 5.

<sup>90</sup> Ibid 8.

<sup>91</sup> Fleming, above n 13, 6; Cane, above n 21, 533; See also Madden and Cockburn, above n 20.

<sup>92</sup> Cane, above n 21, 533.

<sup>93</sup> Fleming, above n 13, 41; Discussed Warrington, above n 13; Michael Clarke, 'Insurance of Wilful Misconduct' (1996) 7 *Insurance Law Journal* 173; Desmond Derrington QC, 'Accident' (Paper presented at Australian Insurance Law Association National Conference, Sydney, November 2005, <[http://www.aila.com.au/research/2005\\_nov\\_papers/DesDerrington%27sPaper.pdf](http://www.aila.com.au/research/2005_nov_papers/DesDerrington%27sPaper.pdf)> at 27 March 2007). For a recent judicial discussion see: *Hawley v Luminar Leisure* [2006] EWCA Civ 18 (24 January 2006).

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will be imposed,<sup>94</sup> it seems that there may be advantages for plaintiffs who plead intentional torts, particularly trespass to the person. Some of the key legal advantages are that trespass is actionable per se; the defendant bears the onus of proof; the rules of causation and remoteness which relate to negligence actions may not apply to trespass actions; and exemplary and aggravated damages may be awarded.<sup>95</sup> Significantly, the legislative restrictions which have been introduced in the various Civil Liability Acts which have been imposed on plaintiffs in negligence actions following the Ipp Review of the Law of Negligence recommendations may not apply.

Like the phoenix, the ancient trespass action, which first emerged in the 13<sup>th</sup> Century,<sup>96</sup> appears destined to rise in the wake of the enactment of the various Civil Liability Acts.

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<sup>94</sup> See generally *New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland* [2003] 212 CLR 511; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Deatons v Flew* (1949) 79 CLR 370; *Bugge v Brown* (1919) 26 CLR 110. Recent cases have considered vicarious liability for intentional torts in the context of security guards: *Starks v RSM Security* [2004] NSWCA 351 (employer vicariously liable); *Sprod v Public Relations Oriented Security Pty Ltd* [2005] NSWSC 1074 (employer not vicariously liable); *Ryan v Ann Street Holdings Pty Ltd* [2005] QDC 345 (employer vicariously liable). Particular issues arise in relation to the prospect of dual vicarious liability and contribution between tortfeasors: *Viasystems (Tyneside) Limited v Thermal Transfers (Northern) Limited* [2005] EWCA Civ 1151; *Whiteside Properties v McNery* [2005] NSWCA 436; Cf. *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18 (dual vicarious liability rejected in favour of imposing sole vicarious liability upon the owner of a nightclub, the temporary employer of the nightclub bouncer who assaulted the plaintiff). There are also issues as to whether vicarious liability will be imposed upon employers, including the crown, for exemplary damages *Houda* above n46; *New South Wales v Bryant* [2005] NSWCA 393 (exemplary damages awarded against the State in relation to a tort committed by a police officer); *Ibbett*, above n 52.

<sup>95</sup> See generally, Fleming, above n 13, 41 et seq; See also Cockburn and Madden, above n 15.

<sup>96</sup> See Fleming, above n 13, 21.