

Intentional torts and Civil Liability Acts

In 2002 and 2003, most Australian state and territory governments introduced legislation to restrict the ability of plaintiffs to recover damages for personal injury under the common law.

The legislation, some of which is still passing through various parliaments, comprises:

- *Civil Law (Wrongs) Act 2002* (ACT).
- *Civil Liability Act 2002* (NSW).
- *Personal Injuries (Liability and Damages) Act 2002* (NT).
- *Civil Liability Act 2003* (Qld).
- Part 2A of the *Wrongs Act 1936* (SA) - to be amended on passage of the *Law Reform (Ipp Recommendations) Bill 2003* (SA).
- *Civil Liability Act 2002* (Tas) - to be amended on passage of the *Civil Liability Amendment Bill 2003* (Tas).
- Certain parts of the *Wrongs Act 1958* (Vic).
- *Civil Liability Act 2002* (WA) - to be amended on passage of the *Civil Liability Amendment Bill 2003* (WA).

In all jurisdictions, the legislative schemes apply where the plaintiff's

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injury was caused by the defendant's unintentional negligent tort. To different extents, some of the legislative schemes apply to torts with intentional features. This paper considers the intentional-type torts to which the legislative schemes *do not* apply.

The paper refers to several criminal law cases. Caution is required when applying principles from one field of law to another, but it is also useful to remember the observation in *Scott v Shepherd*¹ that '[a]lthough criminal cases are [generally] no rule for civil ones, yet in trespass I think there is an analogy'.

NEW SOUTH WALES, QUEENSLAND, TASMANIA, VICTORIA AND WESTERN AUSTRALIA

New South Wales, Tasmania and Victoria's legislative schemes, either in whole or in part, do not apply 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'.²

Intentional Act

Where the defendant desires and carries out an act, it is clear that the act is intentional. In the criminal case of *He Kaw Teh v R*,³ Brennan J explained:

'Intent, in one form, connotes a decision to bring about a situation so far as it is possible to do so – to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result. Thus when A strikes B, having decided to or desiring or wishing to strike him, it can be said that he intends to strike B.'

Similarly, in *McNamara v Duncan*,⁴ a case involving the tort of battery, Fox J in the Supreme Court of the Australian Capital Territory stated that 'the striking of the plaintiff by the defendant was intended: he meant to do it'.

Where the defendant's act is involuntary, it is clear that the act is not intentional.⁵ Where the defendant's act is voluntary but not desired, it is unclear whether the act is an intentional act

within the meaning of the statutory term.

Take for example a driver who, in a moment of absence of concentration, drives his or her vehicle into another vehicle. The driver intended to do the acts which caused his or her vehicle to collide with the other vehicle. Perhaps McPherson JA had this meaning of intention in mind when he said: 'Most everyday acts of what we call actionable negligence are in fact wholly or partly a product of intentional conduct.'⁶ However, the driver did not intend to collide with the other vehicle.

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In *He Kaw Teh*, Brennan J gave the following example: 'When A strikes B, his action can be divided into A's movement of his fist and B's presence in the path of A's movement. Although A's movement of his fist may be voluntary, he is not said to strike B intentionally unless he knows that B (or someone else) is in the path of his moving fist. If *mens rea* were imported into an offence defined as striking another – a definition that does not include a result – two states of mind would normally be involved: voluntariness of movement and an intention to strike another – and intention is, for all practical purposes, established by knowledge that another person is, or is likely to be, in the path of the movement. If the definition is extended to include a result – causing bodily harm – the statute may prescribe a further mental element: ordinarily a specific or special intent to cause bodily harm.'

The distinction between voluntary movements and immediate consequences was also considered to some extent in *Hogan v Gill*,⁷ where the defendant child playing Cowboys and Indians pulled the trigger of a loaded gun causing a bullet to discharge and hit the plaintiff.

Shepherdson J in the Supreme Court of Queensland held that the element of intention to establish the tort of battery was not made out. His Honour held that the defendant intended to pull the trigger and simulate firing the gun, but did not intend to fire the bullet.

Intent to Cause Injury or Death

Where the defendant causes injury to the plaintiff and the defendant desired to cause that injury, it is likely that there is 'intent to cause injury' within the meaning of the statutory term. In *He Kaw Teh*, Brennan J said:

'[S]pecial or specific intent is an intent to cause the results to which the intent is expressed to relate... [S]pecific intent is usually established by proof of a desire or wish to cause the prescribed result.'⁸

A defendant's intention to cause injury can be inferred in the absence of direct evidence.⁹

Where the defendant does not desire to cause injury to the plaintiff, but the defendant is aware that his or her act is likely to produce that result, a question is whether there is 'intent to cause injury' within the meaning of the statutory term.

In the field of criminal law, there is support for the view that where the defendant knows there is a high degree of probability that his or her act will have a consequence, the defendant can be imputed with an intention to cause the consequence. However, there is disagreement as to the degree of probability required. The following materials demonstrate the point:

In *The Queen v Crabbe*,¹⁰ the High Court considered the mental element for the offence of murder under the common law. The court stated: 'The conduct of a person who does an act, ►

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knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm... If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word 'probable' means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm.'

In many cases, the dividing line between intention and recklessness is barely distinguishable.

In England, the House of Lords is unwilling to impute intention to the defendant unless death or grievous bodily harm was 'a virtual certainty' as a result of the defendant's actions, and the defendant appreciated that such was the case.¹¹

Section 5.2(3) of the *Criminal Code Act 1995* (Cth) states: 'A person has an intention with respect to a result if he or she...is aware that it will occur in the ordinary course of events.'

In the context of the tort of misfeasance in public office, in *Rowan v Cornwall*, Debele J stated: 'An intention to produce a result will be imputed where the act is plainly likely to produce that result.'¹² The context of the statement suggests that the defendant must also have knowledge that their act is 'plainly likely' to produce the result.

In some cases, a defendant neither desired to cause the plaintiff injury, nor was aware that their act was likely to cause injury. Instead, they were recklessly indifferent to the likely consequences of their act. A question is whether this

constitutes 'intent to cause injury' within the meaning of the statutory term.

In *Northern Territory v Mengel*,¹³ a majority of the High Court, in considering the tort of misfeasance in public office, stated that the element of 'intentional infliction of harm' included acts 'which are done with reckless indifference as to the harm that is likely to ensue'.¹⁴

In *R v Venna*,¹⁵ the English Court of Appeal said that '[i]n many cases, the dividing line between intention and recklessness is barely distinguishable'.

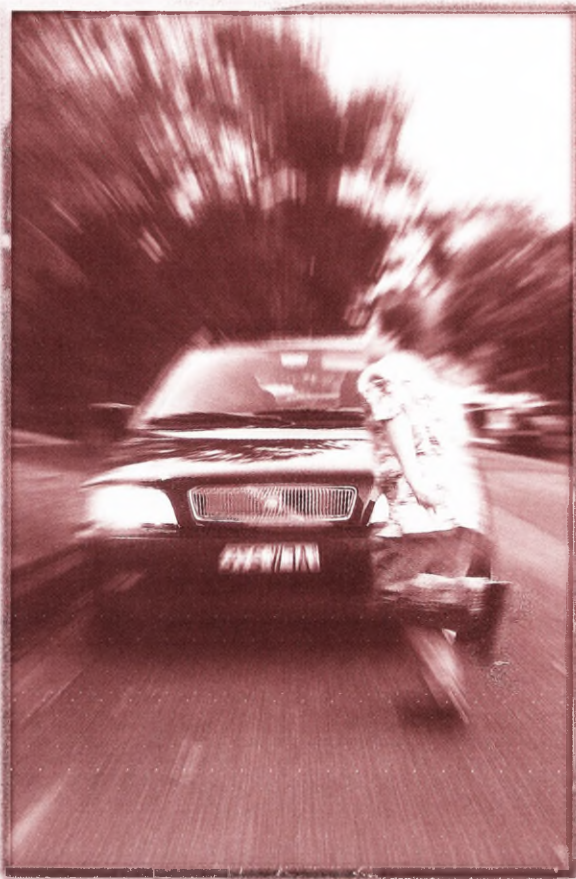
Where the defendant does an act with intent to cause some injury to the plaintiff, but the plaintiff suffers more serious injury, which the defendant did not intend and which was not a likely consequence of the defendant's act, a question is whether this circumstance constitutes 'an intentional act that is done with intent to cause injury'. It appears that it would.

An example is where a defendant strikes the plaintiff with a light blow intending to cause a small injury, but because, unknown to the defendant, the plaintiff has an 'eggshell skull', the plaintiff suffers more serious injury.

Where the defendant does an intentional act with intent to cause injury to person A, but instead causes injury to person B, a question is whether in B's claim against the defendant there is 'an intentional act that is done with intent to cause injury'.

The answer to this question is unclear. If the issue arises, consideration should be given to the doctrine of transferred intent in criminal law.¹⁶

Another question is how the legislative schemes apply to operations carried out by surgeons on patients. Obviously, the surgeon's acts during the operation are intentional. Whether the legislative



schemes apply depends on whether the surgeon's acts were 'done with intent to cause injury' within the meaning of the statutory term.

The answer to this question is unclear. In *Hyam v Director of Public Prosecutions*,¹⁷ Lord Hailsham stated that a surgeon carrying out a transplant does not have an intention to wound his patient. Glanville Williams, in a comment on the case, disagreed, stating that 'a surgeon intentionally wounds his patient when he inserts the scalpel'.¹⁸ It is unclear how Australian courts interpreting the legislative schemes will decide this point.

'Unlawful'

The Queensland and Western Australian legislative schemes use the term 'unlawful intentional act' instead of 'intentional act'.¹⁹ The use of the term 'unlawful' appears to make clear that in order for the legislative schemes not to apply, the intentional act must be done without the plaintiff's consent and without legislative authority.

A question that may arise is whether

The law is unclear – does a surgeon intentionally wound a patient when making an incision?

an operation carried out by a surgeon on a patient involves an unlawful intentional act. In considering whether any intentional act was unlawful, it is necessary to consider whether the patient consented.

On this issue, it is useful to recall that in *Rogers v Whitaker*²⁰ the High Court stated that 'the consent necessary to negate the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed'.

SOUTH AUSTRALIA

In South Australia, the legislative scheme applies to damages claimed for personal injury 'arising from an accident caused wholly or in part by negligence or by some other unintentional tort on the part of a person'.²¹

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,²² it is unclear whether the legislative scheme applies. **PL**

Endnotes: 1 (1773) 2 Wm BI 892 at 899; 96 ER 525. 2 NSW s 3B, Tas s 3B, Vic s 28LC. 3 (1985) 157 CLR 523 at 569. 4 (1971) 26 ALR 584. 5 *supra* 3 at 568-69; and the United States case of *Stokes v Carlson* (1951) 240 SW 2d 132 at 135. 6 *Carrier v Bonham* [2002] 1 Qd R 474 at [27]. 7 (1992) Aust Torts Reports 81-182. 8 *supra* 3 at 569-70. See also *R v Glebow* [2002] QCA 442 at [22]; s5.2(3) *Criminal Code Act 1995* (Cth). 9 See *R v Glebow* [2002] QCA 442 at [12], [15], [20]. 10 (1985) 59 ALJR 417 at 419. 11 *R v Woollin* [1998] 4 All ER 103. 12 (2000) 82 SASR 152 at 360. 13 (1995) 185 CLR 307 at 347. 14 See also *The Queen v Crabbe* (1985) 59 ALJR 417 at 420. 15 [1976] 1 QB 421 at 429. 16 See general texts on criminal law and torts law discussing the doctrine of transferred intent. 17 [1975] AC 55 at 77. 18 G Williams, *Oblique Intention* [1987] CLJ 417 at 420. 19 WA s 6 (Bill s 3A); Qld s 52(2). 20 (1992) 175 CLR 479 at 490. 21 s 24A (to be amended to s 52 pursuant to SA Bill). 22 See *Wilson v Horne* (1999) 8 Tas R 363 at 380-381; *Carrier v Bonham* [2002] 1 Qd R 474 at [27].