INTENTIONAL CONDUCT AND THE OPERATION OF THE CIVIL LIABILITY ACTS: UNANSWERED QUESTIONS

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The Civil Liability Acts place significant limitations and caps on the damages that are recoverable for claims caught by those Acts or relevant parts thereof. Such limitations and preclusions significantly impact on what were plaintiffs' existing common law rights prior to the passage of the CLAs. Importantly, however, many of those limitations do not apply to certain classes of claims excluded from the operation of the CLAs. The focus of this article is on some widely (but not uniformly) adopted exclusions to the operation of the CLAs, namely that many parts of the CLAs do not apply to claims arising from types of intentional conduct. Many of these limitations are express; but other limitations raise issues of intention that are less patent. The precise reach of the 'intentional conduct' exclusions in the CLAs has not been resolved and many important questions remain unanswered. This is despite the increasing number of cases coming before the courts in which plaintiffs are attempting to circumvent the operation of the CLAs. The issues will continue to attract judicial attention. This article considers the different interpretation and operation of the 'intentional conduct' exclusions in the CLAs and seeks to answer some of unanswered questions.

I INTRODUCTION

The various Civil Liability Acts[1] ('CLAs') place significant limitations and caps on the damages that are recoverable for claims caught by those Acts or relevant parts

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1 Although the title of this article refers to the 'Civil Liability Acts', the titles of the various Acts, like their content, are not uniform. The relevant CLAs in each jurisdiction are as follows: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA) (a renamed version of the *Wrongs Act 1936* (SA), substantially amended by the *Law Reform (Ipp Recommendations) Act 2004* (SA)); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic) (as substantially amended in particular by the *Wrongs and Other CLAs (Law of Negligence) Act 2003* (Vic) and the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic)); and *Civil Liability Act 2002* (WA). For convenience, each of these CLAs will be referred to in shorthand form in the text as the 'New South Wales CLA', 'Queensland CLA' (etc), and in the footnotes as 'NSW CLA', 'Qld CLA' (etc).

of them. These include caps on certain types of damages, such as loss of earning capacity, and minimum threshold requirements that must be met before some damages are available, such as gratuitous care awards (so-called '*Griffiths v Kerkemeyer* damages').[2] One of the most significant adverse impacts on plaintiffs' damages is the setting of five per cent or higher discount rates on lump sums, replacing the much more plaintiff-friendly three per cent that applies at common law.[3] Further, exemplary and aggravated damages are precluded altogether for certain claims in some jurisdictions. Such limitations and preclusions significantly impact on what were plaintiffs' existing common-law rights prior to the passage of the CLAs. Importantly, however, many of those limitations do not apply to certain classes of claims excluded from the operation of the CLAs. One exclusion, for example — in several, but not, all jurisdictions — is that the CLAs (or most parts thereof) do not apply to claims arising from dust-related conditions.[4] However, given that the CLAs are not uniform, their impact varies from state (or territory) to state. This makes generalisations difficult and dangerous. I will note exceptions to general statements of law, so far as I am aware, but the caveat applies: errors may easily occur and the interpretation of each CLA must start with its specific provisions and framework.

The focus of this article is on some widely (but not uniformly) adopted exclusions to the operation of the CLAs, namely, that many parts of the CLAs do not apply to claims arising from types of intentional conduct. For example, a common *express* exclusion is for an 'intentional act … done by the person [the defendant] with intent to cause injury or death' or for a sexual assault or sexual misconduct.[5] Other limitations raise issues of intention that are less patent; for example, many of the limitations of the CLAs apply only to awards of 'personal injury damages'. Such damages are typically sought in negligence claims,

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2 *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

3 See *Todorovic v Waller* (1981) 150 CLR 402. The Australian Capital Territory has retained the common-law position. For the various statutory provisions, see Harold Luntz et al, *Torts Cases and Commentary* (LexisNexis Australia, 8th ed, 2017) [8.2.39].

4 Jurisdictions without a general dust-diseases exclusion are as follows. In Western Australia, an exclusion applies only to asbestos-related diseases (WA CLA, s 3A). The Tas CLA, s 3B(4), excludes asbestos-related conditions arising from employment. The Vic CLA, 45(1)(b), excludes claims covered by the *Accident Compensation Act 1985* (Vic), which also applies to dust-related illnesses. The ACT CLA has no general exclusions, but specific sections and parts contain limited exclusions. The ACT CLA does not exclude from its operation claims for dust-related conditions.

5 For example, the NSW CLA relevantly states in s 3B, headed 'Civil Liability Excluded from this Act'
(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
(a) 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.

although they might also be sought in respect of intentional wrongs (such as trespass to the person). However, some claims founded on intentional acts and framed as trespass claims (known as 'intentional torts'), even if not *intended* to cause injury, are likely to be characterised as not being for personal injury *damages*. For example, is a claim for damages for false imprisonment one for 'personal injury damages'? If not, then the CLA limitations on damages may not apply, in particular those regarding non-pecuniary loss.[6] Further, in New South Wales, exemplary and aggravated damages are not allowed for 'negligence' claims and therefore are still available for intentional — that is, deliberate — conduct even if it was not intended to cause injury. In Queensland, the restriction on exemplary and aggravated damages is broader. Such damages are not available for personal injury claims generally, *other than claims* arising from conduct that is intended to cause injury. All of this is important because it means that plaintiffs who can frame their claims as arising from conduct that satisfies one or other of these different intentions are able to avoid many significant restrictions on their rights contained in the CLAs; in short, damages awards may be larger.

The precise reach of the 'intentional conduct' exclusions in the CLAs (or parts thereof) has not been resolved and many important questions remain unanswered. This is despite the increasing number of cases coming before the courts in which plaintiffs are attempting to circumvent the operation of the CLAs.[7] Although Peter Cane commented, prior to the enactment of the CLAs into Australian law, that 'mental states are often difficult to prove; and the legal advantages gained by establishing tortious intention may not be sufficient to justify the attempt',[8] the incentives for plaintiffs to avoid the operation of the CLAs appear to be sufficient to warrant such arguments in recent litigation.[9] The issue will continue to attract judicial attention.

One important aspect of the background to the issues raised in this article is the overlap between causes of action in negligence and trespass. In Australia, at

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6 See further Part III C below, and see *State of New South Wales v Le* [2017] NSWCA 290, [24]–[26] ('*Le*').

7 A plaintiff will also be able to avoid the operation of the CLAs (to obtain more generous damages awards and potentially also exemplary and aggravated damages) where the defendant is *vicariously liable* for an employee's act intended to cause harm. See *Zorom Enterprise Pty Ltd v Zabow* (2007) 71 NSWLR 354.

8 Peter Cane, '*Mens Rea* in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533, 533.

9 See, eg, *Dean v Phung* (2012) Aust Torts Reports 82-111; [2012] NSWCA 223 ('*Dean*'), where the NSW CLA was held not to apply and substantially higher damages were awarded as a result (see, eg, at [5]–[7] as to some of the differences in common-law versus CLA damages). Although in that case, the insurer refused to pay the increase in damages awarded by the Court of Appeal, which refusal was upheld: *Dean v Phung* [2015] NSWSC 816. For other cases in which higher damages were payable for intentional conduct, see Luntz et al (n 3) [11.4.5] and *Hamilton v State of New South Wales [No 13]* [2016] NSWSC 1311 ('*Hamilton*').

least, it is still possible for a plaintiff to bring an action in trespass even where the interference was a negligent act ('negligent trespass'). The survival of such claims has been extensively canvassed in cases and textbooks,[10] and I do not intend to traverse that ground here. It is worthwhile to note, however, relevantly for later discussion, that conduct that constitutes a trespass to the person can range across a whole gamut of moral blameworthiness: it can be negligent conduct ('negligent trespass'); deliberate conduct that was not intended to be wrongful, being based on a mistaken assumption of right, for example ('innocent trespass'); intentional infringements that were nonetheless not intended to injure the victim; and infringements that were intended to injure (that is, a 'double' intention can be proved).

More difficult is the question of whether a plaintiff can bring a negligence claim for conduct that is an intentional act. There are conflicting authorities on the point, and the issue is canvassed in some detail by Peter Handford, although the better view, as the law currently stands, is yes.[11] For the most part, that question is not relevant to the central issue addressed in this article — that is, when can a plaintiff avoid the limitations on damages in the CLAs? — but the question of whether intentional acts might fall within the concept of 'careless' or negligent conduct (or the cause of action in negligence) is touched on below.[12]

The article proceeds as follows. Part II provides an overview of the scope of the CLAs and, specifically, sets out the exclusions in the CLAs for intentional conduct. These exclusions vary in their ambit and use different terminology to delineate what is and is not covered by the CLAs. Part III addresses some of the issues that arise in interpreting the intentional conduct exclusions, including the meaning of 'intentionally caused injury' and how recklessness should be characterised for such purposes, and where damages for trespass fit within the personal injury damages regimes. Part IV briefly concludes the discussion.

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[10] See, eg, Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press , 4th ed, 2007) [2.3]; compare now the fifth edition, where the authors argue that negligent trespass is anomalous, but still part of Australian law: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [2.1]; Luntz et al (n 3) [11.3]. A recent case discussing the issue is *Croucher v Cachia* [2016] NSWCA 132 ('*Croucher*'), and see also *State of New South Wales v Ouhammi* [2019] NSWCA 225 (re whether a police officer slamming a door on the plaintiff in a holding cell constituted negligent battery).

[11] See Peter Handford, 'Intentional Negligence: A Contradiction in Terms' (2010) 32(1) *Sydney Law Review* 29.

[12] See text accompanying nn 44–5.

II The Scope of the CLAs

A *Generally*

The CLAs are broad in their potential operation. Most apply, subject to specific exceptions, to civil claims for recovery of damages for harm, including personal injury (physical or mental), damages to property and economic loss. Broadly speaking, each of the CLAs (other than that of the Northern Territory)[13] introduced four types of reforms. First, the CLAs set out general principles governing liability arising from a failure to take reasonable care, irrespective of whether such claims are brought in tort, contract or under statute.[14] Secondly, the CLAs set out certain exemptions from 'civil liability' for certain classes of defendants, as well as provisions disentitling certain classes of plaintiff from claiming damages. These exemptions and disentitlements generally apply not just to negligence actions, but to any forms of 'civil liability'. Some examples include the protection from civil liability of 'good Samaritans' and 'volunteers', and limitations upon the rights to recover imposed (in some jurisdictions) on criminals.[15] Thirdly, the CLAs introduce proportionate liability regimes that govern economic loss and property damage.

Fourthly and finally, the CLAs introduce principles governing (and generally limiting) the award of personal injury damages. Such principles apply generally to 'civil liability'; that is, they are not, in most jurisdictions, limited to claims arising from negligent conduct (let alone claims in the tort of negligence).[16] They are, however, subject to the general exclusions to the operation of each CLA (as to

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13 The Northern Territory legislation is more limited in its scope and does not include the first reform (principles of negligence), and the proportionate liability reforms are contained in separate legislation. See the *Proportionate Liability Act 2005* (NT).

14 ACT CLA: see ch 4, s 41 ('negligence claims'); NSW CLA: see s 5A (Part applies to claims for harm resulting from negligence, regardless of the precise cause of action pleaded to sustain such a claim); Qld CLA: see ch 2, pt 1 (most sections apply to 'breach of duty of care', defined to include claims in contract or under statute); SA CLA: see pt 6 (which is limited to claims in negligence, defined as a 'failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care'); Tas CLA: see s 10 (claims for breach of duty of care); Vic CLA: see s 44 (negligence claims). Under the WA CLA, oddly, the relevant part of the Act uses the term harm caused by 'fault' of another, whether damages are sought for breach of contract or other action (s 5A(1) and (2)). Section 5B, setting out the principles of negligence, also uses the more generic term 'fault' but the Division is headed 'Duty of Care'.

15 An early discussion of some of these exemptions can be found in J Dietrich, 'Duty of Care Under the "Civil Liability Acts"' (2005) 13(1) *Torts Law Journal* 17.

16 See ACT CLA, ss 92 and 93; NSW CLA, s 11A; Qld CLA, ss 4(1), 50; Vic CLA, s 28C(3); WA CLA, s 6(2). In South Australia, s 51 applies the damages part of the CLA to damages for personal injuries arising from breaches of duty of care (including in contract or under statute), other *unintentional* torts, but also *intentional* 'motor vehicle' accidents. The difficulties created by the term 'other unintentional torts' are discussed further below.

which, further below). Assuming no exclusions apply, this means that, even where negligence is not an element of the cause of action — such as breach of contract, nuisance or failure to meet some statutory standard of conduct — damages awards for personal injury would be governed by the relevant parts of the CLAs. In Tasmania, the damages part of the CLA (pt 7) only applies to civil liability for damages for personal injury from a 'breach of duty' (s 24), defined as including a 'duty of care' under contract or statute (s 3).

The focus of this article is on this fourth type of reform and the operation of — or, more importantly, the non-operation of — the CLAs to limit personal injury damages in relevant provisions, including the exclusion of exemplary and aggravated damages in some CLAs. It is necessary, then, to set out in greater detail the application of the various CLAs in relation to 'intentional conduct'.

B *Intentional Conduct Exclusions*

Most of the CLAs are set up so as not to apply (or for most parts not to apply) to intentional conduct or, more specifically, to conduct that is intended to cause injury. The effect is that such conduct will not be subject to the limitations and caps on personal injury damages.

As already noted, according to s 3B, the New South Wales CLA does not apply (although in limited circumstances, it does so apply)[17] as follows:

> (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
>
> (a) 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 whole Act except [certain provisions] …

That terminology has been described as 'somewhat awkward'[18] and 'curiously imprecise'.[19] For convenience, general references in this article to the 'intentionally caused harm exclusion' include sexual assault and sexual misconduct. The Western Australian CLA is similarly drafted, although it uses the phrase an 'unlawful intentional act' that is intended to cause injury (s 3A).[20]

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17 See, eg, the provision relating to damages for loss of capacity to perform domestic services provided by a plaintiff (NSW CLA, s 15B), which applies to intentionally caused harm: see s 3B(1)(a).

18 See Basten JA in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168, 179 [197] ('*Ibbett*').

19 See *Dean* (n 9) [26] (Basten JA, Beazley JA agreeing).

20 Does the adjective 'unlawful' create a point of distinction? I will not consider this issue, but note that in the context of s 52 of the Qld CLA, Richard Douglas, Gerard Mullins and Simon Grant, *Annotated Civil Liability Act — Queensland* (LexisNexis Butterworths, 4th ed, 2016) 471 [52.5], consider that 'unlawful' would 'ordinarily' require a breach of criminal law, whereas in *State of*

The Tasmanian CLA is drafted in similar terms (s 3B(1)(a)), although that exclusion does not have as much significance as it does in other jurisdictions because the Part that governs personal injury damages in any case only applies to breaches of 'duty of care' (in tort, contract or under statute: s 3). The Victorian CLA is a more comprehensive piece of legislation (taking the form of amendments and additions to the *Wrongs Act 1958* (Vic), which is the correct title of the Act), such that relevant inclusions and exclusions are identified in relevant parts. Part VB ('Personal Injury Damages') excludes conduct in similar terms to those used in New South Wales: s 28C(2)(a) CLA (Vic). Interestingly, however, the Victorian provisions covering non-economic loss are contained in a separate pt VBA, and the application provision of that Part, s 28LC(2)(a), differs in its wording from s 28C(2)(a). Section 28LC(2)(a) excludes claims not only where the fault concerned is an intentional act intended to cause death or injury, but also where it '*relates to*' such acts. Such subtle differences in the choice of words can have significant consequences.[21]

In those jurisdictions, therefore, the chapters or parts of the CLAs on the assessment of damages do not apply to claims arising from acts intended to cause 'injury'.

Importantly, as will be seen below, the focus of these exclusions is therefore on the conduct giving rise to the claim rather than the cause of action pleaded. In other words, even if a claim is brought in trespass, such a claim need not involve conduct that was intended to cause injury and the exclusion will not automatically apply.[22]

The South Australian CLA does not directly exclude liability arising from intentional conduct, although it indirectly excludes intentional torts, since most of the relevant provisions are limited to negligence claims, and the personal injury damages chapter is also limited to accidents caused by negligence and 'other unintentional torts' (as well as intentionally caused motor vehicle

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New South Wales v McMaster (2015) 91 NSWLR 666, 704–5 [200]–[204] (Beazley P, McColl and Meagher JJA agreeing) ('*McMaster*'), in the context of self-defence provisions of the NSW CLA, it was held that 'unlawful' extends to conduct that is merely tortious. Both conclusions could, of course, be correct, given the very different statutory contexts.

[21] One consequence is that the personal injury damages provisions contained in pt VB of the Vic CLA would apply (and that Part is not excluded) where a defendant is held liable in negligence for failing to prevent an intentional attack on a plaintiff, whereas pt VBA does not apply to such circumstances. It has been held that a plaintiff who sues a defendant prison authority for failing to prevent the intentional stabbing of the plaintiff need not meet the relevant threshold requirements of pt VBA for non-economic loss: *State of Victoria v Thompson* [2019] VSCA 237 (there being a sufficient nexus between the intentional stabbing and the plaintiff's claim in negligence to satisfy the 'relating to' requirement (at [40])).

[22] *Croucher* (n 10) [33]–[35] and [117]. The Court relied on the earlier decisions of the New South Wales Court of Appeal in *Ibbett* (n 18), *Dean* (n 9) and *White v Johnston* (2015) 87 NSWLR 779 ('*White*').

accidents).[23] The use of the term 'unintentional torts' contrasts with the focus on the intent to cause harm in the jurisdictions noted above. Whether that term implicitly excludes all trespass claims, because they are often described as 'intentional torts' (even if that trespass was not intended to cause injury) will be discussed further below.

The Queensland CLA does not generally exclude intentionally caused injury, nor is the personal injury damages chapter (ch 3) in its terms limited to breaches of duty. Nonetheless, there is at least an argument that some parts of ch 3 do in fact apply *only* to breaches of duty, that is, negligent conduct, as is discussed further below (Part III(E)).

The damages chapter (ch 7) in the Australian Capital Territory CLA applies to any claims ('however described') for damages 'based on a liability for personal injury', whether that liability is based in tort or contract or on another form of action (including 'breach of statutory duty': ss 92, 93).[24] However, apart from limiting loss-of-earnings claims in s 98, the Australian Capital Territory CLA contains no other restrictions. This means that although the failure to exclude claims for harm suffered through intentional conduct might appear at first blush to be unusual, there are few impediments in the Australian Capital Territory to claiming one's full common-law rights to damages when compared to the other CLAs. The Australian Capital Territory CLA also does not limit rights to exemplary and aggravated damages. For these reasons, I will not further consider the Australian Capital Territory CLA in this article.

Similarly to the Australian Capital Territory CLA, the Northern Territory CLA applies to all personal injury claims, even those caused by intentional conduct (see ss 3 and 4), but unlike that of the Australian Capital Territory, the limitations imposed for personal injury damages are significant. Consequently, there is no incentive for a plaintiff to plead intentional conduct as the basis for their claim where they suffer personal injury. Again, therefore, I will not further consider the Northern Territory legislation.[25]

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23 Section 51 states that that Part of the CLA only applies to '(a)(ii) an accident caused wholly or in part by — (A) negligence; or (B) some other unintentional tort on the part of a person other than the injured person'.

24 Personal injury includes bodily harm, mental harm and death (Dictionary). Claims under the *Workers Compensation Act 1951* (ACT) are excluded: ACT CLA, s 93.

25 Section 19 of the NT CLA is also the widest in terms of excluding exemplary and aggravated damages for all claims 'in respect of personal injury'. Even intentionally caused personal injury would be caught by this prohibition, although if the reasoning from the Queensland cases discussed below is applied, it would not preclude such awards for trespass claims for battery, assault and false imprisonment where the damages sought are for the infringement of the plaintiff's rights (eg for humiliation, distress, etc). That was the conclusion reached in *Majindi v Northern Territory of Australia* (2012) 31 NTLR 150 ('*Majindi*') in relation to false imprisonment.

Apart from these express exclusions, the use of the term 'personal injury damages' may itself limit the application of damages restrictions — a point discussed in Part III(C) below.

C *Exemplary and Aggravated Damages*

Both Queensland and New South Wales have enacted provisions that exclude both exemplary (punitive) and aggravated damages in certain circumstances. Before considering the relevant sections, it is necessarily briefly to reiterate the purpose of those damages. Although both types of damages focus on the circumstances and manner of a defendant's wrongdoing,[26] exemplary and aggravated damages have very different purposes, with only the latter being compensatory in nature.[27] As the Queensland Court of Appeal stated in *Bulsey v State of Queensland* ('*Bulsey*'):

> The conceptual distinction between exemplary damages and aggravated damages is that aggravated damages are assessed from the plaintiff's perspective, whereas an assessment of exemplary damages focuses upon the defendant's conduct.[28]

In other words, aggravated damages focus on the impact of the defendant's wrongdoing on the plaintiff; the manner of the defendant's wrongdoing 'aggravates' the impact of the wrong such that additional compensation is necessary to remedy such impact. Exemplary damages, by way of contrast, seek to achieve the broader social impact of punishing a defendant (and deterring future defendants) where there has been an outrageous or contumelious disregard for a plaintiff's rights.[29] For our purposes, since aggravated damages compensate, it is necessary to stress at the outset how these damages differ from ordinary compensatory damages for trespass — assault, battery and false imprisonment — where such trespasses do not cause personal injury. Ordinary damages here compensate for injured feelings, such as outrage, humiliation, indignity and insult, even in the absence of aggravating circumstances. Importantly, however, where aggravating circumstances exist that increase such humiliation, indignity, etc, aggravated damages increase the plaintiff's compensation to account for that aggravation.[30] As Michael Tilbury has stated,

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[26] See Michael Tilbury, 'Aggravated Damages' (2018) 71(1) *Current Legal Problems* 215, 219–20, referring to aggravated damages.

[27] See, eg, the detailed discussion in Tilbury, ibid.

[28] [2015] QCA 187, [94] (Fraser JA, Atkinson and McMeekin JJ agreeing) ('*Bulsey*'), citing *Lamb v Cotogno* (1987) 164 CLR 1, 8 ('*Lamb*').

[29] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149–50 (Windeyer J); *Lamb* (n 28).

[30] See Tilbury (n 26) 219–20; cf the High Court in *New South Wales v Ibbett* (2006) 229 CLR 638, 646–7 [31] ('*Ibbett (HC)*'), which does not expressly make this point.

aggravated damages compensate for the increased distress attributable to the indignity caused to a plaintiff by the defendant's motives or the circumstances of the wrongdoing; such damages 'can be separately identified from basic compensatory damages as the increased loss that "rubs salt in the wounds inflicted" by the wrong'.[31]

Turning now to the relevant provisions. Section 52 of the Queensland CLA states:

> **52 Exemplary, punitive or aggravated damages can not be awarded**
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> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.
> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was —
> (a) an unlawful intentional act done with intent to cause personal injury; or
> (b) an unlawful sexual assault or other unlawful sexual misconduct.

This provision reflects the fact that, in Queensland, the CLA does not contain a general exclusion for intentionally caused injury. Contrast the wording of the New South Wales CLA, which does contain such exclusion. Section 21 states:

> **21 Limitation on exemplary, punitive and aggravated damages**
>
> In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.

Section 21 of the New South Wales CLA assumes that the only awards that are relevantly being considered are ones where death or injury was caused by 'negligence'. Although that term is not specifically defined for that part of the CLA, it has been held to mean negligent conduct, irrespective of the cause of action pleaded. This is consistent with other parts of the New South Wales CLA, which make clear that 'negligence' encompasses all causes of action where careless conduct is the basis of the claim.[32] This means that pleading trespass does

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[31] See Tilbury (n 26) 222–3, citing *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 170 (Lord Donaldson MR), and discussing *Richardson v Howie* [2004] EWCA Civ 1127; [2005] PIQR Q3. See also *State of New South Wales v Riley* (2003) 57 NSWLR 496, 528 [131] (Hodgson JA), and Tilbury (n 26) at 225–6. Tilbury's analysis is supported by the fact that conduct post-wrongdoing can constitute aggravating circumstances. This principle is well-established in the tort of defamation but has also been applied to awards of aggravated and exemplary damages for trespass; see, eg, *Cruse v State of Victoria* [2019] VSC 574, [210]–[215] (aggravated damages further justified by subsequent acts of defendant in 'blaming the victim' for the serious batteries committed during an unlawful arrest and in mischaracterising his alleged offences as suspected 'terrorism'); *Ibbett* (HC) (n 30); *Cheng v Fajudi* (2016) 93 NSWLR 95 (conduct of civil proceedings justified award of exemplary damages).

[32] See *Ibbett* (n 18) [118] (Ipp JA), [209] (Basten JA), and generally [200]–[209]; *Croucher* (n 10) [35].

not circumvent that restriction if the act constituting the trespass was negligent. It does mean, however, that where a defendant *intentionally* trespasses, even if he or she did not intend to cause injury, s 21 does not preclude exemplary and aggravated damages. Therefore, for example, a doctor who performs surgery without consent would potentially be subject to such damages. This potential has seen litigation where patients have, with mixed success, sought to characterise medical malpractice as trespasses[33] — of which more below.

More problematic still is whether it can be said that, where an intentional trespass results in (unintended) consequential injury, or where gross negligence causes injury, the 'act or omission' that caused the injury was 'negligence' for the purposes of excluding exemplary damages under s 21 of the New South Wales CLA.[34]

Interestingly, the South Australian, Tasmanian, Victorian[35] and Western Australian CLAs still allow for exemplary and aggravated damages for negligence-based claims, albeit that that possibility is only ever likely to arise in exceptional circumstances.[36]

III Interpreting the Intention Exceptions: Some Questions that Arise

A *The Relationship between Different Fault Criteria*

In establishing their application, the CLAs refer to numerous different fault criteria: negligence, breach of duty, conduct intended to cause harm, 'unintentional torts'. Even within individual CLAs, several fault criteria are used and, if they are defined, such definitions are at best obvious — for example, a 'breach of duty' is a 'failure to take reasonable care'.[37] Some of these fault criteria may involve overlapping concepts and the relationships between those concepts, and with established causes of action, are not spelt out. Some of these criteria determine when a part or provision of a CLA operates. For example, s 21 of the New South Wales CLA applies where the conduct that caused injury 'was negligence'. Other fault criteria determine when a part or provision of a CLA does not operate. Importantly, these criteria do not necessarily interlink in a logical way. The

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33 See, eg, *Dean* (n 9); *White* (n 22).

34 The latter question was left open by Basten JA in *Ibbett* (n 18) [210].

35 In Victoria, however, exemplary damages are prohibited under workplace and motor accident statutes, even where a defendant acted intentionally.

36 See *Lamb* (n 28), and *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ): 'there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff'.

37 See, eg, Qld CLA, sch 2.

reference to 'unintentional torts' in the South Australian CLA is an example; that nomenclature is not a defined or established legal concept and it is not clear whether it refers to all torts that are not 'intentional torts', which is a more commonly used (but also itself, as explained below, a misleading) term. Nor is it clear whether it refers to causes of action, or to the underlying conduct that gives rise to a cause of action (on which, more below). It is worthwhile, therefore, as a preliminary matter, to note how these various fault criteria might inter-relate.

The New South Wales Court of Appeal has noted in relation to s 3B of the New South Wales CLA that the language of the exceptions in para (a) (intentionally caused injury), when considered as a whole,

> is not suggestive of concepts having some specific legal connotation, but is rather language which encompassed a broad policy objective. Thus, subject to the limited express exceptions, the purpose was to leave those who committed intentional torts to the operation of the general law.[38]

Different fault criteria may well overlap. For example, can it be said that conduct that is intentional (deliberate) or even intended to cause injury (what we might call malicious) also amounts to negligent conduct? After all, to hit someone intentionally is also, it would seem, a failure to meet the standard of reasonable care towards that person. This idea, that more blameworthy conduct also constitutes less blameworthy conduct, is based on a concept of 'nesting'. Peter Cane has noted that fault criteria have two components — mental elements and standards of conduct — and that '[l]egal fault consists either of a failure to comply with a specified standard of conduct, or a failure to comply with a specified standard of conduct accompanied by a specified mental state'.[39] According to Cane, those fault criteria are 'nested' within each other as a matter of evidence: it will be easier to prove defendants were negligent even where they acted intentionally. This would also seem to follow as a matter of definitional logic.[40] Iain Field summarises the point: 'conduct that *does* satisfy the definition of intentional conduct *will*, by logical necessity, satisfy the definition of reckless conduct, negligent conduct', etc.[41] Also, as Peter Handford has stated:

> [I]f inadvertently caused injury that entails unreasonable risk of harm constitutes a breach of [the] standard [to take reasonable care], then presumably injury inflicted deliberately or recklessly constitutes a more egregious departure from the norm set by the law. In terms of general principle, therefore, there is nothing illogical in breach of

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38 *Dean* (n 9) [26] (Basten JA, Beazley and Macfarlan JJA agreeing).
39 Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 78.
40 Ibid 88.
41 Iain Field, 'Good Faith Defences in Tort Law' (2016) 38 *Sydney Law Review* 147, 163–4.

> duty for the purposes of the tort of negligence extending to harm deliberately, as well as carelessly, inflicted.[42]

One can find judicial support for such views.[43]

Of course, a plaintiff who was the victim of intentionally caused harm may not be able to prove such intention; or he or she may simply disavow such an attempt, being satisfied with more restricted damages under the CLAs for negligence claims. However, does this mean that a defendant could argue that, even where a plaintiff does prove intention, he or she nonetheless should be limited by personal injury damages provisions that apply to 'negligence' (relevantly only in South Australia) because negligence includes, on the logic of nesting, intentional acts?[44] This argument can be dealt with quickly. A plaintiff who can show a higher level of culpability ought not to have his or her damages limited by provisions that apply to negligence, even if his or her claim is in the tort of negligence and proof of that higher level of culpability is therefore unnecessary to establish liability. To conclude otherwise would be inconsistent with the legislative intention discernible in the CLAs. This follows from the stated purposes of the CLAs to implement the recommendations of the *Review of the Law of Negligence Final Report* ('*Ipp Report*'),[45] which was only concerned with the tort of negligence and other failures to take reasonable care. The *Ipp Report* recommendations were not purporting to alter the law in relation to intentionally

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42 Handford (n 11) 30.

43 See, eg, the various judgments in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, in the context of whether suicide constitutes 'contributory negligence'. Lord Hoffmann stated: 'I recognise, of course, that it is odd to describe [the intentional act of committing suicide] as having been negligent. [The deceased] acted intentionally and intention is a different state of mind from negligence. On the other hand, the "defence of contributory negligence" at common law was based upon the view that a plaintiff whose failure to take care for his own safety was a cause of his injury could not sue. One would therefore have thought that the defence applied a fortiori to a plaintiff who intended to injure himself. The late Professor Glanville Williams, in his book *Joint Torts and Contributory Negligence* (1951), p 199, expressed the view that "contributory *intention* should be a defence." ... Logically, it seems to me that Professor Glanville Williams is right (at 369–70).' Presumably, Lord Hoffmann's reference to a 'state of mind' for negligence is intended to mean a standard of conduct. See also Lord Jauncey at 377 (no difference between accidentally or intentionally pushing one's hand into a vat of boiling water), and Lord Hope at 383.

44 This argument has the strongest potential in South Australia because intentionally caused harm has not been expressly excluded (whereas it has been excluded in the Tasmanian CLA, which also only applies the damages restrictions to 'breach of duty'). In Tasmania, however, such a nesting argument could also make a difference where a defendant intentionally trespassed, but without an intent to cause injury. In such a case, the exclusion of the operation of the CLA in relation to conduct intended to cause injury would not apply, but the personal injury damages provisions would nonetheless still not apply (being limited to negligence claims) unless such a nesting argument were accepted.

45 *Review of the Law of Negligence* (Final Report, September 2002) ('*Ipp Report*'). The *Ipp Report* can be accessed at <https://treasury.gov.au/review/review-of-the-law-of-negligence>.

caused injury.[46] The scheme of the other CLAs is that conduct that meets higher thresholds of culpability than negligence should not be subject to the same restrictions as claims based on failures to take care, and the South Australian CLA should be interpreted consistently with that approach.

B *The Meaning of 'Intentionally Caused Injury'*

What does conduct that is 'intended to cause injury' mean? The answer to this question is important both for determining (1) whether, in many jurisdictions, the personal injury damages limitations apply, and (2) whether, in Queensland, exemplary (and aggravated) damages are available.[47]

As noted above, it has been held that s 3B(1)(a) of the New South Wales CLA looks to the nature of the conduct found to occur, rather than to the cause of action that has been pleaded. As Leeming JA stated in *Croucher v Cathia*, s 3B(1)(a)

> does not operate upon the particular *cause of action*, but instead upon the particular *act* which gives rise to the civil liability and the *intent* of the person doing that act (I pass over the question whether and if so how s 3B(1)(a) applies to intentional omissions to act). This was the point made by Basten JA in *Dean v Phung* [2012] NSWCA 223 at [10]: 'the statutory scheme is not identified by reference to a particular cause of action'.
>
> A cause of action in battery may be established where the defendant's conduct is either intentional or alternatively merely negligent. The former would engage s 3B(1)(a) and the latter would not. In other words, the language of 'intentional tort' is an unsafe guide to whether s 3B(1)(a) is engaged ... [48]

References to 'intentional torts' are therefore unhelpful for establishing exclusions under the New South Wales CLA (and those jurisdictions with a similar framework). In any case, that label is a misnomer, since the intention refers to the doing of the act with volition; it does not require 'an understanding as to its nature and quality'.[49] For the purposes of the s 3B(1)(a) exception, however, such an understanding is required. This makes it more difficult for plaintiffs to establish the requisite intention and, therefore, the exclusion. In effect, a plaintiff needs to show that the defendant acted with two intentions: first, that his or her *act* was intentional or volitional; and, secondly, that that act was done subjectively with

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46 See, eg, *Ibbett* (n 18) [116]–[119] (Ipp JA). The *Ipp Report* (n 45) notes, at [1.14], that it does not consider 'liability for intentionally or recklessly caused personal injury'.

47 In the NSW CLA, s 21 excludes exemplary damages only for 'negligence'; therefore, such damages will be available for an intentional trespass that is not intended to cause injury.

48 *Croucher* (n 10) [33]–[34], citing *White* (n 22) [132].

49 *Fede v Gray* [2018] NSWCA 316, [170]–[172] (Basten JA, Meagher JA agreeing) ('*Fede*'). See also *Croucher* (n 10) [20].

the intent to injure.[50] In *Fede v Gray*, the mentally disturbed and delusional defendant bit the plaintiff police officer in the leg, drawing blood.[51] Although the New South Wales Court of Appeal held, unanimously, that the act of biting was intended, as it was not involuntary,[52] nonetheless the Court held, by majority, that the bite was not intended to cause injury, given that the defendant did not understand the nature or quality of his act.[53] Consequently, the CLA damages caps applied.

Particular difficulties have arisen in applying the exclusion in the New South Wales CLA to claims in the medical context. A defendant who provides medical procedure without consent, although clearly committing a trespass, does not necessarily 'intentionally cause injury' thereby. Instead, the plaintiff would need to show that the medical procedure was motivated solely by a non-therapeutic purpose and unnecessary, such that the patient's consent was for a different, and presumed necessary, procedure. In such a case, it appears to suffice that the procedure was objectively unnecessary, that is, 'it was not capable of constituting a therapeutic response to the patient's condition'.[54] Further, unnecessary medical procedures can be said to have been intended to cause injury.[55] The legislative caps on damages will not apply and exemplary damages are available. If the procedure has some therapeutic purpose, but the patient did not consent to it, being able to prove a fraudulent intent on the part of the practitioner, going at least to the nature of the acts done,[56] then that conduct also constitutes trespass.[57] It does not necessarily follow, however, that the conduct therefore qualifies as being done

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50 *Fede* (n 49) [191] (Basten JA, Meagher JA agreeing): the term 'intent' is therefore used in two senses. As to the first, as was stated in *Carter v Walker* (2010) 32 VR 1, 38 [215] (Buchanan, Ashley and Weinberg JJA), 'if the act is voluntary, and the defendant "meant to do it" in the sense of meaning to contact the plaintiff, it will be relevantly intentional' (footnote omitted).

51 *Fede* (n 49).

52 Ibid [121]–[122], [137] (McColl JA), [195]–[196] (Basten JA, Meagher JA agreeing).

53 Ibid [206] (Basten JA, Meagher JA agreeing), [119], [138] (McColl JA dissenting).

54 *White* (n 22) [73], summarising the majority position in *Dean* (n 9) [65] (Basten JA and Beazley JA). It will not be necessary to show that the defendant acted fraudulently at least by being reckless as to the necessity of treatment, as required by the dissenting judge, Macfarlan JA at [94]. Leeming JA in *White* noted that there is support for both positions but did not indicate which view he preferred (at [74]).

55 *Dean* (n 9). One would assume this only applies to invasive or substantive medical procedures and not, say, to an x-ray. Similarly, an innocent trespasser who mistakenly believes that consent has been given, eg, because of an administrative error, and performs an unnecessary procedure, can probably not be said to have intended such injury, but the question was not considered in the cases under consideration.

56 *White* (n 22). It may also be argued that fraud not going to the nature of the acts being done may be sufficient to vitiate consent where the defendant's purpose is not within the plaintiff's consent. See the discussion at [53]–[72].

57 Ibid.

with the intent to cause injury. If it does not, the limitations on personal injury damages in the CLA will apply. That said, however, under the New South Wales CLA, for the latter type of trespass at least, exemplary and aggravated damages are not excluded (the claim not being in 'negligence').[58]

One issue that has arisen is what constitutes 'injury' for the purposes of the requisite intent to cause injury. In *Hamilton v State of New South Wales [No 13]*, Campbell J held that the 'infliction of a deliberate blow accompanied with the intent to cause some injury even of a temporary nature would be sufficient' to meet this requirement, as would 'the deliberate infliction of physical violence intended to cause pain and submission to the will of the police officer'.[59] That conclusion seems warranted, for otherwise conduct such as torture that is intended to cause pain, but which may not be intended to leave lasting physical damage, would not qualify as relevantly intentional. Further, in *New South Wales v Ibbett* ('*Ibbett*'), the New South Wales Court of Appeal held that an intent to cause an apprehension of physical violence satisfies the 'intentional injury' requirement. Hence, an intentional assault qualifies, even where no physical injury results.[60] This conclusion is perhaps more questionable for reasons discussed in Part III(C) below.

It is not clear whether the same can be said for an intentional false imprisonment. Is the intent to restrain or imprison — albeit an obvious infringement of a person's liberty — also an intent to cause injury? That question was left open in *State of New South Wales v Le*.[61]

In South Australia, the legislature has not used the language of 'intended to cause injury' to *disapply* the CLA and, specifically, the personal injury damages provisions, but instead *applies* those provisions to negligence and other 'unintentional torts'.[62] By inference, does this suggest that all 'intentional torts' are excluded from the relevant provisions? And does 'intentional torts' encompass all claims that are framed as causes of action in trespass? If so, and if

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58 In *White*, ibid, the issue of exemplary damages did not arise, as the Court had dismissed the claim that the consent was vitiated by fraud, leaving the plaintiff with her sole claim in negligence.

59 *Hamilton* (n 9) [184]–[194].

60 *Ibbett* (n 18) [11] (Spigelman CJ), [120]–[130] (Ipp JA) and [217] (Basten JA) reaching the same conclusion. This issue was not considered on appeal to the High Court: *Ibbett (HC)* (n 30). Does the conclusion apply where the acts of trespass are intended (ie deliberate) but are innocent, perhaps even reasonable, where, eg, a defendant mistakenly believes they have statutory authority to commit the assault (or, similarly, the false imprisonment or battery)?

61 *Le* (n 6). Perhaps, the answer to this question depends on whether the focus of the term 'injury' is on intended substantial consequences (eg mental distress, humiliation, etc, from an assault) or merely on an intended interference in the right (namely, liberty) itself. However, even if the former is the case, any non-trivial infringement of liberty would also involve humiliation, etc.

62 See SA CLA, s 51.

a plaintiff were able to frame his or her claim as one for trespass to person, even though the injury was negligently caused,[63] then he or she might be able to avoid the limitations on personal injury damages. Trespass is generally described as an intentional tort; the plaintiff need only show the elements of direct contact and need not allude to fault.[64] Therefore, if the reference to 'torts' is a reference to causes of action, this would allow for the circumvention of the damages restrictions even for negligently caused harm (that is, the trespass claim is not one for an 'unintentional tort'). The more likely interpretation, however, is that 'unintentional *torts*' refers to the underlying *act* or *wrong* causing the plaintiff's loss and, therefore, if the alleged 'trespass' was a negligent infringement, that 'tort' is, indeed, unintentional. There do not appear to be any decisions that consider the point.

C *Intentional Torts and Personal Injury: The Relevance of the Damages Sought*

In Queensland, the CLA does not expressly exclude claims for 'intentionally caused injury', except where exemplary or aggravated damages are sought (s 52). The Queensland Court of Appeal has nevertheless interpreted s 52 so as to reach a similar outcome to that in New South Wales, namely, that the CLA restrictions on damages do not apply to trespass claims for damages for outrage, humiliation, indignity and distress, etc, because such damages are not included within the concept of personal injury damages.[65] It also follows from this conclusion that exemplary and aggravated damages are available for trespass claims, even where the trespass was not intended to cause injury. It is necessary to explain in greater detail how the Court arrived at that conclusion.

Section 50 of the Queensland CLA states:

> **50 Application of ch 3**
>
> Subject to section 5, this chapter applies only in relation to an award of personal injury damages.

Section 52 (which is found in ch 3), recall, states:

> **52 Exemplary, punitive or aggravated damages can not be awarded**
>
> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.

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63 As already noted, this is clearly still permitted by common law. See *Williams v Milotin* (1957) 97 CLR 465; *Croucher* (n 10).

64 For discussion of the history of trespass claims, see *Croucher* (n 10) [19]–[26].

65 See *Bulsey* (n 28), discussed further below. That conclusion is probably also supported in New South Wales, but in *Ibbett* (n 18) [21]–[22], Spigelman CJ and Basten JA left the question open.

> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was —
>
> (a) an unlawful intentional act done with intent to cause personal injury; or
>
> (b) an unlawful sexual assault or other unlawful sexual misconduct.

How do these sections impact on claims in trespass? Subject to the issue considered in Section E of this Part below, the absence of a general exclusion for intentionally caused injury potentially leads to the harsh outcome that, unlike in other jurisdictions, personal injury damages in Queensland are subject to the limitations in ch 3 even where the injury was intended. Obviously, if a trespass was intended to cause personal injury, then s 52(2)(a) does allow for exemplary and aggravated damages in such cases, but other limitations on damages would still potentially apply. But what if such intention cannot be proved?

A plaintiff who has a claim in trespass, such as for false imprisonment or battery, may not be able to show that the defendant intended to cause injury[66] (and, indeed, no physical harm may have been caused).[67] For example, a defendant may have acted under a mistaken view as to the plaintiff's consent, or on a mistaken belief as to the lawfulness of his or her actions. In such cases, do the general ch 3 restrictions apply? The answer is 'yes' if personal injury is suffered and damages are claimed for that injury, but 'no' if the plaintiff claims damages for the trespass itself. Further and more specifically, are exemplary and aggravated damages available? The answer is 'yes'. These answers follow from the conclusion that the trespass claim per se is not one for personal injury damages.

The issue turns on whether the term 'claims for personal injury damages' includes damages for humiliation, distress, indignity, and the like, caused by an assault, battery or false imprisonment. As already noted above, such compensatory damages are available in response to an infringement of the plaintiff's right — that is, they apply to any 'run of the mill' trespass claim. Where, however, aggravating circumstances exist, the damages may be increased to provide larger compensation. In Queensland, the Court of Appeal in *Bulsey* held that damages for humiliation (etc) are not caught by ch 3, as they are not for personal injury damages.[68] The Court relied on the High Court authority of *New*

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66 Ibid [92].

67 Even a battery need not cause personal injury: *New South Wales v Williamson* (2012) 248 CLR 417, 428–9 [33] (French CJ and Hayne J) ('*Williamson*'), citing *Watson v Marshall and Cade* (1971) 124 CLR 621.

68 *Bulsey* (n 28). Only a few of those restrictions are probably relevant in any case, although the statutory regime for calculating non-pecuniary ('general') damages would apply to restrict such non-pecuniary losses (Qld CLA, s 62). See *Bulsey* (n 28) [81]–[82]. Procedural requirements under the *Personal Injury Proceedings Act 2002* (Qld) would also apply.

South Wales v Williamson ('*Williamson*') to support that conclusion.[69] In *Williamson*,[70] French CJ and Hayne J (Kiefel J agreeing) held that the phrase 'personal injury damages' as used in s 11 of the New South Wales CLA does not extend to a claim for damages for the deprivation of liberty, despite the broad definition of 'injury' in that Act as meaning 'personal injury', which in turn includes 'impairment of a person's physical or mental condition'.[71] Their Honours held that the

> claim for false imprisonment was necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty (loss of liberty and harm to reputation) is not an 'impairment of a person's physical or mental condition' or otherwise a form of 'injury' within s 11 of the [New South Wales CLA].[72]

Implicitly, their Honours' reasons also lend support to the further conclusion that damages for loss of dignity, humiliation (etc) caused by a battery or assault are also not 'personal injury damages' under the relevant CLA provisions.[73] Certainly, the Queensland Court of Appeal in *Bulsey* took that view,[74] relying also on Spigelman CJ in *Ibbett*, who stated:

> The concept of 'personal injury' … 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. … An award for the emotional harm involved in the apprehension of personal violence would not generally be regarded as an award for 'personal injury damages'.[75]

It followed from this that aggravated damages were available in *Bulsey* even though the defendants had not intended to cause injury:

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69 *Bulsey* (n 28) [85]–[86] (Fraser JA; Atkinson and McMeekin JJ agreeing). See also *Majindi* (n 25) (exemplary damages for false imprisonment available as not a claim for personal injury).

70 *Williamson* (n 67).

71 See NSW CLA, s 11.

72 *Williamson* (n 67) [34] (French CJ and Hayne J), [45] (Kiefel J). The question arose for the purposes of applying the legal cost limitations in the *Legal Profession Act 2004* (NSW). Section 337(1) of that Act, however, defines 'personal injury damages' as having the same meaning as in pt 2 of the NSW CLA. The other two judges, Crennan and Bell JJ, did not express any opinion on the matter, having decided the case on other grounds. See *Williamson* at [38[–[39] and the related case of *Certain Lloyd's Underwriters Subscribing to Contract No IHOOAAQS v Cross* [2012] HCA 56.

73 *Williamson* (n 67) [32]–[33] (French CJ and Hayne J). That conclusion appears to find further support in *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 and in its approval of *Williamson*.

74 *Bulsey* (n 28) [85]–[86]. Under the Schedule to the Qld CLA, 'personal injury' includes '(c) psychological or psychiatric injury', and 'personal injury damages' means 'damages that relate to the death of or injury to a person'. It could be argued, contrary to the Court's conclusion, that humiliation, distress (etc) are a form of psychological injury.

75 *Ibbett* (n 18) 172 [21].

> An award of aggravated damages for the assault, battery and wrongful imprisonment which makes no allowance for personal injury is not an award of personal injury damages.[76]

What if the plaintiff who has been assaulted or battered also suffers other, consequential physical losses, which were not intended, such as where he or she runs in fear and injures him- or herself while doing so?[77] Although the consequential damages themselves will be capped by the personal injury restrictions in the CLA (s 50, applying ch 3 to any 'award' of personal injury damages), are exemplary and aggravated damages available? Or does s 52 restrict such damages because the personal injury was not intended (albeit that the *act* was), such that s 52(2)(a) does not apply? Clearly, where a plaintiff abandons his or her claim for personal injury damages, then s 52 has no operation.[78] The Court in *Bulsey* went further, however, and held that the fact that a plaintiff pleads both consequential personal injury damages and other damages, such as humiliation, insult and distress resulting from assault and false imprisonment, does not preclude an award of exemplary or aggravated damages:

> In so far as personal injury results from those torts, it may be said that they create a liability for personal injury, but that is not so insofar as a plaintiff is entitled to compensation for his or her humiliation, indignity, distress, discomfort, and the like. It seems natural in this context to read s 52(1) as precluding an award of aggravated damages only in relation to the death of or personal injury to a person.[79]

Nor is compensation for humiliation, distress (etc) 'in relation to' such a claim or award precluded.[80] Accordingly, aggravated (or, less likely, exemplary) damages may be awarded to a plaintiff in addition to ordinary damages for trespasses to the person, but not in addition to any personal injury damages awards that also arise from the same trespass. That must be right. Otherwise, a plaintiff who suffers some consequential personal injury from a trespass would be unable to claim aggravated (and exemplary) damages, whereas a plaintiff who is not physically harmed would be able to so claim. As the Queensland Court of Appeal stated in *Bulsey*, '[i]t is not easy to accept that the legislative purpose was that adding injury to insult should limit the damages for the insult in that way.'[81]

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76 *Bulsey* (n 28) [98].

77 See *ACN 087 528 774 Pty Ltd (formerly Connex Trains Melbourne Pty Ltd) v Chetcuti* (2008) VR 559 ('*Chetcuti*'). Another example of consequential injury arising from trespass to the person is *New South Wales v Riley* [2003] NSWCA 208 (prisoner unlawfully arrested and suffered fractured wrist in police wagon; injury was unintended and indirect consequence of 'assault' (battery) and false imprisonment).

78 *Bulsey* (n 28) [97].

79 Ibid [100].

80 Ibid [98]; and see at [98]–[102].

81 Ibid [101].

Interestingly, however, as was noted above, the New South Wales Court of Appeal has also held that an intentional assault or battery not causing physical harm falls within the statutory meaning of 'injury' when that term forms part of the phrase 'intentionally caused injury'.[82] Is this reasoning consistent with that of the Queensland Court of Appeal in *Bulsey*? Although the terms are contained within different statutory schemes and parts thereof, there nevertheless appears to be a fundamental contradiction here, at least at a broad conceptual level. If it can be said that an intentional threat[83] that causes the apprehension of imminent physical violence causes the victim of that threat an intentional injury (according to cases interpreting the New South Wales CLA), how can it be that where damages for an assault are sought, those damages are not themselves ones for 'personal injury damages' (according to *Bulsey* in the Queensland CLA). This latter phrase also uses the term 'injury', and if the monetary award to remedy the assault is not 'personal *injury* damages', it is difficult to see how, consistently with this conclusion, the assault itself can cause 'injury', intentionally or otherwise (albeit for the purposes of a different section under a different Act).

Indeed, Spigelman CJ in *Ibbett* was alive to the possible contradiction. Although his Honour ultimately left open the question of whether damages for humiliation, distress (etc) resulting from an assault were awards of personal *injury* damages, his judgment certainly lends support to the view that they were not. This was despite his conclusion that an intentional assault was intended to cause *injury*. That conclusion was sustained by the definition of 'injury' (in s 11) for the purposes of the personal injury damages restrictions of pt 2 of the New South Wales CLA, which definition did not apply to the term 'injury' as used in s 3B(1)(a). That latter term, according to Spigelman CJ, should be 'given its natural and ordinary meaning. That meaning would encompass the harm occasioned by an apprehension of violence.'[84] The difficulty with this conclusion is that the s 11 definition is itself inclusive and to some extent circular: '"injury" means personal injury', and 'personal injury damages' is defined to mean 'damages that relate to the death of or injury to a person'. 'Injury' also includes, it should be noted, impairment of a 'mental condition'. Although Ipp JA agreed that the 'intent to injure' exception in s 3B(1)(a) was activated by the intentional assault, his Honour did not address the question of whether damages for such an injury are personal injury damages; nonetheless, his judgment appears to hint that the meaning of the two references to 'injury' may well be the same.[85] If that were so, then

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82 *Ibbett* (n 18). A battery may also be intended merely to humiliate P (ie not cause physical injury), but such a battery would also be one that was intended to injure: *Hamilton* (n 9).

83 It is questionable whether a negligent assault is possible, albeit some recent cases have confirmed that it is. See, eg, *McMaster* (n 20); *Sahade v Bischoff* [2015] NSWCA 418, [71]–[73].

84 *Ibbett* (n 18) [5]–[12], Basten JA agreeing at [216]–[218].

85 Ibid [121]–[125].

presumably, on that reasoning, 'personal injury damages' would include damages for an assault.

D *How Does 'Reckless' Conduct Fit into the Scheme of the CLAs?*

One significant issue is whether reckless conduct constitutes conduct that is *intended* to cause injury. If it does, then for those jurisdictions that have excluded intentionally caused injury from the CLAs, the personal injury damages restrictions would not apply (and, in Queensland, the restriction on exemplary and aggravated damages would not apply).

The issue therefore arises: does reckless conduct — a reckless indifference to another's safety (as defined further below) — come within the purview of intended injury, or does it only constitute negligently caused injury? A related issue is whether one can be said to intend the inevitable, or natural and probable, consequences of one's intentional act.[86]

The issue was discussed but not resolved in *Croucher v Cachia*.[87] In that case, one issue was whether a claim in battery engaged s 3B(1)(a) and therefore was not subject to the CLA restrictions on damages. Leeming JA for the New South Wales Court of Appeal noted that if the battery was done with the intent to injure, then clearly the CLA would not apply. However, the conduct in question was engaged in by a defendant who 'was recklessly indifferent to the prospect that opening and shutting the shears and thrusting them at [the plaintiff] would cause injury'.[88] Leeming JA went on to state:

> It is far from clear that conduct which is reckless, even if it amounts to an 'intentional tort' such as battery, engages s 3B(1)(a). It is perfectly clear that a battery which involves merely negligent conduct will not engage s 3B(1)(a) …
>
> … In *Hayer v Kam* [2014] NSWSC 126, when dealing with a strike out application, Hoeben CJ at CL expressed the view that, subject to authority, he would have accepted the submission that s 3B(1)(a) 'excluded any reliance upon concepts such as "recklessness"': at [38]–[39], a view which I regard as being not without force. However, even so his Honour regarded an allegation of recklessness as sufficiently arguable not to be struck out. It may also be noted that D Villa, *Annotated Civil Liability Act 2002 (NSW)* (2nd ed, 2013, Lawbook Co) at 55–56 notes that the position is unclear but expresses the view that 'it would be consistent with the purpose of the exclusion that recklessness be sufficient for the purposes of s 3B(1)(a)'.
>
> I do not think that it is appropriate to determine this point. …[89]

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86 *Dean* (n 9) [27] left this issue open.

87 *Croucher* (n 10). The Court relied on the earlier decisions of the New South Wales Court of Appeal in *Ibbett* (n 18), *Dean* (n 9) and *White* (n 22).

88 *Croucher* (n 10) [116].

89 Ibid [117]–[119].

Recklessness is a concept to which resort is made in different areas of law and it has been given different meanings; indeed, there is no inherent reason as to why recklessness cannot be given different meanings in different legal contexts. This applies even more so where the question is one of statutory interpretation. Of course, the issue here is not what 'recklessness' means for the purposes of the CLAs, since those statutes do not use that terminology. The issue under the CLAs is whether the phrase 'intended to cause injury' encompasses what might, on some definitions, be considered merely reckless conduct. Different conclusions might be reached in different jurisdictions given the different statutory contexts of each CLA. But before proceeding, it is necessary to at least start with a workable meaning of reckless conduct.

Recklessness has been usefully defined as 'awareness of a risk that certain consequences will result from conduct, and indifference to that risk'.[90] The risk must be so substantial as to have been an unreasonable one to take;[91] that is, there must be a 'conscious disregard of a substantial and unjustifiable risk',[92] as opposed to a merely foreseeable one. Awareness of the risk can be founded on the person's actual knowledge of the risks, or at least actual knowledge of facts combined with the reasonable predictions that could be drawn from those facts leading to a finding of reckless indifference. The definition of 'recklessness' given in § 2 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* is as follows:

> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.[93]

If 'recklessness' indicates fault that sits somewhere between carelessness and intentional conduct and, specifically, conduct that is intended to cause injury, then we might say that a reckless defendant must surely also have been negligent. As a matter of logic, it appears that this higher level of fault — awareness of substantial risks — is necessarily 'nested' within the standard of reasonable care. It is a very different argument, however, to say that recklessness is a lesser form,

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90 See Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd ed, 1999) 184–5, cited in Cane (n 8) 535.

91 Ibid, and Cane (n 39) 80: the required knowledge of the actor is of a risk that, *because of the likelihood* of *its outcome*, is unreasonable to take. See also Jim Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, 106.

92 *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920, [28] (Finkelstein J).

93 American Law Institute, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2005).

but still a form, of establishing intention: that is, D recklessly disregarded P's safety when D caused P's injury and therefore D intended to cause that injury. Nonetheless, such an argument can certainly be made.

As Peter Cane has said, fault criteria have two components: mental elements and standards of conduct.[94] Importantly, recklessness can refer both to a mental element of legal fault and to standards of conduct, that is, the quality of that conduct.[95] In the context of the CLAs, references to an intention to cause injury go to the mental element of fault. This is because it focuses on the defendant's reason for acting (that is, to cause injury).[96] As Iain Field has noted, this distinguishes intention from recklessness, which does not describe a person's reasons for acting.[97] However, since recklessness does also include a state of mind — a reckless person has subjective knowledge of a substantial risk (or of facts that establish the obviousness of such a risk) and deliberately acts with conscious disregard for that risk — the question still remains: might such knowledge and conduct function as a substitute for proving intention, or as a basis for inferring it for the purposes of circumventing restrictions set out in the CLAs? Ultimately, the legislation does not give any real guidance to answer that question, but I tend to agree with Villa:[98] the policy of restricting damages that underpins the CLAs does not apply as forcefully to a plaintiff injured through another's reckless conduct.[99]

E *Do the Damages Limitations in the Queensland CLA Apply to Intentional Conduct?*

In most jurisdictions, the CLAs do not apply to acts that are intended to cause personal injury or death, either directly via express limits on the applicability of the CLAs, or indirectly by limiting key parts to claims arising from 'breaches of duty of care'.[100] Queensland, as always, appears to be a special case. No such general exclusion for intentionally caused injury exists in the Queensland CLA.

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94 Compare Cane (n 39) 78.

95 Ibid 79–82.

96 Ibid 82.

97 See Field (n 41) 162.

98 As cited by Leeming JA in the text above at n 89.

99 In the context of establishing intention for the purposes of trespass — ie intention in the first sense of volitional acts — Barker et al (n 10) 39–40 consider that that concept extends to where it is 'substantially certain that the act will result in contact with the plaintiff; and perhaps also if the act is reckless with respect to contact with the plaintiff'. See generally Barker et al at 37–41.

100 In Tasmania, this means that the damages restrictions do not apply even for damages for injuries that are consequential upon an intentional trespass (that was not intended to cause injury).

However, some chapters of the CLA are limited in their application to 'breach of duty' 'to take reasonable care or to exercise reasonable skill' (sch 2).[101] 'Breach of duty' is also a prerequisite to some provisions that seek to limit plaintiffs' rights.[102]

Importantly, however, ch 3 of the Queensland CLA ostensibly applies to 'awards of personal injury damages' generally (s 50) and is not limited to breaches of duty. That chapter contains similar caps and limitations on damages awards as apply in other jurisdictions. That apparent result is reinforced by the different way in which the Queensland CLA deals with exemplary damages and aggravated damages, when compared to other jurisdictions. The Queensland CLA seems to assume that intentional conduct would be captured by s 52, but for the sub-s (2) exceptions (which expressly exclude intentionally caused injury).

This would appear to be a significant difference and potentially harsh in its consequences. A defendant who intentionally injures a plaintiff, although subject in Queensland to exemplary damages, would nonetheless appear to be able to invoke the CLA's restrictions on damages contained in ch 3. Such a defendant would not be subject to higher damages awards as apply at common law (and in other jurisdictions). However, there is an unresolved question as to whether all of the provisions within ch 3 do, in fact, apply to all personal injury claims, or only ones that arise from a 'breach of duty'.

Although s 4(1) of the Queensland CLA states that the Act 'applies to *any civil claim* for damages for harm',[103] later subsections set out when various provisions of the Act *commence* their operation. These subsections, however, contain odd restrictions that seemingly could narrow the scope of the operation of the Queensland CLA. For example, s 4(4) states that many of the restrictive personal injury sections apply 'in relation to *a breach of duty*' happening after the date of assent.[104] On the other hand, other sections in ch 3 covering personal injury damages 'apply *in relation to personal injury damages* regardless of when the injury

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101 This is defined as a duty of care in tort, or a contractual duty that is 'concurrent and coextensive with a duty of care in tort', or a statutory duty that is 'concurrent 'with such a duty: Qld CLA, sch 2.

102 For example, s 45 concerning plaintiffs who have committed an indictable offence. Section 45 applies to such plaintiffs if their claims are for a defendant's 'breach of duty' but not, it would seem, if they arise in battery, assault or false imprisonment, for example. As the Queensland Court of Appeal in *Corliss v Gibbings-Johns* [2010] QCA 233, [39] and [41] ('*Corliss*'), suggested, albeit not conclusively, 'there is a substantial argument' that s 45 does not apply to such action: 'The text of s 45 therefore indicates that the section is concerned with a duty of care in tort or a concurrent duty of care … Neither the text of s 45, nor its statutory context, indicate that it applies to a case in which civil liability arises from an intentional tort, such as an assault.'

103 Emphasis added.

104 Emphasis added.

happened' (s 4(6)).[105] These provisions, although purporting to be commencement provisions, use inconsistent language as to what *sort of claims* are to commence. Some sections of ch 3 commence their application for claims for breach of duty, others in relation to claims for personal injury damages more generally. All of this may simply be the unintended consequences of poor drafting and, perhaps, inconsistently or haphazardly borrowing language used in other, differently constructed, legislative schemes or from within parts of the Queensland CLA itself.[106]

Judicial decisions have not resolved the questions. The Queensland Court of Appeal, in the earlier case of *Corliss v Gibbings-Johns*,[107] seemed to assume that 'many of the CLA's provisions extend beyond claims for damages for personal injury or death resulting from negligence' and, specifically, gave the example of ch 3 provisions about the assessment of damages for personal injury. It noted that these 'would appear to apply to a wide variety of causes of action, including intentional torts'. [108] More recently, however, in *Bulsey*, the same Court left open the question of whether all or some of ch 3 applies to the intentional torts at all, since these do not involve a 'breach of duty'. [109] As Douglas et al have observed, s 4 is undoubtedly 'clumsily drawn' and '[c]urial interpretation is awaited'.[110]

IV Conclusion

The legislative schemes of the CLAs are complex, and this complexity extends to basic questions such as the circumstances in which the CLAs (or parts thereof) apply. This article has considered some of the difficulties that have arisen in interpreting whether, and, if so, what, types of intentional conduct are subject to the application of the CLA provisions, specifically those provisions that restrict or limit plaintiffs' damages awards. Much of the case law discussed in this paper is from New South Wales, which is not surprising given that that State has some of the most significant restrictions and is the largest of Australia's jurisdictions. The rationale behind some of the legislative choices made is not always clear. It is therefore useful, by way of conclusion, to attempt to summarise the conclusions reached in this article, at least with respect to the New South Wales CLA, by way of the following table.

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105 Emphasis added.

106 Similarly, although s 5 of the Qld CLA does not expressly exclude conduct that intends to cause injury, the introduction to it (sub-s (1)) states: 'This Act does not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting *from the breach of duty* is …' (emphasis added).

107 *Corliss* (n 103).

108 Ibid [36].

109 *Bulsey* (n 28) [103].

110 Douglas et al (n 20) 18 [4.5].

Type of conduct	Do restrictions on damages apply?	Are exemplary/aggravated damages available?
Negligent conduct	Yes	No
Personal injury consequential upon intentional trespass (ie injury not intended)	Yes	Yes (not 'negligence')
Personal injury intended	No	Yes (intentional injury exclusion applies and not 'negligence')
Intentional trespass in form of wholly unnecessary medical procedure	No (constitutes 'intended injury')	Yes (ditto)
Intentional trespass and no physical or psychiatric injury	No, for assault and battery ('injury' in form of assault, battery is intended). Question open re false imprisonment. Open question in NSW whether qualifies as award of personal injury damages at all (compare Qld)	Yes, for all (ditto)
Intentional but innocent trespass with or without consequential physical or psychiatric injury	Uncertain (is there an intent to injure; are damages for the indignity, etc, personal injury damages?)	Yes, in theory (as claim not in 'negligence'), but unlikely in practice

Table 1: Application of Damages Restrictions of Different Types of Intentional Conduct