



COSTS OF WRONGFUL ARREST, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION ACTIONS

By Phillipa Alexander

The *Legal Profession Act 2004* (NSW) (LPA) prescribes maximum costs for 'claims for damages for personal injuries' where not more than \$100,000 is recovered on the claim.

These costs are fixed at the greater of 20% of the amount recovered, or \$10,000. Claims for wrongful arrest, false imprisonment and malicious prosecution often encompass a component of damages for personal injuries, in conjunction with non-personal injury damages. Such actions may also include claims for exemplary and aggravated damages.

In many cases, not more than \$100,000 in damages is recovered on these kinds of claims, which gives rise to two costs issues:

- Is the claim, or part of the claim, a 'claim for personal injury damages' within the meaning of Division 9 of Part 3.2 LPA?
- If so, does the fact that the claim may relate to an intentional tort mean that the costs are not governed by the maximum costs provisions of the LPA?

CHARACTERISATION OF THE CLAIM

Categorising such claims is problematic. The causes of action are wrongful arrest and false imprisonment, and may include malicious prosecution. Such torts will not necessarily result in personal injury in the same way that a common assault might, but often entail injury to a plaintiff's civil rights. However, many claims incorporate a component of personal injury, such as where an assault occurs during an arrest or where there is alleged to be a consequent psychological injury, such as nervous shock, anxiety and depression or stress.

Where damages are sought in respect of such personal injuries, does this make the claim a 'claim for personal injury damages'? Section 337 of the LPA provides that:

"personal injury damages" has the same meaning as in Part 2 of the *Civil Liability Act*.'

Section 11 of Part 2 of the *Civil Liability Act 2002* (NSW) (CLA) states:

"Personal Injury Damages" means damages that relate to the death of or injury to a person.'

Therefore, if damages are sought in relation to an injury to a person, a defendant may argue that it is a claim for personal injury damages. However, if the claim also includes damages for non-personal injury such as injury to reputation, does this affect the characterisation of the claim? There would seem to be no settled answer to this question. Determinations on assessment have ranged from categorising the claim as a personal injury damages claim in full, in part and not at all. It would seem arguable that at least the work done on the personal injury claim specifically, such as obtaining medical evidence, could be held to be part of a claim for personal injury damages.

The amount of damages recovered does not affect the categorisation of the claim, so long as it does not exceed \$100,000. Nor should the fact that the claim is not only for personal injury damages mean that the provisions of Division 9 do not apply. Otherwise, the costs restrictions could easily be overcome by including, for example, a small property damage claim in the proceedings. The question of whether or not Division 9 applies has been held to be a question of law arising out of the conduct and hearing of the proceedings, which should be determined by the court and not a costs assessor.¹

In order to avoid the operation of the maximum costs provisions in a claim categorised in part as a personal injury damages claim – even where the total damages exceed \$100,000 – the damages for the personal injury component alone must exceed \$100,000.

INTENTIONAL TORT

The costs issue also tends to become confused with whether or not the tort was intentional. Section 3B of the CLA provides:

(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:

- (i) section 15B and section 18(1) (in its application to damages for any loss of the kind referred to in section 18(1)(c)), and
- (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death.'

However, whether or not the tort was intentional is, in this writer's view, not relevant to determining whether the maximum costs provisions of the LPA apply. The LPA reproduces only the definition of 'personal injury damages' from the CLA, without also reproducing the exclusions in s3B. Section 337 of the LPA contains its own list of matters excluded from the operation of Division 9, some of which mirror the exclusions in the CLA (that is, claims for damages for dust diseases; motor accidents claims; and work injury damages claims). But the LPA does not exclude intentional torts, and there are reasonable policy grounds for not doing so. The LPA is concerned with limiting recoverable costs on small claims, whereas the CLA was never intended to limit recoverable damages for intentional torts – this would have reduced an offender's liability to pay damages. It is difficult to believe that parliament intended practitioners to recover lower costs for small claims involving negligence resulting in personal injury, than for performing the same work to recover damages in intentional tort actions.

A number of decisions have addressed the question of whether the torts of wrongful arrest, false imprisonment and malicious prosecution are intentional torts for the purposes of the CLA, but these decisions are not relevant for the purposes of considering whether the costs are subject to the maximum costs provisions in Division 9 of the LPA. In *Andrews v New South Wales*,² Cooper DCJ held that a claim for malicious prosecution was not a claim for personal injury damages, but for damages arising out of injury to the plaintiff's civil rights. His Honour also held that it was an intentional act, although not done with intent to 'cause injury' to the plaintiff, and therefore it was not excluded from the CLA. However, Cooper DCJ went on to say that even if the intentional tort exclusion in s3B had applied, it would have excluded the claim only from the operation of the CLA insofar as an award of substantive damages was concerned. It would not exclude the claim from the LPA maximum costs provisions, as an exclusion under s3B of the CLA has no effect on the 'definition' of personal injury damages contained in s11 of the CLA, which sets out the criteria for whether Division 9 of Part 3.2 LPA applies. Accordingly, intentional or not, if a claim or part of a claim is categorised as a claim for personal injury damages, the maximum costs provisions apply, so long as not more than \$100,000 is recovered on the personal injuries component of the claim.

PRACTICAL ASPECTS

When instituting a claim for wrongful arrest, false imprisonment and/or malicious prosecution, practitioners should consider whether there is any risk that the claim may be categorised as a personal injury damages claim and, if so,

properly contract out of the maximum costs provisions accordingly.³ If the damages on the personal injuries component are not likely to exceed \$100,000, consider whether this aspect of the claim is worth pursuing in light of the other heads of damage that are available. This may be particularly important if a lengthy trial is likely. If the personal injuries claim is to be pursued, separately record the work done on this aspect and the remaining claims so that, if necessary, the work subject to the maximum costs provisions can readily be identified on assessment. Where appropriate, request the court to make a determination that the claim is not regulated by Division 9 of Part 3.2 LPA. The application of the maximum costs provisions to costs recovery must be taken into account when estimating costs and net recovery. ■

Notes: 1 *Andrews v New South Wales* (2004) 1 DCLR (NSW) 230. 2 (2004) 1 DCLR (NSW) 230. 3 See s339 LPA.

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