

Pleading Intention

By Tina Cockburn and Bill Madden



The preamble to the terms of reference of the 2002 *Review of the Law of Negligence* claimed that:

'The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.'¹

Following this assertion, the terms of reference requested the Ipp Review Panel to 'develop and evaluate principled options to limit liability and quantum of awards for damages'.² In accordance with this brief, the Panel proposed various reform recommendations³ which, despite a call for a national response,⁴ were enacted to varying extents by non-uniform civil liability legislation across Australia.⁵ It is therefore

difficult to discern a consistent principle underlying the differing statutory approaches.

This article considers the scope of the application of the civil liability legislation, an issue which is still being clarified by the courts,⁶ despite the passage of some ten years since the enactment of the non-uniform civil liability legislation across Australia. The introduction of the civil liability legislation has made more important the pleading of intention, in addition

to negligence, so as to maximise damages awards.⁷ This involves pleading torts traditionally referred to as intentional torts – particularly trespass to the person.⁸ Such an approach is attractive for plaintiffs because, in several jurisdictions, tort claims which plead intention have been excluded from the operation of the legislative restrictions on the quantum of damages awards, and prohibitions on exemplary and aggravated damages.⁹ This approach reflects the policy that those who intend the harmful consequences of their actions should be held fully responsible.

CIVIL LIABILITY ACT EXCLUSIONS

In New South Wales (NSW), s11A of the *Civil Liability Act 2002* (NSW) (the NSW Act) states that provisions regarding damages apply to an award of personal injury damages, regardless of whether the claim is brought in tort, in contract, under statute or otherwise. However, s3B(1)(a) sets out three exceptions to the application of the Act: (a) civil liability of a person in respect of an intentional act that is done by the person,¹⁰ with intent to cause injury or death; or (b) that is sexual assault, or (c) other sexual misconduct, committed by the person. A similar exclusion appears in the Tasmanian legislation.¹¹

In Victoria, s28C(2)(a) *Wrongs Act 1958* (Vic) is framed in similar terms, excluding: 'an award where the fault concerned is an intentional act that is done with intent to cause death or injury...'

In South Australia, the damages provisions apply to 'accidents caused wholly or in part by negligence or some other *unintentional tort*'.¹²

By contrast, in Queensland, the civil liability legislation applies to 'any civil claim for damages for harm', and intentional torts are not expressly excluded. Although there is an argument that the Queensland *Civil Liability Act* does not apply to intentional torts, this is yet to be judicially determined.¹³ Although there is no express exclusion in Queensland, the s52 prohibitions on exemplary and aggravated damages awards do not apply in cases of an unlawful intentional act done with intent to cause personal injury; or an unlawful sexual assault or other unlawful sexual misconduct.

The recent decision of the NSW Court of Appeal, *Dean v Phung*,¹⁴ suggests important developments for personal injury claimants in the context of the application of the civil liability act exclusions, which may permit higher damages awards.

Dean v Phung

*Dean v Phung*¹⁵ is the first appellate consideration of medical treatment claims excluded from the civil liability legislation. The decision arguably has application well beyond its facts in two ways: firstly, by identifying a special category of 'uncapped' negligence claims in some jurisdictions; and secondly, by widening the doorway for viable trespass-to-the-person claims.

Both options may permit significant increases in damages awards. At trial when assessed under the NSW Act, the patient, Mr Dean, recovered \$1.388 million. On appeal, the award was increased by about 25 per cent to \$1.743 million.¹⁶

The facts were unusual. A young man suffering a minor injury at work in 2001¹⁷ was provided in the following year with root canal therapy, crowns and bridges on all 28 of his teeth, in 53 consultations¹⁸ at a cost of \$73,640.¹⁹ One of the experts later described the treatment as inexcusably bad and completely outside the bounds of what any reputable practitioner might prescribe or perform²⁰ – that expert was not cross-examined.²¹ The dentist did not give evidence at the trial nor did he call any evidence to defend his treatment.²²

UNCAPPED NEGLIGENCE CLAIMS – INTENTIONAL NEGLIGENCE²³

The NSW exception to the operation of the NSW Act excludes claims relating to 'civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death'.²⁴ This exception has two elements: firstly an intentional act, and secondly an intent to cause injury or death.

Despite some differences between the three members of the NSW Court of Appeal in *Dean v Phung*, there appears to have been agreement²⁵ that the language of the exception is not suggestive of concepts having some specific legal connotation, but is rather language which encompasses a broad policy objective,²⁶ namely to leave those who have committed intentional torts to the operation of the general law.²⁷

How then is the broad policy objective to be applied in practice? In relation to the first element, an intentional act, the court put it simply:

'A medical procedure will generally be an intentional act...'²⁸

Indeed, the court commented that '(m)any acts which give rise to tortious liability, including driving a car, are properly described as "intentional". However, what is unforeseen or unintended is the consequence of driving in a particular manner.'²⁹ So, in the case of an accidental laceration or perforation during surgery, for example, it would appear that the surgery is the act to which the label 'intentional' is to be applied, not the accidental laceration or perforation.

Establishing the second element, intent to cause injury, is therefore the critical issue for plaintiffs.³⁰ On the facts of *Dean v Phung*, Basten JA appears to have equated the absence of therapeutic intent or cosmetic purpose with an 'intent to cause injury':

'In ordinary language, an injury is a harmful consequence. Something which is done with a therapeutic intent, that is, to prevent, remove or ameliorate a disability or pathological condition, would not ordinarily be so described. Indeed, even non-therapeutic treatment, such as cosmetic surgery, would not generally be so described... The somewhat controversial distinction between therapeutic and non-therapeutic purposes may be disregarded. The appellant sought assistance from the dentist in relation to some minor chipping of his front teeth, together with a level of sensitivity and pain, apparently resulting from injury to the teeth, such symptoms not having preceded the blow to his jaw. There was no suggestion the purpose of the treatment was cosmetic. So far as the operation of s3B is concerned, it would have been sufficient for the appellant's purposes to establish that the dentist knew at the time of giving >>>

the relevant advice that the treatment was not reasonably necessary.³¹

As to whether an inference could be drawn that the consequences were intended, Basten JA referred to what the dentist was found to have 'believed'; namely, that at the time of giving the relevant advice the treatment was not reasonably necessary.³² However, later in the judgment (when discussing trespass), Macfarlan JA extends this language in a way which appears to encompass *recklessness* as to whether the treatment was appropriate or necessary. Macfarlan JA said:

'I agree with Basten JA's conclusion that in the present case the appellant established that the practitioner acted fraudulently, at least in the sense that he was reckless as to whether the treatment that he administered was either appropriate or necessary (see [65]). In other words it was established that the practitioner did not perform the relevant procedures undertaken on the appellant's teeth for therapeutic purposes but for another purpose, presumably to generate income for himself...'³³

MORE SCOPE FOR TRESPASS CLAIMS

A trespass to the person claim involving physical injury arising out of an intentional act – battery – may be brought where there has been a direct interference with the plaintiff as a result of the fault³⁴ of the defendant. If the interference is consented to there is no trespass, such as where a patient consents to medical treatment.³⁵

Although there has for some time been uncertainty about the effect of fraud on consent to medical treatment, *Dean v Phung* appears to confirm that fraud can vitiate consent.³⁶ However, Basten JA (with Beazley JA agreeing) focused on ostensible consent and its validity, even falling short of fraud. He commented:

'Where there has been an ostensible consent, which is later challenged, the convenient starting point is to consider the validity of the consent, rather than asking whether it has been obtained by fraud.'³⁷

Having reviewed the cases, Basten JA summarised the law in four points.³⁸ In particular, he said:

'...consent is validly given in respect of medical treatment in circumstances where the patient has been given basic information as to the nature of the proposed procedure. However, where the nature of the procedure has been misrepresented, consent will be vitiated. Thus, if it were demonstrated, objectively, that a procedure of the nature carried out was not capable of addressing the patient's condition, there can have been no valid consent.'³⁹

On the facts of *Dean v Phung*, the application of this principle led to the conclusion that Mr Dean did not consent⁴⁰ to the proposed treatment, because the core nature of the procedure had been misrepresented in that it was not in fact treatment necessary for his condition. As a result, the treatment constituted a trespass to the person.⁴¹

If, contrary to his preferred analysis, it was necessary to establish fraud, Basten JA found that the dentist was 'at least reckless as to whether the treatment proposed was either appropriate or necessary for the purpose of addressing the appellant's discomfort'.⁴²

Macfarlan JA dissented on the question of whether a procedure objectively incapable of addressing the patient's condition would vitiate consent. He expressed the view that the practitioner's state of mind was a necessary element – either intending or being reckless as to the performance of the relevant procedures not for therapeutic purposes but for another purpose, presumably to generate income for himself.⁴³

POSSIBLE FUTURE APPLICATIONS

While it is difficult to predict the full range of cases in which the principles in *Dean v Phung* may give rise to future viable uncapped negligence claims or trespass claims, possibilities include cases involving sexual misconduct; cosmetic procedures that are not reasonably necessary; over-prescription of drugs of addiction; and perhaps the withholding of information about adverse events.

Sexual misconduct cases

In *Dean v Phung* itself, Macfarlan JA commented on *R v Mobilio*,⁴⁴ (a sexual assault trial) in which the Victorian Court of Appeal said that for a woman's consent to be real, she 'needs to understand that the act is one of sexual connection as distinct from an act of a totally different character'.

Justice Macfarlan said that it was therefore difficult to understand why the Court in that case nevertheless quashed the conviction of a radiographer who had introduced an ultrasound transducer or probe into a woman's vagina for his own sexual gratification when he had led the woman to believe that he was conducting a medical examination.⁴⁵ He stated that:

'...consent to the penetration of one's body for the purpose of medical treatment is not consent for other purposes such as sexual gratification or financial gain. The nature and character of the act of penetration may vary with the purpose for which it is performed.'⁴⁶

Although such claims may fall within the 'intentional acts with intent to cause harm' exclusion, specific exceptions are available in any event for sexual assault and sexual misconduct.⁴⁷

Cosmetic procedures that are not reasonably necessary

Cases involving cosmetic procedures which the practitioner believed at the time of giving the relevant advice were not reasonably necessary may fall within 'intent to cause injury'. A possible example may be drawn from the circumstances in *Health Care Complaints Commission v Dr Tat Kong Joseph Tiong*,⁴⁸ where it appears to have been implied that the procedure was designed to benefit the practice development aims of Dr Tiong more than the patient.

Over-prescription of drugs of addiction

In *Health Care Complaints Commission v Dr Nemeth*,⁴⁹ the particulars included prescriptions in quantities in excess of recognised therapeutic standards of what is medically appropriate, when the practitioner knew or ought to have known that the drugs so prescribed were being, or were likely

to be, abused. It is arguable that in such circumstances the practitioner may be found to have known or been reckless as to whether the treatment was appropriate or necessary so as to satisfy the requirement of 'intent to cause injury'.

Withholding information about adverse events

In relation to the withholding of information about adverse events, in *Wighton v Arnot*,⁵⁰ the defendant was found negligent in: the failure to carry out sufficient post-operative examinations to determine whether the right spinal accessory nerve had been severed; the failure to advise the plaintiff prior to her discharge from hospital of the suspected severance of that nerve; the failure to carry out appropriate examinations of the plaintiff at the post-discharge consultation such as would have established the severance of the accessory nerve; and the failure to advise the plaintiff of the need for surgical repair of that nerve by a suitably qualified specialist.

It is arguable that in cases where there is a surgical error or other adverse event which is not disclosed to the patient, such failure to provide information may be found to be an intentional act with intent (recklessness) as to future injury to the patient.

CONCLUSION

While earlier cases have considered the scope of the exclusions to the civil liability legislation in the context of sporting injuries,⁵¹ claims against the police⁵² and claims against bouncers,⁵³ *Dean v Phung* is the first time the exclusion has been held to apply in a medical context.

Given the differing civil liability exclusion provisions across Australia, the preceding discussion in relation to 'uncapped' negligence claims may not apply in jurisdictions other than NSW, Tasmania and Victoria. However, the greater scope for trespass to the person claims should apply, not only in these jurisdictions, but also in South Australia.

Dean v Phung has been applied in *Bain v Bambit*,⁵⁴ where the court was called upon to determine the appropriateness of a preliminary discovery application. In that case, the plaintiff foreshadowed bringing a claim in trespass (battery) by arguing that the consent given by the plaintiff for Dr Bambit to operate upon her was in some way vitiated by matters not disclosed to the plaintiff at the time such consent was procured.

Given the renewed interest in pleading intention and intentional torts and the possibility of increased damages awards, it seems inevitable that further judicial consideration of the issues explored in *Dean v Phung* will follow. ■

This article has been peer reviewed in line with standard academic practice.

Notes: **1** 'Terms of Reference: Principles-Based Review of the Law of Negligence' in David Ipp et al, *Review of the Law of Negligence Final Report* (2002) <<http://revofneg.treasury.gov.au/content/review2.asp>>, ix. **2** *Ibid*. **3** *Ibid*, 'List of Recommendations', 1-9. **4** *Ibid*, Recommendation 1, 'List of Recommendations', 1. **5** See Des Butler, 'A comparison of the adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms'

(2005) 13 *Torts Law Journal*, 203. **6** Tina Cockburn and Bill Madden, 'Intentional torts to the person, compensation for injury and the Civil Liability Acts – Recent cases and contemporary issues' (2007) 18 *Insurance Law Journal*, 1. **7** Tina Cockburn and Bill Madden, 'A renewed interest in intentional torts following legislative changes to the law of negligence?' (2006) 14 *Tort Law Review*, 161. **8** Including battery and false imprisonment. *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107; *New South Wales v Ibbett* (2005) 65 NSWLR 168. **9** See, generally, Peter Handford, 'Intention, Negligence and the Civil Liability Acts', (2012) 86 *Australian Law Journal*, 100; Peter Handford, 'Intention, Negligence and Some Statutory Conundrums', (2010), 18 *Tort Law Review*, 140-53; and Richard Douglas, Gerard Mullins and Simon Grant, 'Civil Liability Australia', Lexis-Nexis, looseleaf and online, para [7,050]. For a helpful comparative summary of the legislative provisions, see Des Butler, 'A comparison of the adoption of the Ipp report recommendations and other personal injury liability reforms', (2005) 13 (2) *Torts Law Journal*, 203. **10** The words 'by the person', which were included by amendment in NSW to address concerns about vicarious liability, do not appear in the Victorian legislation. Accordingly, in jurisdictions other than NSW, under the principles of vicarious liability, public hospitals, private hospitals and perhaps medical centres may be exposed to the more substantial damages awards for trespass or uncapped negligence claims. **11** *Civil Liability Act* 2002 (Tas) s3B(1)(a). **12** *Civil Liability Act* 1936 (SA) s51(a)(ii). **13** *Civil Liability Act* 2003 (Qld) s4, 5. For a discussion see: Tina Cockburn and Bill Madden, 'Intentional Acts and the Civil Liability Act 2003', (Qld) (2005) *Qld Lawyer* 310; Richard Douglas, Gerard Mullins and Simon Grant 'Annotated Civil Liability Legislation Queensland', (2012) (3rd ed: Lexis Nexis), para [4.7]. **14** [2012] NSWCA 223. **15** *Ibid*. **16** *Dean v Phung* [2012] NSWCA 223 at [86]. **17** A limitation period extension was later granted as proceedings were not issued until 2008: see *Todd Owen Dean v Mark Phung* [2010] NSWSC 722. **18** *Dean v Phung* [2011] NSWSC 653 at [4]. **19** *HCCC v Phung (No. 1)* [2012] NSWDT 1 at [8]. **20** *Dean v Phung* [2011] NSWSC 653 at [7]. **21** *Dean v Phung* [2012] NSWCA 223 at [43]. **22** *Dean v Phung* [2011] NSWSC 653 at [10]. **23** See, generally, Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' [2010] 32 (29) *Sydney Law Review*, 29. **24** Section 3B *Civil Liability Act* 2002 (NSW). **25** Basten JA, Beazley & Macfarlan JJA agreeing. Beazley JA agreed with the reasons and orders of Basten JA (at [1]). Macfarlan JA agreed with Basten JA's conclusions, and in general terms with his reasons (at [87]). **26** *Dean v Phung* [2012] NSWCA 223 at [26]. **27** *Ibid* at [26]. **28** *Ibid* at [30]. **29** *Ibid* at [27]. **30** *Ibid* at [30]. **31** *Ibid* at [30]. **32** *Ibid* at [47]. **33** *Ibid* at [94]. **34** Generally satisfied by establishing intention, or in some cases a lack of due care: *Williams v Milotin* (1957) 97 CLR 465. Traditionally, plaintiffs have tended to sue in trespass for intentional interferences, and in negligence for unintentional acts. For a discussion, see Kit Barker, Peter Cane, Mark Lunney, Francis Trindade *The Law of Torts in Australia*, (2012) (5th ed: Oxford University Press) at [2.1]. **35** *Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218, 310; *Rogers v Whitaker* (1992) 175 CLR 479. **36** Basten JA at [58], Beazley A agreeing. **37** *Dean v Phung* [2012] NSWCA 223 at [48]. **38** *Ibid* at [61] – [64]. **39** *Ibid* at [61]. **40** The doctor bore the onus of proving consent: *Ibid* at [64]. **41** *Ibid* at [66]. **42** *Ibid* at [67]. **43** *Ibid* at [94]. **44** [1991] 1 VR 339. **45** *Ibid* at [91]. **46** *Ibid* at [93]. **47** See, for example, *Lee v Fairbrother* [2009] NSWDC 192. **48** [2012] NSWMT 6. **49** [2012] NSWMT 4. **50** [2005] NSWSC 637. **51** *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107. **52** *New South Wales v Ibbett* (2005) 65 NSWLR 168. **53** *Zorom Enterprises Pty Limited v Zabow & Ors* [2007] NSWCA 106. **54** [2012] NSWDC 113.

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