

Intentional Negligence: A Contradiction in Terms?

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Abstract

The area of torts dealing with the intentional and negligent infliction of personal injury is characterised by the interplay between the torts of trespass to the person, negligence, and the rule in *Wilkinson v Downton*. However, negligence is the dominant tort. Beginning as a cause of action restricted to indirect injuries, in 1833 it expanded into the area of direct injuries, provided that the defendant's conduct was negligent and not wilful. Negligence has now crossed this boundary; in recent years it has been extended to intentional wrongs, a development openly recognised by Australian courts. The author looks at the rise of 'intentional negligence', and suggests that the interrelationship of the various torts dealing with personal injury is more complex than conventionally suggested.

Introduction

Matthew Paul Cusack and his girlfriend Sarah May Stayt had both had a good deal to drink one Sunday night in October 1997. He abused and assaulted her, she retaliated, and then attempted to get away from him by getting into her car and driving off. After he smashed the rear window, she lost control of the car and hit a brick wall. She then drove forward with Matthew standing in the path of the vehicle, waving his arms and yelling at her. He could have got out of the way, but failed to do so, with the result that there was a minor impact between the car and his body. Matthew then taunted Sarah to run him over, saying, 'Come on, do it'. Goaded beyond her endurance, she drove the car at him and caused him to suffer a severe injury to his shoulder. All this resulted in an action in the New South Wales District Court, in which Matthew sued Sarah — for negligence.

On appeal to the New South Wales Court of Appeal,¹ Heydon JA specifically found that 'the acts of the defendant were intentional following upon the verbal abuse, threats, assaults and taunting by the plaintiff'.² His Honour noted that:

Trespass to the person, ie battery, was not pleaded in the statement of claim. The plaintiff's opening is not recorded. The defendant's opening does not seem to be structured by reference to any consciousness that the tort of battery was being alleged, and today counsel

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¹ *Cusack v Stayt* (2000) 31 MVR 517.

² *Cusack* (2000) 31 MVR 517, 518.

for the plaintiff properly informed the Court that after enquiry he had established that the issue was not raised in the trial.³

Heydon JA clearly accepted that on the facts a battery had taken place,⁴ but said that on appeal the plaintiff ought not to be permitted to put forward a cause of action that had not been pleaded.⁵ However, what is of interest for the purposes of this article is not the thwarted cause of action in battery, but the fact that all parties automatically assumed that this intentional conduct on the part of the defendant gave rise to a cause of action in negligence. The Court eventually upheld the decision of the trial judge that there was no duty of care.⁶

Traditionally, negligence as a tort has been associated with conduct which is careless rather than deliberate. Orthodox definitions of the breach of duty element in negligence are couched in terms of failure to conform to the standard of the hypothetical reasonable person,⁷ and many textbooks simply assume that this formulation involves carelessness rather than intention.⁸ However, if inadvertently caused injury that entails unreasonable risk of harm constitutes a breach of this standard, 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 duty for the purposes of the tort of negligence extending to harm deliberately, as well as carelessly, inflicted. If this is accepted, then it can be argued that negligence should be redefined in terms of *blameworthy* rather than careless conduct, and indeed perhaps that the tort of negligence could do with a new name.

Speculation on the role of the tort of negligence in relation to intentional wrongdoing, in Australia at least, is no longer merely an academic preserve. Though for many years judicial recognition of the existence of intentional negligence has been confined to a few minor references and veiled hints, Australian judges have now come out into the

³ *Cusack* (2000) 31 MVR 517, 520.

⁴ The use of an instrument (such as the car in this case), rather than direct contact between person and person, clearly constitutes a battery; another example of battery by the use of a motor vehicle (albeit in the context of a criminal prosecution for assault) is *Fagan v Cmr of Metropolitan Police* [1969] 1 QB 439.

⁵ *Cusack* (2000) 31 MVR 517, 520. This cause of action was not referred to in the notice of appeal and the plaintiff had applied for an amendment so as to be able to argue it: at 520. It seems that the plaintiff intended to argue that according to Australian authority (*Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 310 (McHugh J)) the burden of proof of consent in battery was on the defendant: at 520. This might have affected the conduct of the trial: at 520.

⁶ Heydon JA, while not clearly accepting the trial judge's reliance on the lack of a relationship of proximity, was content to hold that the relationship of the parties was not one in which a duty of care was owed by analogy with cases such as *Gala v Preston* (1991) 172 CLR 243, where the duty was excluded because the parties were jointly participating in an illegal activity: *Cusack v Stayt* (2000) 31 MVR 517, 522–3.

⁷ See, eg, *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson B): 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'

⁸ See, eg, John Fleming, *The Law of Torts* (9th ed, 1998) 115, 117; Rosalie Balkin and Jim Davis, *Law of Torts* (4th ed, 2009) 188; John Murphy, *Street on Torts* (12th ed, 2007) 23; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (6th ed, 2008) 113–114. Other texts, however, make a point of saying that the tort of negligence can involve intentional conduct: see below n 118.

open and recent cases contain important discussions of this principle.⁹ Moreover, legislation has given the topic another dimension. The *Civil Liability Acts* enacted in the Australian states and territories from 2002 onwards,¹⁰ have imposed restrictions on the rights of persons who suffer personal injury, both in relation to the scope of liability and in respect of the damages that may be awarded. While it is clear that this legislation resulted from the need to keep liability for accidents (and the resulting volume of insurance claims) within bounds,¹¹ it is legitimate to ask whether it has any effect on claims for intentional injury. On this point, the legislation of different jurisdictions may yield different answers. In some jurisdictions, such as New South Wales, the legislation is expressed to apply to claims for damages for harm resulting from negligence,¹² ‘negligence’ being defined as ‘failure to exercise reasonable care and skill’.¹³ In other jurisdictions a different formula is used,¹⁴ and one Act simply says that it applies to claims ‘for harm caused by the *fault* of a person’.¹⁵ The New South Wales Act specifically provides that it does not apply to civil liability in respect of intentional acts,¹⁶ but most of the others do not contain an equivalent provision. Though these distinctions may simply be the result of drafting quirks,¹⁷ on the question of whether the legislation applies to intentional harm, there is an apparent difference of potentially major significance following from the use of different terminology in what was intended to be uniform legislation.¹⁸

⁹ See below n 140 and accompanying and following text.

¹⁰ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA) (formerly called the *Wrongs Act 1936* (SA), title changed by the *Law Reform (Ipp Recommendations) Act 2004* (SA)); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic) (amended by *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic)); *Civil Liability Act 2002* (WA). In the Northern Territory the reforms are much more restricted: the leading Act is the *Personal Injuries (Liability and Damages) Act 2003* (NT).

¹¹ See David Ipp, Peter Cane, Don Sheldon and Ian Macintosh, Commonwealth Parliament, *Review of the Law of Negligence: Final Report* (2002).

¹² *Civil Law (Wrongs) Act 2002* (ACT) s 41(1) (applying to Chapter 4); *Civil Liability Act 2002* (NSW) s 5A(1) (applying to Part 1A); *Wrongs Act 1958* (Vic) s 44 (applying to Pt X).

¹³ *Civil Law (Wrongs) Act 2002* (ACT) s 40; *Civil Liability Act 2002* (NSW) s 5; cf *Wrongs Act 1958* (Vic) s 43 (‘failure to exercise reasonable care’).

¹⁴ In Queensland the Act applies to civil claims for damages for harm: *Civil Liability Act 2003* (Qld) s 4(1), but Chapter 2 deals with harm caused by breach of duty (see s 9), ‘duty’ being defined as a duty of care: at Sch 2. For equivalent provisions in Tasmania, see *Civil Liability Act 2002* (Tas) ss 3, 9, 10. In South Australia the Act applies to liability for harm arising out of an ‘accident’: *Civil Liability Act 1936* (SA) s 4(1); ‘accident’ might suggest inadvertent conduct, but is defined as ‘an incident out of which personal injury arises’: at s 3.

¹⁵ *Civil Liability Act 2002* (WA) s 5A(1) (emphasis added) (‘fault’ is not defined).

¹⁶ See, eg, *Civil Liability Act 2002* (NSW) s 3B(1)(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’); *Civil Liability Act 2002* (Tas) s 3B(1)(a). The *Civil Liability Act 2002* (WA) s 3A(1) is more restricted.

¹⁷ See Joachim Dietrich, ‘Duty of Care under the “Civil Liability Acts”’ (2005) 13 *Torts Law Journal* 17, 17–18.

¹⁸ See Ipp, Cane, Sheldon and Macintosh, above n 11, 35. So far, New South Wales is the only jurisdiction in which these issues have received extended consideration. It has been held that s 3B(1)(a) *Civil Liability Act 2002* (NSW) (the provision which excludes intentional injuries from the Act: above n 16), is to be given its ordinary meaning, rather than a deliberately narrow construction: *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107; *New South Wales v Ibbett* (2005) 65 NSWLR 168; and words added to the provision in 2006 to clarify it have not changed its meaning: *New South Wales v Bujdosó* (2007) 69 NSWLR 302. ‘Injury’ is not limited to bodily injury: *Houda v New South Wales* (2005) Aust Torts Reports ¶81-816. The provision covers both personal and vicarious liability for intentional torts: *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354.

Having one cause of action for all fault-caused personal injury has an appearance of tidiness and logic, but in the common law the picture is complicated by the existence of separate actions for: trespass to the person, negligence (derived historically from the old action on the case),¹⁹ and under the principle in *Wilkinson v Downton*.²⁰ There is a striking contrast with the orderly appearance of civil law systems, particularly those with a civil code. The French and German *Civil Codes* have a single principle covering all fault-caused harm; in France the provision covers damage of any kind and in Germany it lists various protected interests, including life and body.²¹ Granted, these general principles are the product of centuries of development: the Roman law, to which the principles owe their origin, was always a law of specific delicts rather like the common law of torts,²² and it took centuries of study by the scholars following the rediscovery of *Justinian's Digest* in the 12th century to refine them into two principles, one (the action on the *Lex Aquilia*) covering intentional and negligent injuries to interests of substance²³ and the other (the *actio injuriarum*) dealing with injuries to interests of personality,²⁴ and then to fuse them into a

¹⁹ Historically the law of torts can be divided into actions of trespass (eventually rationalised as involving harm caused directly) and actions on the case, sometimes called trespass on the case or simply case (harm caused indirectly). See, eg, David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 39–56; Stroud Milson, *Historical Foundations of the Common Law* (2nd ed, 1981) 283–313; John Baker, *An Introduction to English Legal History* (4th ed, 2002) 59–64, 401–13. For more detail see below n 30 and accompanying and following text.

²⁰ [1897] 2 QB 57. This principle may or may not be a species of action on the case. The text assumes that it has a continuing existence despite recent decisions. See below n 205 and accompanying and following text.

²¹ Under art 1382 of the *Code Civil des Français*, ‘Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation’: *The French Civil Code (as amended to July 1, 1976)* (John Crabb trans, 1977 ed) 253 [trans of: *Code Civil des Français*]. Under art 823(I) of the *Bürgerliches Gesetzbuch*, ‘A person who, wilfully or negligently, unlawfully injures the life, body, freedom, health, property or other right of another contrary to law is bound to compensate him for any damage arising therefrom’: *The German Civil Code (as amended to January 1, 1975)* (Ian Forrester, Simon Goren and Hans-Michael Ilgen trans, 1975 ed) 134 [trans of: *Bürgerliches Gesetzbuch*].

²² See, eg, Alan Prichard, *Leage's Roman Private Law* (3rd ed, 1964) 394–421; Herbert Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed, 1972) 167–74, 272–9; Thomas Glyn Watkin, *An Historical Introduction to Modern Civil Law* (1999) 287–9. The delicts recognised by Roman law were *furtum* (theft), *rapina* (robbery), *injuria* (insult and similar wrongs) and *damnum injuria datum* (loss wrongfully caused). The last of these originated from the *Lex Aquilia* of 287 BC. The primitive state of the Roman law of delicts at this time was shown by the fact that this legislation singled out the killing of slaves or cattle, and whether it extended to other property or injuries short of killing was disputed: see Herbert Jolowicz, ‘The Original Scope of the *Lex Aquilia* and the Question of Damages’ (1922) 38 *Law Quarterly Review* 220; David Daube, ‘On the Third Chapter of the *Lex Aquilia*’ (1936) 52 *Law Quarterly Review* 253; David Pugsley, ‘The Origins of the *Lex Aquilia*’ (1969) 85 *Law Quarterly Review* 50; David Ibbetson, ‘How the Romans did for us: Ancient Roots of the Tort of Negligence’ (2003) 26 *University of New South Wales Law Journal* 475, 481–4.

²³ The *Lex Aquilia* was extended to cover intentional killing and wounding of free men in the time of Emperor Hadrian: see *Justinian's Digest* 48.8.1.3, 48.8.4.1, and later to negligent injuries: at 9.2.13.pr. See Frederick Lawson, *Negligence in the Civil Law* (1950) 22. Note that ‘culpa’, the term which describes the element of wrongfulness in this delict, translates as ‘blame’; this is directly parallel to the suggested redefinition of negligence as involving *blameworthy* conduct: see above n 8 and accompanying and following text.

²⁴ This action originally lay only for physical assaults, but was later extended to cover all acts which involved an element of insult: see Jolowicz and Nicholas, above n 22, 272–3; Robert McKerron, *The Law of Delict; A treatise on the principles of liability for civil wrongs in the law of South Africa* (7th ed, 1971) 9.

single general principle covering all intentional and negligent injuries.²⁵ But even the Roman-Dutch law, which remained uncodified, rests on the foundation of the two general principles forged by medieval scholarship.²⁶ Compared with systems such as these, the common law with its jumble of specific principles, often of uncertain scope, seems to be lagging several centuries behind.²⁷

The aim of this article is to examine the various torts recognised by the common law as having a role to play in the area of intentional and negligent injury to the person and the relationships between them, and in particular to focus on the growing importance of negligence as a remedy for conduct that is intentional rather than merely careless.²⁸ So far as Australian law is concerned, a particular reason for carrying out such an examination is that the findings may be important for determining the reach of the *Civil Liability Acts* and other legislation purporting to cover some areas of tort but not others, such as legislation on contributory negligence and limitation periods.²⁹

The Early History of Negligence

As is well known,³⁰ the origins of the tort of negligence lie in the recognition by the common law courts of an action on the case concerned with the careless performance of an undertaking. Perhaps the earliest case was *Bukton v Townsend*,³¹ an action against a ferryman who agreed to carry the plaintiff's mare across the River Humber, but through his negligence in overloading the ferry caused the horse to perish. At this point in time, the common law courts already recognised the wrongs of trespass to the person, land and goods, and for these cases had developed standard writ formulae which alleged that the wrong had been committed by force and arms and against the King's peace. Such allegations were inappropriate for the Humber ferryman, and others such as farriers or surgeons, who had

²⁵ Ibbetson emphasises the key role of Hugo Grotius (1583–1645), 'in whose *De Iure Belli ac Pacis* we first find a statement of a general principle of liability for loss caused by one's fault': Ibbetson, above n 19, 477–8, 484–7. In France, Jean Domat (1625–1695) was perhaps the first to formulate a single general principle of liability for fault of the kind which later found expression in art 1382 of the *Code Civil des Français*: Jean Domat, *Loix Civiles* (1702), ii, tit vii, sect IV, para 1. See Pierre Catala and John Antony Weir, 'Delict and Torts: A Study in Parallel' (1963) 37 *Tulane Law Review* 573 583–584; Watkin, above n 22, 314–17.

²⁶ McKerron, above n 24, 53–57; Paul Boberg, *The Law of Delict Vol 1: Aquilian Liability* (1984) 18–21; Jonathan Burchell, *Principles of Delict* (1993) 11–14. These principles are also present in the Scottish law of delict, which is based on civil law: David Walker, *The Law of Delict in Scotland* (2nd ed, 1981) 17–31; William Stewart, *Delict* (4th ed, 2004) 7–10.

²⁷ Professor John Langbein, in another context (procedure), envisioned a time when England, under the influence of the European Union, would adopt civil law principles, and the remaining common law systems would simply be isolated examples of a bygone tradition, 'quaint Jurassic Parks of English-derived law' in a civil law world: John Langbein, 'Trinity Hall and the Relations of European and English Law from the Fourteenth to the Twenty-First Centuries' in *Trinity Hall Cambridge: The Milestones Lectures: In Celebration of 650 Years of Education and Learning* (2001) 84.

²⁸ The only article known to the writer which attempts to examine the same ground is Stanley Yeo, 'Comparing the fault elements of trespass, action on the case and negligence' (2001) 5 *Southern Cross University Law Review* 142.

²⁹ It is intended that the scope of such legislation will form the subject of a future article.

³⁰ See above n 19. Older accounts include Percy Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 *Law Quarterly Review* 184.

³¹ (1348) YB 22 Lib Ass pl 41.

undertaken to perform work or services, because the essence of the wrong was not the mere touching of the plaintiff or his goods, which was of course done with consent, but the fact that it was done incompetently. For a time, the need to plead the standard writ formulae in order to persuade the common law courts to take jurisdiction caused pleaders, and perhaps the courts, to indulge in legal fictions;³² however, by about 1370 the courts had dropped the need to use the standard forms and had instead recognised a procedure under which plaintiffs could set out the special circumstances on which they relied in an action of trespass on the case. Soon enough, it was recognised that it was improper to attempt to rely on the old formulae if the case was more appropriately classified as one where the details ought to be set out in the pleadings under the newer procedure.³³ In these cases, it was alleged that the defendant had acted ‘so negligently, improvidently and incautiously’ that damage to the plaintiff (or his chattels) resulted. Actions on the case for intentional harm were also recognised, but the wording was different.³⁴

Though in nearly all the earliest cases there was some previous relationship between the parties,³⁵ an important expansion took place in the 17th century when actions on the case for negligence became recognised as appropriate in ‘running down’ cases — the equivalent of the road accident case of the present day — and other situations in which the parties were previously strangers.³⁶ The most well-known case is *Mitchil v Alestree*³⁷ in 1676, where the defendant was held liable for injuries caused by an unruly horse that got out of control. He had chosen to use Lincoln’s Inn Fields for the purpose of breaking and taming the horse, a place clearly unsuitable for such a purpose because of the large number of people using it.³⁸ Though the word ‘negligence’ does not appear in the declaration, it is clearly the basis of the

³² The most well-known example is *Rattlesdene v Grunestone* (1317) YB 10 Edw II (54 SS) 140, where the plaintiff pleaded that the defendants had sold him a barrel of wine, but before delivery the defendants, ‘by force of arms, with swords bows and arrows etc’, drew off much of the wine and replaced it with salt water. Ibbetson, above n 19, 44 says: ‘It is hard not to suspect that the true basis of the claim was a shipping accident.’ For other examples, see Ibbetson, above n 19, 51–3.

³³ See *Broadmeadow v Rushenden* (1363) 103 SS 422, case 40.1, cited by Ibbetson, above n 19, 54. As Ibbetson notes, in *Waldon v Mareschal* (1369) YB M.43 Edw III f 33 pl 38, it was held improper to include an allegation of breach of the King’s peace in an action against a doctor who killed a horse through negligent treatment, and ‘[b]y 1375 the *Broadmeadow* form of writ, which came to be known as trespass on the case, was the appropriate one to be used by plaintiffs who wanted to get the details of their story into the pleadings’: Ibbetson, above n 19, 55.

³⁴ In *Bird v Holbrook* (1828) 4 Bing 628; 130 ER 911, the allegation was that the defendant had placed a spring gun in his garden and ‘wrongfully, wilfully and negligently’ allowed it to remain without giving notice. On actions on the case for intentional harm, see below n 182 and accompanying and following text.

³⁵ There were some other instances, for example liability for the escape of fire, eg *Beaulieu v Finglam* (1401) YB 2 Hen IV f 18, where the liability was based on a custom of the realm. For other instances see Baker, above n 19, 461–2.

³⁶ See Michael Prichard, ‘Scott v Shepherd (1773) and the Emergence of the Tort of Negligence’ (Lecture delivered at the Selden Society, Lincoln’s Inn, London, 4 July 1973).

³⁷ (1762) 1 Vent 295; 86 ER 190.

³⁸ Another report of the case discloses that there was a coach and two horses, and that the coach was under the control of a coachman, the defendant not being present: see *Michael v Alestree* (1793) 2 Lev 172; 83 ER 504. As later cases made clear (see below n 50 and accompanying text), issues of vicarious liability had to be litigated in case, and the decision here was that the master was liable, though not present, because he had ordered his servant to perform the task in question. See also *Michell v Allestry* (1685) 3 Keb 650; 84 ER 932.

case. Over the next 150 years, as such actions began to multiply,³⁹ the courts began to rationalise the distinction between actions on the case and the older actions of trespass in terms of a division between direct and indirect harm. By the 1830s, it had become clear that negligence could not be confined to cases of indirect harm, and that it was necessary to allow an action on the case for negligence to be brought in at least some cases in which the harm was caused directly.

Michael Prichard has drawn attention to the crucial role played in this story by the rule forbidding joinder of causes of action.⁴⁰ A plaintiff uncertain whether trespass or case was the appropriate remedy could not simply allege both: he had to make a choice. Once the courts began to take a firm stance on bringing the right form of action, plaintiffs were in an impossible position: time after time litigants failed because they had chosen one alternative, only for the court to rule, that in the light of the evidence as proved before the court, they should have chosen the other.⁴¹ However, it was quite some time before the distinction in this 'hard-line' form became firmly embedded.

Two cases mark important stages in this process. *Reynolds v Clarke*,⁴² where the plaintiff sued in trespass for damage to the walls of his house caused by a water spout fixed by the defendant, was one of the first cases where the court rejected the suit on the ground that the action should have been case. Fortescue J held that trespass lay for immediate wrongs, and case for those which caused harm consequentially, citing his famous example of a man who throws a log into the highway: if it hits a person in the highway, trespass is the appropriate action, but if someone tumbles over the log as it lies there, he must bring an action on the case.⁴³ However, this was not the verdict of the whole Court. Lord Raymond CJ, at any rate as reported by Strange,⁴⁴ said that trespass lay only if the act was in the first instance unlawful.⁴⁵ Reynolds J agreed with Fortescue J, while Powys J agreed with the Chief Justice.

Fifty years later, in *Scott v Shepherd*,⁴⁶ Blackstone J delivered the authoritative judgment which finally confirmed that in trespass the wrong had to be directly inflicted,

³⁹ Baker, above n 19, 412, gives some figures for the numbers of vehicles at this time and suggests that the increase in litigation was due to: improvements in roads; the fact that the entrepreneurs who were responsible for these improvements had enough capital to make them worth suing; and the controversy about whether trespass or case was the correct form of action.

⁴⁰ Michael Prichard, 'Trespass, Case and the Rule in *Williams v Holland*' [1964] *Cambridge Law Journal* 234.

⁴¹ In some cases it was possible to submit to a nonsuit and subsequently bring the alternative cause of action, eg *Tripe v Potter* (1767), noted in *Savignac v Roome* (1794) 6 TR 125; 101 ER 470.

⁴² (1795) 1 Str 634; 93 ER 747.

⁴³ *Reynolds v Clarke* (1795) 1 Str 634, 636; 93 ER 747, 748.

⁴⁴ Strange notes that the distinction by which the lawfulness or otherwise of the original act was made the criterion of the distinction between trespass and case, is not to be found in Lord Raymond's own report of the case, *Reynolds v Clarke* (1790) 2 Ld Raym 1399; 92 ER 410. For other reports of the case see *Reynolds v Clerk* (1725) 8 Mod 272; 88 ER 193 and *Reynolds v Clark* (1748) Fort 212; 92 ER 822.

⁴⁵ *Reynolds v Clarke* (1795) 1 Str 634, 635; 93 ER 747, 748.

⁴⁶ (1746) 2 Bl R 892; 96 ER 525 (B).

whereas in case the harm had to be consequential.⁴⁷ However, his was a dissenting judgment, and again the Court was evenly split as to the rule to be applied. *Scott v Shepherd* is the well-known case in which a joker threw a firework into the crowded market at Bridgwater, and it exploded in the plaintiff's eye after two others had thrown it away in acts of self-protection. The question for the Court was whether the plaintiff had been correct in framing his claim in trespass. The majority was clearly of the view that the plaintiff's claim ought to succeed. Nares and Gould JJ were prepared to hold that the unlawfulness of the act justified the use of trespass. While De Grey CJ agreed with Blackstone J that the division turned on whether the harm was direct or consequential, rather than on unlawfulness, his Honour managed to find some evidence of directness on the facts.⁴⁸ Even Blackstone J did not endorse the directness-indirectness distinction in its most hard-line form, which would require turning away a plaintiff who had brought the wrong action. His Honour said:

Every action of trespass with a 'per quod' includes an action on the case. I may bring trespass for the immediate injury, and subjoin a 'per quod' for the consequential damages; — or may bring case for the consequential damages, and pass over the immediate injury ... But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant.⁴⁹

After *Scott v Shepherd*, many plaintiffs in running-down actions were turned away because they had sued in trespass when they should have brought case, or vice versa. Apart from the possibility that a plaintiff who sued in trespass might be undone by evidence which showed that the accident resulted from a loss of control, and was therefore consequential, if it came out in the evidence that the defendant's servant was driving, and not the defendant in person, trespass was incorrect because case was the appropriate cause of action for questions of vicarious liability unless it was clear that the master was present and playing an active part.⁵⁰ The controversy reached its height during the time when Lord Kenyon was Chief Justice of the King's Bench (1788–1802): in case after case he held that there was a clear distinction between trespass and case according to whether the harm was immediate or consequential, and that the plaintiffs had brought the wrong action.⁵¹ When Lord Kenyon

⁴⁷ Cases prior to *Scott v Shepherd* included *Haward v Bankes* (1760) 2 Burr 1113; 97 ER 740, where the defendant argued unsuccessfully that the harm was immediate and so the action should have been trespass, not case; and *Harker v Birkbeck* (1764) 3 Burr 1556; 97 ER 978, where the immediate-consequential distinction was referred to in argument, but not in Lord Mansfield CJ's judgment; but he held nonetheless that the plaintiff had brought the wrong action. For a different view, see *Slater v Baker* (1799) 2 Wils KB 359, 362; 95 ER 860, 862 (Wilmott CJ): 'The Court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if it be possible.'

⁴⁸ *Scott v Shepherd* (1746) 2 Bl R 892, 899; 96 ER 525 (B), 528–9.

⁴⁹ *Scott* (1746) 2 Bl R 892, 897; 96 ER 525 (B), 528. For a similar dispute over the proper form of action in the United States, see *Guille v Swan* (1822) 19 John Ch 381, cited by Richard Epstein, *Cases and Materials on Torts* (8th ed, 2004) 96 (defendant's balloon landed in plaintiff's garden causing damage to his potatoes and radishes).

⁵⁰ *M'Manus v Crickett* (1800) 1 East 106; 102 ER 43, referring to *Michael v Alestree* (1793) 2 Lev 172; 83 ER 504 (above n 38). See also *Seymour v Greenwood* (1861) 7 Hurl & N 355; 158 ER 511.

⁵¹ *Sheldrick v Aberly* (1793) 1 Esp 55; 170 ER 278; *Day v Edwards* (1794) 5 TR 648; 101 ER 361; *Savignac v Roome* (1794) 6 TR 125; 101 ER 470; *M'Manus v Crickett* (1800) 1 East 106; 102 ER 43; note also Lord

died in 1802, Lord Ellenborough, who succeeded him, affirmed a similar view in *Leame v Bray*,⁵² but in the light of suggestions by the Court of Common Pleas that the rule might need to be reconsidered,⁵³ Lord Ellenborough began to have doubts, and by 1812 he was suggesting that there might be a possibility of waiving the trespass along lines suggested by Blackstone J in *Scott v Shepherd*.⁵⁴ After the death of Lord Ellenborough in 1818, uncertainty increased. In *Moreton v Hardern*⁵⁵ in 1825, Holroyd J in the Court of King's Bench affirmed the waiver view,⁵⁶ while Bayley J attempted to explain Lord Ellenborough's judgment in *Leame v Bray* in a kinder light;⁵⁷ but two years earlier a dissenting judge in the Court of Exchequer, in one of its few forays into this area, maintained the hard-line view.⁵⁸

By the time of *Williams v Holland*⁵⁹ in 1833, it was clear that something had to be done, and it was the Court of Common Pleas which took the initiative. The plaintiff brought an action on the case, alleging that the defendant so carelessly, unskilfully and improperly drove his gig that it struck the plaintiff's cart with great violence, damaging the cart and injuring the plaintiff's son. Serjeant Bompas for the defendant, argued in favour of the hard-line rule, insisting that the effect of the authorities was that where the act complained of was immediate, whether it was wilful or negligent, the remedy was by trespass only.⁶⁰ Serjeant Jones for the plaintiff, urged the view that although where the act was immediate and wilful the remedy was trespass only, where the act was immediate but occasioned by negligence or carelessness the remedy was either trespass or case.⁶¹ Though there were some subtle differences between the rationalisation propounded by Serjeant Jones and the views expressed in some of the authorities on which he relied, such as the waiver view supported by Blackstone J in *Scott v Shepherd*, it was Serjeant Jones' argument which finally won the day and provided a solution to the controversy. Tindal CJ, after an examination of the authorities, said that *Moreton v Hardern* decided that where the injury was caused by negligence, then even if it was immediate, the plaintiff could make the negligence of the defendant the ground of his action, and declare in case. His Honour concluded:

Kenyon's reference to the immediate-consequential distinction in *Ogle v Barnes* (1799) 8 TR 188; 101 ER 1338.

⁵² (1803) 3 East 593; 102 ER 724.

⁵³ See *Rogers v Imbleton* (1806) 2 Bos & P NR 117; 127 ER 569; *Huggett v Montgomery* (1807) 2 Bos & PNR 446; 127 ER 702.

⁵⁴ *Hall v Pickard* (1812) 3 Camp 187; 170 ER 1350. See also: *Covell v Laming* (1808) 1 Camp 497; 170 ER 1034, where it was argued that there were doubts about *Leame v Bray*, but Lord Ellenborough affirmed it; and *Lotan v Cross* (1810) 2 Camp 464; 170 ER 1219, where Lord Ellenborough said that if *Leame v Bray* were to be reconsidered, he would not do so on a motion for a new trial, but would wait for a case where the question was raised on the record.

⁵⁵ (1825) 4 B & C 223; 107 ER 1042.

⁵⁶ *Moreton v Hardern* (1825) 4 B & C 223, 228; 107 ER 1042, 1044.

⁵⁷ *Moreton* (1825) 4 B & C 223, 226; 107 ER 1042, 1043.

⁵⁸ *Lloyd v Needham* (1823) 11 Price 608, 619–20; 147 ER 579, 580 (Graham B). The other judges, though they say little, appear not to endorse the hard-line view. The plaintiff in argument referred to the waiver view.

⁵⁹ (1833) 10 Bing 112; 131 ER 848.

⁶⁰ *Williams v Holland* (1833) 10 Bing 112, 114; 131 ER 848, 848–9.

⁶¹ *Williams* (1833) 10 Bing 112, 114; 131 ER 848, 848–9.

We think the case ... has laid down a plain and intelligible rule, that where the injury is occasioned by the carelessness and negligence of the Defendant, the Plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act; and, upon the authority of that case, we think the present form of action maintainable to recover damages for the injury.⁶²

There is no more important landmark in negligence law than *Williams v Holland*, not even *Donoghue v Stevenson*.⁶³ The action on the case for negligence would henceforth be available whether the harm was directly or indirectly occasioned. Negligence had escaped the confines of the forms of action and had become a generalised principle of liability, unconstrained by limitations about how the harm was caused.⁶⁴ Though references to a ‘tort’ of negligence prior to this case are rare,⁶⁵ *Williams v Holland* signals that negligence of itself is a recognised cause of action. As Tindal CJ himself said, ‘such carelessness and negligence is, strictly and properly in itself, the subject of an action on the case’,⁶⁶ and authority for such a principle could be found in the title in Sir John Comyns’ *Digest of the Laws of England*: ‘Action upon the Case for Negligence’⁶⁷ — probably the first judicial reference to the first treatise to identify negligence as a standalone principle.⁶⁸

However, one important limitation identified by Tindal CJ should be carefully noted. The plaintiff was now permitted to bring an action on the case for negligence, whether immediate or consequential, *so long as it was not a wilful act*.⁶⁹ The clear intention was that in the area of wilful and immediate harm, trespass should remain the sole remedy. We will

⁶² *Williams* (1833) 10 Bing 112, 117; 131 ER 848, 850.

⁶³ [1932] AC 562.

⁶⁴ Milsom, above n 19, 398–9, suggests that negligence, because of its more modern development, is a different kind of tort from the old traditional torts. Cf Fleming, above n 8, 102, who suggests that negligence is a basis of liability rather than a single nominate tort.

⁶⁵ One of the first examples is *Govett v Radnidge, Pulman and Gimblett* (1802) 3 East 62, 64; 102 ER 520, 520–1, where the declaration was in terms of negligence and the argument mentions it as being laid ‘in tort’. See also *Ansell v Waterhouse* (1817) 6 M & S 385, 390; 105 ER 1286, 1288–99 (Bayley J); *Bretherton v Wood* (1821) 3 Brod & Bing 54, 62–3; 129 ER 1203, 1206 (Dallas CJ). Cf *Smith v London & South Western Railway* (1870) LR 6 CP 14, 14: ‘This was an action for negligence’; *Heaven v Pender* (1883) 11 QBD 503, 506 (Brett MR): ‘The action is in form and substance an action for negligence.’

⁶⁶ *Williams v Holland* (1833) 10 Bing 112, 115; 131 ER 848, 849.

⁶⁷ Sir John Comyns, *Digest of the Laws of England* (1762) vol 1, 223–8; note also Francis Buller, *Introduction to the Law of Trials at Nisi Prius* (1767) 35. See Ibbetson, above n 19, 164–68; Baker, above n 19, 464–70.

⁶⁸ It is noteworthy that only four years after *Williams v Holland*, in *Vaughan v Menlove* (1837) 3 Bing NC 468; 132 ER 490, we have the first formulation of the standard of care in negligence in terms of the reasonable man; note also *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson B) (see above n 7). At round about the same time, the courts begin to identify the need for a duty of care, culminating in the first attempt to state a general principle of duty by Brett MR in *Heaven v Pender* (1883) 11 QBD 503, 509. The earliest statements of a remoteness rule can be found in Pollock CB’s judgments in *Rigby v Hewitt* (1850) 5 Ex 240; 155 ER 103 and *Greenland v Chaplin* (1850) 5 Ex 243; 155 ER 104. On the 19th century development of negligence see generally, Ibbetson, above n 19, 169–78.

⁶⁹ Note *Sharrod v London & North Western Railway Co* (1849) 4 Ex 580, 585; 154 ER 1345, 1347 (Parke B), stressing this limitation. The plaintiff’s sheep strayed onto a railway line and were run over by the defendant’s locomotive. The plaintiff sued in trespass, but it was held that the proper cause of action was case. Under *Williams v Holland*, the question whether the damage was direct or otherwise would not have been an issue. The case is of interest in that it appears to be the first case which raises the question whether the principles established in relation to road accidents also apply to railway accidents. The first railway was the Stockton-Darlington railway, opened in 1825.

see how, by the end of the 20th century, long after the abolition of the forms of action, some courts came to disregard this limitation. But first, it is necessary to say something about the tort of trespass and the territory it occupies in the field of intentional and negligent harm to the person.

The Role of Trespass to the Person

The three torts of trespass to the person — assault, battery and false imprisonment — had been recognised by the common law courts since the early 13th century.⁷⁰ Until the 19th century, it was not clear whether there was any requirement that the defendant should act intentionally or negligently, and the views of scholars have differed.⁷¹ David Ibbetson, for example, says that the primary focus was on the loss suffered by the plaintiff rather than the wrong done by the defendant, and that it is hard to avoid the conclusion that liability was *prima facie* strict.⁷² Others, such as Stroud Milsom,⁷³ argue that leading cases such as the *Case of Thorns*⁷⁴ and *Weaver v Ward*,⁷⁵ which appear to suggest strict liability, in fact turn on errors of pleading.⁷⁶ However, the 19th century cases of *Holmes v Mather*⁷⁷ and *Stanley v Powell*⁷⁸ confirmed that there had to be either intention or negligence.⁷⁹ Any suggestion that this may have been a special rule confined to highway cases⁸⁰ was quashed by the decision in *Stanley v Powell*, which involved a shooting accident on private land.

⁷⁰ See Stroud Milsom, 'Trespass from Henry III to Edward III' (1958) 74 *Law Quarterly Review* 195, 407 and 561, 207–10.

⁷¹ For example, Oliver Wendell Holmes opined that from the earliest times the basis of tort liability was fault, whereas Morten J Horwitz maintained that the original standard was strict liability: see Robert Kaczorowski, 'Common Law Background of Nineteenth-century Tort Law' (1990) 51 *Ohio State Law Journal* 1127.

⁷² Ibbetson, above n 19, 58. See also Morris Arnold, 'Accident, Mistake and Rules of Liability in the Fourteenth-century Law of Torts' (1979) 128 *University of Pennsylvania Law Review* 361.

⁷³ Milsom, above n 19, 296–7, 394–5. See also Baker, above n 19, 402–5.

⁷⁴ *Hulle v Orynge (The Case of Thorns)* (1466) YB M.6 Edw IV f 7 pl 18.

⁷⁵ (1792) Hob 134; 80 ER 284.

⁷⁶ In *Weaver v Ward* (1792) Hob 134; 80 ER 284, the parties were soldiers practising with their muskets and the defendant pleaded that he had 'accidentally, by misadventure and involuntarily' shot the plaintiff: the court found in the plaintiff's favour, saying that 'no man shall be excused of a trespass ... except it may be judged utterly without his fault', but added that the defendant's plea should have stated facts negating negligence or showing how the act was involuntary. See *McHale v Watson* (1964) 111 CLR 384, 388 (Windeyer J).

⁷⁷ (1875) LR 10 Ex 261.

⁷⁸ [1891] 1 QB 86.

⁷⁹ In the United States, the courts had arrived at this position some years earlier, in *Brown v Kendall*, 60 Mass 292 (1850): see George White, *Tort Law in America: An Intellectual History* (1980) 12–19. For later cases in England see *Gayler & Pope Ltd v B Davies & Son Ltd* [1924] 2 KB 75; *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861 (confirming that the same rule applies to trespass to goods); *League against Cruel Sports v Scott* [1986] QB 240 (in the hunting context, at least, intention or negligence is required in the tort of trespass to land). For confirmation in Australia see *Chin v Venning* (1975) 49 ALJR 378, 379 (Gibbs J); see also, more generally, *Northern Territory v Mengel* (1995) 185 CLR 307, 341–2 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), confirming that liability should be confined to intention or negligence.

⁸⁰ As suggested by some reports of *Holmes v Mather*, such as (1875) 33 LT 361, where Bramwell B's statement as reported in (1875) LR 10 Ex 261, 268–9 ('trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable ...') is preceded by the words 'in cases such as the present': see Philip Landon, *Pollock's Law of Torts* (15th ed, 1951) 131–2.

The judicial legislation effected by *Williams v Holland* had created a choice of remedy in cases where harm was negligently but directly inflicted,⁸¹ but trespass came into its own where the defendant's act was intentional, rather than negligent, because Tindal CJ had specifically excluded wilful acts from case's newly extended function.⁸² Further, because trespass was actionable per se, it had a role to play in upholding the right of the plaintiff not to be touched without consent in cases where no damage resulted — a role which trespass continues to play at the present day.⁸³ Trespass had another advantage, even where the defendant's act was negligent rather than intentional: whereas in negligence the burden of proof of negligence lay with the plaintiff, in trespass the traditional authorities maintained that the burden was on the defendant to disprove negligence.⁸⁴ In England, Diplock J, in *Fowler v Lanning*,⁸⁵ attempted to rewrite history and align the position in trespass with negligence by holding that even in trespass the burden of proof of the mental element lay upon the plaintiff; New Zealand appears to have followed this lead,⁸⁶ but Australian⁸⁷ and Canadian⁸⁸ authorities have generally adhered to the traditional view.

In any consideration of the respective roles of trespass and negligence in the area of intentional and negligent injury to the person, the judgment of Lord Denning MR in *Letang v Cooper*⁸⁹ is of the utmost importance. In this case the English Court of Appeal was asked to consider whether a plaintiff who had delayed for more than three years before bringing an action for negligent personal injury could invoke the alternative cause of action for trespass to the person which, it was argued, was governed by a six-year limitation period. The Court of Appeal held that trespass to the person also fell within the three-year limitation period, which according to the statute governed actions for 'negligence, nuisance and breach of duty' resulting in personal injury.⁹⁰ But Lord Denning MR opposed the plaintiff's claim on a more fundamental ground. His Honour said:

⁸¹ Joinder of counts in trespass and negligence was permitted after the procedural reforms brought about by the *Common Law Procedure Act 1952* (UK). Early examples of joining causes of action in trespass and negligence include *Holmes v Mather* (1875) LR 10 Ex 261; *Gayler & Pope Ltd v B Davies & Son Ltd* [1924] 2 KB 75.

⁸² See above n 62 and accompanying text.

⁸³ For example, in contexts such as medical treatment without consent, contact in sport, and affirmation of civil liberties. Note also the use of battery as a private right of action in respect of sexual abuse: see Bruce Feldthusen, 'The Canadian Experiment with the Civil Action for Sexual Battery' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 274.

⁸⁴ *Holmes v Mather* (1875) LR 10 Ex 261; *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861. [1959] 1 QB 426.

⁸⁵ *Beals v Hayward* [1960] NZLR 131.

⁸⁶ *McHale v Watson* (1964) 111 CLR 384 (earlier authorities relied on by Windeyer J included *Blacker v Waters* (1928) 28 SR (NSW) 406 and *Williams v Milotin* (1957) 97 CLR 465, 474); *Venning v Chin* (1974) 10 SASR 299; *Shaw v Hackshaw* [1983] 2 VR 65, 97-99 (McInerney J); *contra Kruber v Grzesiak* [1963] VR 621, 623 (Adam J); *Shaw v Hackshaw* [1983] 2 VR 65, 113-114 (Gobbo J); *Hackshaw v Shaw* (1984) 155 CLR 614, 619 (Gibbs CJ); *Platt v Nutt* (1988) 12 NSWLR 231, 240 (Kirby P, dissenting).

⁸⁷ *Cook v Lewis* [1951] SCR 830; *Tillander v Gosselin* (1966) 60 DLR (2d) 18, *aff'd* (1967) 61 DLR (2d) 192; *Ellison v Rogers* (1967) 67 DLR (2d) 21; *Dahlberg v Naydiuk* (1969) 10 DLR (3d) 319; *contra Walmsley v Humenick* [1954] 2 DLR 232.

⁸⁹ [1965] 1 QB 232.

⁹⁰ *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 2(1). See now *Limitation Act 1980* (UK) s 11. The House of Lords subsequently took a different view in *Stubbings v Webb* [1993] AC 498, but in the recent

The truth is that the distinction between trespass and case is obsolete. We have a different subdivision altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as [sic] the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. ... If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care.⁹¹

Danckwerts LJ agreed,⁹² and Diplock LJ's position was not too different: he said that there was only one cause of action, which could be described either as negligence or as trespass to the person, though negligence was to be preferred.⁹³

This now appears to be the generally accepted view in England.⁹⁴ Other jurisdictions have been more hesitant. The accepted position in Australia and Canada is that it is still possible to bring an action for negligent trespass to the person as an alternative to an action in negligence, where the harm is negligently but directly inflicted.⁹⁵ But the implications of Lord Denning's dictum should be carefully considered. He did say that for unintentional injuries the only cause of action was negligence. What he did not, in terms, say was that for intentional injuries the only cause of action was trespass. However, if Tindal CJ's limitation of the scope of *Williams v Holland*⁹⁶ to cases where the injury was not wilful is still operative, it would appear that Lord Denning has created a clear division whereby, in English law at any rate, intentional injuries to the person are redressed by an action in trespass and negligent injuries attract the tort of negligence, with no overlap. It is the object of the next part of this article to show that this division has not been observed — and may not even be a rational division to make. The imperial expansion of the law of negligence has not ceased.⁹⁷ Having occupied the area of negligent direct harm, it has now marched into the area of intentional personal injury.

decision in *A v Hoare* [2008] 1 AC 844 it overruled its own decision and restored the view taken in *Letang v Cooper* [1965] 1 QB 232.

⁹¹ *Letang v Cooper* [1965] 1 QB 232, 239. Compare the older view, as stated by Lord Ellenborough in *Leame v Bray* (1803) 3 East 593; 102 ER 724, that wilfulness was not necessary to constitute a trespass: until Lord Denning's intervention, this foreclosed any possible view that trespass was limited to intention.

⁹² *Letang v Cooper* [1965] 1 QB 232, 242.

⁹³ *Letang* [1965] 1 QB 232, 242–3.

⁹⁴ Note *Mullin v Richards* [1998] 1 WLR 1304, a case where two 15-year old schoolgirls were having a mock fight with rulers, and one injured the other in the eye: there was presumably no claim in trespass because there was no intentional injury. In *Devlin v Roche* [2002] 2 IR 360, the Irish Supreme Court refused to commit itself on whether actions for unintentional trespass were permissible in Ireland.

⁹⁵ In *Kruber v Grzesiak* [1963] VR 621, where the plaintiff wanted to sue in trespass to the person rather than negligence because the limitation period in negligence had expired, there was no suggestion that an action for negligent trespass was unavailable. In *Gray v Motor Accidents Commission* (1998) 196 CLR 1, 9, Gleeson CJ, McHugh, Gummow and Hayne JJ said that there was no need to revisit the debate on whether trespass could be committed negligently.

⁹⁶ (1833) 10 Bing 112, 117; 131 ER 848, 850 (see above n 62 and accompanying text).

⁹⁷ This phrase was coined by Brennan J in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 570.

Negligence and Intentional Harm

Some Early General Statements

Until fairly recently, there was very little express judicial recognition of the possibility that negligence could be used as a remedy for intentional harm. However, some prominent cases contain a few statements of a very general nature — perhaps all products of an era in which it was easier to generalise about the tort of negligence than it is today. It seems appropriate to begin with *Donoghue v Stevenson*,⁹⁸ Lord Atkin’s famous attempt to provide a general definition of duty in terms of the ‘neighbour principle’ is introduced by the words: ‘The liability for negligence, whether you style it as such or treat it as in other systems as a species of *culpa*’.⁹⁹ This represents a deliberate attempt to relate the common law to the general principles of liability in the codified systems of civil law, and the mental element at the heart of the Roman law delict of wrongfully causing loss. ‘*Culpa*’, or blame, incorporates both intention and negligence.

Some years earlier, Lord Atkin, before his elevation to the House of Lords, produced another statement in very general terms drawing intention and negligence together. In *Hambrook v Stokes Bros*,¹⁰⁰ his Honour said:

... if the plaintiff can prove that injury was the direct result of a wrongful act or omission by the defendant, the defendant can recover, whether the wrong is a malicious and wilful act, is a negligent act, or is merely a failure to keep a dangerous thing in control.¹⁰¹

The reference to malicious and wilful acts probably owed something to his Honour’s discussion of the *Wilkinson v Downton* principle¹⁰² as part of a summary of the case law on nervous shock.

A third prominent case containing a statement of this kind in very general terms is *Bunyan v Jordan*,¹⁰³ where the plaintiff sued for neurasthenia allegedly caused by the defendant making various wild statements to the effect that he intended to kill himself, and firing a gun in her hearing. The causes of action alleged included negligence and *Wilkinson v Downton*. Davidson J, in the Full Court of the Supreme Court of New South Wales, referred to Lord Atkin’s speech in *Donoghue v Stevenson* and endorsed a general principle on ‘the nature of an actionable breach of duty’ covering both wilful and negligent acts and clearly based on Atkin LJ’s dictum in *Hambrook v Stokes Bros*.¹⁰⁴ When the case was

⁹⁸ [1932] AC 562.

⁹⁹ *Donoghue v Stevenson* [1932] AC 562, 580.

¹⁰⁰ [1925] 1 KB 141.

¹⁰¹ *Hambrook v Stokes Bros* [1925] 1 KB 141, 156.

¹⁰² *Wilkinson v Downton* [1897] 2 QB 57: Wright J held that an act calculated to cause and actually causing physical harm was actionable.

¹⁰³ (1936) 36 SR (NSW) 350.

¹⁰⁴ *Bunyan v Jordan* (1936) 36 SR (NSW) 350, 356–7.

appealed to the High Court,¹⁰⁵ the judges in the main confined themselves to discussion of *Wilkinson v Downton*.¹⁰⁶

Statements in such general terms are rare, and it may be that it takes an exceptional judge of the calibre of Lord Atkin to go to the heart of the matter and set out generalisations that are so appealing in their simplicity.¹⁰⁷ Until very recent times discussions of the relationship between intention and negligence have generally been found in academic writings, rather than in the law reports.

Discussion of the Relationship between Intention and Negligence in Legal Writing

From the early years of the 20th century, there have been a few exceptional texts which have been prepared to generalise on the application of negligence principles to wilful conduct. The oldest is probably *Beven on Negligence*, which in its fourth edition in 1928, posed the question ‘can negligence in law be wilful?’, saying:

Negligence is ‘the absence of care according to the circumstances’ whether in doing or not doing; and in law the most deliberate act which either goes beyond, does not attain to, or deflects from the rules of duty may be treated as a negligent wrong.¹⁰⁸

A number of judicial dicta are cited to support this proposition.¹⁰⁹ However, the most influential textbook discussion is John Charlesworth’s *The Law of Negligence*, which in its second edition in 1947, stated:

Negligence may consist in a wilful or an intentional act. This is because negligence as the breach of a duty to take care is concerned with conduct and not with intention. It is no defence to prove that the defendant intentionally inflicted the damage in question and did not cause it by mere carelessness. If the driver of a heavy lorry deliberately runs into a bicycle and destroys it he can be sued for negligence, just as if he had destroyed it by careless driving. If a trench is made in the highway with a red lamp to give warning of its presence and A, seeing X approaching and intending to cause him to fall into the trench, removes the red lamp and X does fall into the trench, A is liable in negligence, his intention instead of being a defence being a matter which facilitates proof of negligence.¹¹⁰

This passage, with only minor changes, has appeared in every edition since.¹¹¹

¹⁰⁵ *Bunyan* (1937) 57 CLR 1.

¹⁰⁶ Negligence is discussed only by Latham CJ and (very briefly) by McTiernan J.

¹⁰⁷ However, note a more recent example by Lord Bridge of Harwich in *R v Deputy Governor of Parkhurst Prison ex parte Hague* [1992] 1 AC 58, 166, suggesting that the custodian of a prison who negligently allowed, or deliberately caused, a detainee to suffer injury to health would be in breach of a duty of care.

¹⁰⁸ William Byrne and Andrew Gibb, *Beven on Negligence: Negligence in Law by Thomas Beven* (4th ed, 1928) 32.

¹⁰⁹ See, eg, *Dixon v Muckleston* (1872) LR 8 Ch App 155, 160 (Lord Selborne); *Ratcliffe v Barnard* (1871) LR 6 Ch App 652, 654 (James LJ).

¹¹⁰ John Charlesworth, *The Law of Negligence* (2nd ed, 1947) 9. The first edition in 1938 contains the same passage except for the initial sentence.

¹¹¹ See, eg, CT Walton, Roger Cooper and Simon Wood, *Charlesworth & Percy on Negligence* (11th ed, 2006) [1-25].

A note of controversy was injected into this question in 1965 when MA Millner, in an article in *Current Legal Problems*, suggested that trespass was obsolescent and that ‘the defendant is liable in negligence for intentional breach of the duty of care or intentional infliction of unlawful injury’.¹¹² Seemingly in response to statements such as this, RWM Dias, the editor of the negligence chapter in *Clerk and Lindsell on Torts*, issued a reasoned denial:

... some mention should be made of a recent tendency to use ‘negligence’ in the general sense of ‘fault’ and as such applicable to intentional as well as to unintentional wrongdoing. So procrustean a use as this can only mislead and should be resisted. It appears to derive mainly from the objective approach of the law of torts, namely, its concern with unreasonable conduct. But negligence and intentional wrongdoing are only two different forms of unreasonable conduct; this does not make them equivalent to each other even in torts.¹¹³

Dias pointed to a tendency in practice for a plaintiff to sue in negligence where he has to prove unreasonable conduct, rather than under one of the intentional torts, where establishing an intentional state of mind would be much more difficult, commenting: ‘difficulties of proof do not render the concepts identical’. This passage continued to appear in the next few editions but disappeared when a new editor took over.¹¹⁴

More recently, an English text has provoked a note of disagreement by Australian authors. In 1976, Glanville Williams and Bob Hepple, in an introductory text for students entitled *Foundations of the Law of Tort*, said that in modern law a claim for damages for an injury which has been intentionally caused may be framed in negligence since it is no defence to say that the act was intentional.¹¹⁵ In one passage in their Australian torts text, Francis Trindade, Peter Cane and Mark Lunney agree,¹¹⁶ but in a later passage the authors suggest that the position is not as clear as Williams and Hepple imply, and that it is still uncertain whether an action for negligence can be brought for a direct intentional act.¹¹⁷

¹¹² Maurice Millner, ‘The Retreat of Trespass’ (1965) 18 *Current Legal Problems* 20, 30, a statement repeated in Maurice Millner, *Negligence in Modern Law* (1967) 208. Note also the statement in Robert Heuston, *Salmond on the Law of Torts* (14th ed, 1965) 267 that ‘the action of negligence lies not only for careless but also for intentional conduct’. The statement, which does not appear in earlier editions, apparently owes its presence in the book to *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656. Heuston commented: ‘The habit of using “negligence” to describe a deliberate act is well-established, but inaccurate’: at 267, n 5.

¹¹³ Arthur Armitage (ed), *Clerk & Lindsell on Torts* (13th ed, 1969) 455–6. The present author, a member of Dias’ Cambridge postgraduate LLB class in 1968–69, remembers Dias informing the class that he had recalled the proofs of the 13th edition to deal with this problem.

¹¹⁴ The passage last appeared in Arthur Armitage (ed), *Clerk & Lindsell on Torts* (16th ed, 1989) 51–2.

¹¹⁵ Glanville Williams and Bob Hepple, *Foundations of the Law of Tort* (1976) 44.

¹¹⁶ See Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2007) 14, n 56.

¹¹⁷ *Ibid* 31–32, referring to *Gray v Barr* [1971] 2 QB 554, 569 (Lord Denning MR) and *Williams v Humphrey* (Unreported, Talbot J) *The Times*, 13 February 1975. The same passage appeared in earlier editions. The authors maintain this position in the 4th ed despite *Wilson v Horne* (1999) 8 Tas R 363 (see below n 140 and accompanying and following text), which is not cited.

It is now more common for torts texts to comment briefly on the possibility of using negligence as a remedy for an intentional wrong.¹¹⁸ However, the really important development of recent years is that this practice has now been openly endorsed by the courts. Before this could happen, the courts had to overcome the problem presented by an important High Court dictum in *Williams v Milotin*.¹¹⁹

The Problem of Williams v Milotin

Williams v Milotin was one of the leading cases in which the High Court confirmed that an action in negligent trespass was still available as an alternative to an action in negligence. Ettore Milotin, an infant suing by his next friend, claimed damages for personal injury sustained when he was knocked off his bicycle by the defendant's truck. The action was commenced more than three years after the accident. The defendant argued that it should have been brought in trespass, which under s 36 of the *Limitation of Actions Act 1936* (SA) was subject to a three-year limitation period. The plaintiff contended that under s 35 of the Act the action was one which 'would formerly have been brought in the form of actions called trespass on the case' which 'shall, save as otherwise provided in this Act, be commenced within six years next after the cause of such action accrued but not after'. The High Court, in a judgment concurred in by all five judges, confirmed that the action was properly brought in negligence and that the six-year limitation period applied, with the result that the claim had been brought in time.¹²⁰ It held that the words 'save as otherwise provided in this Act' referred to provisions extending the limitation period in cases of absence from the State, disability and so on, not to the shorter limitation period for trespass actions in s 36 of the Act.¹²¹

The starting point of the defendant's argument was that the plaintiff's action could properly have been framed as an action for trespass to the person: this being so, the plaintiff should have sued in trespass, or at any rate the shorter limitation period for trespass actions should have been applicable. The High Court accepted that the action could have been brought in trespass, but confirmed that by virtue of *Williams v Holland* and other cases discussed above, negligence was an available alternative where the damage was direct; where it was indirect, in former times the action would have had to be brought as an action on the case and so negligence was the only available alternative.¹²² The plaintiff had a choice of causes of action: 'The two causes of action are not the same now, and they never

¹¹⁸ See, eg, Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th ed, 2006) 35; David Howarth, *Textbook on Tort* (1995) 36; Bob Hepple, David Howarth and Martin Matthews, *Tort Cases and Materials* (5th ed, 2000) 850; Michael Jones, *Textbook on Torts* (8th ed, 2002) 9; Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (3rd ed, 2008) 51; Horton Rogers, *Winfield & Jolowicz on the Law of Tort* (17th ed, 2006) 74–5; Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich and Neil Foster, *Torts Cases and Commentary* (6th ed, 2009) [11.4.25].

¹¹⁹ (1957) 97 CLR 465.

¹²⁰ *Williams v Milotin* (1957) 97 CLR 465, 474.

¹²¹ *Williams v Milotin* (1957) 97 CLR 465, 472.

¹²² *Williams v Milotin* (1957) 97 CLR 465, 470.

were.’¹²³ Given this, he was perfectly within his rights in choosing the one which had the longer limitation period.

In introducing this discussion, the High Court made a statement about what the position would be if there had been an intentional striking — a dictum that has caused problems in later cases. In referring to the word ‘formerly’ as used in the statute — interpreted to mean before the *Judicature Act* reforms were introduced in South Australia in 1878 — the Court said:

At that time the present action might have been framed as an action of trespass. For it seems that the facts which the plaintiff, by his next friend, intends to allege are that he was immediately or directly hit by the motor car driven by the defendant as a result of the negligence of the defendant himself. There is no suggestion that the defendant intended to strike him. If that had been the allegation, the action could have been brought in trespass and not otherwise. But as only the negligence of the defendant is relied upon, while the cause of action might have been laid as trespass to the person, the action might also have been brought as an action on the case.¹²⁴

This dictum seems perfectly consistent with *Williams v Holland*, and in particular with Tindal CJ’s ruling that an action on the case could lie for direct harm ‘so long as it is not a wilful act’.¹²⁵ But in a more modern age the High Court’s dictum came to be viewed as an inconvenient limitation on the potential scope of liability for negligence.¹²⁶

Though it was not discussed by the High Court, there had been an earlier case in South Australia, *Hillier v Leitch*,¹²⁷ where the facts were very similar to *Williams v Milotin*. The defendant argued that since the plaintiff’s claim involved a negligent but direct injury, the cause of action should have been trespass, and the three-year limitation period for trespass actions under s 37 of the *Limitation of Suits and Actions Act 1866–1867* (SA) should have applied. Cleland J held that the only form of action which could be called trespass on the case was one where damages were claimed for injury to the person or property not coming within other previously recognised forms of action: only in such circumstances could the six-year period set out in s 36 of the Act apply. It seems likely that this case caused the South Australian Parliament to pass the *Limitation of Actions Act 1936* (SA). While this Act did little more than re-enact the 19th century legislation, some subtle word changes undermined the view taken by the Court in *Hillier v Leitch*.¹²⁸ The problem was revisited in New South Wales in *Elliott v Barnes*,¹²⁹ where the defendant relied on

¹²³ *Williams v Milotin* (1957) 97 CLR 465, 474.

¹²⁴ *Williams v Milotin* (1957) 97 CLR 465, 470.

¹²⁵ *Williams v Holland* (1833) 10 Bing 112, 117; 131 ER 848, 850 (see above n 62 and accompanying text).

¹²⁶ See below: n 138 and n 142 and accompanying and following text.

¹²⁷ [1936] SASR 490.

¹²⁸ See *Parsons v Partridge* (1992) 111 ALR 257, 259 (Morling CJ); note also *Williams v Milotin* (1957) 97 CLR 465, 473:

‘When the law was consolidated by the *Limitation of Actions Act 1936* it is unlikely that there was any intention to take the step of limiting a plaintiff who could have sued in effect for negligence or in trespass to the shorter period of limitation.’

¹²⁹ (1951) 51 SR (NSW) 179.

Hillier v Leitch for the proposition that in a case of negligent but direct injury the plaintiff could only sue in trespass, an argument that according to Street CJ ‘required a certain amount of hardihood’,¹³⁰ despite the old-fashioned pleading system still in force in New South Wales at the time of this case. Street CJ rejected the argument, saying: ‘I do not think, however, that this authority is sufficient to overbear the vast mass of authority to the contrary and also the long-established practice and course of procedure which the Courts have followed’,¹³¹ and supported this by reference to Bullen and Leake on pleading,¹³² *Moreton v Hardern*,¹³³ *Williams v Holland*¹³⁴ and other cases. The rest of the Court agreed, but both Street CJ¹³⁵ and Maxwell J¹³⁶ repeated the proposition that where the act was wilful, a plaintiff was confined to a remedy in trespass. Six years after this case, the High Court in *Williams v Milotin* confirmed that in a non-wilful case, negligence remained an alternative to trespass — but as we have seen, echoed the reservations about the position in relation to wilful injuries.¹³⁷

It was a first instance judge in New South Wales who showed the way forward. In *Carroll v Folpp*,¹³⁸ the plaintiff was struck by the defendant’s car, thrown onto the bonnet of the car and carried along for about 70 metres before he fell off, sustaining further injury. There was animosity between the parties because the defendant had commenced a relationship with the plaintiff’s ex-partner. At the time of the injury, the plaintiff was involved in a domestic dispute with his ex-partner and was threatening to hit her with a pinch-bar. The plaintiff tried to stop the defendant’s car, but the defendant swerved towards the plaintiff and accelerated. Dunford J held that even though the plaintiff was engaged in the unlawful act of assault, there was still a relationship of proximity between the parties, and that the defendant was liable in negligence, though he reduced the damages on the ground of the plaintiff’s contributory negligence. However, the defendant had argued that if (as was found) the defendant had acted deliberately, under *Williams v Milotin* the plaintiff’s cause of action was trespass and not case. Dunford J distinguished the case, saying:

... that case involved a question under the relevant *Limitation of Actions Act 1936* (SA), where different limitation periods were specified for actions in trespass and in actions on the case, and the plaintiff was out of time in respect of the former but not the latter; and the Court held that the plaintiff was entitled to sue in negligence with its longer limitation period, notwithstanding that he might also be entitled to sue in trespass. It was not concerned

¹³⁰ *Elliott v Barnes* (1951) 51 SR (NSW) 179, 180.

¹³¹ *Elliott* (1951) 51 SR (NSW) 179, 180.

¹³² Edward Bullen and Stephen Leake, *Precedents of Pleadings* (3rd ed, 1868) 369.

¹³³ (1825) 4 B & C 223; 107 ER 1042 (see above n 55 and accompanying text).

¹³⁴ (1833) 10 Bing 112; 131 ER 848 (see above n 59 and accompanying and following text).

¹³⁵ *Elliott* (1951) 51 SR (NSW) 179, 182.

¹³⁶ *Elliott* (1951) 51 SR (NSW) 179, 182.

¹³⁷ Note also *Cousins v Wilson* [1994] 1 NZLR 463, where there is a suggestion that the intentional felling of trees without authority was remediable only by means of the tort of trespass to land, although the reasons for not allowing a negligence claim turn on the inconsistency between such a claim and the clearly defined duties and liabilities arising from unlawful entry on land — reasoning closely related to the High Court of Australia’s current concern with ‘coherence in the law’ as a factor regulating the recognition of duties of care in negligence in cases such as *Sullivan v Moody* (2001) 207 CLR 562.

¹³⁸ (Unreported, Supreme Court of New South Wales, Dunford J, 10 February 1998).

with whether a defendant who has failed to take reasonable care for the safety of another can escape liability in negligence by showing that his actions were intentional; and I know of no case where it has been held to be a good defence.

Dunford J said that in *Elliott v Barnes*, where again there was a limitation issue, there was no question of a deliberate act. *Charlesworth on Negligence* was invoked to support the proposition that a wilful or intentional act may constitute negligence.¹³⁹

The Leading Cases

Over the last ten years, Australian courts have come out into the open, and a series of important cases have acknowledged that negligence has a role to play in cases where injuries were intentionally inflicted. The work of textbook authors and the judicial developments discussed above formed part of the foundation for this major expansion.

In many ways the most important, and certainly the most dramatic, illustration of the new role of negligence is *Wilson v Horne*.¹⁴⁰ The plaintiff sued in 1996 in respect of acts of sexual abuse by her uncle between 1973 (when she was five years' old) and 1980. The plaintiff had repressed the memories of these experiences, but in 1994 she was encouraged to go to counselling by her sister (who said that her uncle had also abused her), as a result of which her memory of the events returned and she began to suffer symptoms of post-traumatic stress disorder. The endorsement on the writ alleged negligence, assault, battery and breach of fiduciary duty, but the statement of claim confined the claim to negligence — doubtless because of the likelihood that the limitation period for the trespass claims had expired, and the difficulty in Australian law of establishing a fiduciary duty in such circumstances.

At first instance, the defendant made a submission of no case to answer,¹⁴¹ arguing that according to the High Court in *Williams v Milotin*¹⁴² where there was a direct and intentional act the only cause of action was trespass. However, Underwood J, in a ruling which opened the way to the recognition of negligence as a cause of action for intentional harm, held that this statement only described the position prior to the *Judicature Acts*, and had no continuing effect after the abolition of the forms of action and the other procedural reforms of the 19th century:

The statement in *Williams v Milotin* ... relied upon by senior counsel for the defendant does not support the submission of no case to answer. That statement is authority for the proposition that *prior to the introduction of the Judicature System* a direct and intentional application of force only gave rise to an action for trespass. However, nothing in that judgment purports to declare that that remains the law today. In negligence, a duty of care is owed to those within the requisite proximity not to expose them to the risk of injury or harm.

¹³⁹ See above n 110 and accompanying and following text. Dunford J referred to the 9th ed: Rodney Percy (ed), *Charlesworth & Percy on Negligence* (9th ed, 1997) [1-21].

¹⁴⁰ (1999) 8 Tas R 363.

¹⁴¹ *Horne v Wilson* [1998] TASSC 17.

¹⁴² (1957) 97 CLR 465, 470 (see above, n 119 and accompanying and following text).

Such a duty must encompass protection from intentional, as well as actionable harm. As Cooke J observed in *Long v Hepworth* [1968] 1 WLR 1299 at 1308: ‘An intentional trespass by A to the person of B is just as much a breach of the duties owed by A to B as an unintentional trespass by A to the person of B.’¹⁴³ ... The plaintiff has not pleaded her case in trespass. Had she done so, the *Limitation Act* s 4(1) would have barred its success. The plaintiff has brought her action in negligence as she is entitled to do, regardless of whether the trespass to her person was intentional or negligent.¹⁴⁴

An alternative argument, that the cause of action in negligence had accrued earlier than 1994, more than six years before the writ was issued, was rejected on the ground that ‘the statute of limitation does not arise until after the defendant’s case begins’,¹⁴⁵ that is until the defendant chooses to rely on it.

Following the failure of the submission of no case to answer, Underwood J heard the claim on its facts and awarded \$15 000 compensatory, and \$40 000 exemplary, damages.¹⁴⁶ He confirmed that the cause of action in negligence could not have arisen before 1994, since it was only then that symptoms of post-traumatic disorder became apparent. Transitory emotional upset was not damage recognised by the law as sufficient to give rise to a cause of action in negligence.¹⁴⁷

The defendant appealed to the Full Court of the Supreme Court of Tasmania, arguing once again that where the acts were direct and intentional, and the injury was intended or adverted to, trespass was the only cause of action (and also that the limitation period had expired, on the ground that the sexual behavioural problems experienced by the plaintiff before 1995 were enough to constitute damage and so cause time to start running). All three judges rejected the argument that negligence was not an available cause of action for intentional conduct. Cox CJ endorsed Underwood J’s response to the *Williams v Milotin* argument,¹⁴⁸ and was also able to call in aid the High Court decision in *Gray v Motor Accident Commission*,¹⁴⁹ decided subsequent to the first instance decision, as ‘a recent example of conduct involving an intentional trespass to the plaintiff’s person but pleaded in negligence’.¹⁵⁰ His Honour said:

I conclude, therefore, that the mere fact that the circumstances complained of by a plaintiff might fit more than one category of tort and might, on one view, be more appropriately described as trespass rather than negligence, is not sufficient to deprive the court of

¹⁴³ In *Long v Hepworth* [1968] 1 WLR 1299 Cooke J extended the ruling in *Letang v Cooper* [1965] 1 QB 232 (see above n 89 and accompanying and following text) by holding that an intentional trespass to the person was a ‘breach of duty’.

¹⁴⁴ *Horne v Wilson* [1998] TASSC 17 (emphasis in original).

¹⁴⁵ *Horne v Wilson* [1998] TASSC 17.

¹⁴⁶ *Horne v Wilson (No 2)* [1998] TASSC 44.

¹⁴⁷ *Horne v Wilson (No 2)* [1998] TASSC 44. See Peter Handford, *Mullany & Handford’s Tort Liability for Psychiatric Damage* (2nd ed, 2006) 79–101.

¹⁴⁸ Peter Handford, *Mullany & Handford’s Tort Liability for Psychiatric Damage* (2nd ed, 2006) 366–7.

¹⁴⁹ (1998) 196 CLR 1 (see below n 176 and accompanying text).

¹⁵⁰ *Wilson v Horne* (1999) 8 Tas R 363, 367.

jurisdiction to entertain an action in the latter form and to grant a remedy therefore, provided all the facts essential to that cause of action can be established.¹⁵¹

Wright J also agreed as to the approach to be adopted to *Williams v Milotin*: the plaintiff could pursue whichever cause of action she preferred, and having decided to abandon trespass because that cause of action would be statute-barred, she could proceed in negligence.¹⁵² Evans J also endorsed Underwood J's approach to *Williams v Milotin*, saying that it would be most surprising if it were still the law that a direct and intentional application of force only gave rise to an action of trespass:

... it is not unusual for a plaintiff to suffer injuries as a consequence of a wide range of conduct by a defendant which may include the intentional application of physical force. This occurs quite often when a patient makes a claim against a doctor, or an employee makes a claim against an employer. In the case under consideration, the conduct of the appellant about which complaint is made included acts of intentional trespass as well as other conduct, such as showing the respondent pornographic magazines, involving the respondent in acts of deception and bribing her. If the submission put on behalf of the appellant is correct, a plaintiff is barred from relying on any part of a defendant's conduct which can be categorised as an intentional trespass to support the plaintiff's negligence claim. This would impose a significant restriction on the conduct of the defendant upon which a plaintiff may rely. If that restriction exists today, it is to be expected that it will clearly be spelt out in the authorities.¹⁵³

His Honour's support for the proposition was buttressed by authorities not referred to by the other judges:¹⁵⁴ the decision of Dunford J in *Carroll v Folpp*¹⁵⁵ and the passage from *Charlesworth on Negligence* referred to earlier.¹⁵⁶

The alternative claim that sufficient damage had been suffered more than three years before the institution of proceedings was also rejected.¹⁵⁷ An application to the High Court for special leave to appeal, to argue that an action in negligence was not available for direct intentional acts was rejected on the ground that it had insufficient chances of success.¹⁵⁸

Since this case, the possibility of using an action in negligence in cases of intentional harm has twice been referred to in favourable terms by judges of the High Court. In *New South Wales v Lepore*,¹⁵⁹ the Court was concerned with whether State education authorities could be held responsible for acts of sexual abuse by teachers, either under the principles

¹⁵¹ *Wilson v Horne* (1999) 8 Tas R 363, 368.

¹⁵² *Wilson v Horne* (1999) 8 Tas R 363, 373–75.

¹⁵³ *Wilson v Horne* (1999) 8 Tas R 363, 381.

¹⁵⁴ *Wilson v Horne* (1999) 8 Tas R 363, 381–2.

¹⁵⁵ (Unreported, Supreme Court of New South Wales, Dunford J, 10 February 1998), see above n 138 and accompanying text.

¹⁵⁶ Evans J referred to the 9th ed: Rodney Percy (ed), *Charlesworth & Percy on Negligence* (9th ed, 1997) [1-21].

¹⁵⁷ *Wilson v Horne* (1999) 8 Tas R 363, 370–1 (Cox CJ), 375–8 (Wright J), 382–5 (Evans J). Evans J, at 385–9, suggested that if the development disorder suffered by the plaintiff had amounted to a recognisable psychiatric illness, it might nonetheless be possible to hold that the cause of action in such a case accrued when the damage became discoverable.

¹⁵⁸ *Wilson v Horne* (1999) 8 Tas R 363, 389.

¹⁵⁹ (2003) 212 CLR 511.

governing vicarious liability for intentional acts or by recognition of a non-delegable duty. It declined to extend either of these doctrines to cover such a situation. The issue of the teacher's personal liability was therefore not centre stage, but McHugh J said:

The plaintiff elected to sue the teacher for trespass to the person. But if it matters — and I do not think it does — the plaintiff could have sued the teacher in negligence. An action for negligent infliction of harm is not barred by reason of the intentional act of the person causing the harm. Historically, as long as a plaintiff did not make the intention of the defendant part of the cause of action, the plaintiff could sue in trespass to the person or by an action on the case for the direct infliction of force. At all events, that was the position before the enactment of the *Common Law Procedure Act 1852* (UK) and its analogues in Australia. Since the abolition of the forms of action, a plaintiff may, if he or she chooses, sue in negligence for the intentional infliction of harm.¹⁶⁰

However, the only other judgment to mention this issue, the joint judgment of Gummow and Hayne JJ, took a more conservative approach, saying:

As *Williams v Milotin* makes plain, negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.¹⁶¹

It could be argued that this latter statement represents the views of two justices as against one, and that McHugh J dissented on the non-delegable duty issue.¹⁶² However, his Honour's carefully considered comments are consistent with the direction being pointed by other authority. Three years later In *Stingel v Clark*¹⁶³ a majority of the Court (Gleeson CJ, Callinan, Heydon and Crennan JJ) adopted a statement generally consistent with the views of McHugh J, saying:

Why would Parliament have restricted the discretionary power conferred by s 23A [*Limitation of Action Act 1958* (Vic)] to cases of negligence as distinct from intentional harm? Such a restriction also would carry its own problems. Trespass to the person might be intentional or unintentional. Would a case of unintentional (or negligent) trespass (leaving aside questions of onus of proof) be treated as a breach of duty? Furthermore, an intentional trespass might be committed by someone (such as a teacher or a nurse) who owes a conventional duty of care to the injured person. Is that duty to be ignored in characterising an action for the purposes of s 23A?¹⁶⁴

¹⁶⁰ *New South Wales v Lepore* (2003) 212 CLR 511, 572, citing *Gray v Motor Accident Commission* (1998) 196 CLR 1 (see below n 176 and accompanying text).

¹⁶¹ *New South Wales v Lepore* (2003) 212 CLR 511, 602–3.

¹⁶² Subsequent judicial comments, mainly from New South Wales, have tended to pay more attention to the views of Gummow and Hayne JJ: see, eg, *New South Wales v Ibbett* (2005) 65 NSWLR 168, 172 (Spigelman CJ); *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 484–5 (Spigelman CJ), 522–3 (Basten JA); *McCracken v Melbourne Storm Rugby League Football Club* (2007) Aust Torts Reports ¶81-925, 70,515 (Ipp JA); *Giller v Procopets* (2008) 40 Fam LR 378, 385 (Maxwell P); *Walker v Hamm* [2008] VSC 596, [74]; *Sangha v Baxter* (2009) 52 MVR 492, 524 (Basten JA).

¹⁶³ (2006) 226 CLR 442.

¹⁶⁴ *Stingel v Clark* (2006) 226 CLR 442, 452.

The Court was dealing with limitation issues arising out of a civil claim for rape committed many years previously — whether trespass was a ‘breach of duty’ for the purposes of ss 5(1A) and 23A of the *Limitation of Actions Act 1958* (Vic), and whether psychiatric injury was a ‘disease or disorder’ under s 5(1A) of the Act. The majority answered each question in the affirmative.

Exemplary Damages Cases

Prior to these two cases, in *Gray v Motor Accidents Commission*,¹⁶⁵ the High Court had already given some consideration to the question of intentional negligence in a different context — exemplary damages. This was the culmination of a line of cases in which Australian courts have recognised that it is possible to award such damages in at least some cases of negligence.

The starting point of this development was the decision in *Lamb v Cotogno*,¹⁶⁶ where the High Court confirmed an award of exemplary damages in a case where the plaintiff, who was angry with the defendant following service of a summons, threw himself on the bonnet of the defendant’s car. The defendant continued to drive away, veering from side to side in an attempt to dislodge the plaintiff, an attempt which eventually succeeded. The High Court confirmed its earlier decision in *Uren v John Fairfax & Sons Pty Ltd*¹⁶⁷ departing from *Rookes v Barnard*¹⁶⁸ and holding that the award of exemplary damages was possible in a wide range of torts. It held that even though the object of such damages was to punish and deter, it was appropriate to make such an award in a case where the damages would be paid by the defendant’s compulsory insurer. The Court rejected a suggestion that such damages should not be awarded where there was no malice or reckless indifference, saying:

Whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word.¹⁶⁹

This was followed in *Midalco Pty Ltd v Rabenalt*,¹⁷⁰ where the Full Court of the Victorian Supreme Court upheld a ruling that exemplary damages could be awarded to a mesothelioma sufferer in a negligence action, though this appears to have come about because of a technicality: because counsel for the defence in the court below had accepted as correct a direction that exemplary damages could be awarded in such circumstances, and new counsel appearing on appeal accepted that this could not be questioned. Kaye J specifically said that he was not to be understood as agreeing that the direction was correct,¹⁷¹ and Fullagar J also uttered words of reservation.¹⁷² However, in *Coloca v BP*

¹⁶⁵ (1998) 196 CLR 1.

¹⁶⁶ (1987) 164 CLR 1.

¹⁶⁷ (1966) 117 CLR 118.

¹⁶⁸ [1964] AC 1129.

¹⁶⁹ *Lamb v Cotogno* (1987) 164 CLR 1, 13.

¹⁷⁰ [1989] VR 461.

¹⁷¹ *Midalco Pty Ltd v Rabenalt* [1989] VR 461, 467.

¹⁷² *Midalco* [1989] VR 461, 475–6.

Australia Ltd,¹⁷³ O'Bryan J in the Supreme Court of Victoria held that the law permitted an award of exemplary damages in an action for personal injury caused by negligence, where the defendant had acted in contumelious disregard of the plaintiff's rights, playing down the cautionary statements in *Midalco Pty Ltd v Rabenalt* and relying on Canadian authority.¹⁷⁴ A New South Wales court has also indicated that it was prepared to award exemplary damages in such circumstances.¹⁷⁵

In *Gray v Motor Accidents Commission*,¹⁷⁶ this approach was endorsed by the High Court where, for the first time, some members of the Court accepted that in appropriate cases negligence could be used as a remedy for deliberate wrongdoing. The major issue was whether exemplary damages should be awarded where punishment had already been inflicted by the use of the criminal law. The appellant was seriously injured by a car intentionally driven at him by a man who was convicted of intentionally causing serious bodily harm and imprisoned. The appellant sued the driver for damages for personal injury, and the driver's third party insurer was substituted as defendant. The High Court upheld the decision of the courts below not to award exemplary damages, holding that such an award was not appropriate where the criminal law had been brought to bear and substantial punishment inflicted. It refused to reopen its earlier decision in *Lamb v Cotogno* that an award of exemplary damages was possible even where the tortfeasor was covered by compulsory insurance. Gleeson CJ, McHugh, Gummow and Hayne JJ, in a joint judgment, referred to the Australian cases discussed above in which exemplary damages had been awarded in negligence where there was an element of conscious wrongdoing, saying:

... exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But 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 or persons in the position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind. No doubt other examples can be found.¹⁷⁷

Kirby J agreed in a separate judgment, noting that the authorities in favour of this view were not confined to recent Australian decisions: even in some older English cases, exemplary damages were occasionally awarded where wilful negligence was shown to have been followed by high-handed conduct towards the victim. He commented: 'Although punitive damages would not be awarded for acts properly described as accidents, framed in terms of the tort of negligence, proof that the wrong went beyond mere negligence and could be

¹⁷³ [1992] 2 VR 441.

¹⁷⁴ *Dhalla v Jodrey* (1985) 16 DLR (4th) 732; *Robitaille v Vancouver Hockey Club* (1981) 124 DLR (3d) 228.

¹⁷⁵ *Trend Management Ltd v Borg* (1996) 40 NSWLR 500.

¹⁷⁶ (1998) 196 CLR 1.

¹⁷⁷ *Gray v Motor Accidents Commission* (1998) 196 CLR 1, 9–10 ('Gray').

characterised as wanton, reckless or outrageous would attract exemplary damages.’¹⁷⁸ As an example, Kirby J referred to *Emblen v Myers*,¹⁷⁹ where the defendant pulled down a building ‘in so negligent and improper a manner’ that timber fell on the adjoining building, a stable and loft owned by the plaintiff, damaging the cart that he used in his trade and injuring the horse that pulled it. Pollock CB suggested that the declaration could be read as charging a wilful wrong, like Kirby J making a distinction between ‘an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence’.¹⁸⁰

There is now ample authority, at least in Australia, for saying that the tort of negligence is applicable to harm caused intentionally, whether directly or indirectly, and it has been shown that the roots of this incursion of negligence into the realms of intention go back many years. Trespass remains an important and distinct cause of action, because it is actionable without proof of damage and protects interests of a dignitary nature, and not just freedom from physical harm. However, the relationship between these two torts in the field of intentional harm to the person is complicated by the fact that they are not the only weapons in the armoury. Since very early times, the action on the case has been available to redress certain cases of intentional harm, and in 1897 it was joined by the principle in *Wilkinson v Downton*.¹⁸¹

Actions on the Case and *Wilkinson v Downton*

Actions on the case for intentional harm go back a long way. The case most often cited is *Bird v Holbrook*,¹⁸² where the defendant placed a spring gun in his garden to deter trespassers without following the customary practice of giving notice. It was held that he was liable for an ‘inhuman act’, because the spring gun had been set for the express purpose of doing injury.¹⁸³ This was just one of a number of so-called ‘spring gun cases’ in which defendants were held liable on similar principles,¹⁸⁴ but there are other examples of the action on the case being used as a means of holding defendants liable for intentional harm to the person, for which trespass was not appropriate because the harm had been inflicted

¹⁷⁸ *Gray* (1998) 196 CLR 1, 28.

¹⁷⁹ (1860) 6 Hurl & N 54; 158 ER 23.

¹⁸⁰ *Emblen v Myers* (1860) 6 Hurl & N 54, 58; 158 ER 23, 25. Note also Bramwell B (at 59; 25): ‘It is said that the act of the defendant was wilful, and therefore the plaintiff cannot recover on this declaration; but the act was negligent as well as wilful’. Channell B (at 59–60; 25) said that the declaration had to be read as charging the defendant with wilful negligence, and anticipated the modern Australian cases by saying that if in actions of trespass the plaintiff could recover damages beyond the amount of the actual injury, he saw no reason why the same rule should not extend to wilful negligence.

¹⁸¹ [1897] 2 QB 57.

¹⁸² (1828) 4 Bing 628; 130 ER 911.

¹⁸³ *Bird v Holbrook* (1828) 4 Bing 628, 641–42; 130 ER 911, 916 (Best CJ).

¹⁸⁴ See also *Deane v Clayton* (1817) 7 Taunt 489; 129 ER 196; *Jordin v Crump* (1841) 8 M & W 782; 151 ER 1256.

indirectly,¹⁸⁵ just as there are further examples of actions on the case for indirect harm equivalent to other forms of trespass.¹⁸⁶

In 1897, in *Wilkinson v Downton*,¹⁸⁷ the case of the practical joker who told a false story that the plaintiff's husband had been seriously injured in a road accident, and caused her to suffer a severe shock and consequent serious illness, Wright J introduced a new principle. Having decided that neither deceit nor any other existing tort was appropriate, his Honour said:

The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.¹⁸⁸

His Honour then proceeded to demonstrate that that these assumptions were justified.¹⁸⁹

This case has become the foundation for a large body of case law dealing with the intentional or reckless infliction of nervous shock, or in more modern terms, psychiatric injury or mental harm.¹⁹⁰ Interestingly, however, the implications of Wright J's general principle outside the area of mental injury have received little or no attention, judicial or otherwise.¹⁹¹ Textbooks often assume that the *Wilkinson v Downton* principle is a species of action on the case, or perhaps a restatement of the basis of the action on the case as it applies to causing wilful harm to the person:¹⁹² in other words, that it is limited to indirect harm. While the fact that damage in the form of physical harm is required might give this argument some support, there is nothing in the actual words of the judgment to impose the limitation that the damage must be indirect, or to rule out cases where trespass torts might be applicable. I have argued elsewhere¹⁹³ that there is no reason why a new tort invented in 1897, some considerable time after the abolition of the forms of action, should be fettered by the limitation of indirectness, and that Wright J's principle could have been used as the foundation of a generalised principle of liability for intentional harm to the person equivalent to the generalised principle of liability for unintentional but negligent harm

¹⁸⁵ See, eg, *M'Manus v Crickett* (1800) 1 East 106; 102 ER 43 (see above n 50 and accompanying text).

¹⁸⁶ See *Bird v Jones* (1845) 7 QB 742, 752; 115 ER 668, 672 (Patteson J) (false imprisonment); *Hunt v Dowman* (1791) Cro Jac 478; 79 ER 407; *Baxter v Taylor* (1832) 4 B & Ad 72; 110 ER 382 (trespass to land); *Mears v London & South Western Railway* (1862) 11 CB NS 850; 142 ER 1029 (trespass to goods).

¹⁸⁷ [1897] 2 QB 57.

¹⁸⁸ *Wilkinson v Downton* [1897] 2 QB 57, 58–9.

¹⁸⁹ *Wilkinson v Downton* [1897] 2 QB 57, 59–61.

¹⁹⁰ See Handford, above n 147, 679–83, 691–4.

¹⁹¹ For example, there is no reason why it should not be invoked in cases of the administration of drugs or poison, or the infliction of disease: Harry Street, *Law of Torts* (7th ed, 1983) 22; see, eg, *Smith v Selwyn* [1914] 3 KB 98 (seduction after putting drug in drink: the issue was whether an action for damages based on a felonious act should be stayed pending the criminal prosecution).

¹⁹² See, eg, Trindade, Cane and Lunney, above n 116, 81; Danuta Mendelson, *The New Law of Torts* (2007) 130.

¹⁹³ Peter Handford, 'Wilkinson v Downton and Acts Calculated to Cause Physical Harm' (1985) 16 *University of Western Australia Law Review* 31, 34–8.

inspired by *Donoghue v Stevenson*.¹⁹⁴ This argument was put forward over twenty years ago, before it became apparent that the tort of negligence was invading the realms of intentional harm: the present article will suggest a slightly different conclusion.

In recent times *Wilkinson v Downton* has become the subject of controversy. Though neglected for nearly a century, over the last 20 years it has been invoked much more often, particularly in Canada.¹⁹⁵ At the same time there has been an attempt to downgrade it by suggesting that Wright J's principle is virtually indistinguishable from negligence.¹⁹⁶ The chief protagonist here has been Lord Hoffmann in *Wainwright v Home Office*,¹⁹⁷ where the plaintiff was seeking a tort remedy (other than battery) for an invasive strip search (in the course of which there had been an incidental touching of his penis). The House of Lords refused to recognise invasion of privacy, and Lord Hoffmann, whose judgment on this issue was concurred in by the rest of the Court, refused to accept the suggestion that *Wilkinson v Downton* be extended to cover the case. His Honour said that on analysis *Wilkinson v Downton* differed very little from negligence and had 'no leading role in the modern law'.¹⁹⁸ It had owed its origin to the problem presented by the decision in *Victorian Railway Comrs v Coultas*¹⁹⁹ that nervous shock resulting from negligence was too remote to be recoverable: though Wright J had distinguished this case on the ground that Downton was not merely negligent but had intended to cause injury, '[q]uite what the judge meant by this is not altogether clear; Downton obviously did not intend to cause any kind of injury but merely to give Mrs Wilkinson a fright'.²⁰⁰ Once the Court in *Dulieu v White & Sons*²⁰¹ had declined to follow *Victorian Railway Comrs v Coultas*, 'the law was able comfortably to accommodate the facts of *Wilkinson v Downton* ... in the law of nervous shock caused by negligence. It was unnecessary to fashion a tort of intention or to discuss what the requisite intention, actual or imputed, should be.'²⁰² There was no point in arguing about whether the injury was in some senses intentional if negligence would do just as well:

I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J wanted to water down the concept of intention as much as possible. He clearly

¹⁹⁴ [1932] AC 562. As pointed out there are limits to this analogy because negligence is not limited to harm to the person, but encompasses other forms of damage: Handford, above n 193, 36–7. The article also canvassed a possible relationship between Wright J's principle and the prima facie tort doctrine associated with Oliver Wendell Holmes and Sir Frederick Pollock, given the close relationship between Wright and Pollock: Handford, above n 193, 37–8.

¹⁹⁵ See Handford, above n 147, 681–3.

¹⁹⁶ See *ibid* 683–91. It has also been suggested that there is a problem in accommodating the facts of *Wilkinson v Downton* [1897] 2 QB 57 within Wright J's principle: at 685.

¹⁹⁷ [2004] 2 AC 406.

¹⁹⁸ *Wainwright v Home Office* [2004] 2 AC 406, 425.

¹⁹⁹ (1888) 13 App Cas 222.

²⁰⁰ *Wainwright* [2004] 2 AC 406, 424.

²⁰¹ [1901] 2 KB 669.

²⁰² *Wainwright* [2004] 2 AC 406, 425.

thought ... that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs* case ... prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.²⁰³

Lord Hoffmann's view of *Wilkinson v Downton* has obviously had to be treated with respect by British courts. However, his Honour's interpretation has not found universal acceptance and has caused a good deal of controversy.²⁰⁴ Though Lord Hoffmann's view has been endorsed in the High Court of Australia (without extended discussion),²⁰⁵ there are lower court decisions which incline towards the view that *Wilkinson v Downton* still has a role to play as a principle of intentional tort liability, notably *Nationwide News Pty Ltd v Naidu*,²⁰⁶ where the New South Wales Court of Appeal emphasised the differences between this intentional tort and negligence.²⁰⁷ In Canada, in *Rahemtulla v Vanfed Credit Union*,²⁰⁸ McLachlin J, a future Chief Justice of Canada, had earlier restated the *Wilkinson v Downton* principle to require conduct which was 'flagrant and outrageous', plainly calculated to produce some effect of the kind which was produced and result in a 'visible and provable illness',²⁰⁹ and ever since then the principle has clearly enjoyed a settled existence independent of negligence, a fact attested to by a considerable volume of case law.²¹⁰ Even in England, despite Lord Hoffmann, *Wilkinson v Downton* has been invoked by some lower court judges.²¹¹

In particular, many commentators disagree with Lord Hoffmann's view that *Wilkinson v Downton* has no real independence from negligence, and that once it was recognised that damages were recoverable for 'nervous shock', Wright J's principle became obsolete. The matter is more complex than Lord Hoffmann suggests. First, *Dulieu v White & Sons*,²¹² the case cited by Lord Hoffmann for this proposition, cannot be the basis for recognising a duty of care on the facts of *Wilkinson*, since it was limited to persons who suffered shock through being in the zone of physical danger; it was only much later, when it was eventually accepted that there might be a duty to take care not to convey untrue bad

²⁰³ *Wainwright* [2004] 2 AC 406, 425.

²⁰⁴ See, eg, Penelope Watson, 'Searching the Overfull and Cluttered Shelves, *Wilkinson v Downton* Rediscovered' (2004) 23 *University of Tasmania Law Review* 264; Denise Réaume, 'The Role of Intention in the Tort of *Wilkinson v Downton*' in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (2007) 533.

²⁰⁵ *Magill v Magill* (2006) 226 CLR 551, 562 (Gleeson CJ), and see also at 589 (Gummow, Kirby and Crennan JJ). Note also the earlier discussion by Gummow and Kirby JJ in *Tame v New South Wales* (2002) 211 CLR 317, 376.

²⁰⁶ (2007) 71 NSWLR 471. Note also *Giller v Procopets* (2008) 40 Fam LR 378; *Walker v Hamm* [2008] VSC 596.

²⁰⁷ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 485–6 (Spigelman CJ); 522–3 (Basten JA). Spigelman CJ at 486 noted that the distinction between intentional torts and negligence would assume greater significance by reason of the exemption of the intentional torts from the *Civil Liability Act 2002* (NSW), on which see above n 16.

²⁰⁸ (1984) 51 BCLR 200.

²⁰⁹ (1984) 51 BCLR 200, 215–16.

²¹⁰ See Handford, above n 147, 681–3; Réaume, above n 204, 544–52.

²¹¹ See, eg, *C v D* [2006] EWHC 166.

²¹² [1901] 2 KB 669.

news, that the facts of the case found a niche in the tort of negligence.²¹³ Second, and more importantly, it has been argued that it is wrong to regard Wright J as stating a principle based on foreseeability, and that while there might be more than one view about what Wright J meant by ‘wilfully’,²¹⁴ the words ‘calculated to cause physical harm’ must imply at least recklessness rather than mere negligence. Denise Réaume, who has examined these issues in detail and convincingly refutes Lord Hoffmann’s approach, comments:

Wainwright threatens to take all the mystery out of *Wilkinson*. Lord Hoffmann’s decision for the court takes the rather striking view that *Wilkinson* was really grounded in negligence and not a separate cause of action at all. He suggests that generations of judges adjudicating these cases have all the time been ‘speaking negligence’ without realising it. This analysis strikes me as anachronistic — it imputes a modern sensibility about and understanding of the tort of negligence to a judge operating at the dawn of the development of negligence as we know it. This seems wrong to me. If there is a thought that cannot sensibly be attributed to Wright J in 1897, it is that the defendant deserved to be held liable simply because he created an unreasonable risk of foreseeably causing physical injury to the plaintiff through the mechanism of the shock inflicted by the tall tale of her husband’s injury. More importantly, by converting these cases into proto-negligence cases, Lord Hoffmann overlooks most of what is interesting in the reasoning in the case law over the years. The judges have been struggling to articulate a cause of action; I just don’t think that they have been struggling to articulate negligence.²¹⁵

Summing up, Réaume says that what justifies imposing liability even for unforeseeable consequences in Wright J’s mind is the intention to behave wrongfully by intentionally making false statements designed to do some harm.²¹⁶

Even if Lord Hoffmann’s arguments are accepted, it may well be that *Wilkinson v Downton* is still useful. An English first instance judge has pointed out that there may still be cases where negligence is not available because there is no duty of care, making Wright J’s principle a useful alternative.²¹⁷ Moreover, as highlighted by Wright J’s reference to the legal right to personal safety, there may be interests which *Wilkinson v Downton* can protect which are beyond the reach of negligence. From time to time it has been argued that *Wilkinson v Downton* should be extended to cover mere distress falling short of psychiatric injury, if there was an intention to cause it,²¹⁸ and such an argument was advanced by the claimants in *Wainwright v Home Office*.²¹⁹ Lord Hoffmann acknowledged

²¹³ See Handford, above n 147, 630–7, 685–6.

²¹⁴ Though ‘wilful’ generally means intentionally or recklessly, it has been suggested that it may have been intended to mean ‘voluntary’: see Mark Lunney, ‘Practical Joking and its Penalty: *Wilkinson v Downton* in Context’ (2002) 10 *Tort Law Review* 168, 175; Handford, above n 147, 683–4.

²¹⁵ Réaume, above n 204, 533–4.

²¹⁶ *Ibid* 542.

²¹⁷ *Bici v Ministry of Defence* [2004] EWHC 786, [82] (Elias J).

²¹⁸ As happened in the United States with the tort of intentional infliction of emotional distress: see Peter Handford, ‘Intentional Infliction of Mental Suffering: Analysis of the Growth of a Tort’ (1979) 8 *Anglo-American Law Review* 1; Handford, above n 147, 699–712.

²¹⁹ [2004] 2 AC 406.

that this would make a great difference to his view of *Wilkinson v Downton*, but uttered some words of warning:

If ... one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, 'imputed intention' will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not.²²⁰

Lord Hoffmann noted that the proposition that *Wilkinson v Downton* should be extended to mere distress falling short of psychiatric injury had already been rejected by the Court of Appeal²²¹ and his Honour reserved his opinion on the issue.²²² Though Canadian courts have highlighted distress, rather than physical injury, as the relevant consequence of the defendant's conduct, no Canadian court has taken up the suggestion that liability might be extended to mere distress.²²³ The matter has been discussed in recent Australian cases, notably *Giller v Procopets*,²²⁴ where Maxwell P suggested that in the light of modern developments in psychiatric medicine the requirement for a recognised psychiatric illness should be discarded,²²⁵ but Ashley JA ruled out taking such a step²²⁶ and Neave JA reserved her opinion.²²⁷

Lord Hoffmann may have been endeavouring to clear the ground by eliminating a cause of action which in his view was indistinguishable from negligence. He did this by attempting to show that Wright J's principle was in effect one which depended on foreseeability. However, it is suggested that this may have been the wrong way to go about it. It has been contended in this article that the courts are now prepared to recognise that the tort of negligence can be called in aid in many cases where the defendant's conduct is genuinely intentional — where, in the words of Lord Hoffmann, the defendant has 'acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not'.²²⁸ If this is correct, then negligence is a possible alternative cause of action in many instances where defendants have been held liable under *Wilkinson v Downton*. It is suggested that this truth has been recognised by McPherson JA of the Queensland Court of Appeal in *Carrier v Bonham*,²²⁹ in a discussion of the relationship between negligence and *Wilkinson v Downton* that has not received anything like as much attention as that of Lord Hoffmann, but is much more perceptive.

In *Carrier v Bonham*, the defendant, who had been allowed to wander away from a psychiatric hospital, stepped in front of a bus intending to kill himself. It was contended that

²²⁰ *Wainwright* [2004] 2 AC 406, 426.

²²¹ *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932.

²²² *Wainwright* [2004] 2 AC 406, 426.

²²³ Réaume, above n 204, 548–9.

²²⁴ (2008) 40 Fam LR 378.

²²⁵ *Giller v Procopets* (2008) 40 Fam LR 378, 389.

²²⁶ *Giller* (2008) 40 Fam LR 378, 411; see also *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 486 (Spigelman CJ).

²²⁷ *Giller* (2008) 40 Fam LR 378, 487.

²²⁸ *Wainwright* [2004] 2 AC 406, 426.

²²⁹ [2002] 1 Qd R 474.

the defendant was liable for the traumatic injury suffered by the driver either under *Wilkinson v Downton* or in negligence. The court below held that negligence was not established because the defendant's unsoundness of mind justified the adoption of a lower standard of care, but found that the defendant had wilfully done an act calculated to cause physical harm. On appeal, it was held that there was liability under both torts, since unsoundness of mind did not automatically diminish the standard of care in negligence.²³⁰ McPherson JA, having ruled that 'calculated' meant objectively likely rather than subjectively contemplated,²³¹ proceeded to summarise his interpretation of the relationship between *Wilkinson v Downton* and negligence:

Wilkinson v Downton is still sometimes described as being an action 'on the case', as if that would serve to distinguish it from actions for negligence. The implication seems to be that it does not quite fit the traditional dichotomy between liability in trespass for intentional wrongs, and liability in negligence for those that involve conduct that is merely inattentive. Despite the debate generated by *Fowler v Lanning* ... the distinction that was recognised by the late 18th century did not correspond to that between intentional and unintentional harm. As is evident from the differences of opinion in the famous case of *Scott v Shepherd* ... the difference was between harm that was immediate and direct, and harm that was caused indirectly. ...

The feature that is often singled out as peculiar about *Wilkinson v Downton* is that it was an intentional act which had reasonably foreseeable consequences that were apparently not in fact foreseen by the defendant in all their severity; but that is, as RS Wright J pointed out in *Wilkinson v Downton*, 'commonly the case with all wrongs'. Most everyday acts of what we call actionable negligence are in fact wholly or partly a product of intentional conduct. Driving a motor vehicle at high speed through a residential area is an intentional act even if injuring people or property on the way is not a result actually intended. *Wilkinson v Downton* is an example of that kind. The defendant intended to speak the words in question to the plaintiff's wife. Even if he did not intend to inflict the harm on her that followed, or perhaps any harm at all, he was plainly negligent as regards the result that followed. It is only when injury ensues from inaction or omission to act that problems may still arise at common law about whether the wrong is, properly speaking, the act or conduct of the defendant. Otherwise, since the *Judicature Act* which, in Maitland's famous phrase, buried the forms of action, it no longer matters whether the act was done intentionally or negligently, or partly one and partly the other. What matters is whether the consequences of the conduct, whether foreseen or not, were reasonably foreseeable and are such as should have been averted or avoided. What we really have now is not two distinct torts of trespass and negligence, but a single tort of failing to use reasonable care to avoid damage however caused. Negligence, if narrowly understood, is something of a misnomer.

It follows, in my opinion, that if the defendant Bonham in this case was, because of his mental condition, not legally responsible for the foreseeable consequences of his action in throwing himself at or under the bus, he was no more liable under the decision in *Wilkinson*

²³⁰ McMurdo P expressly so held (*Carrier v Bonham* [2002] 1 Qd R 474, 480). McPherson JA dismissed the defendant's appeal except in relation to an issue of costs (at 489). McMurdo P (at 481) and Moynihan JA (at 489) agreed with the orders proposed by McPherson JA.

²³¹ *Carrier v Bonham* [2002] 1 Qd R 474, 483.

v Downton than he was according to ordinary principles of the law of negligence. On either approach he was, according to the evidence accepted by his Honour, actually unable to foresee that harm might result to the occupants of the bus, including the plaintiff Carrier, from his intentional act.²³²

It is noteworthy that McPherson JA suggested that what we now have is not distinct torts of trespass and negligence — one remedy for intentional conduct, the other for inadvertence — but ‘a single tort of failing to use reasonable care to avoid damage however caused’. He even went so far as to say that negligence, if narrowly understood, may not be the most appropriate name for this remedy — a thought that he then proceeded to underline by reference to the *Lex Aquilia* of Roman law,²³³ under which ‘liability was recognised as arising either *dolo* or *culpa*, of which the latter did not precisely mean negligence but rather conduct that was “blameworthy”’.²³⁴ This leads us back to the generalised principles of responsibility found in the civil law systems, codified and uncoded.²³⁵ It is suggested that with the recognition that negligence can be used as a remedy for intentional as well as unintentional conduct we may not be so very far away from an equivalent principle in the common law.

Conclusion

This study of the various torts available for intentional and negligent injuries to the person shows that the interrelationship of these remedies is more complex than the conventional trespass-negligence antithesis might suggest. Specifically, in Australia at least, the courts have now recognised that the tort of negligence has a role to play in cases of harm inflicted deliberately. Though this doctrinal development has proceeded independently of the *Civil Liability Acts*, enacted since 2002 in an attempt to place limits on personal injury claims because of a perception in certain quarters that the law was becoming ‘unaffordable and unsustainable’,²³⁶ if the limitations on liability introduced by this legislation do not apply to injuries inflicted intentionally,²³⁷ the tort of negligence is a valuable addition to the armoury of weapons available for deliberate wrongdoing, one that is superior in many respects to trespass, limited by the confines of directness, and *Wilkinson v Downton*, subject to the uncertainties introduced by recent case law.

In England, the courts have yet to give express recognition to the concept of intentional negligence, and to do so no doubt offends the simple division between intention and negligence claims posited by Lord Denning in *Letang v Cooper*.²³⁸ However, the foundations on which the Australian developments have been erected are all English: the

²³² *Carrier* [2002] 1 Qd R 474, 483–4.

²³³ See above n 23 and accompanying text.

²³⁴ *Carrier* [2002] 1 Qd R 474, 484.

²³⁵ See above n 21 and accompanying and following text.

²³⁶ See Ipp, Cane, Sheldon and Macintosh, above n 11, ix.

²³⁷ See above n 12 and accompanying and following text.

²³⁸ [1965] 1 QB 232, 239 (see above n 91 and accompanying text).

effects of the *Judicature Acts* and other procedural reforms on *Williams v Holland*,²³⁹ and the other judicial dicta and textbook statements dealt with above. Moreover, as the need to align the common law with the law in other European countries becomes ever more important,²⁴⁰ a unified principle applying to all kinds of fault-caused harm has a certain attractiveness. Perhaps developments in a common law country on the other side of the world may provide the impetus to move in the desired direction.

²³⁹ (1833) 10 Bing 112; 131 ER 848.

²⁴⁰ See, eg, *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, 9 (Lord Bingham of Cornhill).