

## **Intentional Torts: Civil Claims, Remedies & Defences to Sex Abuse, Assault and Battery - A New Paradigm – by P. G. HAMILTON<sup>1</sup>**

We may give it little thought today, but intentional tort claims are ancient, much older than the “duty of care” in negligence and many other causes of action.

It is, therefore, somewhat surprising that new life is being breathed into these ancient causes of action, where wrongs once ignored are being acted upon through our courts.

This paper seeks to look afresh at the elements of intentional tort claims, including police tort claims, defences, evidentiary issues, and limitation periods.

### **Common Intentional Tort Claims**

Traditionally, there are said to be two forms of tort, or civil wrongs – trespass<sup>2</sup> and an ‘action on the case’. Trespass included trespass to a person, such as hitting a person or wrongfully imprisoning them, today more commonly described as intentional torts. Causes of action on the case concerned all personal wrongs and injuries caused without force, for example the neglect or want of skill in physicians and surgeons.<sup>3</sup>

Doubtless a member of the legal pantheon, Sir William Blackstone,<sup>4</sup> in his seminal work of 1765, *Commentaries on the Laws of England*,<sup>5</sup> spoke of various intentional tort claims against the person, adding the maxim ‘for every wrong there is a legal remedy’, being:

1. threats – he described as menaces of bodily hurt, whereby someone threatens to harm you and affect your business affairs while doing so;
2. assault – an attempt or “offer” to beat you or a strike or near-miss;
3. battery – an unlawful beating, not in self-defence;
4. wounding – an aggravated form of battery;
5. mayhem – violently depriving you of important body parts, mostly limbs, to be able to defend yourself in a fight;
6. malicious prosecution – prosecuting you without a “tolerable ground of suspicion”;

---

<sup>1</sup> This is the written paper of a talk by Peter Hamilton on 22 August 2018, chaired by Aine Magee QC. Christine Willshire also presented. The writer would like to thank his many VicBar colleagues who provided useful feedback on drafts.

<sup>2</sup> Meaning literally “to pass across”, but for present purposes to mean “any direct interference with the person, goods or property of another without lawful justification”: *Butterworths Australian Legal Dictionary* at [1190].

<sup>3</sup> Blackstone, *Commentaries on the Laws of England*, Vol 3, page 120. Actions on the case were an early form of negligence.

<sup>4</sup> 1723 – 1780.

<sup>5</sup> Vol 3, page 120.

7. false imprisonment.

Scholars Luntz and Hambly<sup>6</sup> discuss that these remedies have been available since time immemorial in an effort to keep the peace and prevent retaliation. Professor Fleming<sup>7</sup> adds that such damages are available as a punishment. He also offers that these actions provide an important safeguard where the State fails to prosecute a wrongdoer. There is also the issue of appropriate recompense, that may not be available through other avenues.<sup>8</sup>

Perhaps with the exception of “mayhem”,<sup>9</sup> little seems to have changed all these centuries hence. It is especially interesting that, unlike claims in negligence, there has been limited statutory intrusion into this area, with few references cropping up throughout the *Wrong Act 1958* (Vic), for example.

The phrases ‘intentional tort’ or ‘trespass to the person’, are perhaps, misleading or at times written about in Delphic or ambiguous terms in judgments, depending on the context of the claims. Commonly, such claims are looked at by the voluntariness of an act and, at other times, as requiring an intention to have injured the plaintiff in one form or another. More confusingly, sometimes want of care is enough to establish an intentional tort and can be described as a tort itself, namely “negligent trespass” (although such claims would more commonly be brought in negligence.)<sup>10</sup>

Some of this confusion might be abated by adopting the distinction of intentional torts and negligence by Professor Stanley Yeo.<sup>11</sup> He sees the difference being one of subjective intention versus objective analysis:

- an intentional tort is a subjective test – one considers whether the defendant consciously and voluntarily brought about the result by their actions e.g. did they strike someone consciously and voluntarily. That would be enough to succeed. It is not about consequences or foreseeability;
- a claim in negligence is an objective test – one considers whether the act or omission fell short of an objective standard of care required of a reasonable person in the defendant’s position. To that extent, it is irrelevant whether the act was done with intent, because an unintentional or careless act may well fall below what was expected of a reasonable person in the defendant’s position.

---

<sup>6</sup> *Torts: cases and commentary*, 5<sup>th</sup> Ed, at [657].

<sup>7</sup> *Fleming’s the law of torts*, 10<sup>th</sup> Ed, at [2.70].

<sup>8</sup> Such as victims of crime legislation or *Sentencing Act* claims.

<sup>9</sup> It is none too surprising that I was unable to find reference to such a cause of action in today’s leading text, *Fleming’s the Law of Torts*, 10<sup>th</sup> Ed.

<sup>10</sup> See *Halsbury’s Laws of Australia* at [415-335].

<sup>11</sup> In his paper *Comparing the Fault Elements of Trespass, Action on the Case and Negligence*, available at:  
<http://classic.austlii.edu.au/au/journals/SCULawRw/2001/6.pdf>.

## **The Elements of Intentional Tort Law Claims – and some examples<sup>12</sup>**

### *Assault*

Assault, in the legal sense of the word, is not to be confused with battery. It is about words and actions, not physical contact.

The essential elements are:

1. that the defendant threatened the plaintiff with harm or violence;
2. the threat was made with the intention to threaten or scare the plaintiff, applying a subjective test of intention; and
3. it is irrelevant whether the defendant intended to go through with the threat – it is about the plaintiff's perception (such perception considered objectively).

The Civil Juries Charge Book<sup>13</sup> suggests that a plaintiff must also establish some loss from the assault to succeed in the claim. However, that appears questionable for reasons I will come to about how intentional torts differ in their view of loss as an essential ingredient to succeed in the action, as compared to negligence claims.

### EXAMPLE

An assailant breaks into the bank you work at. He holds a gun near your head and asks you to open the safe. You fear for your life and open the safe, handing over millions to him. Later, you sue the assailant who, for reasons surprising to all, has millions in assets. It turns out the gun was not loaded, the assailant had no bullets and the assailant denies ever intending to harm you. You sustain no physical injury.<sup>14</sup>

This is a classic example of an assault as opposed to a battery. You were threatened with harm or violence. The assailant intended to scare you and did indeed scare you. When viewed objectively, that behaviour would reasonably have scared you. It does not matter that the assailant never intended to shoot you, because it is about the fear of the victim reasonably believing they are in danger of a battery being committed on them, not in proving their ability to follow through with the threat. It resulted in you sustaining mental or psychiatric injury. In a way, it can be seen as an early recognition of 'nervous shock' and psychiatric injury.

But what about if you got into an oral fight with someone, you stirred them up into a frenzy and eventually, in a fit of pique, they threatened to kill you? Is provocation a defence to the claim? What about contributory negligence?

---

<sup>12</sup> All examples are based on reported cases.

<sup>13</sup> At [2.2.2].

<sup>14</sup> For the elements in more detail, see *ACN 087 528 774 P/L (formerly Connex Trains Melbourne P/L) v Chetcuti* [2008] VSCA 274 at [16].

Save for some statutory provisions, it appears that such defences are not available.<sup>15</sup>

If the threat is carried out, it is called an ‘assault and battery’.

### *Battery*

A battery is impermissible contact with another.

The essential elements are:

1. there was physical contact (which can even extend to things like spitting or even by pouring water on the plaintiff);
2. the physical contact was done intentionally and voluntarily;
3. it was a direct action on the plaintiff by the defendant; and
4. the contact caused the plaintiff some harm or was offensive - contact such as an accidental bump while walking in the street will not suffice.

### EXAMPLE

Your maths teacher is running late for class. Students run amok in the classroom. With no intention of causing any great harm, your classmate sticks his leg out to stop you moving past him, causing you to trip, and fly through the air, whereupon you smash your face against a desk, fracturing your cervical spine.

This is a classic case of battery.<sup>16</sup> There was physical contact with you. The act was intentional or voluntary, because the student meant to strike you. It was a direct action that affected you. Although he did not mean to cause you injury, it was harmful to you. You are therefore entitled to damages for the harm and consequential damage this caused you.<sup>17</sup>

But what if the student brushed your leg and not in anger? While anger is said not to be definitive, like two people accidentally coming into contact on the street, that is unlikely to be a battery.<sup>18</sup> Some contact is seen as acceptable and not, therefore, a battery.

---

<sup>15</sup> See *ACN 087 528 774 P/L (formerly Connex Trains Melbourne P/L) v Chetcuti* [2008] VSCA 274 at [11]. See also section 25 of the *Wrongs Act 1958 (Vic)*, which appears to limit contributory negligence to actions in tort for negligence where available at common law or breaches of a contractual duty of care that is co-extensive with a duty of care in tort.

<sup>16</sup> For the elements in more detail, see *Carter & Anor v Walker & Anor* [2010] VSCA 340 at [214].

<sup>17</sup> The harm and consequential damage must have been a “natural and probable consequence” of the battery, a test not identical, but similar to, reasonable foreseeability. Even if a plaintiff suffers no harm, the direct contact is still actionable as a battery, although presumably compensatory damages would be nominal. (See *Carter v Walker*)

<sup>18</sup> Perhaps this is because some touching in everyday life brings with it implied consent: see *Collins v Wilcock* [1984] 1 WLR 1172 per Lord Goff, cited in *Rixon v Star City Pty Limited* [2001] NSWCA 265.

Or what if you had first punched the student? For him to get away, he struck your leg and you fell. Or what if he kicked you to stop you from harming another student? Self-defence and defence of others are both defences to this tort.<sup>19</sup>

### *False imprisonment*

The term 'false imprisonment' is what it says, wrongly withholding someone's liberty. A writ of habeas corpus can be issued to release the person wrongfully detained. But what about a claim for being wrongfully imprisoned?

The essential elements are:

1. the defendant intended to restrain the person;
2. the plaintiff did not volunteer to be restrained; and
3. there must be no ability to leave the imprisonment or confinement.

### EXAMPLE

You are shopping at Myer. A shop assistant believes you had previously stolen from the store. Coincidentally, two police officers are present near the store. You are taken by a Myer staff member and the officers to the security office for questioning, without being offered a choice. Later, you voluntarily go to the police station to plead your innocence.

The officers and Myer's store member intended to restrain you for questioning and did not give you the opportunity to say no. While there was no use of force, you felt compelled to attend. Your liberty was taken away fully, and you were extremely distraught of being accused of stealing and of the whole experience. This appears to be a false imprisonment. There is no need to establish any damages flowing from the false imprisonment, but distraught feelings are compensable as compensatory damages for intentional torts.<sup>20</sup>

On the other hand, voluntarily attending the police station to plead your innocence is unlikely to be false imprisonment because you were not restrained against your will.

Claims become somewhat more clouded when one is imprisoned under a warrant, for example, but it is for a defendant to establish lawful justification.<sup>21</sup> A plaintiff does not need to prove the imprisonment was unlawful to establish a *prima facie* false imprisonment claim.

---

<sup>19</sup> For a further discussion, see the *Civil Juries Charge Book*, 2.2.1.

<sup>20</sup> Because the tort is treated as giving rise to some damage without proof: *Halsbury's Laws of Australia* at [415-50]. On the other hand, negligence is about consequential damage from the wrong: *Letang v Cooper* [1965] 1 QB 232 at 239 per Lord Denning MR.

<sup>21</sup> *Myer Stores Ltd v Soo* [1991] 2 VR 597.

### *Malicious prosecution*

This concerns the launching of a prosecution falsely and action that can be taken after an innocence finding.

The essential elements are:

1. did the defendant prosecute or play a principal role in the prosecution of the plaintiff;
2. the defendant was vindicated, that is, the charges were dismissed;
3. that in bringing or playing a role in bringing the prosecution, there was 'malice', that is, it was brought about for an improper purpose, for example brought about by ill-will against the defendant or whether it was honestly brought against the defendant.

### EXAMPLE

You have an acrimonious relationship with your neighbour. You had refused building developments through VCAT and the neighbour was out to get you. She made up that you indecently exposed yourself to her, said she would give evidence on oath, and encouraged the police to prosecute you. The Magistrate on the committal dismissed all charges and found that the neighbour had made up the allegations as 'pay back'.

The neighbour played an important role in the police bringing the prosecution. The proceeding was resolved in your favour and the neighbour brought the allegations to police for the improper purpose of punishing you. It appears to be a good case of malicious prosecution against the neighbour.

Commonly, of course, such claims are brought against the State who brings the prosecution, but as this example evidences, these claims are not limited to the State through its public prosecutors.

### *Defences - consent, necessity and discipline*

As with other intentional torts, and negligence (*volenti non fit injuria*), consent is a defence to such a claim, or perhaps better categorised as a means to prevent a plaintiff from establishing the elements of their claim.

For obvious reasons, consent features heavily in sexual assault claims. The central issue in sexual assault claims is whether a defendant went beyond consent or whether consent was genuine or begot through threat or fraud, vitiating the consent.

If a defendant establishes the conduct was reasonably necessary to protect the plaintiff or someone else, or in self-defence (the defence of necessity), generally speaking that defendant has not committed an assault or battery. Self-defence, of course, must itself be reasonable or proportionate, when considering all the circumstances.



Likewise, some leeway has been given for parents, schoolteachers and Armed Forces personnel in disciplining others and may not be considered an intentional tort.

Evidently enough, another available defence to an intentional tort is committing a lawful arrest or preventing a crime. However, the defence is limited to ‘reasonable force’<sup>22</sup>.

### *Compensatory damages, and aggravated and exemplary damages*

Damages for breaches of intentional tort, like for other torts, are to put the victim back in the position they would have been if the tort not occurred. However, as noted above, while in damages claims in negligence some damage has not been recognised as compensable, for instance upset feelings, damages for intentional torts can be more encompassing, and do not require a recognised psychiatric response to the incident.

Moreover, some damage does not have to be proved, unlike in a claim in negligence where consequential loss is an essential ingredient to the action. To use the legal parlance, then, intentional tort claims are ‘actionable per se’, without establishing loss. Obviously if no loss is established, a plaintiff would only establish an entitlement to an award of nominal damages.

What’s more, aggravated damages are said to be available, as a rule, over and above other heads of damage to compensate victims of intentional torts for “insult, humiliation and the like”<sup>23</sup> and can be given for the Defendant’s conduct, including its denial of the allegations and failure to apologise. Such damages may even be available where compensatory damages are nominal.

Exemplary damages, too, are frequently awarded in these claims. Such damages are designed to punish a defendant and make it known that the court does not condone the behaviour of a defendant.

### *Why an intentional tort claim over a claim in negligence?*

As some of the above examples demonstrate, there are a number of reasons a plaintiff may wish to pursue a claim in intentional tort rather than negligence (or solely in negligence), which may include:

- difficulty establishing one or other of the elements of negligence;
- establishing loss (or damages), as this is not required for intentional torts and a claim can be pursued for nominal damages and exemplary damages;<sup>24</sup>

---

<sup>22</sup> *Halsbury’s Laws of Australia*, at [533].

<sup>23</sup> *De Reus & Ors v Gray* [2003] VSCA 84 at [28].

<sup>24</sup> See for e.g. *Fatimi Pty Ltd v Bryant and Others* (2004) 59 NSWLR 678. *Cf* a claim in negligence, discussed in *Williams v Milotin* [1957] HCA 83 at [15] “The essential ingredients in an action of negligence for personal injuries include the special or particular damage - it is the gist of the action - and the want of due care. Trespass to the person includes neither.”

- the ability to seek to claim general damages without a Significant Injury Certificate under section 28LC(2)(a) of the *Wrongs Act 1958* (Vic);<sup>25</sup>
- the availability of damages unfettered by statutory caps and minimums for various heads of damage under the *Wrongs Act 1958* (Vic) for sexual assault or other sexual misconduct claims;<sup>26</sup>
- difficulty establishing compensable damages in a negligence sense, particularly as regards recognised psychiatric injury and as compared to actionable per se claims;
- contributory negligence and other defences and restrictions on damages may not apply to intentional tort claims;
- establishing an intentional tort may well result in obtaining aggravated or exemplary damages;
- media attention impacts of allegations on juries and other considerations may apply.

There is also some debate about whether one can bring a claim both in trespass for intentional interference to the person and in negligence.<sup>27</sup> There no longer seems any reason in principle that one cannot bring a claim alleging either or both intentional tort and negligence arising out of the same factual scenario and one can see in many cases a significant overlapping of the two.<sup>28</sup>

For example, in a medical case, if a doctor proceeded with treatment that had no therapeutic benefit or was performed only to defraud the patient, that ought to vitiate the consent the patient gave and would thus be a battery. Alternatively, if there was some therapeutic benefit to some or all of that treatment, it could be said that the treatment was performed negligently because a reasonable doctor in the position of the defendant would not have proceeded with the treatment. It would be absurd to shut a plaintiff out in bringing the claim in two alternative ways.<sup>29</sup>

---

<sup>25</sup> Which provides that, for injuries concerning “an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct”, a plaintiff does not require a Significant Injury Certificate to claim general damages.

<sup>26</sup> See section 28C(2)(a) of the *Wrongs Act 1958* (Vic).

<sup>27</sup> For a discussion on the old distinctions see MacCormack G.D., *The Distinction Between Trespass And Case* Williams V. Milotin, <http://www.austlii.edu.au/au/journals/SydLawRw/1959/17.pdf>.

<sup>28</sup> As seemed to have been suggested by *Williams v Milotin* [1957] HCA 83 at [6] in which the Court said “Had the damage been caused indirectly or mediately by the defendant or by his servant (a state of things to be distinguished from violence immediately caused by the defendant's own act) the action must have been brought as an action on the case and not otherwise.” There followed reference to a series of British cases. However, as Professor Yeo explained in his article quoted above, this was based on pre-Judicature system authority that is no longer relevant, that system fusing the disparate legal systems of the United Kingdom.

<sup>29</sup> See *White v Johnston* [2015] NSWCA 18, on which this example is based.



In a sexual assault case,<sup>30</sup> where the plaintiff was out of time to proceed in a claim in intentional tort, he couched his claim in negligence, relying on a limitation period extending time for the onset of psychiatric injury.<sup>31</sup> The defendant relied on an old line of authority that a person could not claim in negligence for an intentional and direct act that caused him harm. The Court of Appeal of Tasmania disagreed and allowed him to proceed in negligence. Special leave to appeal to the High Court was refused.<sup>32</sup>

If a plaintiff succeeded in establishing an intentional tort, there is some suggestion that that would subsume the claim in negligence, such that compensatory and other damages would be awarded for the intentional tort, presumably at least in part because any negligence claim becomes redundant.<sup>33</sup>

### *Concurrent criminal prosecutions and civil actions*

In many intentional tort claims, the defendant is also the subject of a criminal proceeding against them.

There is an important High Court of Australia case setting out the usual way that such claims should proceed, *Commissioner of the Australian Federal Police v Zhao*.<sup>34</sup>

If a defendant in a civil action has to give evidence before the criminal matter, there may well be a real risk of prejudice to them. Unless a plaintiff can establish a real risk of prejudice themselves, it seems the appropriate course is for the civil proceeding to be stayed subject to the criminal prosecution's outcome. Generally speaking, this would be in a plaintiff's interests in any event, because a criminal finding is relevant to issues of liability in a civil case, but not the other way around.<sup>35</sup>

### **Police Torts and Claims Against the State**

Claims for damages against police officers and protective services officers<sup>36</sup> are now governed by the *Victoria Police Act 2013* (Vic). The Act only applies to the extent the officers are performing or purporting to perform their duties.

---

<sup>30</sup> *Wilson v Horne* [1999] TASSC 33.

<sup>31</sup> Which would not be relevant to a personal injury claim in Victoria because, regardless of how the claim is framed, the limitation period is the same for such injuries (other than unrelated exceptions for claims arising e.g. out of employment or for motor vehicle accidents) – see section 27B of the *Limitation of Actions Act 1958* (Vic).

<sup>32</sup> *Wilson v Horne* H6/1999 [1999] HCATrans 516.

<sup>33</sup> See, for example, *De Reus & Ors v Gray* [2003] VSCA 84 at [17].

<sup>34</sup> [2015] HCA 5.

<sup>35</sup> See section 92(2) of the *Evidence Act 2008* (Vic). Evidence of a finding of 'not guilty' is not relevant to the civil standard, because of the difference in proof – 'beyond reasonable doubt' versus 'the balance of probabilities'.

<sup>36</sup> Which officers are referred to in Part 3, Division 7 of the Act as providing services for the protection of (a) persons holding certain official or public offices; and (b) the general public in certain places; and (c) certain places of public importance (see section 37).

Even though, in effect, the claim is made because of an officer's civil wrong, the claim must be brought against the State. The officer may only be joined individually if the State pleads in its defence that either (a) the officer's conduct was serious or wilful misconduct<sup>37</sup> or (b) if the tort is established, it is not a 'police tort'.<sup>38</sup>

If an officer is jointly liable with a non-officer, the Act does not apply to the non-officer and does not seek to inhibit or otherwise affect a claim against the non-officer.<sup>39</sup>

A 'police tort' is defined in section 72 of the Act in broad terms. 'Police tort claims' are referred to in similar terms in section 73 of the Act.

There is nothing in the Act that limits a claim against an officer to certain types of torts. While unclear, it is probable that the common law continues to apply or at least offers guidance on the tort claims available.

Tracing back the common law steps, in 1989, the then House of Lords in *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 considered the duty of police officers to community members.

In that case, a mass murderer, Sutcliffe, had slain Ms Hill. Before her death, the police had interviewed Sutcliffe, and chosen not to follow further leads. Not long after, Sutcliffe took the life of Hill. Hill's mother brought a suit for damages against the police's Chief Constable. She said the police were negligent. She said that that negligence led to her daughter being murdered.

The Constable was successful in applying to have the claim struck out as having no reasonable prospects of success. Lord Keith (who wrote the Court's leading speech) accepted that, officers, like others, may be liable for acts or omissions committed by them in their position as officers, including for assault and battery, unlawful arrest, wrongful imprisonment, malicious prosecution and negligence. The Law Lord accepted also that officers owe a duty to the general public to enforce the law, but found it a step too far to say a duty was owed to ensure the police took reasonable steps to prosecute Sutcliffe before he attacked Hill, partly for public policy reasons and resource issues. His Lordship therefore concluded that, to the extent the duty was alleged in that case, the police were said to be immune from suit.

It would be wrong to interpret this case as providing a general immunity from suit and that has certainly not been the Courts' approach since *Hill*.

In the leading, pre-Act, Victorian case of *State of Victoria & Ors v Richards*,<sup>40</sup> Redlich JA found that there was no general immunity from suit enjoyed by police officers acting in the performance of their duties. That case concerned

---

<sup>37</sup> Section 74(2).

<sup>38</sup> Section 75(2)(b).

<sup>39</sup> Section 80.

<sup>40</sup> [2010] VSCA 1131. And before that, *Zaleswki v Turcarolo* [1995] 2 VR 562.

a third party being pepper sprayed while a police officer was arresting a person near her. His Honour found that such a duty could well exist and permitted the case to proceed to trial. The learned Judge noted that a duty of care may even exist vis-à-vis a subject of a police operation<sup>41</sup>, but the extent of the duty owed and whether it is breached would seem to turn on the facts of each case.

Having said that, it appears impermissible to bring a claim against the State itself for the State's own liability for failing, for example, to instruct or train its officers in performing their duties in a particular way. An appropriate officer or officers would presumably need identifying to bring that aspect of the claim under the Act. So much seems clear from the Act itself and claims generally against the State, which are limited, at least in tort, to vicarious liability for acts and omissions of identified servants or agents. As illustrated by *Salt v State of Victoria*,<sup>42</sup> a plaintiff must be able to identify a servant, agent or independent contractor for whose negligence the State is liable to bring the claim home to the State, although it should be added that police officers are not considered officers of the State, but of the public service.<sup>43</sup>

### **Evidentiary Issues in Intentional Tort Claims**

There are some evidentiary issues peculiar to intentional tort claims, and in particular to sexual abuse claims. I wish to address three, tendency and coincidence evidence, self-incrimination, and access to medical records of a complainant of sexual abuse.

#### *Tendency and coincidence evidence*

For those practising in criminal law, 'tendency and coincidence' evidence will be a familiar phrase. But it should also be familiar to those practising in the civil jurisdiction, as evidentiary rules for such evidence apply in both jurisdictions.

Tendency evidence is evidence used to assist in proving that a defendant acted or thought in a particular way - put another way, that the defendant had a tendency to do the very things alleged in the claim. Coincidence evidence is evidence of previous events that have occurred which make it unlikely the events alleged did not happen - in other words, it is no coincidence the events occurred as alleged because they had happened previously.

Such evidence could be seen as circumstantial evidence or evidence relying on inference.

---

<sup>41</sup> at [20].

<sup>42</sup> [2017] VSC 6.

<sup>43</sup> Police officers are not considered to be servants or agents of the Crown or independent contractors employed by the Crown: see section 23 of the *Crown Proceedings Act 1958* (Vic), section 74 of the *Victoria Police Act 2013* (Vic) and Part 3 of the *Public Administration Act 2004* (Vic).

As one can imagine, such evidence could arise in any factual scenario. However, it is particularly common in alleged historical sexual abuse cases.

In *GGG v YYY*,<sup>44</sup> for example, tendency evidence was used of sexual assaults of other boys alleged against the defendant to establish a tendency for the defendant to be attracted to children<sup>45</sup> and to commit sexual acts on them. The evidence assisted the Court conclude that the events alleged by the plaintiff were more likely than not to have occurred.

It is important for those acting for plaintiffs and defendants alike to be aware of the way such evidence is admitted and its limitations. These are found in Part 3.6 of the *Evidence Act 2008* (Vic), replacing common law principles in this area<sup>46</sup>. Practitioners should also be aware of the leading High Court authorities on tendency evidence, including *IMM v The Queen*.<sup>47</sup> That case highlights the care the Court must take in determining whether the evidence, in truth, is of significant probative value to meet the *Evidence Act* test. For example, the Court, by a majority, determined that evidence of a sexual interest in the complainant from a prior uncharged event was not admissible as tendency evidence that the accused committed the later sexual offence.<sup>48</sup> There is also the case of *Hughes v The Queen*<sup>49</sup> which arguably takes a less narrow approach than *IMM*, and in particular of the Victorian Court of Appeal's approach in *Velkoski v R*<sup>50</sup>, the majority noting<sup>51</sup>:

“Unlike the common law which preceded s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant.”

---

<sup>44</sup> [2011] VSC 429.

<sup>45</sup> Although that finding needs to be considered in the light of *IMM v The Queen* referred to in the next footnote.

<sup>46</sup> See *Hughes v The Queen* below.

<sup>47</sup> [2016] HCA 14, in particular relating to the meaning of “significant” probative value at [46] and [103], and general issues about assessing the admissibility of such evidence, including that its admissibility must be assessed by considering the highest or best use to which it could be put. The case, by majority, also resolved the tension between Victorian and New South Wales approaches to the use of tendency evidence, with Nettle and Gordon JJ preferring the Victorian approach about assessing the credibility and reliability of the evidence to determine whether tendency evidence is admissible, rather than the NSW approach of presuming that the evidence is relevant and credible and proceeding to analyse the admissibility of the evidence under tendency without those considerations. For a further discussion, see Odgers *Implications of IMM v The Queen* [2016] HCA 14 available at <http://inbrief.nswbar.asn.au/posts/7be4753ee4e26b4fd93440f8190772ae/attachment/The%20implications%20of%20IMM%20v%20The%20Queen.pdf>.

<sup>48</sup> See [63]-[64], but *cf* [178].

<sup>49</sup> [2017] HCA 20.

<sup>50</sup> (2014) 45 VR 680.

<sup>51</sup> At [42].

The evidence must have significant probative value<sup>52</sup> to be admissible, that is, the evidence needs to be particularly relevant, probative or compelling to be admitted.

Moreover, the plaintiff must give the defendant notice of its reliance on such evidence by use of a tendency and coincidence notice.<sup>53</sup> Not infrequently, one sees in trials the use of such evidence without a party having gone through the required steps.

Such evidence could also be used when a plaintiff is suing an organisation as vicariously liable for the acts of its member, as that evidence could, at least in theory, increase the probability of the defendant being aware of the abuse occurring within the organisation. Such allegations can also affect pleadings and discovery.<sup>54</sup>

### *Self-incrimination*

In some cases, alleged perpetrators who are sued might object to give evidence on the basis of self-incrimination.<sup>55</sup> Those acting for such persons ought to be aware of their client's rights in this regard, including the ability to ask the Court for a certificate so that that client can give evidence without fear of it being used in a later prosecution.

On the other hand, those acting for plaintiffs ought to be aware, not only of the *Jones v Dunkel* principle that can apply (although will not if self-incrimination privilege is legitimately taken),<sup>56</sup> but more importantly of the principle that a Court ought to accept unchallenged evidence of a witness, unless that evidence was "wholly improbable".<sup>57</sup>

### *Medical records of a complainant of sexual abuse*

For civil claims concerning a "sexual offence",<sup>58</sup> practitioners need to be familiar with Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

While no civil action could be said to be a prosecution for a "sexual offence", section 32C provides that Division 2A applies to "legal proceedings" generally, including civil claims for damages. Section 32AB, however, which are the guiding principles of this Division, provides that the legal proceeding merely "relates (wholly or partly) to a charge for a sexual offence". It may thus be

---

<sup>52</sup> "Probative value" evidence is defined in the Act to mean "evidence [that] could rationally affect the assessment of the probability of the existence of a fact in issue".

<sup>53</sup> Section 99 of the Act, although section 100 allows the dispensing of such evidence.

<sup>54</sup> See for e.g. *Skarbek v The Society for Jesus in Victoria & Ors* (No 2) [2016] VSC 748.

<sup>55</sup> See sections 128 and 128A of the *Evidence Act 2008* (Vic).

<sup>56</sup> Permitting the Court to conclude that the missing witness's evidence, if their absence is unexplained, would not have assisted the party's case who ought to have called that evidence, and to permit the Court to more readily accept the other party's evidence.

<sup>57</sup> See *Duffy v Salvation Army (Vic) Property Trust* [2013] VSCA 253 at [47]-[48].

<sup>58</sup> See Schedule 1 of the *Sentencing Act 1991* (Vic) for the various offences falling under the rubric of "sexual abuse".

arguable in some cases that, if there is no ‘charge’ of a sexual offence, then sexual assault civil claims do not come within these provisions, but as far as I am aware, this provision has not yet been tested, and sections 32AB and 32C remain somewhat at odds.

If Division 2A applies to the civil claim, these provisions prevent a party from compelling another party or medical practitioner to produce or give evidence of “confidential communications” of medical practitioners and counsellors and applies to both written and oral evidence, including evidence to be adduced in a trial.

Prima facie, such evidence is excluded in a proceeding and a defendant cannot obtain or adduce such evidence and the party requires the Court’s leave to do so. This is the result of legislative changes in 1998 to encourage victims of sexual abuse to obtain treatment from their doctors without fear of their records being used against them, among other reasons set out in section 32AB of the Act.

A defendant must seek leave of the Court before seeking such material records under subpoena<sup>59</sup>, before being entitled to inspect documents produced under subpoena and adducing such evidence. Being granted leave in respect of one step in that process does not necessarily mean leave will be granted at the next step.<sup>60</sup>

Medical practitioners themselves have standing to take issue with producing such records, as occurred in *Skarbek v The Society of Jesus in Victoria & Ors* [2016] VSC 622. Courts may call for production of the documents to allow the judge to inspect the material and decide whether leave ought to be granted to inspect those records.<sup>61</sup> Courts may also restrict access to documents if a medical practitioner is called upon to produce those documents.<sup>62</sup>

For the Court to grant leave at any of the stages mentioned, it must be satisfied each of the following criteria (with the onus on the party seeking access to establish that leave should be granted):

1. that the evidence will have substantial probative value; and
2. other evidence of such value is not available; and
3. the public interest in maintaining confidence in the material is outweighed by the public interest in having the evidence available.

In other words, it is a far more onerous test than the usual test for establishing the subpoena is not ‘fishing’, that is to say, that the documents

---

<sup>59</sup> Although it is not limited to the subpoena process.

<sup>60</sup> Sexual Assault Manual of the Judicial College of Victoria at [11.2], citing *SLS v R* [2014] VSCA 31 at [233] and noting that, if leave is granted at one stage, and if the status quo applies, it is more likely leave will be granted at a later stage.

<sup>61</sup> Section 32C(6).

<sup>62</sup> As occurred in *Skarbek v The Society of Jesus in Victoria & Ors*.



sought have a legitimate forensic purpose.<sup>63</sup> The Court must also consider each document or class of documents separately, rather than take a broad-brush approach.<sup>64</sup>

In *K R v B R & Anor*,<sup>65</sup> the Court formed the view that, for the obtaining of records under subpoena, an applicant must first seek leave of the Court to issue that subpoena. The case also looked at waiver and whether the use by the plaintiff of some medical evidence meant that a defendant ought to be granted access the further documents under general waiver principles, despite Division 2A of Part II of the Act. The Court concluded that waiver was relevant, but only within section 32D(2)(f), namely by considering “the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person”.

In so far as claims are brought in the County Court, that Court has recently issued a practice note for practitioners who seek leave to obtain such medical evidence, as set out at [41]-[43] of Practice Note PNCDL 2-2018<sup>66</sup>. In particular, plaintiff lawyers are asked by the Court to ensure that the matters proceed in the “PIS – Personal Injury-Sexual Assault” list when issuing a proceeding.

### **Limitation Periods and Prejudice in Child Abuse Claims**

Many readers will be familiar with significant changes to the *Limitation of Actions Act 1958* (Vic) for “child abuse” claims, effective from 1 July 2015.<sup>67</sup>

The changes are limited to claims brought by minors at the time who were the subject of alleged physical or sexual abuse.

For such claims, there is no longer any specific limitation period.

Nevertheless, as was explored in *Connellan v Murphy*,<sup>68</sup> the Court retains the power to grant a permanent stay of such a proceeding in some circumstances.

In *Connellan*, the alleged sexual abuse occurred almost 50 years prior when the plaintiff said she stayed at the defendant’s family’s residence for a little over a week. At the time, the defendant was aged about 13. There was no interaction between plaintiff and defendant between the alleged events in about 1967 or 1968 and 2015. One of the alleged incidents occurred in the presence of the defendant’s brother. Both brothers denied the incidents occurred and denied the plaintiff ever stayed with their family. Police

---

<sup>63</sup> See *Woolworths Ltd v Svajcer* [2013] VSCA 270 for the usual test.

<sup>64</sup> Sexual Assault Manual of the Judicial College of Victoria at [11.2] citing *PPC v Williams* [2013] NSWCCA 286 at [67] – [69].

<sup>65</sup> [2018] VSCA 159.

<sup>66</sup> Available at:

<https://www.countycourt.vic.gov.au/sites/default/files/forms/PNCLD%202-2018%20-%20Common%20Law%20Division.pdf>.

<sup>67</sup> Effected by the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).

<sup>68</sup> [2017] VSCA 116.

investigated the allegations in 2013 and 2014, but were unable to find relevant witnesses, including the plaintiff's mother, and defendant's parents.

The Court of Appeal analysed whether it ought to grant a permanent stay on the basis that the claim was an abuse of process, considering whether the trial would be manifestly unfair or bring the administration of justice into disrepute because of the delay.

Although the first instance judge placed significant weight on the defendant and his brother being available, the Court of Appeal found that their memories were likely to be significantly impaired, there were key witnesses unavailable and other evidence was not available for a fair trial.

In the result, the proceeding was permanently stayed.

This decision can be compared to *Judd Estate Proceedings*,<sup>69</sup> under equivalent NSW provisions, where the deceased was alleged to have abused three teenagers in the 1970s, 80s and 90s and claims were brought against Judd's estate. The Court would not grant a stay, in part based on the deceased having previously provided statements about the alleged events. Access to the decision is now restricted, so it appears the case is under appeal.

Also of some relevance to the issue is *Prince Alfred College Incorporated v ADC*,<sup>70</sup> where the Court refused to extend time under the equivalent of the old Victorian limitation provisions. The delay in bringing the claim was described by the Court as "extraordinary", the events occurring in 1962, and the plaintiff having earlier made a deliberate choice not to bring the claim.

The defendant was allegedly vicariously liable for the headmaster's sexual abuse of the plaintiff, the headmaster having been found guilty of criminal conduct in 2007 in respect of the abuse. To succeed, the Court said that the plaintiff needed to establish whether the defendant placed the housemaster in a position of "power and intimacy" over the plaintiff. Because of the fluxion of time, the Court found that that question could not be addressed adequately.

### **The *Ellis* Defence**

The so-called *Ellis* defence has caused significant consternation in many quarters. Its name is eponymous, after John Ellis, who brought a claim against the Catholic Church and Cardinal Pell for alleged abuse at the hands of a priest while Ellis was an altar boy.<sup>71</sup> Ellis sued the priest himself, but he died while proceedings were on foot.

---

<sup>69</sup> [2018] NSWSC 462 per Garling J.

<sup>70</sup> [2016] HCA 37 - better known for its importance in the area of vicarious liability.

<sup>71</sup> *Trustees of The Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117.

The Church<sup>72</sup> and Cardinal defended the proceeding partly on the basis that neither could be sued for the criminal conduct of the priest.<sup>73</sup> They succeeded. Ellis could not identify anyone to sue, other than the estate of the deceased priest, but presumably the priest had taken a vow of poverty and Ellis would have received an empty judgment.

While to my knowledge, for several years such a defence has not been taken in similar circumstances, statute now forbids it, under the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic).

That Act permits a claim in respect of child abuse<sup>74</sup> against an unincorporated non-government organisation that controls one or more trusts and that would otherwise not be suable. The Act applies retrospectively.<sup>75</sup>

Part XIII of the *Wrongs Act 1958* (Vic) has also modified the law regarding vicarious liability of such organisations, and others, although the law is not retrospective, applying to sexual abuse claims from 1 July 2017.<sup>76</sup>

**P G HAMILTON**

**OWEN DIXON CHAMBERS WEST**

**22 AUGUST 2018**

---

<sup>72</sup> Technically, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney.

<sup>73</sup> The Church was an unincorporated association that was not suable. The Trustees merely held property of the Church. Cardinal Pell could not be held liable as an individual office holder of the Church as he could not be liable vicariously or in contract for the acts of a priest, a connection between offence and the current office holder being “too remote”.

<sup>74</sup> Defined in section 3 as “an act or omission in relation to a person when the person is a minor that is physical abuse or sexual abuse” and “psychological abuse (if any) that arises out of that act or omission”.

<sup>75</sup> See section 4(3) of the Act.

<sup>76</sup> See section 93 of the *Wrongs Act 1958* (Vic).