**INTENTIONAL TORTS**

# Trespass to the Person

1. The tort of ‘trespass’ is ‘*actionable per se’,* meaning a plaintiff does not need to prove they have suffered damage or loss because of the defendant’s actions.
2. In contrast, negligence for example, is an ‘*action on the case’*. This carries damage as the core of action. In negligence, a plaintiff must prove a defendant’s act or omission had caused some loss or damage to succeed.
3. In Australian law, it is the directness of the defendant’s actions, not the intention to cause damage, which sufficiently amounts to a trespass against the person.

# The Civil Liability Act and Intentional Torts

1. The operation of the CLA extends to any cause of action regarding the award for damages for personal injury or death notwithstanding what auspice of the law a claim is brought.
2. However, the CLA ostensibly excludes intentional torts from its remit, supposedly to reflect the moral rectitude of holding an individual responsible for deliberately inflicting harm upon another.
3. Section 3B(1)(a) excludes intentional acts from the operation of the CLA:

**3B Civil liability excluded from Act**

1. The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows –
	1. civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except—

(ia) Part 1B (Child abuse—liability of organisations), and

(i) section 15B and section 18(1) (in its application to damages for any loss of the kind referred to in section 18(1)(c)), and

(ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and

(iii) Part 2A (special provisions for offenders in custody)

1. The exclusion of intentional acts from the CLA revolves around the phrase ‘intent to cause injury or death’ as contained in section 3B(1)(a).

Whilst on the face this seems to be a rather straightforward exclusion, the Courts have interpreted it to require an examination of alleged tortfeasors state of mind at the time of the impugned tortious conduct.

1. So much was made clear in the case of *Croucher v Cachia* (2016) 95 NSWLR 117, where it was held that section 3B(1)(a) does not operate on a particular cause of action, but rather a particular act. As Leeming JA explained:

A cause of action in battery may be established where the defendant’s conduct is either intentional or alternatively merely negligence. The former would engage section 3B(1)(a) and the latter would not. In other words, the language of ‘intentional tort’ is an unsafe guide to whether s 3B(1)(a) is engaged[[1]](#footnote-1)

1. In other words, section 3B(1)(a) is ‘cause of action neutral’.
2. Simply pleading in the language of intentional tort will not, on its own, exclude the operation of the CLA.[[2]](#footnote-2) Although, what is required to exclude the operation of the CLA remains somewhat ambiguous.
3. On various occasions the Court has opined on the curious impreciseness and awkwardness of this provision.[[3]](#footnote-3) What is clear however, that once excluded the CLA will not affect the assessment of damages for claims arising from intentional acts which cause harm.
4. The application of the CLA was considered by the Court of Appeal in *State of New South Wales v Ouhammi* [2019] NSWCA 225.
5. Mr Ouhammi was arrested whilst intoxicated. He was conveyed to Waverly Police Station and placed into a holding cell, which was enclosed by a heavy deadbolt Perspex door.
6. At some point an officer opened the heavy Perspex door and Mr Ouhammi stepped quickly toward the door. The officer slammed the door shut, catching Mr Ouhammi’s finger in the deadbolt. The finger was later partially amputated.
7. A claim for personal injury was brought by Mr Ouhammi in the District Court. He contended that the officer had shut the door with the intent to cause him injury.
8. The primary judge found for the Plaintiff holding that the officer had unintentionally battered the Plaintiff and subsequently assessed damages by the common law at $82,000.00.
9. The State of New South Wales appealed successfully and had the primary judgement set aside. The Court of Appeal held that the officer did not intent to cause injury therefore the CLA should have been enlivened:

As this Court has noted on a number of occasions, s 3B(1)(a) does not refer to an intentional tort, nor indeed to any specific cause of action. Rather it refers to “an intentional act”, which act is done “with intent to cause injury or death”. Thus, both the formulation of the question and the terms in which it was answered wrongly focused on the causes of action, being battery and negligence.[[4]](#footnote-4)

1. Considering this the Court of Appeal assessed Mr Ouhammi’s damages at approximately $30,500 on the non-economic loss assessment scale.
2. *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294 centred around a game of Rugby League.
3. Mr Dickson was spear tackled by Mr Fletcher during a football match. Mr Dickson was seriously injured and brought an action claiming his injuries were negligently inflicted by Mr Fletcher for which Sports Club was vicariously liable.
4. During the primary hearing, Mr Fletcher acknowledged that he intended to tackle Mr Dickson but denied intending to *harm* him.
5. The primary judge held that Mr Fletcher had not intended to harm Mr Dickson, which consequently led to the failure of the action as section 5L of the CLA precluded the recovery of damages - the injury sustained was the materialisation of an obvious risk of a dangerous recreational activity and therefore not compensable under the CLA.
6. Mr Dickson appeal focused upon Mr Fletcher’s intention. Given spear tackles are prohibited in Rugby League, it was argued that Mr Fletcher must have therefore intended to injure Mr Dickson. The appeal was dismissed by the Court of Appeal where it was held:

An intention can be a statement of mind subjectively held by the relevant person, or it can be an intention imputed by the law, based on the presumption that a person intends the nature and probable consequences of a particular act.[[5]](#footnote-5)

… for the 3B(1)(a) exclusion of the CLA to operate, a plaintiff must prove intention on the part of the defendant in two respects:

* first, intention to do the act (here, the tackle) that caused the injury;
* second, intention, by that act, to cause injury or death.[[6]](#footnote-6)
1. This case highlights again the importance of ensuring that a matter brought under the auspice of an intentional tort must be done so with the intent to injure made out to avoid the application of the CLA.
2. Failing to do so may cause an entire action to fail or result in a low award of damages comparable to the common law.

# Claims for Personal Injury and the Legal Profession Uniform Law

1. Another important factor when considering how to litigate intentional tort matters is the application of the *Legal Profession Uniform Law Application Act 2014* (NSW) (‘the LPA’).
2. This applies to cap the amount of costs recoverable by legal representatives in matters involving claims for personal injury where damages awarded do not exceed $100,000, and that is not uncommon in intentional tort claims.
3. Section 61 of the *Legal Profession Uniform Law Application Act 2014* (NSW) caps recoverable costs in personal injury matters by the provisions of schedule 1 of the same act.

2 Maximum costs fixed for claims up to $100,000

1. If the amount recovered on a claim for personal injury damages does not exceed $100,000 the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:
	1. in the case of legal services provided to a plaintiff – maximum costs are fixed at 20% of the amount recovered or $10,000, whichever is greater,
	2. in the case of legal services provided to a defendant – maximum costs are fixed at 20% of the amount recovered or $10,000, whichever is greater
2. Prior to the enactment of the uniform law the *Legal Profession Act 2004* (NSW) included almost identical provisions. These were discussed in the important case of *New South Wales v Williamson* [2012] HCA 57.
3. The respondent, Mr Williamson, had sued the State of New South Wales for damages arising from assault, battery and false imprisonment.
4. The case was settled, and judgment was entered for Mr Williamson for $80,000 plus costs as assessed or agreed. The parties could not agree on costs. The main issue was whether section 338 of the *Legal Profession Act 2004* (NSW) applied to cap the costs recoverable.
5. Section 338 capped costs recoverable in a similar way that schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (NSW) does so now.
6. Mr Williamson sought a declaration that costs in the proceedings were not regulated by section 338, and the matter made its way up to the High Court where it was said:

false imprisonment [is] necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty is not an ‘impairment of a person’s physical or mental condition’ or otherwise a form of ‘injury’ within s 11 of the [*Civil Liability Act 2002* (NSW)].

1. Because Mr Williamson received an undifferentiated lump sum, it was not possible to say what part of the lump sum was awarded to compensate Mr Williamson’s personal injury arising from the assault and battery, and what part was to compensate Mr Williamson’s loss of liberty and dignity as a result of the false imprisonment.
2. For that reason, the costs capping provisions were held not to apply.
3. Importantly this case makes clear that damages for loss of liberty and false imprisonment are not to be regarded as personal injury damages for the purposes of the CLA.

# Battery

1. The tort of battery is constituted by the intentional act of a person directly causing harmful or offensive physical contact with the person of another.
2. The relevant intention is the intention to make contact with the body of the plaintiff not to cause the plaintiff an injury.
3. The Victorian case of *Carter v Walker* (2010) 32 VR considered a historical analysis of the species of battery

 **…**

(1) it is a species of trespass to the person;

(2) it is a so-called “intentional” tort,

(3) it involves the defendant doing an act which causes physical contact with the plaintiff;

(4) the act must be voluntary,

(5) the act must have a direct rather than a consequential impact

(6) It is actionable per se;

(7) if the act is voluntary it will be intentional;

(8) an act could also be intentional if it is substantially certain that the act will result in contact with the plaintiff; and perhaps also if the act is reckless

The Court went on to say

(9) battery may be contrasted, historically, with two other forms of action: (1) action on the case – which accommodates consequential rather than direct interference by the defendant upon the plaintiff. and (2) negligent trespass to the person ­- which accommodates negligent rather than intentional acts in the sense that the defendant’s act, though intended, was careless with respect to contact with the plaintiff

(10) in England, negligent trespass is wholly subsumed within the tort of negligence. It matters not that the interference is direct. The law in Australia has diverged at that point.

(11) once battery is established, immediate harm and consequential damage are compensable. The boundary of entitlement is set by the “natural and probable consequence”

So, although battery is an intentional tort, a battery may also occur when the defendant is negligent.

So in NSW this will have a bearing on the applicability of the CLA – a negligent battery will not be excluded from the operation of the CLA

1. Most against the Police in battery involve either a purported arrest that was unlawful and therefore, any subsequent battery which would otherwise be lawful is unlawful. Or where an officer uses excessive force, so even if the arrest itself was lawful, the force used constitutes a battery.

## New South Wales v McMaster [2015] NSWCA 228

1. The plaintiff was the victim of a police shooting.
2. To the extent the claims were pleaded in negligence they were unsuccessful, as it was held that the police owed no duty of care to the plaintiff.
3. The trial judge held that the action in discharging his firearm and wounding the Plaintiff constituted a battery. The State did not challenge that the nature of the conduct involved in the shooting was a battery.
4. However, it contended the legal principles and policy considerations determining the absence of a duty of care by police applied to protect it from liability of the intentional actions of police officers performed in the course of carrying out their policing duties.
5. The Court found by the enactment of section 230 of Law Enforcement (Powers & Responsibilities) Act 2002 (‘LEPRA’) – which is the sectioning governing the reasonable use of force by police – the legislature has spoken to the circumstances in which a police officer’s actions are lawful in exercising a function under Act or law.
6. The Court said: ‘The legislature has expressly made lawful what would or may otherwise be contrary to law, whether criminal or civil. Relevantly for present purposes, section 230 makes lawful action that would otherwise constitute a battery. If the police officer’s conduct satisfied the terms of section 230, there was no battery.’
7. The Court held that the police officers’ actions were reasonably necessary and therefore lawful within the meaning of section 230.

***Brighton v Traino*****[2019] NSWCA 168**

1. The plaintiff was a patron in a bar in Cronulla with her male companion. The licensee asked Mr Richardson, to exclude the plaintiff’s male companion. A scuffle occurred on the footpath. Mr Richardson was moving backwards towards the plaintiff; she raised her hands and held the back of his shirt. Richardson turned around and punched her in the face fracturing her jaw.
2. The plaintiff sued in battery claiming damages, including for psychiatric injury. At trial the judge upheld the defence that Richardson had acted in self-defence under section 52 of the CLA and was therefore protected from liability.[[7]](#footnote-7)
3. [Section 3B(1)(a)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/s3b.html) provides the non-applicable CLA provisions are ‘the whole Act except ... [Part 7](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/index.html#p7)  - Self-defence and recovery by criminals ...’.[[8]](#footnote-8)
4. [Part 7](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/index.html#p7), Div 1, includes [ss 52](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/s52.html) . - excluding civil liability for acts in self-defence.
5. The criminal defence in Part 11, Division 3 of the *Crimes Act* *1900* (NSW) may operate in circumstances where the defendant is responding to conduct which is “lawful”.
6. Section 52(1) of the *Civil Liability Act* requires that the conduct to which a defendant is responding be “unlawful” – thus the exclusion for recovery by criminals.
7. The question was then whether the plaintiff’s action in grabbing Richardson’s back was unlawful. The court found:

A man throwing himself into a brawl and stepping back fast cannot be heard to complain of an affront to his personal integrity if he backs into a person who takes reasonable steps to stop him. The circumstances may not closely resemble the “ordinary conduct of daily life”, but the solicitude of the law for the physical integrity of the individual will be muted in such a situation. What constitutes unacceptable conduct “must be considered in the context of the incident in dispute.” The plaintiff’s conduct was not unlawful.

1. The plaintiff was entitled to damages assessed according to general law principles, without regard to the constraints imposed by Part 2 of the *CLA*.
2. The Court accepted that the plaintiff had suffered chronic PTSD connected with the event and her injury. General damages were assessed at $90,000 to $110,000. Aggravated damages were awarded because the action was violent, deliberate and inexcusable.
3. Exemplary damages were not awarded as Richardson had been charged and convicted with recklessly causing grievous bodily harm and had consequently lost his job and security license. Ultimately, the plaintiff was awarded $187,734.

***Fede v Gray by his tutor New South Wales Trustee and Guardian* [2018] NSWCA 316:**

1. Sergeant Fede, whilst on duty came across the respondent, Wally Gray, behaving bizarrely. She apprehend him under [section 22](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/mha2007128/s22.html) of the [*Mental Health Act 2007*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/mha2007128/) (NSW) (‘MHA’), on the grounds that he appeared to be mentally ill or mentally disturbed. He was taken to a mental health facility for an assessment. After being informed that he was to be kept for further observations and asked to take some sedatives to relax, Mr Gray ran towards the exit.
2. While being subdued and handcuffed by other officers, he lunged towards Ms Fede biting her inner thigh through her pants and causing a substantial wound.
3. Mr Gray pleaded guilty to a number of offences in relation to the events including assault police and was sentenced to three months’ imprisonment.
4. Ms Fede commenced proceedings in the District Court seeking damages for battery.
5. The primary judge found the defendant was psychotic at the time of the biting — and unable to form or make a reasonable decision to intentionally cause injury to the Plaintiff. Therefore he was not acting either intentionally or negligently.[[9]](#footnote-9) Judgment was entered for the defendant.
6. The NSW Court of Appeal upheld the appeal finding that the conduct was intentional.
7. Basten JA said at [198]:

**…** the general intention to bite was not involuntary. It may have been motivated by the delusion that Mr Gray thought himself in physical danger if he remained in the hospital and was seeking to escape. That delusion did not, however, render his biting either involuntary or in the nature of an inevitable accident. Accordingly, the authority… does not allow the finding of the trial judge to exclude liability in the tort of battery. The appeal with respect to liability should therefore be upheld.[[10]](#footnote-10)

1. The Court was split as to the applicability of the *Civil Liability Act 2005 (NSW)* with respect to damages.
2. McColl JA found that the defendant acted intentionally with an intent to injure, so that section 3B(1)(a) excluded the operation of the *Civil Liability Act 2005 (NSW)*.
3. Basten JA that found although the biting was intentional the first limb of the provision was satisfied. But because the defendant did not understand the nature or quality of his act he did not “intentionally cause injury to the plaintiff.” Therefore second limb of [section 3B(1)(a)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/s3b.html) was not satisfied and the assessment of damages should therefore be governed by [Part 2](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/index.html#p2) of the [Civil Liability Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/).
4. Meagher J agreed with Basten JA and so no damages could have been awarded for non-economic loss unless the severity of the loss was at least 15% of a most extreme case. There was no finding to that effect, so pursuant to [section 16](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/s16.html) of the [Civil Liability Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/), no amount should have been allowed for non-economic loss. $5,000 was awarded for out-of-pocket expenses.

# Assault

1. The tort of assault involves the making of a threat of force or violence to another person so as to cause that person to believe that the threat will be carried out. It is not necessary that physical contact occurs.
2. This cause of action often accompanies a battery and unlawful imprisonment, because the threatened use of force often precedes or coincides with the events underlining those causes of action.

***Owlstara v State of New South Wales* [2020] NSWCA 217**

1. Ms Owlstara was driving her unregistered motor vehicle when police activated their lights and sirens behind her. Owlstara continued driving at a low speed before pulling into her garage.
2. The constable who was following her pulled up to the garage and ran in after her with his firearm raised. The incident was captured on the dashboard camera the constable was depicted with the gun raised and pointed at Owlstara’s chest. The constable arrested, handcuffed her, and took her to the police station where she was held for 6 hours before release.
3. The trial judge found that the arrest was legal and all subsequent claims for battery were dismissed. The trial judge concluded that section 230 of the *LEPRA* enabled the use of the firearm.
4. The Court of Appeal found the arrest was unlawful, the batteries were made out and that the assault, by way of the pointing of the firearm, was made out.
5. The Court of Appeal found there was no basis in the evidence for concluding that the pointing of his firearm at the appellant was reasonably necessary for the exercise of whatever function the constable was seeking to perform.
6. In terms of damages, the primary judge assessed damages at $170,000, including a sum of $90,000 for aggravation of her pre-existing PTSD condition and further treatment.
7. The Court of Appeal found that the size of the award for aggravation of PTSD could not be justified.[[11]](#footnote-11) And reduced the damages to $115,000 in total.[[12]](#footnote-12)

# False Imprisonment

1. The tort of false imprisonment involves the unlawful deprivation of a person’s liberty by another. If a plaintiff can establish that his or her liberty has been taken away then the cause of action will be made out, unless the defendant can show that the imprisonment was lawfully justified.

***New South Wales v Robinson* [2019] HCA 46**

1. Robinson attended a police station in response to attempts by police to contact him. Upon attending the station, he was immediately arrested, without warrant, for breach of an AVO, interviewed and then released without charge after his interview. Proceedings commenced against the State for false imprisonment and upheld on appeal in the High Court of Australia.
2. By majority (per Bell, Gageler, Gordon and Edelman JJ), The High Court held that the arresting constable had no intention, at the time of arrest, of bringing Robinson before an authorised officer to be dealt with according to law. As such, the arresting officer did not have the power to arrest Robinson without warrant pursuant to s99 of the *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)* (“*LEPRA*”), and so the arrest was unlawful.
3. The HCA said

To comply with the requirement in s 99(3) [of LERPA] immediately upon arrest, a police officer must at the time of arrest have an intention to take the person, as soon as is reasonably practicable, before an authorised officer to be dealt with according to law to answer a charge for that offence. If there is no intention to comply with the requirement in s 99(3), the arrest is unlawful. And a requirement for the police officer to have an intention to bring a person before an authorised officer means, as a matter of substance, a requirement to have an intention to charge that person.[[13]](#footnote-13)

1. Accordingly, the State could not provide lawful justification for the deprivation of Robinson’s liberty during the arrest. The State’s defence to the false imprisonment action on that basis would fail.

***SU v The Commonwealth of Australia and Anor; BS v Commonwealth of Australia and Anor* [2016] NSWSC 8:**

1. Ps were 16 and 14 respectively from Indonesia, caught on a people smuggling boat to Australia and transported to Darwin Children’s Immigration Detention Centre. They were then transported to Sydney where they were taken to Surry Hills Police Station and arrested and charged with the crime of aggravated people smuggling, 10 hours after leaving the immigration centre. Police then detained the pair at Surry Hills Police Station before being taken to a bail hearing at Central Local Court. The reason the children were dealt with as adults was due to highly inaccurate wrist x-ray techniques which informed the AFP that the children were over 18. The pair were refused bail by a Local court Magistrate and transported to the Silverwater correctional centre complex.
2. The Plaintiffs argued that the arrest was wrongful up until the point where bail was refused as judicial immunity prevailed. As the offence was a Commonwealth offence under the *Migration Act 1958*, the *Crimes Act 1914* (Cth) governed the procedure. Under section 3W, an arrest may only be carried out if a summons would not be adequate to ensure the appearance of the person before a court.[[14]](#footnote-14) The Plaintiffs submitted they were already in immigration detention and there was no risk of them not appearing before a court.
3. During the hearing of the false imprisonment claim, the main argument of the Commonwealth was that the plaintiffs hadn’t suffered a deprivation of liberty (a necessary element of false imprisonment). SU and BS were already lawfully detained under the Migration Act 1958, therefore they had no liberty to deprive. The Commonwealth claimed that the lawful immigration detention created an “umbrella of legality”, under which the wrongful criminal detention of SU and BS created no legal liability.
4. The Plaintiffs relied in the P’s residual liberty. -- even though a person may be otherwise lawfully detained, they still enjoy those civil liberties of which they are not are not lawfully deprived.
5. The Supreme Court stated at [47]:

The plaintiffs were not detained in the cells at the Sydney Police Centre as a result of being in immigration detention. They were there to be arrested, charged and dealt with as remand prisoners. In this respect, the legal nature of their detention was different. One of the residual liberties that the plaintiffs enjoyed was the right to be dealt with according to the law. This included the right not to be arrested contrary to the provisions in s 3W. Nothing in the Migration Act alters the requirements for a lawful arrest.[[15]](#footnote-15)

1. The court held that the arrest was unlawful and that the pair was wrongfully imprisoned from the point they arrived at Surry Hills Police station for processing, to the point where bail was refused by the Magistrate.[[16]](#footnote-16)

***State of NSW v Le* [2017] NSWCA 290**

1. Mr Le had been stopped by Transport police at a railway station and was asked to produce his travel card. He was then asked to produce his pensioner card. He was then asked for photograph identification.
2. Mr Le argued about his obligation to do that but provided his details. The police officer then said, “All right, well, you’re going to have to wait here while we confirm who you are.” Mr Le asked to leave so that he could catch is train. The police officer replied, “… until we finish, you’re not leaving.” Mr Le asked, “Am I under arrest?” The officer then replied, “No, you’re not, you are being detained.” Mr Le asked, “What for?” And the officer replied, “To confirm that this is you and that this card isn’t stolen.” He was then told, after a short passage of time, that he was free to go.
3. It was obviously the case that Mr Le was non-consensually detained. The question for was whether or not there was an exercise of power to detain requiring justification.
4. The Court of Appeal considered the many and varied statements of principle to the effect that the law places a high value on personal liberty, and that a statute which authorises the detention of a person must be strictly construed.[[17]](#footnote-17)
5. Ultimately the Court determined that ‘the steps taken by the officer to direct the production of evidence demonstrating entitlement to the concession train ticket carries with it the implied power to detain the person whilst those steps are undertaken’.[[18]](#footnote-18)
6. The Court went on to consider the applicability of *the Civil Liability Act 2002* (NSW). In the District Court, the trial judge had calculated damages outside of the restrictions imposed by the *Civil Liability Act.* However, the Court of Appeal when on to say: “There was no doubt that the temporary detention of the Respondent was an intentional act; on the other hand, there was an open question as to whether the conduct of the officer in directing the Respondent not to leave until the officer had the opportunity of checking the Respondent’s personal information over the radio was done “with intent to injure””.
7. As discussed earlier, s3B(1)(a) excludes the operation of most of the *Civil Liability Act,* that is, of any liability “in respect of an intentional act that is done by the person with intent to cause injury (…)”.
8. In this case the Court of Appeal called into question, whether or not an unlawful imprisonment case, an action which is actionable per se, might be nonetheless come within the limitations imposed by the *Civil Liability Act* because, although the imprisonment might be an intentional act, it might not be done with the intention to injure.

***State of New South Wales v Smith* (2017) NSWCA 19**

1. A complaint was made in relation to some damage to a motor vehicle by the estranged wife of Mr Smith. Upon receiving the complaint, police attended at Mr Smith’s home and requested his presence at the front door of his house, telling him “*your ex-missus has made an allegation of a domestic incident*”
2. The police apprehended him and took him to the police station, later releasing him on a Court Attendance Notice for damaging property. Mr Smith was detained for a total of 3 hours and 40 minutes before his release. Mr Smith was convicted of the offence.
3. Smith commenced proceedings against New South Wales claiming damages for wrongful arrest and false imprisonment.
4. The trial judge considered that Mr Smith had been imprisoned for a period of about three and a half hours and awarded damages for the resulting loss of liberty whilst imprisoned, humiliation, embarrassment, loss of dignity, harm to reputation, anxiety, emotional distress and mental anguish, feelings of being intimidated and coerced by police and awarded the sum of $20,000 in general damages, including an element for aggravated damages, and an amount for exemplary damages, and judgment was entered in the sum of $39,858.
5. The State appealed on the basis that the arrest was not unlawful and that the damages awarded by the primary judge were excessive, notably that exemplary damages ought not to have been awarded because the facts of contumeliousness were not supported by evidence.
6. In the Court of Appeal, McColl J, with whom Leeming JA and Sackville AJA agreed, said:

It is of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual, should be strictly confined, plainly stated and readily ascertainable”.[[19]](#footnote-19) Arrests should be reserved for circumstances in which it is clearly necessary. It is inappropriate to resort to the power of arrest when the issue and service of a summons would suffice adequately.[[20]](#footnote-20)

(…)

An arrest without warrant is not lawful unless effected in good faith and for the purposes contemplated by the statute. The tort of false imprisonment requires proof by the Plaintiff of the restraint imposed by the Defendant which amounts to imprisonment. Upon proof of such imprisonment, the Defendant, to escape liability, needs to establish legal justification.”[[21]](#footnote-21)

1. Because the arresting officer made the decision to arrest Mr Smith before he attended at Mrs Smith’s home, therefore, he did not undertake the risk assessment of Mrs Smith that was part of the process of determining whether, in cases of domestic violence, he should have been arrested.
2. Further, section 202 of *LEPRA* had not been complied with as the officer did not notify the plaintiff of the reason for his arrest.
3. McColl J said:

… the reasons given [for the arrest] must be sufficiently precise as to make it clear to a person being arrested why the arrest is taking place … The reason will not suffice if the arrested person could not know, in any meaningful way, the charge which was likely to be laid. ….[[22]](#footnote-22)

1. The Court of Appeal did uphold State of New South Wales appeal insofar as it related to exemplary damages. The arresting officer’s ignorance in relation to the application of the laws of arrest did not constitute a conscious wrongdoing in disregard of the Plainitff’s rights, nor that it was the product of a police training issue.

***Harris v State of New South Wales* [2021] NSWCA 208**

1. Mrs Harris was contacted by police requesting an interview about her involvement in a number of fraudulent companies related to her husband. Mrs Harris initially agreed to attend the station, but then reneged and did not attend the interview.
2. That same day Mrs Harris was arrested and conveyed to Coffs Harbour Police Station, where she participated in an interview with Senior Constable Coffee. A short time later the arrest was discontinued.
3. She later received future Court Attendance Notices for fraud offences. Mrs Harris subsequently pleaded guilty and was convicted.
4. Ms Harris commences proceedings in the District Court for false imprisonment arguing that the arresting officer did not have the requisite state of mind as set out in section 99 of LEPRA to effect a lawful arrest without a warrant.
5. The primary judge dismissed the claim finding that Mrs Harris failed to demonstrate non-compliance with section 99 of LEPRA.
6. On appeal Mrs Harris argued that Senior Constable Coffee merely arrested her for the purpose of an interview. The Court said on this point that:

It is impermissible for a police officer when making an arrest to do so on the basis that he or she *may* charge the accused following a period of questioning…

It does not mean that a police officer making an arrest must disregard the possibility that, between the arrest and charging, matters may emerge – including through permitted interview during the investigation period – that may negate the intention to charge.

It is not inconsistent with having the requisite intention to charge that the police officer also contemplates utilising the investigation period by questioning the accused, so long as the intention is to charge unless it emerges after investigation that arrest is no longer required.[[23]](#footnote-23)

1. Mrs Harris was refused a grant of leave to appeal.

***Jankovic v Director of Public Prosecutions* [2020] NSWCA 31 (5 March 2020)**

1. The applicant was arrested without a warrant for breaching an AVO by sending a text message to the protected person threatening legal action. Following her arrest, the applicant engaged in behaviour which resulted in her also being charged with resisting police and intimidating a police officer.
2. The applicant appealed the convictions to the District Court arguing that the arresting officer had not complied with s 99(1)(b) of LEPRA – that is the arrest without a warrant was not made for any of the purposes enumerated in that section – they include that it’s necessary for the protection of witnesses, to ensure attendance at court, to stop the continuation or repetition of the offence, etc.
3. The appeal was dismissed.
4. The Applicant applied to the Supreme Court seeking prerogative relief. The principal issue on appeal was - Whether the primary judge erred in finding the arresting officer was satisfied the applicant’s arrest was reasonably necessary to achieve a purpose enumerated in s 99(1)(b).
5. On this issue it was held that the s 99 of LEPRA requires the arresting officer to engage in a process of evaluative judgment and be satisfied that an arrest is ‘reasonably necessary’ for a reason stated in that section.
6. The Court held that “reasonably necessary” is taken to mean more than merely convenient but does not mean essential. As part of this process the officer must consider proportionate responses including alternatives to arrest.
7. The evidence showed that the arresting officer did not engage in this process before arresting the applicant meaning the District Court Judge erred by finding the officer did have the requisite mindset, because this was found to have no basis in evidence adduced in the proceedings.
8. The applicant’s convictions were quashed and remitted to the District Court for determination according to law.

***Attalla v State of New South Wales* [2018] NSWDC 190**

1. Mr Attalla was sitting in front of a church in Bourke Street, Darlinghurst. After a short conversation, a police officer announced that she reasonably suspected Mr Attalla of being in possession of prohibited drugs and determined that he be searched.
2. When Mr Attalla refused to submit, he was told that he was under arrest for hindering police in the execution of their duty. Further police officers arrived and imposed a wrist lock, handcuffed him, and conducted a search by the roadside. No drugs were found.
3. He was then taken in the rear cage of a police wagon to Kings Cross Police Station. There he was subjected to a "strip search", which involved him, at the command of the two police officers; removing his pants and underpants; lifting his genitalia to allow inspection of the area underneath; and squatting while naked.
4. Mr Attalla was thereafter given a Court Attendance Notice for hindering police and allowed to leave the police station. The court proceedings were ultimately dismissed.
5. Mr Attalla sued the State of New South Wales for wrongful arrest, and assault and battery by the police officers.
6. The State conceded that the strip search and the detention after the roadside search were unlawful. The issues at trial revolved around whether the arrest was lawfully justified.
7. The Distrcit Court rejected the submission that reasonable suspicion was formed because Mr Attalla was located in Bourke Street, Darlinghurst, apparently renowned for its, ‘…prostitution, solicitation, street offences, [and] drug crime’.[[24]](#footnote-24)
8. Additionally, His Honour noted that the female police officer was not lawfully entitled to search Mr Attalla, who was entitled to resist the unlawful request.[[25]](#footnote-25)
9. The Court concluded that there was no legal justification for the force used by police on Mr Attalla, and the search constituted an assault and battery - there was no evidence to satisfy the arrest provisions in section 99 or the lawful search provisions in section 21 of LEPRA. Therefore, Mr Attalla was entitled to compensation for the assault and battery suffered.
10. The breakdown and analysis of the award of damages to Mr Attalla, is useful.

…damages are assessed by reference to the duration of the deprivation of liberty and for the hurt or injury to feelings such as by the “injury, mental suffering, disgrace and humiliation suffered as a result of the false imprisonment”.[[26]](#footnote-26) There is not “some kind of applicable daily rate”.[[27]](#footnote-27) A substantial proportion of the ultimate award is for the “initial shock of being arrested”.

1. In evaluating the appropriate sum, the court awarded damages totalling $110,000 on the following basis:[[28]](#footnote-28)

|  |  |  |  |
| --- | --- | --- | --- |
| **Head of Damage** | **General** | **Aggravated**  | **Exemplary** |
| Assaults/Batteries on Bourke St | $7,000 | $3,000 |  |
| Wrongful Arrest/False Imprisonment (from arrest) | $15,000 | $10,000 |  |
| False Imprisonment (after arrest) | $10,000 |  |  |
| Assault/Strip Search | $20,000 | $10,000 |  |
| Combined Exemplary damages |  |  | $35,000 |
| Total = $110,000 | $52,000 | $23,000 | $35,000 |

***Jamal v State of New South Wales* [2020] NSWDC 377**

1. The plaintiff was banned from the premises by the priest. The Plaintiff was involved in an incident at the where police attended, but no further action was taken.
2. Three days later, an officer reviewed the event in the Police computer andarrested the P at his home. He was taken to a police station and interviewed and processed he was asked to sit in the foyer. The Plaintiff told the court he was told if he left, he would be charged with ‘a serious offence’ and as such he waited in the foyer for approximately 2 hours when he was told he was free to leave.
3. The trial judge they found that the arrest was conducted for the purposes of investigation, not to charge the Plaintiff and place him before the courts.
4. As such, the arrest was unlawful and as such the Plaintiff was falsely imprisoned from the time the officers arrived at his house to the time he was released from custody.
5. The trial judge declined to make an award of either exemplary damage nor aggravated damages awarded general damages only at the value of $7000 plus interest.

***Cowan v State of NSW* [2021] NSWDC 31**

1. The plaintiff was an eight-year-old Aboriginal boy. He was outside his aunt’s house in the company of family and friends. Two officers put him in to the back of a police into the care of his mother. The alleged false imprisonment lasted several minutes.
2. The matter was ultimately settled between the parties and approved by Judge Levy in the NSW District Court as the Plaintiff was a minor at the time of the settlement.
3. The court approved the plaintiff’s award of $38,000 in damages.

# Malicious Prosecution

1. Malicious prosecution is a cause of action arising out of the bringing of legal proceedings by one person against another where those proceedings are brought without reasonable and probable cause and with malice. The legal concept of ‘malice’ extends beyond the notions of bias and antipathy that the word ‘malice’ connotes in its ordinary usage.
2. To constitute malice, the dominant purpose in bringing the proceedings must be a purpose other than the proper invocation of the criminal law. The improper purpose must be the sole or dominant purpose actuating the prosecutor.

**Wood v State of New South Wales [2019] NSWCA 313**

1. Gordon Wood was convicted of the murder of Caroline Byrne. He served a number of years in prison before the CCA acquitted him. The Court found that the verdict had been unreasonable.
2. At the forefront of the decision was trenchant criticism of the Crown Prosecutor and the Crown’s crucial expert witness. The CCA was scathing as to the conduct of the Crown Prosecutor at trial.
3. The plaintiff brought proceedings in the NSW Supreme Court for malicious prosecution.
4. The plaintiff identified three prosecutors, namely the lead detective, the expert witness and the actual Crown Prosecutor. The Supreme Court found in favour of the state, with the claim of malicious prosecution not being made out.
5. Fullerton J, agreed with the plaintiff’s contention that, from an objective point of view, the trial had been initiated and maintained without reasonable or probable cause. However, the Court found that the element of malice was not sufficiently made out, Fullerton J stating:

As a matter of law, malice will not be made out simply by evidence that reveals that a prosecutor is blind to his or her failings of judgment, or by a prosecutor failing to appreciate that he or she acted contrary to their ethical obligations, even to the extent that the impact of such failures is eloquent of a breach of professional standards or professional misconduct and productive of unfairness in the conduct of a trial for that reason.[[29]](#footnote-29)

1. An appeal to the Court of Appeal was unsuccessful.

***Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360**

1. Mr Young was charged with five offences under *the Prevention of Cruelty to Animals Act 1979* (NSW). He was found guilty of all offences in the Local Court. Mr Young appealed to the District Court.
2. The DC granted an application under s 32 of the *Mental Health (Forensic Provisions) Act (now s.14)* Section 32 provided that where it appears to a Magistrate that a defendant, who is not a mentally ill person, is suffering from a mental condition for which treatment is available in a mental health facility, and that it would be more appropriate to deal with the defendant in accordance with under the *Act* than otherwise in accordance with law, the magistrate may make orders that the charges be dismissed on conditions including assessment and/or treatment of the condition.
3. Mr Young subsequently brought an action in the District Court for malicious prosecution. The primary judge in the District Court summarily dismissed the proceedings on the basis that the prosecution had not been terminated in Mr Young’s favour. Mr Young applied to the Supreme Court to have that summary dismissal set aside, and the matter was removed to the Court of Appeal.
4. The Court of Appeal held that the orders for summary dismissal be set aside.
5. The words of section 32(4) of the Mental Health Act – that the making of orders under that section “does not constitute a finding that the charges against the defendant are proven or otherwise” – do not deprive a plaintiff of a finding that the proceedings have been terminated favourably to him or her.[[30]](#footnote-30)
6. Favourable termination accordingly means not that there has been an acquittal, but that the proceedings have been terminated without a conviction, eliminating the risk of diverse determinations by different courts on the same facts between the same parties.[[31]](#footnote-31)

***Sahade & Anor v Bischoff & Anor* [2015] NSWCA 418**

1. Sahade, Smith and the Bischoffs were neighbours in Point Piper, Sydney. Following an “unedifying brawl”[[32]](#footnote-32) between the parties in the common courtyard of their property, Mrs Bischoff called the Rose Bay Police Station for assistance. Police reviewed CCTV obtained statements from the Bischoffs. The police arrested Sahade and Smith, charging them with four assault offences. The Bischoffs gave evidence at the criminal proceedings.
2. All charges were dismissed in the Local Court.
3. Subsequently, Sahade and Smith commenced action against the Bischoffs in malicious prosecution, alleging that the Bischoffs had instigated the assault charges by knowingly providing police with false and misleading statements regarding the brawl.
4. They further alleged that the Bischoffs had maintained the charges by reiterating these statements in their evidence at court.
5. The Bischoffs denied liability on the grounds that they were not ‘prosecutors’ of the charges. Further, they denied that they had instigated the charges against Sahade and Smith maliciously and without reasonable and probable cause.
6. The Bischoffs’ argument was accepted by the primary judge, and the claim failed. Sahade and Smith appealed to the Court of Appeal.
7. The Court of appeal[[33]](#footnote-33) upheld the primary judge’s finding that the Bischoffs were not ‘prosecutors’ for the purposes of the tort, as they had neither instigated nor maintained the prosecution of Sahade and Smith.[[34]](#footnote-34)
8. In his reasoning, Gleeson JA emphasised that identification of the appropriate defendant in malicious prosecution actions “is not always straightforward”;[[35]](#footnote-35) for liability to attach under the tort, the defendant must have played “an active role” in the conduct of proceedings by “setting them in motion”.[[36]](#footnote-36) His Honour distinguished this case from those where malicious police complaints formed the sole evidence of the facts on which a charge was laid, where that such facts were “solely within the complainant’s knowledge [eg. where the complainant was the sole witness],[[37]](#footnote-37) and that as a practical matter the [charging] police officer…could not have exercised independent discretion” in commencing the proceedings.[[38]](#footnote-38)
9. Sahade and Smith’s case fell into a separate category of more “complex” cases, where the police or other actual prosecutors were in receipt of evidence from a multitude of sources, and so exercised the discretion to charge on the basis of this multiplicity of evidence.[[39]](#footnote-39)

# Misfeasance in Public Office

1. Misfeasance in public office is a well-established tort particularly useful in the practice of suits against the police.
2. The purpose of the misfeasance in public office is to ensure that a person injured by an intentional knowing misuse of public power will have an effective means of redress.
3. A person is not a public officer merely because they are a public employee.
4. A public officer is someone who by virtue of the particular position they hold, is entitled to exercise executive powers in the public interest. Police officers have been clearly defined to be categorised as public officers.[[40]](#footnote-40) Likewise have prison officers and senior investigators at anti-corruption bodies.[[41]](#footnote-41) Prosecutors, however, have been found by a Victorian Court to not be public officers for the purpose of such tort.[[42]](#footnote-42)
5. It is essential to the tort that the purposed exercise of power by the public officer be invalid. This can becauzse there is no power to be exercise, or the power has miscarried that warrantd judicial review.
6. The element of fault in the tort is based on the state of mind of the public officer. Fault can be established by showing that the officer acted maliciously or with actual knowledge of their lack of power to carry out that action.
7. Merely negligent of unintentional acts or omissions by an officer have been found to be insufficient to found the tort.
8. Misfeasance in public office is an *action on the case* and therefore requires proof of damage to succeed.
9. Damage is not limited to adverse effects on the plaintiff’s person or property. It also includes some disadvantage or loss which the plaintiff would not, or might not, have suffered if the power had been validly exercised.

***Ea v Diaconu* [2020] NSWA 127**

1. The plaintiff appeared in court to be prosecuted for crimes related to conducting a business of sexual servitude and trafficking foreign sex workers. The defendant, an officer of the Australian Federal Police gave evidence at his trial. After her cross-examination, Ms Diaconu sat in the public gallery. The plaintiff alleged that the defendant was laughing, shaking her head, rolling her eyes and grinning in response to answers given by the plaintiff while he was on the stand. The Plaintiff alleges that the defendant was attempting to influence the courts outcome through misconduct,
2. The plaintiff commenced proceedings against the Commonwealth and the AFP officer. The trial judge held that the proceedings should be summarily dismissed as the plaintiff had not demonstrated that the defendant was performing a public power or duty during her behaviour in the gallery. The plaintiff appealed the summary dismissal.
3. In the Court of Appeal, White JA held that:

(…) the respondent’s alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she had, by virtue of her office, to influence the jury by her reactions to submissions and evidence.[[43]](#footnote-43)

1. The Court of Appeal remitted the matter back to trial for hearing.

***Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198**

1. Representative proceedings were commenced in the Federal Court on behalf of approximately 1600 people who were taken to offshore detention in Nauru
2. The applicants alleged that the respondents directed or authorised officers of the Commonwealth to act contrary to Australian law in applying the conditions of regional processing centre (‘RPC’) visas. In doing so, the respondents were also said to have reckless disregard for the means in determining the lawfulness of RPC visa applications. The unlawfulness alleged centred primarily around denial of natural justice and breach of human rights obligations.
3. The respondents sought summary judgement and for the striking out of all the applicants’ pleadings. The Federal court allowed the application for strike out and refused leave to file amended pleadings.
4. Mortimer J made clear findings on the nature of reckless indifference for the purposes of the tort of misfeasance in public officer holding that it is more than mere awareness of some risk of unlawfulness. Rather reckless indifference requires subjective bad faith and wilful blindness with respect to the lawfulness of an impugned exercise of power.
5. In applying this to the applicants’ pleadings, Mortimer J found that the mental element of the tort was not made out:

In the context of any proceeding, let alone one making the grave allegation of misfeasance in public office against Commonwealth Ministers and Departmental Secretaries, the hope that a basis for a cause of action might emerge in the witness box will be unlikely ever to justify permitting applicants to re-plead their case, and proceed to trial so as to keep the possibility of that moment in the witness box alive.[[44]](#footnote-44)

1. This case reaffirms the importance of clearly identifying the abuse of power in pleadings. Misfeasance requires either targeted malice or reckless indifference.
2. Reckless indifference cannot merely be negligent but must be a deliberate blindness to the lack of any lawful authority to exercise a power. In bringing a claim for misfeasance in public office pleadings should pay especial attention to facts, matters and circumstances to the mental element of any allegedly misfeasant use of power by a public officer holder.

O’BRIEN CRIMINAL AND CIVIL SOLICITORS

PETER O’BRIEN

1. *Croucher v Cachia* (2016) 95 NSWLR 117 [132]. [↑](#footnote-ref-1)
2. See Joachim Dietrich, ‘Intentional Conduct and the Operation of the Civil Liability Acts: Unanswered Questions’ (2020) 38(2) *University of Queensland Law Journal* 197. [↑](#footnote-ref-2)
3. *State of New South Wales v Ibbett* (2005) 65 NSWLR 168 [197]; *Dean v Phung* (2012) Aust Torts Reports [29]. [↑](#footnote-ref-3)
4. *State of New South Wales v Ouhammi* [2019] NSWCA 225 [8] (Basten JA). [↑](#footnote-ref-4)
5. Ibid [4] (per Basten JA). [↑](#footnote-ref-5)
6. Ibid [180] (per Simpson AJA). [↑](#footnote-ref-6)
7. *Civil Liability Act (2005) NSW.* [↑](#footnote-ref-7)
8. *Civil Liability Act (2005) NSW, s3B(1)(a).* [↑](#footnote-ref-8)
9. *Fede v Gray by his tutor New South Wales Trustee and Guardian* (District Court (NSW), 15 December 2017, unrep), [32]. [↑](#footnote-ref-9)
10. *Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316, [198].* [↑](#footnote-ref-10)
11. *Owlstara v State of New South Wales* [2020] NSWCA 217, [100]. [↑](#footnote-ref-11)
12. *Owlstara v State of New South Wales* [2020] NSWCA 217, [101]. [↑](#footnote-ref-12)
13. 57 *New South Wales v Robinson* (2019) 374 ALR 687, [109] (Bell, Gageler, Gordon and Edelman JJ) [emphasis added]. [↑](#footnote-ref-13)
14. *Crimes Act 1914* (Cth), s3W(1)(b)(i). [↑](#footnote-ref-14)
15. *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8, [47]. [↑](#footnote-ref-15)
16. *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8, [49-53]. [↑](#footnote-ref-16)
17. [2017] NSWCA 194, [103]. [↑](#footnote-ref-17)
18. *State of NSW v Le* [2017] NSWCA 290, [19]. [↑](#footnote-ref-18)
19. *Donaldson v Broomby* (at 126) referred to with approval in *Prior v Mole* [2017] HCA 10; (2017) 91 ALJR 441 (at [22]) per Gageler J as quoted in *State of NSW V Smith (*2017) NSWCA 19, [102]. [↑](#footnote-ref-19)
20. *State of NSW V Smith (*2017) NSWCA 19, [102]. [↑](#footnote-ref-20)
21. *State of NSW V Smith (*2017) NSWCA 19, [106]. [↑](#footnote-ref-21)
22. *State of NSW v Smith (*2017) NSWCA 19, [146]. [↑](#footnote-ref-22)
23. *Harris v State of New South Wales* [2021] NSWCA 208 [12] [↑](#footnote-ref-23)
24. *Attalla v State of NSW* [2018] NSWDC 190, [27]. [↑](#footnote-ref-24)
25. *Attalla v State of NSW* [2018] NSWDC 190, [46]. [↑](#footnote-ref-25)
26. Trindade and Cane, The Law of Torts in Australia, 3rd Edition, OUP (1999) at 302, *Goldie* at [14], *Smith* at [154] as quoted in *Attalla v State of NSW* [2018] NSWDC 190, [71]. [↑](#footnote-ref-26)
27. *Ruddock v Taylor* (2003) 58 NSWLR 269 at [49] as quoted in *Attalla v State of NSW* [2018] NSWDC 190, [72]. [↑](#footnote-ref-27)
28. *Attalla v State of NSW* [2018] NSWDC 190, [127]. [↑](#footnote-ref-28)
29. *Wood v State of New South Wales* [2018] NSWSC 1247, [1337]. [↑](#footnote-ref-29)
30. *Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360, [42]-[45]. [↑](#footnote-ref-30)
31. *Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360, [47] and [76]. [↑](#footnote-ref-31)
32. *Sahade v Bischoff* [2015] NSWCA 418, [1] (Basten JA) [↑](#footnote-ref-32)
33. *Sahade v Bischoff* [2015] NSWCA 418, [1], [203]. [↑](#footnote-ref-33)
34. See generally *Sahade v Bischoff* [2015] NSWCA 418, [164]. [↑](#footnote-ref-34)
35. *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500, [34]. [↑](#footnote-ref-35)
36. *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500, [34]. [↑](#footnote-ref-36)
37. See generally *Sahade v Bischoff* [2015] NSWCA 418, [138], citing *State of New South Wales v Abed* [2014] NSWCA 419. [↑](#footnote-ref-37)
38. *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500; *Martin v Watson* [1996] AC 74. [↑](#footnote-ref-38)
39. *Sahade v Bischoff* [2015] NSWCA 418, [117]. [↑](#footnote-ref-39)
40. *Farrington v Thomson* [1959] ALR 695. [↑](#footnote-ref-40)
41. *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [[1991] 3 WLR 340](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1991+3+WLR+340)); *Obeid v Lockley* [[2018] NSWCA 71](https://advance.lexis.com/document/?pdmfid=1201008&crid=55532fe9-f451-4977-a210-244fc2e3e5f5&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials-au%2Furn%3AcontentItem%3A59KW-KMT1-F06F-21T6-00000-00&pdcontentcomponentid=121002&pdteaserkey=sr0&pdicsfeatureid=1517127&pditab=allpods&ecomp=yxtrk&earg=sr0&prid=c9de506f-7fe0-44a9-a7ce-1f913ce95fd2). [↑](#footnote-ref-41)
42. See *Cannon v Tahche* [[2002] VSCA 84](https://advance.lexis.com/document/?pdmfid=1201008&crid=55532fe9-f451-4977-a210-244fc2e3e5f5&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials-au%2Furn%3AcontentItem%3A59KW-KMT1-F06F-21T6-00000-00&pdcontentcomponentid=121002&pdteaserkey=sr0&pdicsfeatureid=1517127&pditab=allpods&ecomp=yxtrk&earg=sr0&prid=c9de506f-7fe0-44a9-a7ce-1f913ce95fd2). [↑](#footnote-ref-42)
43. *Ea v Diaconu [2020]* NSWCA 127, [76]. [↑](#footnote-ref-43)
44. *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198 [122]. [↑](#footnote-ref-44)