INTENTIONAL NOISE EXPOSURE AS A BATTERY? A CASE STUDY OF CANADA'S FREEDOM CONVOY

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This article assesses a hypothetical battery claim for noise exposure in Australia using Canada's Freedom Convoy as a case study. I first advance a normative account for why battery ought to respond to noise-related interferences using Kit Barker's taxonomy of 'vindication events'. I argue that battery, relative to negligence and private nuisance: (1) more accurately 'marks' and 'declares' the plaintiff's right to bodily integrity and 'denounces' the defendant's intentional interference; and (2) improves access to 'appropriate compensation' post-infringement. I also explain how the 'prevention of rights infringements' fits within my normative account. I then answer the key doctrinal questions of whether and when noise exposure constitutes an actionable battery. I draw from existing common law precedents to show that physical contact by sound waves is 'direct' and capable of being 'offensive'. I conclude by addressing the concern that my doctrinal conclusions would unduly burden protesters' implied freedom of political communication.

I INTRODUCTION

On 29 January 2022, the Freedom Convoy, consisting of hundreds of trucks and thousands of individual protesters, arrived in Canada's capital, Ottawa, to oppose the federal government's COVID-19 vaccination mandate for cross-border truck drivers.[1] What began as a weekend demonstration, turned into a 23-day occupation. Convoy members used trucks to blockade streets around Parliament Hill and the residential neighbourhood of Centretown and refused to leave until all COVID-19 restrictions were lifted.[2] Horn-honking was one of the Freedom Convoy's main

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1 Public Health Agency of Canada, 'Requirements for Truckers Entering Canada in Effect as of January 15, 2022' (Statement, 13 January 2022) <https://www.canada.ca/en/public-health/news/2022/01/requirements-for-truckers-entering-canada-in-effect-as-of-january-15-2022.html>; Paul S Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency* (Report, February 2023) vol 2, 16.

2 Rouleau (n 1) 16, 181–3, 188–91.

tactics to draw public attention to their cause.[3] Nearby residents were exposed to nearly constant honking from train and air horns;[4] those living with disabilities struggled to receive homecare and other services due to the blockades;[5] and local businesses, a drop-in centre for vulnerable youth, vaccination clinics, libraries, and other public services were forced to shut down over safety concerns.[6] The federal government eventually invoked the *Emergencies Act*, RSC 1985 (4th Supp), c 22 on 14 February 2022, after which a large-scale police operation finally removed the blockades and ended the occupation.[7]

The economic impact of the Freedom Convoy will be long-lasting for Canadians. The police and local government response to the occupation cost the City of Ottawa nearly CAD37 million.[8] Local businesses lost an estimated CAD210 million in revenue that taxpayers will at least partially refund.[9] The human toll was equally as serious, with residents reporting ongoing physical and mental health effects.[10] Unsurprisingly, a CAD290-million class action brought by affected residents, businesses, and employees against multiple Freedom Convoy organisers and 60 'John Doe' truckers is currently underway.[11] Residents allege that the trucker defendants' 'incessant blaring of … high decibel air horns and train horns' substantially and unreasonably interfered with residents' reasonable use and enjoyment of their homes and constituted a private nuisance.[12] Canadian tort scholars predict this claim is likely to succeed.[13]

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3 Ibid 193.

4 Ibid.

5 Leah Larocque, '"We Feel Like We Are Collateral Damage": Residents Living with Disability Fear Homecare Won't Come Due to Protests', *CTV News* (online, 4 February 2022) <https://ottawa.ctvnews.ca/we-feel-like-we-are-collateral-damage-residents-living-with-disability-fear-homecare-won-t-come-due-to-protests-1.5766883>.

6 Rouleau (n 1) 195; Chris Stoodley, '"Freedom Convoy" Protests Force Temporary Closure of Downtown Ottawa Youth Centre', *CityNews* (online, 4 February 2022) <https://ottawa.citynews.ca/local-news/freedom-convoy-protests-force-temporary-closure-of-downtown-ottawa-youth-centre-5027047>.

7 Rouleau (n 1) 28.

8 Josh Pringle, 'Freedom Convoy Protest Cost City of Ottawa $36 Million', *CTV News* (online, 19 March 2022) <https://ottawa.ctvnews.ca/freedom-convoy-protest-cost-city-of-ottawa-36-6-million-1.5824983>. This estimate does not include costs to repair any infrastructure.

9 Rouleau (n 1) 199.

10 Solarina Ho, 'Honking, Fumes and Anger: Mental Toll from Trucker Protest Lingers for Ottawa Residents', *CTV News* (online, 2 March 2022) <https://www.ctvnews.ca/canada/honking-fumes-and-anger-mental-toll-from-trucker-protest-lingers-for-ottawa-residents-1.5801609>. See also Elizabeth Payne, 'Calls for Mental Health Support Up during Protests, Say Professionals', *Ottawa Citizen* (online, 11 February 2022) <https://ottawacitizen.com/news/local-news/calls-for-mental-health-support-up-during-protests-say-professionals>.

11 Rouleau (n 1) 222.

12 Zexi Li et al, 'Further Fresh as Amended Statement of Claim' in *Li v Barber*, CV-22-00088514-00CP, 14 March 2023, 52–3 [229], [231] ('Li Further Fresh Statement of Claim').

13 David V Wright and Martin Olszynski, 'Rigs in a Parlour: The Freedom Convoy and the Law of Private Nuisance', *University of Calgary Faculty of Law Blog* (Blog Post, 9 February 2022) <https://ablawg.ca/2022/02/09/rig-in-a-parlour-the-freedom-convoy-and-the-law-of-private-nuisance/>. See also, *Li v Barber* [2024] OJ No 547, [26]–[32] (MacLeod RSJ finding that class members have a 'meritorious case' and there is 'no slam dunk defence', while refusing to grant the defendant's motion to stay or dismiss the proposed class action). The Freedom Convoy class action will likely provide some compensation to resident class members. The Freedom Convoy was uniquely well-resourced. Organisers raised an

In this article, I use Canada's Freedom Convoy as a case study to assess a hypothetical battery claim for intentional noise exposure in Australia. In my view, an academic examination of this novel tort claim is timely and worthwhile. While the Freedom Convoy was an arguably rare event within Canada's history, it inspired other convoys in major international cities, including in Australia[14] and New Zealand.[15] The non-pandemic issues that fuelled these convoys – from economic disenfranchisement to online misinformation and disinformation – are global problems that are unlikely to disappear.[16] Sound waves could be used in future convoys, or other contexts deeply important to Australians – from police officers using long-range acoustic devices ('LRAD') during an arrest or protest,[17] to the use of 'weaponised' sound during terrorist attacks and domestic violence incidents, to the strategic use of noise as a form of workplace harassment.[18] More importantly, noise-related injuries are not unknown to Australian courts,[19] and

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impressive CAD24 million in donations in one month mostly through the crowdfunding platforms GoFundMe and GiveSendGo. Class members secured a Mareva Injunction to freeze and protect from dissipation and civil forfeiture the donations released to convoy organisers and members. Around CAD5.5 million is being held in escrow as of 6 December 2022. There is thus a reasonable likelihood that resident class members will at least recover a fraction of the compensatory and punitive damages they seek: David Fraser, 'Almost $8M of "Freedom Convoy" Donations Still Unaccounted For, Documents Show', *CBC News* (online, 7 April 2022) <https://www.cbc.ca/news/canada/ottawa/freedom-convoy-donations-1.6410105>; *Li v Barber* (2022) 160 OR (3d) 454, 467 [47] (MacLeod RSJ) (granting the Mareva injunction); *Li v Barber* [2022] ONSC 2662 (endorsement extending the Mareva injunction as of 2 May 2022); *Li v Barber*, 2022 CarswellOnt 17530, sch A (make-up of escrow funds, totaling around CAD5.5 million).

14 Josh Butler, '"Occupy Canberra": Behind the Anti-vaccine Protests at Parliament House', *The Guardian* (online, 4 February 2022) <https://www.theguardian.com/australia-news/2022/feb/04/occupy-canberra-behind-the-anti-vaccine-protests-at-parliament-house>.

15 Ashleigh Stewart, 'Faced with Sprinklers, New Zealand Anti-vaccine Mandate Protesters Dig Trenches', *Global News* (online, 11 February 2022) <https://globalnews.ca/news/8613338/new-zealand-freedom-convoy-canada>.

16 Laura David, 'Why Canada's Freedom Convoy Should Be a Warning to the Country', *Brown Political Review* (online, 15 March 2022) <https://brownpoliticalreview.org/2022/03/canada-freedom-convey-warning/>.

17 Ellen McCutchan and David Campbell, '"Sonic Weapons" Were Used by Police in Canberra's Protests, but Only to Broadcast Messages Rather than Do Harm', *ABC News* (online, 18 February 2022) <https://www.abc.net.au/news/2022-02-18/coronacheck-sonic-weapons-lrad-police-canberra-protests/100839612>; Lawrence English, 'What's an LRAD? Explaining the "Sonic Weapons" Police Use for Crowd Control and Communication', *The Conversation* (Web Page, 21 February 2022) <https://theconversation.com/whats-an-lrad-explaining-the-sonic-weapons-police-use-for-crowd-control-and-communication-177442>. See also James EK Parker, 'Sonic Lawfare: On the Jurisprudence of Weaponised Sound' (2019) 5(1) *Sound Studies* 72 <https://doi.org/10.1080/20551940.2018.1564458>; James EK Parker, 'Towards an Acoustic Jurisprudence: Law and the Long Range Acoustic Device' (2018) 14(2) *Law, Culture and the Humanities* 202 <https://doi.org/10.1177/1743872115615502>.

18 See generally Steve Goodman, *Sonic Warfare: Sound, Affect and the Ecology of Fear* (Massachusetts Institute of Technology Press, 2009) <https://doi.org/10.7551/mitpress/7999.001.0001>.

19 See, eg, *McFadzean v Construction, Forestry, Mining & Energy Union* [2004] VSC 289 ('*McFadzean*') (damages awarded for psychiatric injuries suffered by protesters after the defendants engaged in conduct, including making noise, to force them to leave).

there is, at present, little relevant case law and no academic scholarship to guide common law judges in dealing with these situations.[20]

With this context in mind, in Part II, I investigate whether the tort of battery ought to respond to noise-related interferences. I attempt to advance a normative account that is useful to judges and parties within tort litigation in Australia and other common law jurisdictions. I focus on the function of vindication and draw from Kit Barker's taxonomy of vindication events.[21] I compare how battery and two causes of action most relevant to noise-related interferences (private nuisance and negligence) achieve three of Barker's 'vindication events' using this hypothetical based on Canada's Freedom Convoy:

> Li (the plaintiff)[22] lives in an apartment in the city centre. A member of the Freedom Convoy (the trucker defendant) parks his semi-truck across the street from Li's apartment. The trucker defendant honks the air horn on his semi-truck for between 12 and 18 hours per day for the first 10 days of the occupation. Li hears the air horn day and night.[23] She takes a reading of the noise levels in her apartment using an application on her phone. The application reports readings up to 84 decibels.[24] Li decides to purchase noise-cancelling earphones for $100 because the honking causes her physical discomfort and she is unable to sleep.[25] Li continues to hear air horns periodically for the next 13 days until police end the occupation.[26] A medical professional diagnoses Li with permanent hearing damage.[27] Li ends up spending $500 out-of-pocket on medical care. An expert later determines that Li will require $100,000 for future medical care and expenses.

My investigation reveals that battery is clearly preferable to private nuisance and negligence because it would allow a judge to *accurately* 'declare' or 'mark' Li's legal right or interest (in *bodily integrity*) and 'denounce' the trucker defendant's wrong (an *intentional* interference) ('Event 1'). Vindicating bodily integrity through the backdoor of private nuisance (and Li's interest in the use and enjoyment of her apartment) or negligence risks obscuring tort doctrine and precedent and does not support a rational (in the Kantian sense) or legally coherent tort system. I also leave open the possibility that accurately identifying or classifying legal rights and wrongs will support what Barker refers to as more utilitarian 'social messaging functions'.[28]

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20 There are other unresolved tort law questions related to the Freedom Convoy beyond the scope of this article that deserve further commentary elsewhere. For a discussion of public authority liability in this context, see Erika Chamberlain, 'Could Ottawa Police Be Sued for Failing to Arrest "Freedom Convoy" Protesters?', *The Conversation* (online, 16 February 2022) <https://theconversation.com/could-ottawa-police-be-sued-for-failing-to-arrest-freedom-convoy-protesters-176430>.

21 Kit Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 59.

22 I largely based my hypothetical on the experiences of the representative plaintiff, Zexi Li, in the Freedom Convoy class action.

23 See 'Li Further Fresh Statement of Claim' (n 12) 10 [17].

24 'Meet the 21-year-old Ottawa Woman behind the Injunction that Silenced the Honking', *CBC News* (online, 9 February 2022) <https://www.cbc.ca/news/canada/ottawa/zexi-li-ottawa-injunction-trucker-protest-convoy-1.6344503>. See ibid 43 [175].

25 See 'Li Further Fresh Statement of Claim' (n 12) 43 [180], 46 [194], 54 [236], 55 [238].

26 See ibid 9–10, 31, 39–40, 42.

27 See ibid 43 [180].

28 Barker (n 21) 84.

Second, I uncover sufficient support for the view that battery reverses the effects of the trucker defendant's intentional infringement of Li's bodily integrity by providing *better access* to an award of (sometimes more) 'appropriate compensation' ('Event 2'). Appropriate compensation means an award of damages that meets the compensatory principle of putting the plaintiff 'in the same position as he or she would have been in if the … tort had not been committed'.[29] Using my hypothetical, I compare the award of damages Li would receive under each cause of action. I find that private nuisance may undercompensate Li by measuring her compensatory damages based on the trucker defendant's interference with her inferior interest in using and enjoying her apartment (ie, damages for a loss of amenity) over her superior interest in bodily integrity (ie, personal injury damages). This would be inconsistent with the compensation principle and tort's hierarchy of protected interests. Negligence would provide Li the same measure of compensatory (personal injury) damages, except: (1) unlike battery, negligence would not compensate Li for any *unforeseeable* factual losses caused by the interference (of which there are admittedly none in my hypothetical); and (2) a court is more likely to award aggravated damages, which are said to be compensatory in nature and support vindication, for an intentional battery. Given these findings, I further consider the issue of *access* to an award of damages, assuming each cause of action can provide appropriate compensation. I demonstrate that the essential features or elements of battery likely support *better access* to appropriate compensation in two ways: (1) by making it easier for the plaintiff to establish liability relative to private nuisance and negligence ('Function 1'); and (2) by supporting or ensuring appropriate compensation when a private nuisance and/or negligence claim fails ('Function 2'). I discuss how Functions 1 and 2 apply to my hypothetical, with minor modifications, and other important contexts where noise-related injuries might occur.

Part II concludes by considering whether private nuisance, rather than battery or negligence, best vindicates Li's interest in bodily integrity by 'preventing' the trucker defendant's interference through an injunction ('Event 3'). I proceed under the assumption that Li would likely prefer to avoid the infringement of her bodily integrity *ex ante* than receive compensation for, or a declaration of, an infringement ex post (Events 1 and 2). I provide several legal and practical reasons for why this claim does not weaken or dismantle the normative case for battery's application to noise-related interferences.

In Part III, I answer the key doctrinal questions of whether and when exposure to sound waves constitutes an actionable battery. I aim to provide a doctrinal account that is consistent with existing Australian tort precedents and principles. A battery is broadly defined as a voluntary (and/or intentional, reckless, or negligent)[30] and

29 *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 203 [14] (Kiefel CJ and Keane J), 208 [30] (Gageler J), 214 [50], 217–18 [65]–[66] (Gordon J), 239 [139] (Edelman J) ('*Lewis*'). See also *Haines v Bendall* (1991) 172 CLR 60, 63, 72 (Mason CJ, Dawson, Toohey and Gaudron JJ) ('*Haines*').

30 See my commentary in Part II regarding battery's fault element.

positive act that directly causes offensive physical contact with another person.[31] I focus on the critical elements of 'directness' and 'offensive physical contact'. I show that my hypothetical fits comfortably within the common law's directness paradigm: there is a causally and temporally immediate connection between the trucker defendant's act (honking) and the sound waves contacting Li's ears. I then consider whether the sound waves contacting Li's ears also constitute 'offensive physical contact'. Here I outline a rough analytical framework to guide judges on how to determine offensiveness, particularly when contact by sound waves does not physically injure the plaintiff, using existing precedents and reasonability factors recognisable to tort law. In doing so, I conclude that contact by an intangible source (such as sound waves) constitutes 'physical contact' and that the contact experienced by Li was 'offensive' because: (1) she was exposed to sound waves for a duration and at a decibel level that posed a real risk of physical harm; (2) the Freedom Convoy was not an ordinary political protest and there is reason to question the utility of the trucker defendant's honking; and (3) the trucker defendant acted with hostility based on existing evidence in the Freedom Convoy class action.

Finally, I consider in Part IV whether my doctrinal analysis unduly burdens protesters' implied freedom of political communication or otherwise creates undesirable social justice implications by chilling legitimately noisy protests. I find these concerns unpersuasive; they do not support the outright rejection of using battery to protect the interest in bodily integrity free from offensive noise exposures.

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31 Battery lacks a universal definition in both scholarly and judicial circles. Most definitions do not completely capture the tort's elements. Some are more specific than others. Cf Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (Federation Press, 5th ed, 2022) 56 ('*Principles of Tort Law*') (a battery is an 'intentional act by a person which directly causes contact with the body of another'); Harold Luntz et al, *Luntz and Hambly's Torts: Cases, Legislation and Commentary* (LexisNexis, 9th ed, 2021) 733 [12.4.1] ('a battery is committed by directly and intentionally [or negligently] bringing about a harmful or offensive contact with the person of another'); Donal Nolan and Ken Oliphant, *Lunney and Oliphant's Tort Law: Text and Materials* (Oxford University Press, 7th ed, 2023) 55 <https://doi.org/10.1093/he/9780198865117.001.0001> ('the unlawful application of force to another'); Allen M Linden et al, *Canadian Tort Law* (LexisNexis, 12th ed, 2022) 45 ('the defendant made direct physical contact with [the plaintiff's] person'); Carolyn Sappideen, Prue Vines and John Eldridge, *Torts: Commentary and Materials* (Lawbook, 13th ed, 2021) 44 ('the intentional contact with the body of another person without that person's consent'). Australian courts often define battery based on the onuses applicable to the parties: 'A defendant who directly causes physical contact with a plaintiff will commit a battery unless the defendant proves that the defendant was "utterly without fault"': *Croucher v Cachia* (2016) 95 NSWLR 117, 122 [21] (Leeming JA, Beazley P agreeing at 119–20 [1], Ward JA agreeing at 120 [2]) ('*Croucher*'); *Irlam v Byrnes* (2022) 108 NSWLR 285, 309 [131] (Cavanagh J). '[A] battery is constituted by the direct application of force to the person of another, without lawful justification or excuse': *New South Wales v Ouhammi* (2019) 101 NSWLR 160, 173 [55] (Brereton JA) ('*Ouhammi*'); *Stingel v Clark* (2006) 226 CLR 442, 466 [57] (Gummow J). The 'essential element of the tort is an intentional or reckless, direct act of the defendant which makes or has the effect of causing contact with the body of the plaintiff': *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 311 (McHugh J) ('*Marion's Case*'). See also David Rolph et al, *Balkin and Davis: Law of Torts* (LexisNexis, 6th ed, 2021) 59 [3.1], citing *Williams v Milotin* (1957) 97 CLR 465, 474 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ) ('*Williams*').

II WHY BATTERY? VINDICATING BODILY INTEGRITY

In this Part, I investigate whether the tort of battery ought to respond to noise-related interferences. The hope is to advance a normative account that is useful to judges and parties within tort litigation in Australia and other common law jurisdictions. I focus on the function of vindication because it is often regarded as the primary purpose of the trespass torts, including battery.[32] While scholars and judges often refer to vindication, its meaning is not always clear[33] and there is no universal definition.[34] I adopt Kit Barker's definition of vindication in private law as a 'set of events occurring *within judicial practice* and *in positive response* to legal rights, though not necessarily in response to their past violation'.[35] Barker's definition or 'taxonomy of meanings' is particularly useful because it is focused on and consistent with how common law judges understand and describe vindication.

I compare how battery and the two causes of action most relevant to noise-related interferences (private nuisance and negligence)[36] achieve three of Barker's 'vindication events'[37] using my hypothetical included in the introduction. I proceed on the basis that if battery better supports or achieves at least one of Barker's vindication events in my hypothetical, relative to private nuisance *and* negligence, a normative case for recognising a battery for noise-related interferences is made out. The main findings from my investigation are: (1) battery is most clearly preferrable under Event 1 (marking or declaring Li's right to bodily integrity); (2) there is sufficient, albeit less forceful, support for the view that battery is best

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32 Normann Witzleb and Robyn Carroll, 'The Role of Vindication in Torts Damages' (2009) 17(1) *Tort Law Review* 16, 35; Rolph et al (n 31) 19 [2.4]; Simon Deakin and Zoe Adams, *Markesinis and Deakin's Tort Law* (Oxford University Press, 8th ed, 2019) 24 <https://doi.org/10.1093/he/9780198747963.001.0001>; Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 63 <https://doi.org/10.5040/9781474202190> ('*Anatomy*'); Luntz et al (n 31) 720. See also Jason NE Varuhas, 'Before the High Court: *Lewis v Australian Capital Territory*' (2020) 42(1) *Sydney Law Review* 123, 125–6 ('Before the High Court'); Jason NE Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34(2) *Oxford Journal of Legal Studies* 253 <https://doi.org/10.1093/ojls/gqt036> ('Vindication').

33 Varuhas, 'Vindication' (n 32) 254; Barker (n 21).

34 For a nuanced account of the private and public dimensions of vindication, see Dan Priel, 'A Public Role for the Intentional Torts' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 288 <https://doi.org/10.1017/CBO9781139856478.014> ('Public Role'). See also Jenny Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' (2008) 67(3) *Cambridge Law Journal* 606 <https://doi.org/10.1017/S000819730800069X>.

35 Barker (n 21) 67 (emphasis added).

36 The discussion applies equally to other potential torts, such as the intentional infliction of physical and mental harm under *Bird v Holbrook* (1828) 4 Bing 628; 130 ER 911 and *Wilkinson v Downton* [1897] 2 QB 57 ('*Wilkinson*').

37 Barker (n 21) 56. An event which is not relevant to my case study is where a judge 'specifically enforces' a right through, for example, the remedy of specific performance of a contract or a mandatory injunction: at 73–4. The final event refers to 'punishing' the defendant for the infringement of a right or legal interest 'beyond the obligation to compensate a plaintiff's loss', such as through an award of punitive damages. Barker, however, approaches this event with scepticism, noting that 'there is no sense in which private rights are "vindicated" by punitive awards that is not already accounted for by the other legal meanings of the term to which we have previously adverted': at 82–3.

positioned to achieve Event 2 (reversing the effects of the infringement to Li's bodily integrity using damages); and (3) while battery and private nuisance (but arguably not negligence) are equally capable of achieving Event 3 (preventing the infringement of Li's bodily integrity through an injunction) this does not detract from the normative case for battery's application to noise-related interferences.

I want to be clear about the scope of my normative account. I am not claiming that battery is the *only tort* that ought to respond to noise-related interferences, particularly if multiple interests of the plaintiff are interfered with.[38] I also proceed under the assumption that vindication is a proper function of tort law and normatively desirable. Reasonable tort scholars might disagree.[39] I now turn to my examination of Barker's three events.

A Declaring or Marking the Right

Courts are said to vindicate legal rights or interests when they provide an 'affirmative, institutional acknowledgment of the right'.[40] Barker identifies a post-infringement declaration as the most obvious example, but there are others, such as a court's reasons for judgment and an award of nominal damages.[41] Barker then explains how declarations of rights are justified in a Kantian legal system:

> Public declarations of right might be thought simply to be conceptually required in any Kantian legal system, where freedom is the ultimate value. That is, judicial declarations could be construed as forming part of the essential condition of 'public right' that is necessary for private rights to be determinate and for individual freedom to exist in the Kantian sense … The Kantian justification for judicial declarations makes no empirical claim based on betterment of the public good. It simply asserts that for private rights to constitute a system of rights in which each is his own master and free from the oppressive purposes of others, open court adjudications are necessary from a deontological point of view. That appears to be a credible argument even from a more empirical perspective – how, after all, can a system of individual rights work in practice without institutional announcements of right (and wrong)?[42]

Here is a simple and compelling reason for why it is normatively desirable to apply battery to noise-related interferences. Battery is fundamentally concerned with protecting our interest in physical or bodily integrity[43] – that is, the negative

38 For example, if a plaintiff sustains mental but not physical harm, *Wilkinson* (n 36) may relevantly apply.

39 Some scholars think tort law plays a more public vindicatory role, namely, to hold public authorities accountable: see, eg, AM Linden, 'Tort Law as Ombudsman' (1973) 51(1) *Canadian Bar Review* 155 ('Ombudsman'); Allen M Linden, 'Reconsidering Tort Law as Ombudsman' in Freda M Steel and Sandra Rodgers-Magnet (eds), *Issues in Tort Law* (Carswell, 1983) 1 ('Reconsidering'). Priel, 'Public Role' (n 34) argues more specifically that the trespass to person torts may provide 'a public and impartial public forum' for declaring rights infringements by public authorities and 'the recognition that on certain occasions such a finding is of general public significance': at 308–9 (emphasis altered).

40 Barker (n 21) 69.

41 Ibid 70.

42 Ibid 71–2.

43 See, eg, *Collins v Wilcock* [1984] 3 All ER 374, 378 (Goff LJ) ('*Collins*'); *Marion's Case* (n 31) 233 (Mason CJ, Dawson, Toohey and Gaudron JJ), 265–6 (Brennan J), 309–11 (McHugh J); *Fontin v Katapodis* (1962) 108 CLR 177, 183–4 (McTiernan J); *Fede v Gray* (2018) 98 NSWLR 1149, 1179 (Basten JA) ('*Fede*'); *Binsaris v Northern Territory* (2020) 270 CLR 549, 560 [20] (Kiefel CJ and Keane J), 561 [25], 566 [41] (Gageler J), 586 [109] (Gordon and Edelman JJ) ('*Binsaris*').

right not to be touched.[44] Tort scholars sometimes refer to bodily integrity interchangeably with bodily autonomy, or the right to control the use of, or make decisions about, one's body.[45] Private nuisance, on the other hand, might be 'completely unconcerned with personal interests'[46] – it is a 'tort against land'[47] and its 'essence' is the interference with the use and enjoyment of land, or, what Donal Nolan describes as the abstract usability of the land.[48] The gist of Li's action in my hypothetical is the personal injury to her ears, or the infringement of her right or interest in bodily integrity free from offensive noise exposure. It thus makes little sense – from a Kantian point of view – to require Li to vindicate her right to bodily integrity through the back door of private nuisance and her interest in the use and enjoyment of her apartment. Nor is it desirable to rely on negligence[49] because it masks the true nature of the wrong: the trucker defendant's *intentional* infringement of Li's bodily integrity. How, after all, would a system of individual rights work in practice if institutional announcements of right (in the case of private nuisance) and wrong (in the case of negligence) were not completely accurate?

Perhaps a less theoretical way to capture this point is to describe the accurate identification or classification of rights and wrongs as necessary for a legally coherent and rational tort system. Back-door vindication is problematic within a tort system that relies on reasoning guided by precedents to treat like cases alike.[50]

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44 Christoph Bublitz, 'The Body of Law: Boundaries, Extensions, and the Human Right to Physical Integrity in the Biotechnical Age' (2022) 9(2) *Journal of Law and the Biosciences* lsac032:1–26, 6–8 <https://doi.org/10.1093/jlb/lsac032> (noting that this right covers the biological body and the inviolability of the person to non-bodily objects).

45 Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *Cambridge Law Journal* 566 <https://doi.org/10.1017/S0008197317000605> (which distinguishes between bodily autonomy and integrity). But see Allan Beever, 'What Does Tort Law Protect?' (2015) 27 *Singapore Academy of Law Journal* 626 (which argues that battery protects against violations of the plaintiff's right to control the use of her body, not bodily integrity).

46 John Murphy, 'Tort's Hierarchy of Protected Interests' (2022) 81(2) *Cambridge Law Journal* 356, 364 <https://doi.org/10.1017/S0008197321001069> ('Tort's Hierarchy').

47 *Hunter v Canary Wharf Ltd* [1997] AC 655, 702 (Lord Hoffmann) ('*Hunter*').

48 Donal Nolan, 'The Essence of Private Nuisance' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law* (Hart Publishing, 2019) vol 10, 71, 84 (referring to a diminution in 'use' or 'utility value'). See also Dan Priel, 'Land Use Priorities and the Law of Nuisance: *The Law of Private Nuisance* by Allan Beever (Hart Publishing, 2013)' (2015) 39(1) *Melbourne University Law Review* 346 (commenting on the difficulty of prioritising land uses as part of his rejection of Beever's rights perspective on nuisance).

49 Negligence, like battery, also protects our interest in bodily integrity. However, Tracey Carver and Malcolm Smith suggest that negligence's focus on damage makes battery 'naturally more attuned to protecting … the right to bodily integrity': Tracey Carver and Malcolm K Smith, 'Medical Negligence, Causation and Liability for Non-disclosure of Risk: A Post-*Wallace* Framework and Critique' (2014) 37(3) *University of New South Wales Law Journal* 972, 1002. See also John Murphy, 'Formularism and Tort Law' (1999) 21 *Adelaide Law Review* 115, 117 ('Formularism'); Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 *Adelaide Law Review* 177 (for a critical view of negligence's focus on physical harm).

50 For an interesting discussion on how the creation of new torts using 'nominalist reasoning' impacts legal coherence, see Kerry Sun and Stéphanie Sérafin, 'The Nominalism of the New Nominate Torts' (2024) *Supreme Court Law Review* (forthcoming) <http://dx.doi.org/10.2139/ssrn.4676558>. See also Emily Laidlaw, 'Technology Mindfulness and the Future of the Tort of Privacy' (2023) 60(3) *Osgoode Hall Law Journal* 597, 615, citing Chris DL Hunt, 'A Critical Appraisal of the Ontario Court of Appeal's Decision

Judges would struggle or fail to achieve this outcome if the boundaries of liability for one tort were obscured to indirectly vindicate a legal right or interest which that tort was never designed to accommodate.[51]

There are signs that common law courts – regardless of the theoretical orientation of individual judges – are institutionally committed to legal coherence in the sense just described.[52] In the well-known case of *Hunter v Canary Wharf Ltd* ('*Hunter*'), for example, the United Kingdom House of Lords expressed concern that private nuisance was being used to 'create by the backdoor the tort of harassment'.[53] Similarly in *Letang v Cooper*, Lord Denning refused to allow a claimant to 'dress up' a negligence claim as an intentional tort to seek a longer limitation period.[54] Australian privacy cases provide a more recent illustration. While the tort of trespass to land has sometimes been used to indirectly protect the interest in privacy,[55] Jelena Gligorijevic observes that the High Court of Australia in *Australian Broadcast Corporation v Lenah Game Meats Pty Ltd*[56] and *Smethurst v Commissioner of Police*[57] has reiterated the importance of 'juridifying [the] interest [in privacy] and contemplating the nature of liability for interference with it'.[58] More importantly, unlike the unresolved status of the interest in privacy and freedom from harassment under Australian tort law,[59] there is no need to resort to back-door vindication in my hypothetical. Li's legal right or interest in bodily integrity is already recognised and courts need not mutate existing tort doctrine to achieve vindication.

Another justification for declaring and marking rights accurately relates to what Barker describes as 'social messaging functions' – that the declaration of Li's right to bodily integrity and the denunciation of the defendant's intentional

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in *Jones v Tsige*' (2012) 37(2) *Queen's Law Journal* 665, 689–90 (discussing how the Ontario Court of Appeal has added a harm threshold 'through the back door to [the] tort [of intrusion upon seclusion which] is supposed to be actionable per se').

51 See, eg, Daniel Laster, 'Breaches of Confidence and of Privacy by Misuse of Personal Information' (1989) 7(1) *Otago Law Review* 31, 35–6 (referring to the English approach of protecting privacy 'by the backdoor of an overinflated notion of confidence').

52 For a recent and detailed discussion on Australia's commitment to legal coherence in private law, see Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160. See also Aiden Lerch, 'The Judicial Law-Making Function and a Tort of Invasion of Personal Privacy' (2021) 43(2) *Sydney Law Review* 133, 153–60.

53 *Hunter* (n 47) 691–2. Dan Priel notes that *Hunter* (n 47) was handed down after the enactment of the *Protection from Harassment Act 1997* (UK): Dan Priel, '"That Is Not How the Common Law Works": Paths to Tort Liability for Harassment' (2021) 52(1) *Ottawa Law Review* 87, 110 ('Harassment'). I suspect that the House of Lords considered it unnecessary to discuss a common law tort of harassment or risk treading on the legislature's toes.

54 [1965] 1 QB 232, 237–42 ('*Letang*'), discussed in Nolan and Oliphant (n 31) 45.

55 See Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 115–19.

56 (2001) 208 CLR 199 ('*Lenah*'). Trespass to land and the interference with privacy do not cover the same ground: see at 227 [43] (Gleeson CJ).

57 (2020) 272 CLR 177. In obiter, Kiefel CJ, Bell and Hayne JJ noted that both trespass and privacy cover the same fundamental concerns: see at 213 [73].

58 Jelena Gligorijevic, 'A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*' (2021) 44(2) *University of New South Wales Law Journal* 673, 675 <https://doi.org/10.53637/XCHP1278>. See below n 194.

59 Priel, 'Harassment' (n 53) 110 (referring to *Hunter* (n 47) and suggesting that it is better to address problems like harassment 'head-on' and 'more directly').

infringement of that right are important for achieving public education and norm signalling, deterrence, psychological or therapeutic benefits for the plaintiff and so forth.[60] Instrumentalist tort scholars have approached this justification with some rigour.[61] Barker, however, is not wrong in his assessment that social messaging functions are largely based on untested empirical assumptions.[62] Perhaps Li would experience psychological benefits simply by participating in the civil litigation process regardless of what tort claims or evidence are raised or the words the judge uses in their decision? The public does not necessarily read or fully understand judicial decisions.[63] Perhaps the news or alternative media coverage of the Freedom Convoy is a more successful vehicle for achieving public education about our legal rights or deterrence? While answers to these questions would be helpful, some judges would still view the potential social messaging function of battery as appropriately vindicatory in nature.[64]

B Reversing an Infringement through Appropriate Compensation

The second event in Barker's taxonomy is when a judge vindicates or affirms legal rights (or interests) by reversing the effects of their infringement through a positive award of usually monetary damages.[65] I find sufficient support for the conclusion that battery, when compared to private nuisance and negligence, *improves access* to (sometimes *more*) appropriate compensation[66] in my hypothetical

60 Barker (n 21) 72, 84.

61 See, eg, Priel, 'Public Role' (n 34); Linden, 'Ombudsman' (n 39); Linden, 'Reconsidering' (n 39); Erika Chamberlain, 'Negligent Investigation: Tort Law as Police Ombudsman' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 283; Robyn Carroll and Normann Witzleb, '"It's Not Just about Money": Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37(1) *Monash University Law Review* 216; Bruce Feldthusen, 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' (1993) 25(2) *Ottawa Law Review* 203; Linden et al (n 31) 18–30; Scott Hershovitz, 'Treating Wrongs as Wrongs: An Expressive Argument for Tort Law' (2017) 10(2) *Journal of Tort Law* 405 <https://doi.org/10.1515/jtl-2017-0004>.

62 Barker (n 21) 84–5. In fairness, the remaining events in Barker's taxonomy would also benefit (perhaps to a lesser extent) from empirical validation.

63 Australians tend to have confidence in the judiciary: TF Bathurst, 'Trust in the Judiciary' (2021) 14(4) *Judicial Review* 263, 263.

64 Barker (n 21) 84–5, citing *Ashley v Chief Constable Sussex Police* [2008] AC 962, *Walumba Lumba v Secretary of State for the Home Department* [2012] 1 AC 245.

65 Barker (n 21) 69–70.

66 This is especially true in Australia, where tort law is said to play a 'fundamental constitutional role' to protect rights against 'excessive official action': Varuhas, 'Before the High Court' (n 32) 123. Li might have access to a restitution order or financial assistance under a victim compensation statute if the defendant trucker were held criminally responsible. However, these remedies are (often intentionally) less robust than tort damages: see, eg, Luntz et al (n 31) 56, referring to 'modest' awards. Some victim compensation statutes explicitly state that awards are 'not intended to reflect the level of compensation to which victims of acts of violence may be entitled at common law': *Victims of Crime Assistance Act 2009* (Qld) s 3(3); *Victims of Crime Act 2001* (SA) s 3(d). See also Sentencing Advisory Council, *Restitution and Compensation Orders* (Issues and Options Paper, March 2018) 19, 92–101 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Restitution_and_Compensation_Orders_Paper_0.pdf>, which notes practical problems and the fact that compensation orders do not include awards for loss of earnings. No-fault compensation and insurance schemes are inapplicable to my hypothetical. Assume for the sake of thoroughness, that my hypothetical instead involved a public authority defendant. In Australia at least, Li has no right to damages for any breach of the *Australian Constitution* or under

and other noise-related contexts. 'Appropriate compensation' means an award of damages that meets the 'compensatory principle'. The High Court, most recently in *Lewis v Australian Capital Territory* ('*Lewis*'), described this principle as 'a sum which, so far as money can do, will put [the plaintiff] in the same position as he or she would have been in if the … tort had not been committed'.[67] Compensatory damages (economic, non-economic and aggravated) should return Li to her original position by covering all factual losses directly caused by the defendant trucker's interference with her bodily integrity.

The High Court also described the vindicatory function of compensatory damages in *Lewis*. Implicit in that decision is the idea that monetary awards, including the heads of compensatory damages for personal injuries, have a vindicatory function.[68] There is, however, ongoing debate in the law of damages over the existence and justification of vindicatory or substantial damage awards for rights infringements (normative loss) absent factual loss.[69] Sandy Steel has unpacked possible normative justifications for these damages.[70] But even he admits that the 'current law already largely accommodates these justifications within the category of punitive and aggravated damages'.[71] I do not aim to contribute to this debate. What bears repeating is that the High Court in *Lewis* clearly rejected vindicatory (and substantial) damages, and so, regardless of any academic objections, the

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the Human Rights Charters in the Australian Capital Territory, Victoria, or Queensland, which expressly preclude damages against public authorities: *Human Rights Act 2004* (ACT) s 40C(5); *Human Rights Act 2019* (Qld) s 59(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3). See also Ciara Murphy, 'Damages in the Australian Human Rights Context' (2022) 27(2) *Australian Journal of Human Rights* 311 <https://doi.org/10.1080/1323238X.2021.1997093>. Tort law (and battery) thus remains the only viable avenue for appropriate compensation in my hypothetical in the private and public sphere.

67 *Lewis* (n 29) 208 [30] (Gageler J), quoting *Haines* (n 29) 63 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *Lewis* (n 29) 203 [14] (Kiefel CJ and Keane J), 214 [50], 217–18 [65]–[66] (Gordon J), 239 [139] (Edelman J).

68 Only Gageler J and Edelman J address in detail vindication and the concept of vindicatory or substantial damages: *Lewis* (n 29) 206 [22] (Gageler J), 248–60 [153]–[176] (Edelman J). Gageler J states succinctly that '[*l*]*acking an entitlement to compensatory damages* and having no arguable entitlement to aggravated or exemplary damages', the plaintiff's right to liberty 'is vindicated by the nominal damages he has been awarded': at 206 [21] (emphasis added). Gordon J explains that vindication 'is not an alien concept to damages awards' and the '"aim" of vindicatory damages can be and is achieved by existing heads of damages': at 230 [109]. Both Gordon J and Edelman J specifically refer to exemplary, aggravated (as a form of compensatory damages), and nominal damages in this context: at 230–4 [108]–[121] (Gordon J), 257–60 [170]–[176] (Edelman J). Gordon J also notes that costs may be awarded on an 'indemnity basis where appropriate' to ensure that 'vindication of a right comes at no cost to the plaintiff': at 233 [120]. If vindication is achieved by reversing the adverse financial effects related to protecting an interest through litigation (eg, cost awards) and the factual losses flowing from the way in which such losses were caused (eg, aggravated damages), then surely compensation for other factual losses is 'vindicatory' too. Put differently, a right (or interest) is vindicated (more or less) to the extent courts reduce or eliminate *all* effects of the infringement on the plaintiff.

69 Cf Varuhas, 'Before the High Court' (n 32); Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 4 <https://doi.org/10.1093/acprof:oso/9780199211609.001.0001>; Eric Descheemaeker, 'Unraveling Harms in Tort Law' (2016) 132 (October) *Law Quarterly Review* 595; Eric Descheemaeker, 'Against Normative Damages' (2023) 76(1) *Current Legal Problems* 35 <https://doi.org/10.1093/clp/cuad001>.

70 Sandy Steel, 'Damages without Loss' (2023) 139 (April) *Law Quarterly Review* 219, 237.

71 Ibid.

responsibility to vindicate the right to bodily integrity is left to existing heads of damages and non-monetary remedies.[72] Fait accompli.

Table 1 outlines the awards of damages Li would likely recover against the trucker defendant under successful battery, private nuisance, and negligence claims. The awards have been broken down by head of compensatory damages (non-economic loss, past and future economic loss, and aggravated). The second last row provides a total damages award for each cause of action. The bottom row shows the numerical differences in these awards across the three causes of action. Below are the relevant facts from my hypothetical included for ease of reference:

> Li decides to purchase noise-cancelling earphones for $100 because the honking causes her physical discomfort and she is unable to sleep … A medical professional diagnoses Li with permanent hearing damage. Li ends up spending $500 out-of-pocket on medical care. An expert later determines that Li will require $100,000 for future medical care and expenses.

Table 1: Comparing Compensatory Damages in Battery, Private Nuisance and Negligence in the Freedom Convoy Hypothetical

Head of 'Compensatory' Damages	**Battery**	**Private Nuisance**	**Negligence**
– Non-economic loss – Economic loss (past) – Economic loss (future) – Aggravated	$25,000 $600 $100,000 More likely	$9,200 $100 $0 Less likely	$25,000 $600 $100,000 Less likely
Total Damages Award	$125,600	$9,300	$125,600
Difference from Total Damages Award – Battery	N/A	($-116,300)[73] (– Aggravated Damages)	$0 (– Aggravated Damages)

Beginning with Li's battery claim, Li would receive an award for non-economic loss based on pain and suffering and loss of enjoyment of life attributable to the hearing loss.[74] Suppose that figure is $25,000.[75] Li would also receive $600 for

72 *Lewis* (n 29) 200 [2] (Kiefel CJ and Keane J), 206 [22] (Gageler J), 214 [51], 229–34 [104]–[121] (Gordon J), 234 [122], 248–63 [153]–[183] (Edelman J). See also James Edelman, 'Vindicatory Damages' (Conference Paper, TC Beirne School of Law Conference, 15 December 2015) <https://fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/justice-edelman/edelman-j-20151215>.

73 See below n 91 and accompanying text regarding double recovery.

74 Compensatory (personal injury) damages would relevantly cover non-economic losses (loss of amenity, pain and suffering, and loss of expectation of life) and economic losses (special damages, future hospital and medical care, and loss of earning capacity). Non-economic losses are sometimes labeled as general/non-pecuniary, while economic losses are labelled as pecuniary (that is, capable of quantification) and include special (pecuniary) damages.

75 The quantum of Li's non-economic compensatory damages (or general damages) would depend on the severity of the hearing loss and its impact on her quality of life. The figure of $25,000 is provided for illustration purposes and is likely a conservative estimate for some level of permanent hearing loss. See eg, *Queen Elizabeth Hospital v Curtis* (2008) 102 SASR 534, 558 [70]–[72] (Gray J), where the Supreme Court of South Australia Full Court upheld an award of $80,000 in general damages where the plaintiff suffered total hearing loss equal to 17% binaural hearing impairment. See also, section 66 of the *Workers*

past economic losses (past medical care and the noise-cancelling earphones) and $100,000 to cover her future economic losses (the cost of future medical care calculated by the expert), for a total award of $125,600.

Li's damages award under private nuisance requires some brief explanation. The orthodox approach under private nuisance is to award damages for the non-economic or intangible 'amenity loss' to the plaintiff's property for the duration of the defendant's interference.[76] The assumption is that the value of occupying a noisy house, must be less than the value of occupying a quiet house. The House of Lords in *Hunter* laid out an objective assessment: determine the 'notional market rental value' for a property without the nuisance and assess the reduction in that value with the nuisance.[77] It is objective because the assessment focuses on the interference's impact on the land, not its occupiers.[78] As Nolan explains, the amenity value of the land is based on 'objective qualities of the land, such as its size, commodiousness, and value'.[79] Damages for loss of amenity due to noise, for example, would be the same for three identical terraces even if one plaintiff lives with five children, one plaintiff lives alone, and one plaintiff is deaf. Nolan, however, makes the important point that courts will consider the 'actual experience of the persons in occupation of the property' as this will usually be good evidence of the objective impact of the interference on the land.[80] Thus, if the plaintiff who lives with her family in my hypothetical terrace adduces evidence of how she and her five children are unable to sleep, that would be objective evidence that a noisy terrace would have a lower market rental value (in the eyes of a reasonable renter) than a quiet one.

Courts are likely not as objective in their assessment of amenity value loss as the House of Lords might wish.[81] Judges appear to reach a figure through largely invisible arithmetic guided by precedent and a desire for 'consistent' and 'fair' or 'reasonable' compensation.[82] There is 'no financial yardstick',[83] but some intangible losses to a property's usability (such as being unable to sleep in a noisy home, or having an interest in a home with low 'acoustic amenity'[84]) are valued more highly than others. Economic losses that are foreseeable consequences of the defendant's

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Compensation Act 1987 (NSW), where a worker suffering the same permanent impairment would receive a lump sum payment of $40,120.

76 See, eg, *Hunter* (n 47), where damages were awarded for diminution in the amenity of the property during the period of the nuisance. The plaintiff might seek a lump sum or assign a daily value to the amenity loss and multiply that value by the duration of the interference.

77 Donal Nolan, '"A Tort against Land": Private Nuisance as a Property Tort' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 459, 477 ('A Property Tort'), quoting *Khatun v United Kingdom* [1998] 26 EHRR CD 212, 214.

78 Nolan, 'A Property Tort' (n 77) 478.

79 Ibid.

80 Ibid 479, citing *Dobson v Thames Water Utilities Ltd* [2009] 3 All ER 319, 333 [33] (Waller LJ for the Court) ('*Dobson*').

81 See Nolan, 'A Property Tort' (n 77) 478–9, where Nolan appears to concede this in his discussion of *Dobson* (n 80).

82 *Oldham v Lawson [No 1]* [1976] VR 654, 660 (Harris J) ('*Oldham*'); *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, [336]–[337] (Ward J) ('*Quick*').

83 *Quick* (n 82) [336] (Ward J).

84 *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145 ('*Uren*').

interference with the amenity of the plaintiff's land are also recoverable.[85] However, there remains uncertainty[86] over whether a plaintiff may recover compensatory damages for personal injuries under private nuisance in Australia.[87] Many tort scholars support the view that personal injuries consequential on an interference with the use and enjoyment of land are or ought to be recoverable, although some scholars disagree.[88] Interestingly, many of the private nuisance cases cited in support of recovery involve modest awards when noise interferes with the ability to sleep.[89]

Using the Further Fresh as Amended Statement of Claim in the Freedom Convoy class action as a guidepost, Li would receive $9,200 ($400 per day x 23 days) in non-economic (amenity loss) damages and $100 for consequential economic/special damages, for a total award of $9,300.[90] Absent clear judicial guidance on whether personal injuries are recoverable under private nuisance, I assume that Li would not receive compensation for non-economic loss ($25,000) or her past ($500) and future ($100,000) medical care attributable to her permanent hearing loss. Thus, if a judge refused to recognise Li's battery claim, Li would be under-compensated under private nuisance (at least in the amount of $116,300)[91] because her damages would be assessed based on the interference with her (inferior) interest

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85 *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 ('*Cambridge Water*'); *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514.

86 The position in the United Kingdom is clear – personal injury damages are not recoverable: see *Hunter* (n 47), approved in *Dobson* (n 80). But see *Re Corby Group Litigation* [2009] QB 335, 346 [29]–[30] (Dyson LJ, Smith LJ agreeing at 347 [36], Ward LJ agreeing at 347 [37]), where personal injury damages were awarded for a public nuisance claim.

87 See, eg, Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 739, stating the Australian common law position is 'uncertain'. But see *Marsh v Baxter* (2015) 49 WAR 1, 43 [244], where McLure P (albeit in dissent) held nuisance covers property damage and personal injury.

88 See, eg, Luntz et al (n 31) 906, suggesting that damages for consequential personal injury are recoverable; Rolph et al (n 31) 595 [14.34], suggesting recovery of personal injury damages is 'strongly arguable'; Nolan, 'A Property Tort' (n 77) 479–80. But see Martin Davies, 'Private Nuisance, Fault and Personal Injuries' (1990) 20 *Western Australian Law Review* 129, 130 ('Private Nuisance') (observing there is 'little or no authority that directly supports' the view that personal injury damages are recoverable); Jenny Steele, 'Private Law and the Environment: Nuisance in Context' (1995) 15(2) *Legal Studies* 236, 257 <https://doi.org/10.1111/j.1748-121X.1995.tb00061.x> (stating that nuisance has been 'preoccupied with ownership' not security from personal injury, although 'it has sometimes been assumed that personal injury can be compensated in private nuisance'). For accounts against recoverability of personal injury damages under nuisance, see FH Newark, 'The Boundaries of Nuisance' (1949) 65 (October) *Law Quarterly Review* 480, 488–90; JW Neyers, 'Reconceptualising the Tort of Public Nuisance' (2017) 76(1) *Cambridge Law Journal* 87, 112–14 <https://doi.org/10.1017/S0008197316000829>.

89 See, eg, *Uren* (n 84) [377]–[382] (Richards J), where each plaintiff recovered damages in the amount of $1,000 per month or $12,000 per year; *Cohen v City of Perth* (2000) 112 LGERA 234, 271 [182] (Roberts-Smith J), where despite 'very little evidence', the Court awarded $1,000 for the disruption in the plaintiff's sleep pattern and the suffering of 'stress and depression for which [the plaintiff] was prescribed medication [which were] consequential on the stress, disruption and emotional upset occasioned by the noise of the Council's garbage collections'; *Oldham* (n 82) 660 [50] (Harris J), where the Court held $500 in damages for one year of noise disturbance from an adjoining house was a 'reasonable assessment'.

90 'Li Further Fresh Statement of Claim' (n 12) 54–5.

91 The $25,000 award for non-economic loss under battery ought to be in addition to the $9,200 amenity loss award under private nuisance because each award covers a different factual loss connected to the infringement with a separate legally protected interest. Any double recovery concerns are left for another day. In theory at least, if the award for amenity loss damages was increased to account for Li's hearing

in property instead of her (superior) interest in bodily integrity. This is precisely the type of departure from tort law's hierarchy of protected interests that Nicholas McBride and Roderick Bagshaw had in mind when they remarked that 'the law [of nuisance] attaches greater importance to protecting people's land … than it does to protecting people's physical welfare'.[92] Existing accounts tend to suggest that our interest in bodily integrity sits at the top of this hierarchy; it is, simply put, the interest or asset that tort law most values.[93] In practical terms, judges use (or ought to use) a particular remedy to vindicate our superior interest in bodily integrity generally and in priority over other inferior property and economic interests.[94]

Some tort scholars have documented,[95] questioned,[96] and even identified departures from[97] tort law's hierarchy of legally protected interests. Others have elsewhere discussed the limitations of using the law of torts as an appropriate compensation scheme.[98] I do not attempt to add to these bodies of work. The least

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loss (as a sign of a more substantial loss of amenity), the award for non-economic loss under battery should be correspondingly reduced.

92 Nicholas J McBridge and Roderick Bagshaw, *Tort Law* (Pearson, 6th ed, 2018) 399. The problem of under-compensation for non-economic loss in my hypothetical is likely exacerbated in litigation involving multiple plaintiffs. For example, in the Freedom Convoy class action, class counsel provided a standardised daily rental value for the entire class. Doing so is likely necessary to avoid certification issues (in Canada), but it prevents a full consideration of the objective qualities of each class member's property (certainly the notional rental value of every property within a class is not identical) or subjective evidence of the impact of sound waves on class members. The extent to which the daily rental value accounts for these impacts is unknown. By awarding amenity loss damages based only on the duration of the interference, private nuisance under-compensates class members who suffered personal injuries (and/or who potentially suffered a more significant loss to the amenity value of their property) relative to those class members who do not. To use a simple example, suppose Li suffered no hearing loss but was exposed to the honking for 23 days. As mentioned, she would receive an amenity loss award of $9,200. Now suppose another class member suffered permanent hearing loss but only experienced the honking for 10 days. That class member would receive under half of what Li was awarded ($4,000) despite suffering a personal injury.

93 Murphy, 'Tort's Hierarchy' (n 46) 358–63, discussing Cane, *Anatomy* (n 32); Richard O'Sullivan, 'A Scale of Values in the Common Law' (1937) 1(1) *Modern Law Review* 27, 35–6; Nicholas J McBride, *The Humanity of Private Law: Part I* (Bloomsbury Publishing, 2018) 124. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 277–8 [267] (Kirby J) ('*Perre*'); *Waller v James* (2006) 226 CLR 136, 149–50 [37] (Kirby J).

94 Murphy, 'Tort's Hierarchy' (n 46) 356–7 (referring to this as the dispositive function of the hierarchy).

95 See, eg, Ken Oliphant, 'Rationalising Tort Law for the Twenty-First Century' in Kit Barker, Karen Fairweather and Graham Ross (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 47, 51–3, 64; Anne Schuurman and Zoë Sinel, 'Matter over Mind: Tort Law's Treatment of Emotional Injury' in Kit Barker, Karen Fairweather and Graham Ross (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 439, 446. See also Zoë Sinel, *Just Feelings: A Tort Law Theory of Emotion* (forthcoming), which defends tort law's indifference to emotions, but not for the reasons historically given by courts.

96 See, eg, Martha Chamallas, 'Social Justice Tort Theory' (2021) 14(2) *Journal of Tort Law* 309, 332 <http://dx.doi.org/10.2139/ssrn.3933027> ('Social Justice'); Jean Thomas, 'Which Interests Should Tort Protect?' (2013) 61(1) *Buffalo Law Review* 1; Cane, *Anatomy* (n 32) 132, rejecting the hierarchy on rational, moral or ethical grounds. But see Murphy, 'Formularism' (n 49), responding to the criticisms of Cane, *Anatomy* (n 32).

97 Murphy, 'Tort's Hierarchy' (n 46) 363–8.

98 See, eg, Bruce Feldthusen, 'Posturing, Tinkering and Reforming the Law of Negligence: A Canadian Perspective?' (2002) 25(3) *University of New South Wales Law Journal* 854, 856–7; Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27(3) *Melbourne University Law Review* 649.

controversial, in my view, is the proposition that the law of torts should at least protect the interest in bodily integrity as much as, if not more than, property and economic interests. I am not aware of any strong opposition to this proposition.[99] Battery supports this proposition in my hypothetical. Private nuisance does not.

Finally, Li would likely receive an identical compensatory damages award ($125,600) under negligence. It is worth noting, however, that only foreseeable compensatory damages are recoverable in negligence and private nuisance.[100] In contrast, battery is so concerned with the plaintiff's bodily integrity, that all factual losses (subject to any restrictions imposed by civil liability legislation)[101] flowing directly and even unforeseeably from the offensive physical contact are compensable.[102] I have not identified an unforeseeable loss in my hypothetical, but at least notionally, battery would provide more appropriate compensation to Li by capturing *all* losses directly caused by the contact.[103]

I pause here to address aggravated damages. The High Court recently described this head of 'compensatory' damages as vindicatory in nature, awarded for enhanced mental distress (namely, insult and humiliation) based on *how* the defendant interfered with the plaintiff's bodily integrity.[104] Traditionally, aggravated damages were available for the trespass torts, but not necessarily private nuisance.[105] This orthodoxy arguably exists because private nuisance focuses on 'unreasonable' interferences and cares less about the fault of the defendant; however, there appears to be no reason to preclude an award of aggravated damages where the defendant maliciously interferes with the plaintiff's reasonable use and enjoyment of their land. But to the extent the orthodox view prevails, a court is more likely

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99 See Murphy, 'Tort's Hierarchy' (n 46) 383, who refers to the hierarchy as a 'very helpful dispositive tool'.

100 Luntz et al (n 31) 294 (referring to the requirement in negligence that damage of the kind suffered was reasonably foreseeable), 904 (noting that Australian courts have followed the obiter remarks regarding foreseeability of damage in *Overseas Tankship (UK) Ltd v Miller Steamship Co Ltd* [1967] 1 AC 617 in private nuisance cases). See also *Cambridge Water* (n 85); Martin Davies, 'Strict Liability and Reasonable Foreseeability: *Cambridge Water Co v Eastern Counties Leather Plc*' (1994) 2(1) *Torts Law Journal* 12.

101 See discussion below.

102 Rolph et al (n 31) 47 [2.92], citing *Allan v New Mount Sinai Hospital* (1980) 109 DLR (3d) 634, 643 (Linden J) (Ontario Superior Court).

103 An alternative view is that a 'diluted' remoteness test (or the direct consequences test) can have a 'punitive impulse' that punishes the defendant by making them pay 'enhanced compensatory damages': James Goudkamp and Eleni Katsampouka, 'Punitive Damages and the Place of Punishment in Private Law' (2021) 84(6) *Modern Law Review* 1257, 1271–6 <https://doi.org/10.1111/1468-2230.12654> ('Punishment'). This view is consistent with the 'punishment' event in Barker's taxonomy: Barker (n 21) 78–83.

104 *Lewis* (n 29) 230 [108], 232 [112]–[113], 233 [118] (Gordon J). See also Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23(1) *Oxford Journal of Legal Studies* 87 <https://doi.org/10.1093/ojls/23.1.87>. The compensatory purpose of aggravated damages is not without debate: see John Murphy, 'The Nature and Domain of Aggravated Damages' (2010) 69(2) *Cambridge Law Journal* 353 <http://dx.doi.org/10.1017/S0008197310000504>; James Goudkamp, 'Reforming English Tort Law: Lessons from Australia' in Eoin Quill and Raymond J Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (Hart Publishing, 2016) 75 (suggesting that aggravated damages should be sacrificed based on the needs principle); Goudkamp and Katsampouka, 'Punishment' (n 103) 1277–8 (noting that courts sometimes award aggravated damages to punish the defendant).

105 *Oldham* (n 82) 658–9 (Harris J).

to award aggravated damages for the battery claim in my hypothetical, which is more likely than private nuisance to achieve a full vindicatory effect. I reach the same conclusion for negligence because three state or territory Civil Liability Acts ('CLAs') in Australia prevent the awarding of aggravated damages in an action for negligently caused personal injuries.[106] In states or territories where aggravated damages remain available,[107] the point made above about reasonableness and fault applies, such that damages remain more likely to be awarded in a battery claim for intentionally caused personal injuries.[108]

Given these findings, an important question to address is whether battery is normatively desirable under Event 2 because it improves Li's *access* to a damages award, assuming each of the causes of action under consideration offer appropriate compensation. My discussion here thus assumes that consequential personal injuries are recoverable under private nuisance, that the doctrine of foreseeability would not reduce an award of compensatory damages under private nuisance or negligence, and that aggravated damages are likely to be awarded under each cause of action.

A common thread running through the vindication scholarship is that the trespass torts, including battery, have fundamental internal features that primarily aim to vindicate legally protected interests, rather than engage in loss-spreading like negligence.[109] These features – actionability without proof of loss, that damage (if suffered) need not be foreseeable, that the defendant bears the onus of disproving fault, and that liability is 'strict' insofar as the concepts of motive, mistake, and

106 See *Civil Liability Act 2002* (NSW) s 21 ('*NSW CLA*'); *Civil Liability Act 2003* (Qld) s 52 ('*Qld CLA*'). But see Joachim Dietrich, 'Intentional Conduct and the Operation of the *Civil Liability Acts:* Unanswered Questions' (2020) 39(2) *University of Queensland Law Journal* 197, 206–7 <https://doi.org/10.38127/uqlj.v39i2.5021>; *New South Wales v Ibbett* (2005) 65 NSWLR 168, 174 [119] (Ipp JA) ('*Ibbett*'), suggesting the onus lies on the defendant to establish the application of section 21 of the *NSW CLA* (n 106). The *Qld CLA* (n 106) may be a special case on account of its wording: see Dietrich (n 106) 220–2. The Northern Territory equivalent excludes aggravated and exemplary damages for all personal injury claims: *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19 ('*NT PIA*').

107 They include Western Australia, South Australia, Tasmania, Victoria, and the Australian Capital Territory.

108 See, eg, James Goudkamp, 'The Spurious Relationship between Moral Blameworthiness and Liability for Negligence' (2004) 28(2) *Melbourne University Law Review* 343, 364 nn 139–140 (noting there is a 'paucity of authority' as to whether aggravated damages are available for negligence and such awards are in any event 'rare'). There is some empirical support for this conclusion at least with respect to exemplary damages, which have a 'degree of overlap' with aggravated damages: Rachael Mulheron, 'The Availability of Exemplary Damages in Negligence' (2000) 4 *Macarthur Law Review* 61, 74. See also *New South Wales v Zreika* [2012] NSWCA 37, [60] (Sackville AJA, Macfarlan JA agreeing at [1], Whealy JA agreeing at [2]), noting that 'the same set of circumstances may justify an award of … both' aggravated and exemplary damages. See especially Felicity Maher, 'An Empirical Study of Exemplary Damages in Australia' (2020) 43(2) *Melbourne University Law Review* 694, 727, 729, noting that the 'heartland for exemplary damages is undoubtedly the intentional torts' and that 'exemplary damages have always been a marginal remedy in negligence claims'. See also James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38(1) *Oxford Journal of Legal Studies* 90 <https://doi.org/10.1093/ojls/gqx013> (finding no successful claims for exemplary damages in negligence cases in England, Wales, and Northern Ireland from 2000 to 2015).

109 See, eg, Varuhas, 'Vindication' (n 32) 254, 258–9; Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *Modern Law Review* 59, 79; Varuhas, 'Before the High Court' (n 32) 123, 126. See also Priel, 'Public Role' (n 34) 301–7 for a critical discussion of the intentional torts and the vindication of rights more generally.

reasonable conduct are irrelevant – are said to make it 'easy to establish prima facie liability', after which defences are strictly construed.[110] In Australia, most of these features are not contestable except for the fault feature or element. A plaintiff need only prove that the defendant's positive act directly caused offensive physical contact with their person to establish a prima facie battery claim under Australian common law. The onus then shifts to the defendant to disprove fault[111] or, to quote the judicial authorities, show the defendant was 'utterly without fault'[112] – what James Goudkamp would describe as a denial of liability.[113] There nonetheless appears to be ongoing scholarly[114] and judicial debates[115] in Australia over whether the words 'utterly without fault' mean that: (1) the defendant's act was involuntary or an inevitable accident (the 'strict liability' view); or (2) the defendant must disprove fault, in that, the defendant did not subjectively intend to contact the

110 Varuhas, 'Vindication' (n 32) 261–7. See, eg, *New South Wales v McMaster* (2015) 91 NSWLR 666, 678 [36]–[38] (Beazley P), where the New South Wales Court of Appeal rejected the argument that the *Hill/Crowley* operational immunity in negligence cases protected the police from liability in battery. See also *Hyder v Commonwealth of Australia* (2012) 217 A Crim R 571, 575 [13] (McColl JA).

111 The onus shift for fault applies in Australia, except in highway cases: *Croucher* (n 31) 122–3 [23]–[26] (Leeming JA). The onus shift also exists in Canada, but not the United Kingdom, New Zealand, or the United States: see, eg, *Non-marine Underwriters, Lloyd's of London v Scalera* [2000] 1 SCR 551, 560–1 [4] (McLachlin J, L'Heureux-Dubé, Gonthier and Binnie JJ joining) ('*Scalera*'); *Garratt v Dailey*, 279 P 2d 1091, 1093 (Hill J for the Court) (Wash, 1955); *Fowler v Lanning* [1959] 1 QB 426, 431–2 (Diplock J); *Letang* (n 54) 238–40 (Denning LJ); *Beals v Hayward* [1960] NZLR 131. There is some confusion over whether the plaintiff must prove single (contact) or dual (contact and harm) intent in the United States: Stephen D Sugarman, 'Restating the Tort of Battery' (2017) 10(2) *Journal of Tort Law* 197 <https://doi.org/10.1515/jtl-2017-0020>.

112 The phrase 'utterly without fault' is traced to the 17th century case of *Weaver v Ward* (1616) Hob 134; 80 ER 284.

113 Denials of liability or wrongdoing are 'pleas by the defendant that one or more elements of the tort in which the claimant sues is missing'. A defence, on the other hand, is a liability-defeating rule 'external to the elements of the claimant's action': James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 2, 43–6, 85. Goudkamp classifies a defendant disproving fault (however defined) as a 'denial' of one or more (of the fault, act and/or causation) elements of the trespass torts: at 85–104. Tort scholars disagree over the distinction between defences and denials: see, eg, Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* 515; Iain Field, 'A Good-Faith Challenge to the Taxonomy of Tort Law Defences' (2017) 40(2) *University of New South Wales Law Journal* 537 <https://doi.org/10.53637/PHWQ1298>. Some scholars, however, still refer to disproving fault as an 'excuse', perhaps to maintain consistency with the nomenclature used in battery cases: see, eg, Ruth Sullivan, 'Trespass to the Person in Canada: A Defence of the Traditional Approach' (1987) 19(3) *Ottawa Law Review* 533, 554–5; Rolph et al (n 31) 60 [2.36]–[2.38].

114 See, eg, Rolph et al (n 31) 30–41 [2.36]–[2.69]. But see Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 40, commenting that 'today it is settled that fault is the basis of liability in trespass'; James Goudkamp, 'Rethinking Fault Liability and Strict Liability in the Law of Torts' (2023) 139 (April) *Law Quarterly Review* 269 (questioning the usefulness of pigeonholing the trespass torts based on fault and strict liability).

115 See, eg, *Ouhammi* (n 31) 165–7 [15]–[21] (Basten JA) (where the fault-based view was endorsed), 173–87 [54]–[103] (Brereton JA) (where the strict liability view was endorsed), 202–3 [180]–[187] (Simpson AJA) (where the fault-based view appeared to be endorsed despite referring to 'utterly without fault'). The view adopted mattered. Brereton JA found that the Senior Constable was not utterly without fault and therefore negligent: at 190 [112]–[113]. Basten JA and Simpson AJA determined that a reasonable senior constable would have acted differently: at 169 [36] (Basten JA), 205 [195] (Simpson AJA). Basten JA curiously appeared to endorse the 'strict liability' view only a year earlier in *Fede* (n 43) 1179–85 [169]–[198] (Meagher JA agreeing at 1187 [211]).

plaintiff and was not reckless or negligent in doing so (the 'fault-based' or 'less strict' view).[116]

The CLAs operating across Australia further complicate the matter.[117] These Acts tend to restrict the availability[118] and quantum[119] of personal injury damages.[120] A plaintiff only maximises their recovery if their battery claim is excluded from the application of these Acts and/or provisions. The exclusion clause under the *Civil Liability Act 2002* (NSW) ('*NSW CLA*'), for example, has two limbs.[121] A plaintiff must prove: (1) a 'voluntary' and/or 'intentional' act[122] by the defendant ('limb one'); (2) done with *subjective* or *actual intent*[123] to cause injury or death ('limb two'). The CLAs in Tasmania, Victoria, Queensland, and Western Australia have the same or nearly identically worded exclusion clauses.[124] Critically, these clauses (likely unintentionally) undermine the common law's careful balancing of fault for trespass claims,[125] particularly where plaintiffs have suffered more significant

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116 The fault-based view is traced to the English High Court decision in *Stanley v Powell* [1891] 1 QB 86 ('*Stanley*'). However, a defendant can no longer commit a battery negligently in the United Kingdom: *Letang* (n 54). Prior to *Ouhammi* (n 31), only two Australian authorities had applied *Stanley* (n 116): *Venning v Chin* (1975) 10 SASR 299, 310 (Bray CJ); *McHale v Watson* (1964) 111 CLR 384, 388–9 (Windeyer J).

117 For a detailed discussion, see Dietrich (n 106). The CLAs likely do not shift the onus of negating fault from the defendant for negligent or non-intentional batteries: *Ouhammi* (n 31) 188–9 [105]–[109] (Brereton JA), 204 [189] (Simpson AJA). See also at 167–8 [25]–[28] (Basten JA dissenting).

118 See above nn 106–7 and accompanying text.

119 The CLAs cap non-economic damages (with the exception of the Australian Capital Territory) and awards for loss of earning capacity (with the exception of Western Australia): *Civil Law (Wrongs) Act 2002* (ACT) ss 92, 98 ('*ACT CLA*') (but no cap on general damages); *NSW CLA* (n 106) ss 12, 16–17A; *NT PIA* (n 106) ss 21, 24, 26–7; *Qld CLA* (n 106) ss 54, 61–2; *Civil Liability Act 1936* (SA) ss 52, 54; *Civil Liability Act 2002* (Tas) ss 26–8 ('*Tas CLA*'); *Wrongs Act 1958* (Vic) pts VB, VBA ('*Vic WA*'); *Civil Liability Act 2002* (WA) ss 9–11 ('*WA CLA*') (applying a deductible instead of a cap to loss of earnings). Other common law jurisdictions impose, for example, caps on non-economic damages, such as Canada at common law and by statute in some American states: see, eg, *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229; John CP Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 *Yale Law Journal* 524.

120 For example, there may be situations where the *NSW CLA* (n 106) statutory defence relating to intoxication under sections 47, 48, and 50 may apply to noise-related batteries, making exclusion from the *Act* preferrable. The illegality defence under section 54, however, applies to all intentional torts claims: at s 3B(1)(a)(ii).

121 Ibid s 3B(1)(a).

122 Dietrich (n 106) writes that section 3B(1)(a) requires the plaintiff to establish 'two intentions' and the first limb is satisfied if the defendant's act is 'intentional *or* voluntary': at 210–11 (emphasis added). Since intentional acts are voluntary, the question seems to be whether the defendant's act was voluntary and there was subjective intent to make contact. The case law is not entirely clear on this point: see, eg, *Fede* (n 43) 1183–4 [185]–[190], 1187 [206] (Basten JA, Meagher JA agreeing at 1187 [211]). Clarity would be helpful for transferred dual intent situations, particularly where A intends to contact and cause injury to B, but A accidentally makes contact and injures C: see *Dickson v Northern Lakes Rugby League Sport and Recreation Club Inc* (2020) 103 NSWLR 658, 662 [10] (Basten JA) ('*Dickson*').

123 *Dickson* (n 122) 660–2 [4]–[9] (Basten JA), 663 [19] (White JA), 689–90 [181]–[186] (Simpson AJA), where the Court rejected recklessness as sufficient.

124 *Tas CLA* (n 119) s 3B; *Vic WA* (n 119) s 28LC. The Queensland and Western Australia CLAs refer to 'unlawful intentional acts': *Qld CLA* (n 106) s 52(2); *WA CLA* (n 119) s 3A. The *ACT CLA* (n 119) and the *NT PIA* (n 106) do not explicitly exclude intentional conduct and thus preserve the onus shift.

125 Dietrich (n 106) correctly notes that some plaintiffs will avoid proving fault because they are content with more restrictive damages: at 209.

physical and/or mental harm. Limb one not only shifts the onus from the defendant to the plaintiff to prove fault, but possibly requires a higher level of 'fault' (ie, deliberate contact) than at common law. Limb two adds another fault-based hurdle by requiring the plaintiff to prove the defendant's *subjective intent* to cause injury or harm. I return to these points in Part III.

The possibility remains that, combined, the fundamental features or elements of battery might support the vindication of a plaintiff's interest in bodily integrity free from offensive noise interferences by *improving access* to appropriate compensation in two ways. The first is by making it easier for the plaintiff to establish liability relative to private nuisance and negligence ('Function 1'). This would apply to my hypothetical because Li's claims in negligence, battery and private nuisance against the trucker defendant would likely succeed. For example, there is academic support[126] for the view that Li would find it less onerous to establish an 'offensive physical contact' (in battery)[127] than the trucker defendant's failure to take reasonable precautions (in negligence) or unreasonable interference with her use and/or enjoyment of the apartment (in private nuisance). Function 1 supports the normative case for battery and the hierarchy because it should be easier, or less onerous, to establish liability for interferences with superior interests.

Battery may also support (or ensure) access to appropriate compensation when a private nuisance and/or negligence claim fails ('Function 2'). Making small modifications to my hypothetical illustrates this point for private nuisance. Suppose that Li's child, or a precariously housed individual outside Li's apartment, is exposed to the defendant trucker's honking and suffers permanent hearing loss.[128] Neither would have standing to sue the defendant trucker in private nuisance because they do not have an interest (such as ownership or the right to exclusive possession) in the land affected by the noise.[129] Both would need to rely on battery or negligence to recover appropriate compensation. Function 2 thus supports the hierarchy since tort law should vindicate the plaintiff's (superior) interest in bodily integrity regardless of a plaintiff's physical location at the time of the interference and certainly regardless of whether the plaintiff has an (inferior) interest in land.

Battery's ability to vindicate bodily integrity under Functions 1 and 2 is further illustrated by considering other contexts where noise-related physical injuries might occur. Take these scenarios:

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126 See, eg, Davies, 'Private Nuisance' (n 88) 140 (a plaintiff is 'placed at a considerable advantage by bringing an action in private nuisance rather than in negligence').

127 See below discussion on offensiveness in Part III(B).

128 News reports suggested that Ottawa's precariously housed population and children were exposed to the honking: Elizabeth Payne, 'Convoy Protesters Make for "a Really Tough Day" at Shepherds of Good Hope Shelter: CEO', *Ottawa Citizen* (online, 30 January 2022) <https://ottawacitizen.com/news/local-news/convoy-protesters-make-for-a-really-tough-day-at-shepherds-of-good-hope-shelter-ceo>; Miriam Berger and Amanda Coletta, 'The Children of the "Freedom Convoy": Kids with Protesting Parents Complicate Police Response', *The Washington Post* (online, 17 February 2022) <https://www.washingtonpost.com/world/2022/02/17/freedom-convoy-children-ottawa-protest/>.

129 For further commentary and debate, see Rolph et al (n 31) 594; Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 709–11; Luntz et al (n 31) 857.

> **'Domestic Violence'**: A husband and wife are in a relationship. The wife is a person with a physical disability. The husband is verbally abusive. Whenever the husband and wife fight, the husband screams and turns on extremely loud music. The wife cannot access the source of the music on account of her physical disability. Over time, the wife develops tinnitus.
>
> **'Police'**: Hundreds of people attend a Black Lives Matter march in front of Town Hall in Sydney, New South Wales. Police officers attend and use the alert setting on a LRAD as a crowd control measure. Several protesters sustain permanent hearing loss and nerve damage.

Functions 1 and 2 apply to both scenarios. First, the plaintiffs cannot bring a private nuisance claim to vindicate by the backdoor their interest in bodily integrity (Function 2). In 'Police', the protesters are on public property and do not have a legal interest in the affected land. In 'Domestic Violence', the wife likely cannot rely on private nuisance because the interference occurred on land that she and her husband both possess.[130] Second, unlike my hypothetical with Li, the likelihood of recovery under negligence in either 'Police' or 'Domestic Violence' is questionable, particularly in Australia (Function 1 or 2). Martha Chamallas and Jennifer Wriggins, as well as others, have consistently documented the failure of tort law to respond adequately to domestic violence.[131] Australian courts have also historically shown reluctance to impose a duty of care in negligence on the police.[132] Tort law reform in these contexts seems unlikely.[133]

The normative case for battery is arguably stronger to the extent this tort operates in scenarios like 'Police' and 'Domestic Violence' to support the more *socially just* vindication of bodily integrity within the hierarchy. Domestic violence

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130 Rolph et al (n 31) 601, citing *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208, 228–30 [80]–[86] (Hansen J). Some jurisdictions appear open to watering down private nuisance's standing requirement: Nolan, 'A Property Tort' (n 77) 473 n 93.

131 Martha Chamallas and Jennifer B Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* (New York University Press, 2010) 63–76, 86–7, 98–9; Luntz et al (n 31) 84–92; Kylie Burns, 'The Gender of Damages and Compensation' (2019) 151 *Precedent* 9; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002). But see Martha Chamallas, 'Will Tort Law Have Its #Me Too Moment?' (2018) 11(1) *Journal of Tort Law* 39 <https://doi.org/10.1515/jtl-2018-0008>.

132 See, eg, Anthony Gray, 'Liability of Police in Negligence: A Comparative Analysis' (2016) 24(1) *Tort Law Review* 34; Nina Vallins, 'Police Responses to Family Violence: Recasting a Duty of Care' (2017) 42(1) *Alternative Law Journal* 29 <https://doi.org/10.1177/1037969X17694781>; Mandy Shircore, Heather Douglas and Victoria Morwood, 'Domestic and Family Violence and Police Negligence' (2017) 39(4) *Sydney Law Review* 539; Nithya Narayanan, 'Simply Unpredictable: Establishing Causation for Claims of Police Negligence in Domestic Violence Cases' (2022) 49(1) *University of Western Australia Law Review* 426.

133 In 2019, the Australia Law Reform Commission recommended that the Australian Government amend the *Family Law Act 1975* (Cth) to include a statutory tort of family violence, but this did not occur: Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, March 2019) 17 (Recommendation 19), 240–5 [7.101]–[7.124]; Australian Government, 'Government Response to ALRC Report 135: Family Law for the Future' (March 2021) 22 <https://www.ag.gov.au/system/files/2021-03/alrc-government-response-2021.PDF>. Canada recognised for only a short time a new 'family violence' tort before the Ontario Court of Appeal determined existing tort remedies were 'adequate': *A v A* (2022) 161 OR (3d) 360, revd *Ahluwalia v Ahluwalia* (2023) 167 OR (3d) 561.

in Australia continues to disproportionately impact women,[134] especially women with disabilities and Aboriginal and Torres Strait Islander women.[135] The New South Wales Police Force similarly uses force towards Indigenous Australians at 'drastically disproportionate' rates compared to non-Indigenous Australians.[136] There is no reason to think that noise-related interferences with bodily integrity would not follow the same discriminatory and unjust trends in situations like 'Police' and 'Domestic Violence'. Recognising noise-related batteries (while still subject to criticism)[137] may help mitigate tort law's reflection and reinforcement of 'systemic forms of injustice in … larger society'[138] by increasing more *equal access to appropriate* compensation for noise-induced physical injuries regardless of a plaintiff's gender, gender expression, race, place of origin, class, sexual orientation, disability, and so on.

C Preventing an Infringement

Preventing rights infringements is the final vindicatory event I consider. Barker's taxonomy is descriptive; he does not explicitly assign a value to the four vindication events separately, or relative to each other. One could rather easily develop a remedial hierarchy based on what remedy the plaintiff (as the rights-holder with the legally protected interest) values and the defendant (as the infringer of the plaintiff's legally protected interest) prefers to avoid. The position of any remedy (or event) within the hierarchy would then communicate the practical power or normative desirability of its vindicatory function. Consider my hypothetical. All things being equal, Li would likely prefer to protect her interest

134 See eg, 'Partner Violence', *Australian Bureau of Statistics* (Web Page, 22 November 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/partner-violence/latest-release> (reporting that 17% of women versus 5.5% of men have experienced partner violence); 'Family, Domestic and Sexual Violence', *Australian Institute of Health and Welfare* (Web Page, 19 July 2024) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/family-domestic-violence> (reporting that family and domestic violence was more common among women than men); Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (Report, 2019) vii, 1, 3–4, 8–17.

135 Nas Campanella and Celina Edmonds, 'Royal Commission Told of "Heartbreaking" Abuse Faced by Women with Disability', *ABC News* (online, 15 October 2021) <https://www.abc.net.au/news/2021-10-15/disability-royal-commission-hears-domestic-violence-statistics/100539580>; Stephanie Convery, 'Indigenous Australians Make Up Almost 30% of Hospitalisations Due to Domestic Violence, Report Finds', *The Guardian* (online, 16 December 2021) <https://www.theguardian.com/australia-news/2021/dec/16/indigenous-australians-make-up-almost-30-of-hospitalisations-due-to-domestic-violence-report-finds>.

136 Christopher Knaus, 'NSW Police Use Force against Indigenous Australians at Drastically Disproportionate Levels, Data Shows', *The Guardian* (online, 31 July 2023) <https://www.theguardian.com/australia-news/2023/jul/31/nsw-police-use-force-against-indigenous-australians-at-drastically-disproportionate-levels-data-shows>. See also Chris Cunneen, 'Police Violence: The Case of Indigenous Australians' in Peter Sturmey (ed), *The Wiley Handbook of Violence and Aggression* (John Wiley & Sons, 2017) vol 3, ch 119.

137 See Chamallas and Wriggins (n 131) 70–3 (referring to liability insurance exclusions); Reg Graycar, 'Damaging Stereotypes: The Return of "Hoovering as a Hobby"' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge, 1st ed, 2012) 205 <https://doi.org/10.4324/9780203122822> (which found damages for female-identifying victims of domestic violence are economically depressed).

138 Chamallas, 'Social Justice' (n 96) 315.

in bodily integrity *ex ante* through an injunction (prevent the infringement) than to receive compensation for her permanent hearing loss ex post (reverse the effects of the infringement). Similarly, if prevention of the infringement is not possible, Li would likely prefer compensatory damages (reverse the effects of the infringement) over a declaration that her right to bodily integrity was violated (declare or mark the right).[139]

Assuming the remedial hierarchy is empirically accurate, it might be said that Li's private nuisance claim, rather than any battery claim, better vindicates her interest in bodily integrity in my hypothetical. That is because an injunction to prevent the honking from interfering with her inferior interest in her apartment, would also indirectly protect her (and other possible plaintiffs') superior interest in bodily integrity.

Several reasons explain why this line of thought is problematic and does not support the outright rejection of the normative case for battery. First, there is no guarantee that an injunction will successfully protect Li's interest in bodily integrity *ex ante*. Ottawa's Freedom Convoy has already shown why this is a dangerous assumption. When the representative plaintiff commenced the Freedom Convoy class action about a week into the occupation, she simultaneously applied for an interim injunction to restrain the use of air and train horns in downtown Ottawa.[140] Some class members may have experienced injuries to their hearing by this time or while the request for an injunction was being heard. And while Freedom Convoy members adjusted their horn-honking when faced with the threat of an injunction,[141] the honking eventually resumed and high decibel levels were still recorded after the Court ordered the injunction.[142]

Second, an injunction is available as a remedy to a battery claim. It is generally true that injunctions are awarded to abate nuisances and compensatory damages

139 The idea of a remedial hierarchy is not new: see, eg, David Wright, 'Discretion with Common Law Remedies' (2002) 23 *Adelaide Law Review* 243.

140 Transcript of Proceedings, *Li v Barber* (Ontario Superior Court of Justice, CV-22-00088514-00CP, McLean J, 5 February 2022). The injunction application by a private citizen was arguably necessary due to state inaction and non-enforcement of city noise by-laws.

141 At the injunction hearing on 5 February 2022, the lawyer for some of the named Convoy organiser defendants advised the presiding judge, McLean J, that Convoy members had an 'accord amongst themselves' to not honk their horns between 8:00pm and 8:00am: ibid 3 (K Wilson). That night, Convoy organisers announced that there would be no horn-honking the next day from 9:00am to 1:00pm as a 'gesture of good will' and 'out of respect for the Lord's day,' for 'members of the military' and for the police 'who are doing such a superb job protecting us': 'Freedom Convoy 2022 Call Temporary Pause in Horn-Blowing', *Cision* (online, 5 February 2022) <https://www.newswire.ca/news-releases/freedom-convoy-2022-call-temporary-pause-in-horn-blowing-833398244.html>. When the injunction hearing resumed on 7 February 2022, the named Convoy organiser defendants furnished an affidavit which stated they were 'immediately implementing, and requesting all the truckers not sound their horns but for one time in the day … [at] 5:00pm for five minutes': Transcript of Proceedings, *Li v Barber* (Ontario Superior Court of Justice, CV-22-00088514-00CP, McLean J, 7 February 2022) 40 (K Wilson) ('7 February Transcript').

142 Rouleau (n 1) 194, 222 (reporting a measurement of 101 decibels on 12 February 2022). The noise level reportedly 'dropped considerably' for the remainder of the occupation: *Li v Barber* (2022) 160 OR (3d) 454, 463 [29] (MacLeod J) (referring to a net-positive effect).

are awarded to address factual losses caused by a battery.[143] John Murphy has explained elsewhere why injunctions are[144] and ought to be available for the trespass torts if courts wish to take tort law's hierarchy of protected interests seriously.[145] Murphy's account requires no further elaboration. Suffice it to say, there are no immediately compelling principles or policies that support retaining any practice to limit injunctions to the non-trespass torts.

Third, even if these first two points are contestable, Barker's vindication events are not mutually exclusive. Tort claims can and do co-exist. Li may plead multiple torts claims following an interference with her interests to increase the likelihood of liability and maximise her recovery. Nothing within Australian common law or the CLAs would prevent Li from securing an injunction using private nuisance and then later receiving appropriate compensation under battery (and/or private nuisance and negligence) against the trucker defendant.

III DOCTRINAL CONSIDERATIONS

This Part addresses doctrinal issues related to the application of the tort of battery to the novel situation of noise exposure. My analysis still centres on my hypothetical: Li would allege that the trucker defendant's voluntary, intentional, and positive act (ie, honking the air horn) generated sound waves that directly made offensive physical contact with her person (ie, her hearing organs). I focus on the elements of battery that would raise unique issues in the application of settled doctrine to sound waves: directness and harmful physical contact. I also address policy-based objections to my doctrinal conclusions. Issues related to class action or mass tort procedures or secondary liability are not addressed.[146]

Before moving to the heart of my analysis, I briefly address fault.[147] Li would likely meet the fault requirement(s) to establish liability in battery, or to exclude her battery claim from the application of a CLA. The trucker defendant's honking was clearly voluntary, meaning Li would meet the requirement of 'fault' under the strict liability view (for liability) and possibly under limb one (for exclusion purposes under the relevant CLAs). Again using the class action's Further Fresh as Amended Statement of Claim as a guidepost, Li could point to evidence that the

143 *Binsaris* (n 43) 569 [49] (Gageler J). But see *Plaintiff S99/2006 v Minister for Immigration and Border Protection* (2016) 243 FCR 17, 129 [456]–[458] (Bromberg J); *Kaye v Robertson* [1991] FSR 62, 68–9 (Glidewell LJ, Bingham LJ agreeing at 70, Leggatt LJ agreeing at 71) ('*Kaye*'). John Murphy also notes that injunctions are not entirely available in negligence: John Murphy, 'Rethinking Injunctions in Tort Law' (2007) 27(3) *Oxford Journal of Legal Studies* 509, 518–21 <https://doi.org/10.1093/ojls/gqm004> ('Injunctions').

144 Murphy, 'Injunctions' (n 143) 375, citing *Egan v Egan* [1975] Ch 218.

145 Murphy, 'Injunctions' (n 143).

146 For example, I do not assess whether Convoy organisers or donators would be indirectly liable for the honking in a hypothetical battery claim. But see, *Li v Barber* [2024] OJ No 547, [28] (MacLeod RSJ) (referring to the claims against funding platforms and donors as 'tenuous').

147 Li would also need to prove that the trucker defendant was the source of the sound waves and that those sound waves were a 'but-for' cause of her permanent hearing loss. Neither pose hurdles for Li. One can imagine, however, more complex factual situations where evidentiary issues might arise.

trucker defendant subjectively intended for the sound waves to contact her (to meet the 'fault-based' view of 'fault' for liability and limb one) and cause 'injury',[148] in the form of 'pain', 'distress', 'discomfort' and 'harm', and to 'pressure, compel and coerce' political leaders to meet their demands to withdraw all COVID-19 public health measures and restrictions (to meet limb two).[149] A court could reasonably infer[150] subjective intent based on the 'obviousness' of the honking causing injury,[151] as evidenced by the Freedom Convoy attempting to implement 'quiet hours' during the evenings and purchasing earplugs.[152]

A court would likely consider any arguments against a finding of fault unpersuasive. For example, suppose the defendant trucker argued that he did not know how far sound waves travelled and did not subjectively intend to contact or injure Li in her apartment across the street. Basten JA's hypothetical in *Dickson v Northern Lakes Rugby League Sport and Recreation Club Inc* provides a solution. Assume that A intends to shoot B and cause injury to B, but hits and injures C. Such a case would, in Basten JA's view, 'likely engage s[ection] 3B(1)(a) although there was no intent to injure [C]'.[153] This interpretation is arguably correct as a matter of statutory interpretation; section 3B(1)(a) makes no mention of any 'person' or 'plaintiff' to which any of the operative terms in the section apply. If Basten JA is correct, Li could still meet the *NSW CLA*'s exclusion clause even under a negligent or reckless battery claim by relying on evidence that the trucker defendant subjectively intended to contact and harm someone closer to his vehicle.[154] I now turn to the remaining and more difficult elements of my hypothetical battery claim.

148 The New South Wales Court of Appeal has interpreted the word 'injury' broadly: see *Ibbett* (n 106) 171 [11] (Spiegelman CJ) (where it was held 'injury' includes 'harm occasioned by an apprehension of physical violence'), 175 [125] (Ipp JA) (remarking that 'the word [injury] is wide enough to encompass anxiety and stress'). 'Temporary injury' or 'pain' would suffice: *Hamilton v New South Wales [No 13]* [2016] NSWSC 1311, [184]–[194] (Campbell J). An open question is whether mere 'offensive conduct' (absent physical harm) for a battery claim qualifies as 'injury'.

149 'Li Further Fresh Statement of Claim' (n 12) 22, 52, 54. See also Rouleau (n 1) 194 (referring to a video in which one organiser 'laughed when referring to residents' inability to sleep due to the horns').

150 *Dickson* (n 122) 690 [186] (Simpson AJA). Based on the burden of proof applicable to tort claims, strong evidence of recklessness is more likely to support a finding of subjective intent than an absence of intent.

151 Rouleau (n 1) 194 (stating the 'negative impact of the honking [on residents] was obvious'); '7 February Transcript' (n 141) 65 (McLean J) (finding that the defendants comprehended the 'deleterious nature to the use of these horns').

152 'Li Further Fresh Statement of Claim' (n 12) 32. See also Rouleau (n 1) 194. The trucker defendant would likely have been unable to avoid the media reports or confrontations with community members that would have made the harm to Li obvious.

153 *Dickson* (n 122) 662 [10] (appearing to capture the doctrine of transferred intent).

154 Any arguments to the effect that the trucker defendant would not have reasonably foreseen the risk of harm from sound waves to Li or someone, and that physical harm from sound waves is a 'kind of damage' that is too remote are difficult to accept, assuming, without deciding, that the remoteness test for negligence applies to a negligent battery.

A Sound Waves and the Directness Paradigm

Directness is 'a vestigial element'[155] in the tort of battery that arguably serves no modern purpose in the common law world. It was originally intended to distinguish the writs of trespass from actions on the case, but the writ system expired more than a century ago.[156] Consistent with this view, the United Kingdom and the United States have abandoned the element.[157] Canada has not,[158] despite scholarly support for the element's abolishment, or, at least, liberalisation.[159] Australia has not received such ideas with enthusiasm, with at least one appellate court rejecting the 'death' of directness.[160] Suffice it to say, directness has 'long been' and remains a requirement of battery in Australia.[161]

Differentiating between 'direct' and 'indirect or consequential' contacts is surprisingly difficult. Judges rarely discuss directness as an element of battery,[162] and academic attempts to make sense of the existing case law or develop a uniform test for directness are sparse.[163] One approach to the directness requirement is to focus on the 'immediate' causal connection or link between the defendant's act

155 Alexandra Mogyoros, 'Deconstructing Directness in Canada: A Critical Evaluation of the Role of Directness in the Tort of Battery' (2013) 21 *Tort Law Review* 24, 29. But see FA Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2(2) *Oxford Journal of Legal Studies* 211, 219 <https://doi.org/10.1093/ojls/2.2.211>. Trindade suggests that directness may serve the purpose of 'remov[ing] the necessity to invoke the doctrine of "transferred intent"'. But see *Dickson* (n 122) 662 [10], where if Basten JA's approach is followed, Australian courts could easily render that purpose obsolete.

156 John Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 74–6, 439–40 <https://doi.org/10.1093/oso/9780198812609.001.0001>.

157 *Letang* (n 54); American Law Institute, *Restatement (Second) of Torts* (1965) § 18(1)(b).

158 *Scalera* (n 111) 562 [8] (McLachlin J, L'Heureux-Dubé, Gonthier and Binnie JJ joining). However, Canadian courts are not completely resistant to calls for reform: see, eg, *Hoffman v Monsanto Canada Inc* [2005] SKQB 225, [130]–[133] (GA Smith J); *Hoffman v Monsanto Canada Inc* [2007] SKCA 47, [64] (Cameron JA).

159 Lewis N Klar, *Tort Law* (Carswell, 2nd ed, 1996) 29; Mogyoros (n 155) 35–6. See also Luntz et al (n 31) 725 (asking whether the distinction between direct and consequential interferences should be 'eradicated from the common law'); Trindade (n 155) 218 (suggesting that many actions of trespass to person would be simplified if we could 'somehow get rid of' directness).

160 *Carter v Walker* (2010) 32 VR 1, 39–41 [216]–[226] (Buchanan, Ashley and Weinberg JJA) ('*Carter*').

161 Ibid 39 [216]; *Williams* (n 31); *Platt v Nutt* (1988) 12 NSWLR 231, 232–3 (Kirby P) ('*Platt*'); *Croucher* (n 31) 122 [20]–[23] (Leeming JA); *Ouhammi* (n 31) 187 [101]–[102] (Brereton JA), 202 [180] (Simpson AJA).

162 As Luntz et al (n 31) 720 observe, because directness poses 'no difficulty' in the 'most obvious instances of trespass', courts tend to discuss the requirement in 'marginal' (or non-paradigm) cases such as *Hutchins v Maughan* [1947] VLR 131 ('*Hutchins*') and *Scott v Shepherd* (1773) 2 Wm Bl 892; 96 ER 525 ('*Scott*').

163 Notable exceptions include the work of (then) law students: Mogyoros (n 155); Albert Ounapuu, 'Abolition or Reform: The Future for Directness as a Requirement of Trespass in Australia' (2008) 34(1) *Monash University Law Review* 103; GD MacCormack 'The Distinction between Trespass and Case: *Williams v Milotin*' (1959) 3(1) *Sydney Law Review* 147 (focusing on the relationship between directness and fault). See also Trindade (n 155).

and the interference.[164] This causal inquiry is capable of different formulations,[165] but the gist of it is easy enough to grasp by reference to the paradigm battery of A punching B. The contact is direct because A's positive and voluntary act is the *only* legally relevant factual cause[166] of the contact; or, put differently, there is an obviously uninterrupted causal link or sequence between A's act (the punch) and the contact (A's fist contacting B's body). There are no other legally relevant factual causes that contributed to the contact and might 'dilute' A's legal responsibility for the battery.[167] Admittedly, what qualifies as a legally relevant contributing factual cause outside the paradigm and why are questions that continue to puzzle judges and tort scholars. There is some authority to suggest that the voluntary and positive acts of the plaintiff or a third party,[168] and *perceptible* natural forces, such as the

164 Mogyoros (n 155) 30, citing Glanville Williams and BA Hepple, *Foundations of the Law of Tort* (Butterworths, 1976) 39 (suggesting that 'immediacy' is generally understood as referring to a 'causal sequence rather than a temporal relationship'). *Hutchins* (n 162) arguably provides the clearest judicial reference to causal immediacy: a 'consequential contact' is one 'when, by reason of *some obvious and visible intervening cause*, it is regarded, not as part of the defendant's act but merely as a consequence of it': at 133 (Herring CJ) (emphasis added).

165 Canadian tort scholars Lewis N Klar and Cameron Jeffries suggest that the inquiry is whether the interference 'would have … occurred had it not been for the intervention of another independent agency?': Lewis N Klar and Cameron Jeffries, *Tort Law* (Thomson Reuters, 6th ed, 2017) 34, quoted in Linden et al (n 31) 33. This causal inquiry arguably captures the definition of a consequential interference from *Hutchins* (n 162). Another formulation, often traced to *Scott* (n 162) is: was the interference 'the immediate consequence of a force set in motion by an act of the defendant?': see, eg, Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 46; *Scalera* (n 111) 562 [8] (McLachlin J, L'Heureux-Dubé, Gonthier and Binnie JJ joining), citing *Scott* (n 162), *Leame v Bray* (1803) 3 East 593; 102 ER 724 ('*Leame*'). See also *Ruddock v Taylor* (2003) 58 NSWLR 269, 278 (Spigelman CJ, Ipp JA agreeing at 285 [84]), where the New South Wales Court of Appeal purportedly applied *Scott* (n 162) to a false imprisonment claim but almost exclusively focused on the defendant's fault.

166 I use the term 'legally relevant factual cause' under the directness requirement for two reasons: (1) to exclude factual causes, such as gravity, that are legally *irrelevant* to tort and causation law; and (2) to avoid using legal terms such as 'intervening act', 'event' or 'cause' because courts may not (or should not) be using these terms or applying a foreseeability test in battery, as they do under negligence law. For further discussion, see Rolph et al (n 31) 47–58. For an insightful discussion on the differences between the foreseeability and directness tests for liability and damages albeit from an American perspective, see Mark A Geistfeld, 'Proximate Cause Untangled' (2021) 80(2) *Maryland Law Review* 420.

167 Sullivan (n 113) 562. Sullivan also refers to the absence of 'competing' factual causes that 'obscure' the defendant's role in causing the contact within the paradigm. This observation is accurate but has nothing to do with directness. If a court determines that a third party and not the defendant is the sole factual cause of the contact (or cannot determine who is the cause of the contact), the battery action against the defendant fails on causation, not because the contact was indirectly caused.

168 See, eg, *Scott* (n 162) (third parties immediately throwing a squib that had landed on their stall to protect themselves and their goods was involuntary); *Hutchins* (n 162) (the plaintiff voluntarily brought his sheep onto the defendant's land and they were poisoned after eating baits the defendant had planted and warned the plaintiff about); *Platt* (n 161) (comparing a deliberate act to prevent a door from slamming (indirect) to a reflex/involuntary action (direct)). But compare the example given in *Hutchins* (n 162) (throwing poisoned meat to a dog who subsequently eats it is a direct interference) with *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007) 243 ALR 356, 379 [72] (Gray ACJ) (leaving pig meat in the feeding and drinking systems of the plaintiff's sheep was not a direct and immediate interference). Ounappu (n 163) 108, 114, sometimes explains these types of directness cases with reference to the defences of necessity and voluntary assumption of risk. This is problematic insofar as the elements of a tort (ie, directness) and any applicable defences are and ought to be conceptually distinct. See, eg, the approach taken by Singleton LJ in *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182, 185, 194

tide or wind,[169] can render a contact indirect. Exceptions, of course, exist and the reasoning in these decisions is sometimes inconsistent and questionable.[170]

Some tort scholars view the directness requirement more as 'an issue of time' and focus on the temporal, as opposed to the causal, relationship between the defendant's act and the interference.[171] So understood, A punching B is a direct interference because A's fist almost instantly contacts B. The contact is 'immediate on the act done'[172] or 'follows so immediately upon the act of the defendant that it may be termed part of that act'.[173] A strict view of temporal immediacy arguably means the critical question is whether there is a small '[temporal] gap' or a 'short [period of] time' between the defendant's act and the contact, whether the contact was a product of contributory factual causes or not.[174] A more straightforward version of *Scott v Shepherd* helps to illustrate this point and the two approaches.[175] Suppose A throws a firework in a crowded marketplace and it lands on B's stall. B, fearing for his life, immediately throws the firework away from his stall and the firework hits C. C sues A in battery. A's interference with C would be direct because while B's act of throwing the firework was a factual cause of the contact

('*Southport*'), where his Honour ignored the directness issue because the defence of necessity would, in his view, defeat the trespass claim.

169 Academic commentaries usually mention *Southport* (n 168) 195–6, where Denning LJ held that oil dumped by the defendant tanker and carried by the tide to the plaintiff's foreshore was an indirect interference. Morris LJ, in dissent, suggested that a trespass may lie if the defendant employed 'the force of the wind or of moving water … to cause a thing to go on to land': at 204. The application of *Southport* (n 168) in Australia is questionable. Of the five members of the House of Lords sitting on the *Southport* (n 168) appeal, *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218, only Lord Radcliffe and Lord Tucker supported Denning LJ's conclusion regarding directness: at 242 (Lord Radcliffe), 244 (Lord Tucker). Lord Tucker was noticeably more tentative. Three of the Lords did not address the trespass claim or explicitly disagree with the trial judge's determination that the interference was direct. In over 50 years since the House of Lord's decision, Australian courts have rarely referred to Denning LJ's treatment of directness: see *Tavitian v Commissioner of Highways* [2018] SASC 179, [7]–[12] (Kourakis CJ). There is no application of Morris LJ's exception to a battery claim to my knowledge. If Denning LJ was concerned about the 'immediacy' of the interference or the defendant's actual intent to interfere with the plaintiff's interest in land, neither of these concerns would arise in my hypothetical. See also Rolph et al (n 31) 46, providing the example of the defendant spraying pesticide on the plaintiff's flowers (a direct interference) and the defendant spraying pesticide on their own land, some of which is carried by the wind and lands on the plaintiff's flowerbed (an indirect interference). But see *Gregory v Piper* (1829) 9 B & C 591; 109 ER 220, where leaving rubbish that dried and rolled onto the plaintiff's land was a direct interference.

170 See Ounapuu (n 163) for specific examples. See also Luntz et al (n 31) 720 (referring to the directness requirement as setting 'crude limits on the availability' of the trespass torts).

171 See, eg, Sappideen, Vines and Eldridge (n 31) 33 (referring to directness as 'an issue of time or immediacy of the resultant contact'); Nolan and Oliphant (n 31) 57; Rolph et al (n 31) 45–7, 49 (requiring an 'immediate connection' between the defendant's act and the interference with the plaintiff's interest, where the 'greater the "degrees of separation"' in terms of time and space between the two, the more likely the interference will be considered indirect or consequential).

172 *Leame* (n 165).

173 *Hutchins* (n 162) 133 (Herring CJ).

174 In other words, contributory factual causes are only legally relevant as a matter of directness if they create too much time or too much of a temporal gap (however measured) between the defendant's act and the contact. See Nolan and Oliphant (n 31) 57 (emphasis in original): 'At least as a matter of civil law, liability in [a case like *DPP v K (a minor)* [1990] 1 WLR 1067] should depend on the length of time between the act and the contact, assuming the requisite intention (*vis-à-vis* the contact) could be shown.'

175 *Scott* (n 162).

it: (1) was involuntary[176] and thus did not legally interrupt the causal link between A and C (causal immediacy);[177] or (2) did not impact, legally speaking, on the very short period of time that passed between A's act of throwing the firework and the firework hitting C (temporal immediacy).[178]

The temporal view has intuitive appeal because temporal and causal immediacy (for lack of better terms) are highly correlated for most battery claims. In other words, the more immediate the temporal connection between the defendant's act and the interference is, the less likely that another legally relevant factual cause will interrupt the causal link between the defendant's act and the interference, and vice versa. A closer inspection, however, reveals that a temporal approach to directness promotes unnecessary and arbitrary line drawing for paradigm and non-paradigm batteries. Consider these simple scenarios: (1) A shoots B from close range. The bullet contacts B almost instantly; (2) A uses a sniper rifle to shoot B. The bullet travels three kilometres in 10 seconds before contacting B; and (3) A fires a missile at B. The missile travels 50 kilometres in five minutes before contacting B. At what point is the temporal separation between A's act and the interference with B too great? How would a court justify where to draw the temporal line between a direct and indirect interference? Most tort scholars would instinctively conclude that each scenario involves a direct interference. The causal view reaches the same conclusion with a simple justification: only A caused the projectile to hit B in each scenario. There are also reasons to question whether temporal immediacy adequately captures a court's directness inquiry in non-paradigm cases.[179] This might explain why some tort scholars, including adherents of the temporal view,

176 Australian courts have generally adopted a narrow definition of 'voluntary acts' as described in *Haber v Walker* [1963] VR 339, 358–9 (Smith J) (emphasis added):

> In some contexts expressions such as 'voluntary act' and 'act of volition' are construed so widely as to cover any act which cannot be said to have been reflex or done without understanding of its nature and quality or due to irresistible impulse. In relation, however, to the principle of causation now in question, the word 'voluntary' does not carry this wide meaning; and for an act to be regarded as voluntary it is necessary that the actor should have exercised a free choice … *But if his choice has been made under substantial pressure created by the wrongful act, his conduct should not ordinarily be regarded as voluntary* …

See, eg, *Scott* (n 162) 527 (Blackstone J, dissenting) ('Willis [and] Ryal; who both were free agents and acted on their own judgment … have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves'), 528 (Gould J) ('[t]he terror impressed on Willis and Ryal excited self-defence … What [they] did, was by necessity…'), 529 (De Grey CJ) ('I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation'); *Platt* (n 161) 244 (Clarke JA) ('reflex action in response to a sensation of danger').

177 This conclusion captures one possible interpretation of the majority's decision in *Scott* (n 162): at 526 (Nares J), 528 (Gould J), 528–9 (De Grey CJ).

178 Rolph et al (n 31) 47.

179 Causal immediacy is not immune from the same criticism. The directness requirement is flexible and judges appear willing to use or even avoid the requirement to reach a favourable outcome. See, eg, *Scott* (n 162), where Nares J (Gould J agreeing at 528) was willing to impose liability based on the defendant's 'unlawful act', regardless of whether the contact with the plaintiff was direct or consequential: at 526, citing *Reynolds v Clark* (1724) 1 Str 634; 93 ER 747.

have questioned the role of the directness requirement in battery,[180] or suggested that temporal and causal immediacy are both relevant factors (or not mutually exclusive approaches) when determining whether an interference is direct.[181]

My aim is not to resolve the decades of confusion surrounding the directness requirement or recommend a single analytical view.[182] It is enough to say that my hypothetical involves a direct interference that fits comfortably within the paradigm from the perspective of either causal or temporal immediacy. The defendant trucker's positive and voluntary act (using the air horn) generated intangible objects (sound waves) which contacted Li's ears. There is causal immediacy because the defendant trucker's act is the only factual cause of the contact. The trucker defendant's use of the air or truck horn as a tool or instrument does not change this conclusion and render the interference indirect. Courts have long held that a battery may arise for acts short of the defendant physically touching the plaintiff's body.[183] For example, hitting someone with a stick[184] or projectile,[185] spitting[186] or coughing[187]

180 See, eg, Mogyoros (n 155) 32–5 (arguing that judges ask whether the defendant *intended to control or use* a 'new force' or 'independent agent' as an instrument to facilitate contact, meaning the directness requirement or causal immediacy 'is at its core a determination of the defendant's intentions … and is a superfluous element'). See also Ounapuu (n 163) 105, 108 (noting that directness is 'very much bound up with intention'); Nolan and Oliphant (n 31) 57 (similarly questioning whether there is any scope for a directness requirement (and temporal immediacy) in battery cases such as *Breslin v McKevitt* [2011] NICA 33, [17] (Higgins LJ for the Court) where the Court of Appeal of Northern Ireland held that terrorists were liable in battery for planting a bomb which exploded and injured victims 40 minutes later because the terrorists 'intended to injure or kill someone').

181 See, eg, Sullivan (n 113) 562 (referring to temporal immediacy *and* the absence or not of competing causal factors); Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 45–6 (referring to 'immediacy', 'no intervening event' and 'no new power' as 'factors' courts consider to 'determine whether the element of directness is present'); Rolph et al (n 31) 47 (suggesting that the majority's decision in *Scott* (n 162) is explained by 'the very short period of time between the defendant's initial act and the interference with the plaintiff' and the involuntary or necessary acts of the third parties should not, 'as a matter of law … properly bear on the question of the immediacy of the connection between the defendant's act and the interference with the plaintiff'); Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 36–7 (referring to a 'close connection' but allowing for 'some gap' between the defendant's act and contact and noting that an 'unbroken series of continuing consequences' is sufficiently direct according to *Scott* (n 162)).

182 Leaving aside any normative issues, it might be possible to preserve a role for directness without focusing on temporal immediacy and the defendant's intent to contact the plaintiff. One could, for example, follow Blackstone J's dissent in *Scott* (n 162) 526–8 and adopt an almost Newtonian approach to directness where, as a matter of 'physical reasoning' any new force interrupting the causal sequence between the defendant's act and the interference would render that interference (causally) mediate or consequential: see Noel M Swerdlow, 'Blackstone's "Newtonian" Dissent' in I Bernard Cohen (ed), *The Natural Sciences and the Social Sciences: Some Critical and Historical Perspectives* (Kluwer Academic Publishers, 1994) 205, 213–17.

183 Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 57; Nolan and Oliphant (n 31) 57.

184 *Darby v DPP (NSW)* (2004) 61 NSWLR 558, 572 [73] (Giles JA) ('*Darby*'); *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439, 444 (James J, Lord Parker CJ agreeing at 443) ('*Fagan*').

185 *Scott* (n 162) (involving fireworks); *Pursell v Horn* (1838) 7 LJQB 228; 112 ER 966 (involving water).

186 *R v Cotesworth* (1704) 6 Mod Rep 172; 87 ER 928; *Majindi v Northern Territory* (2012) 31 NTLR 150.

187 Michael Douglas and John Eldridge, 'Coronavirus and the Law of Obligations' [2020] *University of New South Wales Law Journal Forum* 3:1–11, 8 (arguing that a cough directed towards another person's face could amount to a battery).

on someone, and exposing someone to tear gas,[188] are all direct interferences. There are also several common law decisions canvased in Part III(B) that accept or do not outright reject the possibility that contact by sound waves or light constitutes a battery. These cases are not particularly elucidating; they do not discuss directness explicitly, but impliedly suggest that courts do not immediately or instinctively consider contact by intangible sources generated by an instrument as indirect. The relevant question is whether the defendant has controlled the instrument or object used to facilitate the contact.[189] This question relates to fault,[190] which I have previously addressed. A separate causal inquiry as to whether the air horn makes the contact by sound waves direct or indirect is unnecessary. Observing that the trucker defendant voluntarily and intentionally used an air or truck horn to propel the soundwaves towards Li simply describes *factually* the kind of force applied or contact made as part of the causal link or sequence.[191]

I pause here to briefly distinguish between perceptible natural forces (such as the tide and wind) which are potentially legally relevant factual causes and background natural forces (such as gravity) which are not. The latter are, of course, present in my hypothetical. But the interactions between sound waves and background natural forces are not generally perceptible without the aid of sophisticated scientific instruments. We cannot see, hear, or feel gravity interact with sound waves, for example.[192] Courtrooms are not laboratories and judges are not physicists running granular causal experiments. All battery claims, and indeed all human interactions, will include background natural forces. Judges and the parties are entitled to assume or take for granted these forces when determining or arguing for directness. Background natural forces are baked into the paradigm. When a defendant drops a brick on the plaintiff's foot, gravity is at work. When a defendant shoots the plaintiff with a bullet, natural background forces will influence the speed and trajectory of the bullet. When the trucker defendant uses a truck horn to contact Li using sound waves, natural forces will influence the speed and 'trajectory' of the sound waves. But no judge would or ought to ignore the initial force exerted by the defendant (the punch, firing the gun, or honking of the horn) and point to these background natural forces as reasons to deny a direct interference.

The interference in my hypothetical is also direct when analysed using the temporal view. Like A punching B, the sound waves generated by the trucker defendant's horn almost instantly contact Li's ears. There are no contributing factual causes that legally impact the temporal connection (or very small gap in time) between the trucker defendant's act and the contact.[193]

188 *Binsaris* (n 43).

189 *Fagan* (n 184) 444 (James J, Lord Parker CJ agreeing at 443).

190 See Mogyoros (n 155) 32–4.

191 Ibid.

192 Depending on the circumstances, one's perception of sound (hearing it under water) would entitle them to assume that an interaction (transmission, for example) had taken place.

193 One might ask whether this conclusion regarding directness causes legal incoherence. The concern is not difficult to characterise: if sound waves are a sufficiently *direct* interference with the plaintiff's person under battery, how could that interference also be an *indirect* interference with the plaintiff's use and enjoyment of property under private nuisance? In other words, interferences should be characterised as

B Sound Waves as 'Offensive Physical Contact'

The more difficult doctrinal hurdle for Li is demonstrating that the entry of soundwaves into her ears constitutes 'offensive physical contact'. No Australian court has determined this issue. The Victorian and English Appeal Courts, however, have accepted that 'contact' via the 'intangible' source of light may be offensive. In *Walker v Hamm*, Smith J concluded, and the Victorian Court of Appeal agreed, that a police officer touching an elderly woman's shoulder (a tangible interference) and then shining a torch light in her eyes (an intangible interference) constituted a battery.[194] The English Court of Appeal made similar remarks, albeit in obiter, in *Kaye v Robertson.*[195] The plaintiff was photographed while being treated for injuries at a hospital. Glidewell LJ was 'prepared to accept' that 'if a bright light is deliberately shone into another person's eyes and injures his sight, or damages him in some other way, this may be in law a battery'.[196]

While of potentially limited precedential value in Australia,[197] some United States authorities have specifically accepted, or at least refused to outright reject, the possibility of a sound-induced battery when the plaintiff is exposed to: (1) a high frequency/high-intensity tone transmitted over a phone line directed and/or controlled by the defendant;[198] (2) an unusually loud truck horn modified by the defendant;[199] (3) seizure-inducing images via a tweet where the defendant knew the plaintiff had epilepsy;[200] and (4) the 'alert tone' of a LRAD or sound cannon by

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direct or indirect consistently across the law of torts. This concern is misplaced because an actionable private nuisance includes *either* 'an indirect *or* intangible unlawful interference with the [plaintiff's] use and enjoyment of land … or an interest therein': Luntz et al (n 31) 849 (emphasis altered). See also Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 706. My hypothetical involves an amenity nuisance claim or an *intangible* interference (noise waves) with the plaintiff's use and enjoyment of their home; the defendant trucker has not indirectly caused physical harm to the plaintiff's land.

194 *Walker v Hamm* [2008] VSC 596, [307] ('*Walker*'); Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 58, noting that the police officer's conduct actually constituted a battery despite Smith J's use of the term 'assault'. In fact, his Honour appears to refer to 'assault' in the criminal law sense at various points in his reasons when actually referring to the tort of battery: see, eg, *Walker* (n 194) [23].

195 *Kaye* (n 143).

196 Ibid 68 (Glidewell LJ). Leggatt LJ offered no opinion. Bingham LJ (at [70]), however, remarked that '[b]attery and assault are causes of action never developed to cover acts such as these: they could apply only if the law were substantially extended and the available facts strained to unacceptable lengths'. Bingham LJ's comments should be read in their specific context and not as an outright rejection of Glidewell LJ's remarks. *Kaye* (n 143) was fundamentally about granting an injunction due to the defendant's 'monstrous invasion' of the plaintiff's privacy in hospital: at 70 (Bingham LJ). Each judge was clearly dissatisfied with the lack of protection for privacy rights under English statute and common law: at 66 (Glidewell LJ), 70 (Bingham LJ), 71 (Leggatt LJ).

197 Carter (n 160) [221]–[226] (rejecting the United States' approach to directness for battery). For detailed commentary on how courts have created a unique Australian tort law, see Francis A Trindade, 'Towards an Australian Law of Torts' (1993) 23(1) *University of Western Australia Law Review* 74; Mark Lunney, *A History of Australian Tort Law 1901–1945: England's Obedient Servant?* (Cambridge University Press, 2017) <https://doi.org/10.1017/9781108399609>.

198 *Hendricks v Southern Bell Telephone & Telegraph Co*, 387 SE 2d 593, 593–4 (Carley CJ) (Ga Ct App, 1989), but the matter appears to have settled after a new trial was ordered.

199 *Billups v United States*, 433 F Supp 3d 916, 918–23 (Novak J) (ED Va, 2020) ('*Billups*') where jurisdiction was declined due to statutory exclusion.

200 *Eichenwald v Rivello*, 318 F Supp 3d 766 (Md, 2018) ('*Eichenwald*').

police during a protest.[201] Hong Kong has similarly imposed criminal liability for batteries involving intentional noise exposure where: (1) a loudhailer is used as an implement to send out amplified sound at close range of someone's ears without consent;[202] and (2) whistling produces a loud and high-pitched sound near police at a major public demonstration.[203]

I turn to first principles to consider the question of whether noise waves constitute physical and offensive contact in Australia. At least one commentator has argued that recognising a battery for intentional noise exposure confuses 'physical contact' with 'feeling and perception via the sense organs'.[204] Battery, he argues, is 'directed to protect the autonomy of one's body, but not one's feelings, perception or senses'.[205] While I agree that battery is not primarily concerned with the plaintiff's 'feelings' in the sense of emotion, the experience of touch, which the tort of battery has always covered, is as much a sensory perception as the experience of hearing. Characterising an exposure to noise waves as a 'sensory perception' does not ultimately clarify the issue. Rather, at the uncertain edge of settled tort doctrine, disputed interpretations should be resolved by reference to the purpose or essence of a tort.[206] Since battery is fundamentally concerned with protecting our interest in physical or bodily integrity,[207] it makes little sense to impose liability in battery for a light touch on the ear, but to outright refuse to do so when sound is perceived by that same ear. Similarly, if shining light in someone's eyes is capable of constituting 'offensive physical contact', then surely exposing someone's ears to sound waves is too.

The real challenge for courts will be determining when being 'touched' by sound waves is 'offensive'. Clearly, if someone who creates sound waves is in 'physical contact' with anyone who can hear them, it does not follow that everyone who makes noise is liable to every listener. Australian courts have consistently held that contacts that fall within the general exception of 'ordinary conduct of

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201 *Edrei v New York*, 254 F Supp 3d 565 (SDNY, 2017) ('*Edrei*'), refusing to strike the battery claim. In 2021, the New York City Police Department settled the case, agreeing to ban the future use of the LRAD 'alert tone' and pay USD98,000 in damages to five plaintiffs and USD650,000 in legal fees: Colin Moynihan, 'NYPD to Limit Use of "Sound Cannon" on Crowds after Protesters' Lawsuit', *The New York Times* (online, 19 April 2021) <https://www.nytimes.com/2021/04/19/nyregion/nypd-sound-cannon-protests.html>.

202 *Hong Kong Special Administrative Region v Leung Chun Wai Sunny* [2004] 1 HKC 239.

203 *Hong Kong Special Administrative Region v Ki Chun Kei* (Hong Kong High Court of First Instance, Barnabus Fung Wah J, 16 September 2013) ('*Ki Chun Kei*').

204 Eric TM Cheung, Jacqueline Law and Sackville Leung, 'Sound Interference Found to Be Battery: Is the Judgment Sound? (Part 2)' [2013] (December) *Hong Kong Lawyer Journal* 56, 57. At the time of writing, Cheung, Law and Leung were correct that there were no common law cases recognising battery via an 'intangible' (or less tangible) source such as heat, light, or sound.

205 Ibid.

206 My approach is consistent with the dominant purposive approach to statutory interpretation in private law disputes in Australia: see Prue Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2015) 7–8, 101. But see Pam Stewart and Anita Stuhmcke, 'The Rise of Common Law in Statutory Interpretation of Tort Law Reform Legislation: Oil and Water or a Milky Pond?' (2013) 21(2) *Torts Law Journal* 126, which notes that the High Court's interpretation of civil liability legislation is not always consistent.

207 See above nn 43–5 and accompanying text.

daily life' or the 'exigencies of everyday life' are inoffensive.[208] There is no bright line test for offensiveness because, as Australian courts have stressed, this inquiry is highly contextual.[209] Judges and tort scholars, however, have often struggled to explain in what contexts the general exception applies to negate liability. As Nolan remarks, the boundary of the general exception is 'not easy to draw'.[210] Harold Luntz et al similarly observe that offensiveness can 'depend on fine distinctions drawn from oral evidence',[211] while David Rolph et al refer to cases where it is 'relatively clear [that] no liability should be imposed' but 'unclear on what basis liability should be denied'.[212]

While the offensiveness (or not) of contacts by sound waves may be less intuitive than more tangible contacts, judges are well-equipped to determine the matter. Existing precedents are one source of guidance. For example, a friend at a noisy party or a security officer raising their voices at someone to get their attention,[213] a noisy prank between teenagers, someone screaming at another to protect themselves from being touched,[214] or police yelling at people to create space for officers to respond to an incident might all qualify as 'inoffensive' or 'generally acceptable' sound-based contacts of daily life.[215] By contrast, screaming at a police officer during a lawful arrest,[216] someone raising their voice multiple times at someone in a short time span against the person's objections and for no legitimate reason,[217] a police officer yelling at someone without intending to

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208 The 'general exception' test is traced from the example in *Cole v Turner* (1704) 6 Mod 149; 90 ER 958, 958 (Holt CJ) of two people bumping into each other in a narrow passage, and more specifically to *Collins* (n 43) 378 (Goff LJ) and later *Re F* [1990] 2 AC 1, 73 (Lord Goff). Australian courts have embraced the test: see, eg, *Marion's Case* (n 31) 233, 265–6 (Brennan J), citing *Collins* (n 43) 378 (Goff LJ); *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, 112–14 [49]–[55] (Sheller JA, Priestley JA agreeing at 100 [1], Heydon JA agreeing at 115 [61]) ('*Rixon*'); *Binsaris* (n 43) 566 [41] (Gageler J). Implied consent was historically used as an alternative rationale to explain why some contacts did not amount to a battery: see, eg, *Wilson v Pringle* [1987] QB 237 ('*Wilson*') (rejecting Goff LJ's test as impractical and requiring hostility). See also Allan Beever, 'The Form of Liability in the Torts of Trespass' (2011) 40(4) *Common Law World Review* 378, 391 <https://doi.org/10.1350/clwr.2011.40.4.0228> (referring to an 'implied license' for ordinary touching). Modern courts and academics appear to prefer the general exception: Rolph et al (n 31) 67. However, this view is not universal: see, eg, Nolan and Oliphant (n 31) 56 (referring to the general exception test as 'eminently sensible' but wondering whether implied consent might provide a 'better explanation' of the outcome of some cases); *Scalera* (n 111) 567–8 [19]–[20] (McLachlin J, L'Heureux-Dubé, Gonthier and Binnie JJ joining), where the Canadian Supreme Court found it unnecessary to decide between implied consent and the general exception approaches.

209 *Rixon* (n 208) 113 [54] (Sheller JA, Priestley JA agreeing at 100 [1], Heydon JA agreeing at 115 [61]).

210 Nolan and Oliphant (n 31) 56.

211 Luntz et al (n 31) 738.

212 Rolph et al (n 31) 69.

213 See, eg, *Rixon* (n 208), where a security officer grabbed a casino attendee's shoulder to get his attention.

214 *Brighten v Traino* [2019] NSWCA 168, [39]–[43] (Basten JA, Gleeson JA agreeing at [134], Brereton JA agreeing at [137]). Self-defence might also apply.

215 But see Rolph et al (n 31) 68, arguing that at least some examples of contact by police should be dealt with under the defence of lawful authority, not the general exception test.

216 *Fede* (n 43) (where the defendant committed a battery when he lunged and bit the arresting officer wrongly believing during a drug-induced state that he was in physical danger).

217 *Darby* (n 184) 575–6 [82] (Giles JA) (a police dog kept nudging the plaintiff's genital area despite protests from the plaintiff and no reasonable suspicion to search; the police were not using the dog to attract the plaintiff's attention, nor was the dog nuzzling a pedestrian a physical contact of ordinary life).

arrest them,[218] police injuring the ears of bystanders when deploying a LRAD in an emergency,[219] loggers using chainsaws, drums and generators to cause 'hearing irritation' to protesters to force them to leave,[220] or a neighbour playing loud music 'day and night' that causes 'real health problems' for their neighbour[221] might all constitute 'offensive physical contacts' under current authority.[222]

Relying on historical case law to draw analogies is problematic if society's expectations of what constitutes an 'everyday contact' by sound changes.[223] Nor does an analogy alone necessarily clearly explain why a particular contact is offensive or not.[224] In my view, behind the offensiveness inquiry is a policy decision about what constitutes reasonable sound exposure in a noisy society. This requires a careful balancing of the plaintiff's interest in bodily integrity free from offensive noise exposures, with the defendant's interest in engaging in whatever activity that generates the sound waves.[225] Thus, factors relevant to other reasonableness inquiries in tort law, such as the 'reasonable interference' inquiry in private nuisance and the breach of standard inquiry in negligence, would help frame or guide this balancing. A judge might consider: (1) the timing and duration of the contact; (2) the severity and probability of the risk of harm from the contact;[226]

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218 *Collins* (n 43) (where the police officer grabbed a woman's arm without intending to arrest her).

219 See *Binsaris* (n 43), where the Northern Territory admitted that intentionally exposing the detainee plaintiffs to tear gas constituted a battery in the absence of lawful authority for the deployment of the CS gas to control another detainee at a youth detention facility: at 561 [23] (Gageler J). The other members of the Court concluded that the deployment was unlawful: at 560 [20] (Kiefel CJ and Keane J), 586 [110] (Gordon and Edelman JJ). Gageler J disagreed but concluded that a 'bystander who suffers collateral harm by reason of the necessitous use of force … is entitled to damages … for the simple reason that the use of force has interfered with the bystander's bodily integrity': at 569 [49].

220 See *McFadzean* (n 19) [2320] (Ashley J). The Court relied on (psychological) false imprisonment and public nuisance. Battery was pleaded but for other conduct.

221 *Raciti v Hughes* (1995) 7 BPR 14,837 (relying on private nuisance).

222 There are likely clear examples of contexts where exposure to loud noises is inoffensive. When people enter a dance club, go to a loud concert, or attend a raucous National Rugby League match, it is reasonable to conclude that people impliedly consented to the noise exposures associated with such events. Moreover, in such situations, people generally have a meaningful opportunity to leave the venue if the noise becomes intolerable.

223 Rolph et al (n 31) 68 (alluding to this point in reference to 'social contacts' and sexual harassment and the #MeToo movement).

224 See Christine Beuermann, 'Are the Torts of Trespass to the Person Obsolete? Part 2: Continued Evolution' (2018) 26(1) *Tort Law Review* 6, 11, which made this point with examples.

225 Ibid 10 suggests that, at least in England and Wales, courts are increasingly using the general exception test to possibly balance the competing interests of the parties after negligence was removed from the trespass torts. Arguably, courts have long contemplated this balancing role. As observed in *Wilson* (n 208) 253 (Croom-Johnson LJ for the Court): 'Although we are all entitled to protection from physical molestation, we live in a crowded world in which people must be considered as taking on themselves some risk of injury (where it occurs) from the acts of others which are not in themselves unlawful.' See also Stewart and Stuhmcke, *Principles of Tort Law* (n 31) 60, which appears to reference this passage.

226 It seems least controversial to suggest that exposure to sound waves is likely to constitute 'offensive physical contact' if the plaintiff sustains a physical injury: see, eg, *Billups* (n 199) 919 (where the plaintiff allegedly suffered 'permanent and bilateral high-frequency hearing loss and tinnitus'); *Eichenwald* (n 200) (where the plaintiff allegedly suffered permanent hearing loss); *Edrei* (n 201) (where there was alleged hearing damage). But see *Ki Chun Kei* (n 203) (where it was held the whistling exceeded generally accepted standards of conduct and so amounted to a battery). See also *Binsaris* (n 43) 563–9 [30]–[49] (Gageler J); Linden et al (n 31) 47 (referring to physically harmful contact as offensive). One

(3) the utility of the defendant's conduct; (4) whether the defendant acted with hostility;[227] (5) custom or other evidence of society's reasonable expectations in the 'noisy' circumstances;[228] and (6) any sensitivity of the plaintiff. A court would need to engage in a balancing exercise that is consistent with battery's focus on the plaintiff's interest in bodily integrity, which should receive more protection than other interests in tort law's hierarchy of protected interests. It may, for example, be appropriate for a judge to ignore or emphasise one or more factors in particular contexts. As Rolph et al suggest, we should expect courts to construe the general exception test narrowly, consider the factors from the plaintiff's perspective,[229] and resolve doubtful cases in the plaintiff's favour.[230]

Returning to my hypothetical, regardless of how the balancing takes place, a court would easily conclude that the sound waves Li was exposed to constitute offensive physical contact. It is true that residents who live in a capital city are exposed to the 'ordinary' noise associated with political protests.[231] Noise is an almost universal aspect of protests in Australia, whether through group chanting, speeches delivered via megaphones, the use of noise-makers, or important forms of cultural expression such as Indigenous drumming.[232] Police services use loud noise (whether through whistles, banging on shields, or through LRADs) as a tool for crowd control at demonstrations.[233] And despite some recent legislative changes to restrict protesting activity in Australia,[234] protests are and will likely remain noisy. But my hypothetical does not involve a 'typical' protest.[235] The sound pressure decibel level for air and

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could, of course, identify examples where people are exposed to sound waves that cause discomfort or pain but are not obviously 'offensive', such as briefly hearing an ambulance and police siren. I appreciate that a strict (and possibly only academic) view of the general exception test would require the contact to be offensive for a reason separate from proof of physical harm. One solution might be to engage in a forward-looking inquiry: assess the *risk* of physical harm to the plaintiff based on the timing and duration of the contact, balanced with the remaining factors.

227 Hostility or anger is not an element of battery: *Rixon* (n 208). However, its presence could support a finding of offensiveness, in the same way that hostility supports a finding of unreasonableness in private nuisance: Luntz et al (n 31) 866. But see Rolph et al (n 31) 62, suggesting that 'motive and malice are irrelevant in determining liability for battery, although the presence of either may affect the amount of damages awarded'.

228 Regulatory standards do not set the standard for liability in battery or tort law generally, but the breach of a health-based noise standard arguably supports a finding of offensiveness: see, eg, *Uren* (n 84) [220]–[241] (Richards J).

229 Rolph et al (n 31) 61. But see Beuermann (n 224) 12 (questioning whether courts can effectively balance the parties' interests only from the standpoint of the plaintiff).

230 Rolph et al (n 31) 68, citing *Scalera* (n 111) 567 [18] (McLachlin J, L'Heureux-Dubé, Gonthier and Binnie JJ joining), where the Supreme Court of Canada referred to the general exception approach as 'exceptional'.

231 This statement may require empirical testing.

232 Deborah Frances-White, 'What Do We Want? The Right to Noisy Protests. When Do We Want It? Now!', *The Guardian* (online, 24 June 2021) <https://www.theguardian.com/commentisfree/2021/jun/23/what-do-we-want-the-right-to-noisy-protests-when-do-we-want-it-now>.

233 McCutchan and Campbell (n 17).

234 See, eg, Heath Parkes-Hupton, 'NSW Parliament Passes New Laws Bringing Harsher Penalties on Protesters', *ABC News* (online, 1 April 2022) <https://www.abc.net.au/news/2022-04-01/nsw-new-protest-laws-target-major-economic-disruption/100960746>.

235 See David Tindall, 'Anti-vax Protest or Insurrection? Making Sense of the "Freedom Convoy" Protest', *The Conversation* (online, 21 February 2022) <https://theconversation.com/anti-vax-protest-or-

train horns can reach as high as 105 and 125, respectively.[236] Li was at least exposed to sound waves at 84 decibels – comparable to having a working lawnmower in one's living room[237] – and for a duration (12 to 18 hours a day for 10 days, and more occasionally for the next 13 days) capable of causing physical harm to her ears.[238] In fact, hearing loss is possible after someone is exposed to sound waves reaching 110 decibels after only two minutes.[239] This level of noise exposure would likely exceed state or local government noise restrictions or violate state road laws.[240] The defendant trucker also acted with hostility[241] and there are good reasons to question the utility of the honking as a form of political communication.[242]

I pause here to discuss *Walker v Hamm*[243] because it provides some insight into how a court might determine offensiveness (or balance the factors identified above) when, unlike my hypothetical, contact by an intangible force does not directly cause physical harm to the plaintiff. Police officers attended Walker's apartment in response to a domestic violence complaint. Walker's elderly mother suffered from a terminal illness and lived next door. The mother entered her son's apartment using a walking stick. The police officers asked her to leave. She did not do so immediately. One of the police officers approached the mother while holding a torch and tried to make her leave the apartment. The officer put his hand on the mother's shoulder and shined his torch in her face. The mother hit the officer with her walking stick to protect her son from being battered by the officers. The officer

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insurrection-making-sense-of-the-freedom-convoy-protest-176524>.

236 'Li Further Fresh Statement of Claim' (n 12) 43.

237 SafeWork Australia, 'Noise Hazards: Common Noise Sources and Their Typical Sound Levels in dB(A)' (Infographic, 2022) <https://www.safeworkaustralia.gov.au/sites/default/files/2022-09/nswm22_noise_infographic.png>. 'SafeWork NSW states exposure to noise above 85 decibels (dB) when averaged over 8 hours increases the risk of permanent hearing loss. Every 3dB increase after this doubles the risk of hearing loss': 'Noise from Public Events', *NSW Health* (Web Page, 6 November 2018) <https://www.health.nsw.gov.au/environment/factsheets/Pages/Noise-from-public-events.aspx>.

238 Rouleau (n 1) 193–4; 'Li Further Fresh Statement of Claim' (n 12); Tyler Dawson, 'More than Annoying: What Trucker Convoy's Nearly Nonstop Honking Could Be Doing to People in Ottawa', *National Post* (online, 4 February 2022) <https://nationalpost.com/news/canada/more-than-annoying-what-trucker-convoys-nearly-nonstop-honking-could-be-doing-to-people-in-ottawa>; Caroline Alphonso, 'Stress of Trucker Convoy Protest in Ottawa May Have Long-Lasting Effects on Residents' Health, Experts Say', *The Globe and Mail* (online, 6 February 2022) <https://www.theglobeandmail.com/canada/article-stress-of-trucker-convoy-protest-in-ottawa-may-have-long-lasting/>. As a matter of implied consent, the overwhelming public outcry, the hundreds of reports and noise complaints to police and by-law officers, and the class action itself strongly suggest that any plaintiff did not, and would not, consent to the extreme levels of noise they were exposed to during the occupation.

239 'What Noises Cause Hearing Loss?', *Centers for Disease Control and Prevention* (Web Page, 8 November 2022) <https://www.cdc.gov/hearing-loss/causes/>. The risk of hearing damage increases based on sound intensity and exposure time. See also 'Li Further Fresh Statement of Claim' (n 12) 43.

240 See, eg, *Road Rules 2014* (NSW) s 224 (limiting the use of horns to specific situations). Noise restrictions are often set at the state and local government level: see, eg, *Protection of the Environment Operations Act 1997* (NSW) pts 5.5, 8.6 ('*PEOA*'); *Protection of the Environment Operations (Noise Control) Regulation* 2017 (NSW) regs 6–8 ('*Noise Control Regulation*').

241 See my discussion of fault in Part III.

242 See, eg, '7 February Transcript' (n 141) 47–8 (McLean J) (suggesting that honking a horn 'is not an expression of any great thought' and wondering if the honking was necessary to draw attention to the Convoy).

243 *Walker* (n 194). But see *Carter* (n 160), which partly overruled the decision.

pushed the mother, and she dislocated her arm when she fell to the ground.[244] This injury accelerated the mother's terminal illness and she died before trial.[245] Her estate sued the police officers and the State of Victoria in battery and assault. Smith J held that the police officer

> put his hand on her right shoulder and, for reasons best known to him, shone his torch in her face. This was an assault and created a danger for her physical safety because of her lack of stability. … [C] cannot justify his actions with the torch. Again it was [C] who introduced an element of aggression.[246]

The Victorian Court of Appeal agreed with these factual findings and the legal conclusion regarding assault.[247]

Smith J and the Victorian Court of Appeal treated the shoulder touch and torch incident as a single 'action'[248] by the police officer and an 'assault' (but actually a battery) without explanation.[249] Perhaps this was done for convenience since both interferences seem to have occurred almost simultaneously. It is nevertheless difficult to conclude that either court would have reached a different liability conclusion had the police officer only shone light into the eyes of Walker's mother.[250] Smith J places importance on the utility of the officer's conduct with the torch (there was none),[251] that this conduct introduced 'an element of aggression' ,[252] and the risk of consequential harm the interference(s) posed to Walker's mother who was frail and lacked stability (assumedly, having light shined in your eyes would negatively impact your stability as much as, if not more than, being touched on the shoulder – proper sight is, after all, crucial to maintaining balance).[253] That the duration of the torch incident was short and there was no risk of harm to the mother's eyes (assumedly, separate from brief discomfort) did not matter. Citizens generally expect public authorities to carry out their duties lawfully and reasonably. A range of physical and non-physical contacts between the police and citizens is acceptable within a functioning society.[254] But a police officer choosing to expose an individual (vulnerable or not) to an intangible force (light or sound) for no legitimate reason and with aggression or hostility is arguably not a generally acceptable contact.

A final consideration is whether, in applying either the general exception or implied consent approaches, courts will capture too much noise and create a flood of

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244 *Walker* (n 194) [307]–[308], [313], [1037] (Smith J).
245 Ibid [646].
246 Ibid [307]–[308].
247 *Carter* (n 160) 22 [124], 23–4 [131]–[136], 25 [143]–[144] (Buchanan, Ashley and Weinberg JJA).
248 Ibid (n 160) 25 [144] (referring to the police officer's 'action' as an assault); *Walker* (n 194) [308] (Smith J) (referring to 'an assault').
249 The reasons of Smith J and the Victorian Court of Appeal largely focus on factual and evidentiary findings related to the defence of lawful justification and the assessment of damages, rather than liability.
250 The shoulder touch was clearly a battery. That a police officer's conduct is an 'act of aggression' against a 'physically unstable' elderly woman is arguably irrelevant to a determination of liability, especially when there is no breach of the peace: *Walker* (n 194) [297], [307]–[308], [316] (Smith J); *Carter* (n 160) 25 [144] (Buchanan, Ashley and Weinberg JJA).
251 *Walker* (n 194) [308] (Smith J).
252 Ibid.
253 Ibid [307].
254 See Rolph et al (n 31) 68.

unnecessary litigation.[255] This concern is unconvincing.[256] It is perhaps trite to observe that the boundaries of 'offensive' noise will be determined by the types of unsettled battery claims that come before the courts. Despite a paucity of empirical data,[257] I anticipate that reasonable people will generally avoid initiating a battery claim where they have not suffered any physical damage.[258] One reason for this is that people may not inherently recognise or understand the availability of a battery claim for less tangible contacts. Another reason is the practical disincentive of paying lawyer fees over a long period of time to pursue a tort claim for nominal damages.

IV SAFEGUARDING POLITICAL COMMUNICATION

This Part addresses the important question of whether imposing liability in battery for noise interferences will unjustifiably burden protesters' implied freedom of political communication ('IFPC') under the *Australian Constitution*.[259] Answering this question is not an academic exercise: defendants in the Ottawa Freedom Convoy class action recently and unsuccessfully moved to dismiss the proposed claim on the basis that it unduly limited their freedom of expression.[260] I anticipate that a similar motion would reach Australian courts because: (1) honking to protest government-mandated health measures likely qualifies as 'political

255 Recognising a noise-related battery also does not create the spectre of indeterminate liability. A defendant can reasonably determine the amount of liability to a class of plaintiffs over time based on the properties of sound waves (which cannot be heard in perpetuity) and any instruments used to generate them. Any arguments regarding indeterminate liability are capable of being addressed by battery's fault element. Take the example of the defendant firing a gun in a crowded mall. No court would refuse to hold the defendant liable in battery because the defendant argued he could not determine how many people the bullets would hit and when and where with 'complete accuracy': *Perre* (n 93) 199–200 [32] (Gaudron J), 255–6 [206] (Gummow J). The bullets contacting the plaintiffs were substantially certain to occur and the reckless defendant cannot disprove fault. The same logic applies to a defendant who recklessly generates sound waves.

256 James Goudkamp, 'New Torts' in David Rolph, John Eldridge and Timothy Pilkington (eds), *Australian Tort Law in the 21st Century* (Federation Press, 2024) 48, 62 ('[t]he bare fact that a particular wrong would, if recognised, often be committed is not a good reason for declining to admit its existence. Many extant wrongs are the subject of claims on a very large scale').

257 See Kenneth S Abraham and G Edward White, 'How an Old Tort Became New: The Case of Offensive Battery' (2024) 73(2) *DePaul Law Review* 185 (documenting an increase in offensive batteries in the United States since 1985 but finding only a small number of freestanding claims for contacts that were not physically harmful).

258 Put differently, a noise-related battery might more frequently arise with other tort claims, as was the case in *Walker* (n 194).

259 The High Court first recognised the IFPC in 1992 based upon the principle of representative democracy under sections 7 and 24 of the *Australian Constitution*: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1. While not absolute, the IFPC does protect the 'free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty': *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ), 430 [313] (Gordon J) ('*Brown*').

260 *Li v Barber* [2024] OJ No 547.

communication';[261] and (2) the High Court has routinely held that the common law must develop in conformity with the *Australian Constitution* through the indirect influence of constitutional values.[262] A detailed application of the High Court's structured proportionality enquiry is beyond the scope of this article;[263] however, I offer some brief commentary to support the conclusion that my doctrinal analysis from Part III does not require 're-expression' to conform with constitutional standards.[264]

The High Court would undoubtedly consider the tort of battery (or a request for compensation or an injunction as part of Li's claim) to 'effectively burden' the IFPC. However, most of the High Court Justices would likely not characterise the burden as high or substantial. The High Court in *Farm Transparency International Ltd v New South Wales* explained that the relevant burden is the 'incremental effect' of a tort on the 'ability of a person to engage in a communication which the law may already validly restrict'.[265]At least in the context of protests, my interpretation of 'offensive' contact would likely only impose liability where noise exposure meaningfully increases the risk of physical and/or mental harm. This type of noise is already prohibited by and exposed to sanctions under regulations and other torts.[266] There are no constitutional challenges to these sources of law.[267] Recognising battery for noise interferences would thus only slightly increase a protester's exposure to liability and/or higher damage

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261 The High Court has interpreted 'political communication' broadly: *Hogan v Hinch* (2011) 243 CLR 506, 543–4 [49] (French CJ). See, eg, *Levy v Victoria* (1997) 189 CLR 579 ('*Levy*') (where it included 'non-verbal conduct'); *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*') (where it included 'offensive' letters potentially causing mental harm); *Lenah* (n 56) 281 [195] (Kirby J) (where it included 'sounds'); *Clubb v Edwards* (2019) 267 CLR 171, 235 [195] (Nettle J) ('*Clubb*') (where it was held 'offensive political communication is not carved out as an exception'). But see '7 February Transcript' (n 141) 47–8 (McLean J) (curiously questioning the expressive value of the honking).

262 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–6 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534–5 [66]–[71] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Brown* (n 259) 451 [380] (Gordon J), citing *Monis* (n 261) 141 [103] (Hayne J). The Supreme Court of Canada had adopted a similar approach but with potentially more flexibility regarding the balancing of competing principles: *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1170–1 [95], [97] (Cory J, La Forest, Gonthier, McLachlin, Iacobucci and Major JJ joining).

263 For an incisive discussion of structured proportionality, see Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1. The majority of the High Court continues to endorse structured proportionality for the IFPC: *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1, 59 [250]–[251] (Edelman J) ('*Farm Transparency*') and, significantly, under section 92 of the *Australian Constitution*: *Palmer v Western Australia* (2021) 272 CLR 505, 527–8 [55]–[58] (Kiefel CJ and Keane J), 597–8 [264]–[266] (Edelman J) ('*Palmer*').

264 *Lenah* (n 56) 279–80 [192], 280–1 [194] (Kirby J).

265 *Farm Transparency* (n 263) 11 [37] (Kiefel CJ and Keane J), 22 [88] (Gageler J), 37 [158] (Gordon J), 52 [223] (Edelman J).

266 See, eg, *PEOA* (n 240) Dictionary (definition of 'offensive noise'), which defines offensive noise as that which is harmful or unreasonably interferes with the comfort or repose of persons who are outside the place where the noise is coming from; *Noise Control Regulation* (n 240) pt 2 divs 6–7, sch 1, providing restrictions on horns and alarms; 'Resolve Neighbourhood Noise Issues', *City of Sydney* (Web Page) <https://www.cityofsydney.nsw.gov.au/report-issue/resolve-neighbourhood-noise-issues>. See also the above discussion regarding offensiveness in Part III(B).

267 *Farm Transparency* (n 263) 37 [158] (Gordon J).

awards. More importantly, protesters could still use reasonable levels of sound and other methods of communication (blocking access, visual aids, etc) to effectively communicate their political message to avoid these outcomes.

It is true that the High Court in *Brown v Tasmania* split on the extent to which 'unlawful conduct', including tortious conduct, by protesters impacted the characterisation of the effective burden on IFPC created by anti-protest legislation.[268] However, this decision does not suggest that a legislative provision prohibiting protesters from committing a battery or criminal assault would have substantially burdened the IFPC and rendered the legislative provision invalid.[269] In fact, Edelman J observes that 'there is plainly no need, for example, to develop the common law in relation to assault to create a liberty by which persons can assault others for the purpose of political communication'.[270] The opposite, by implication, is also true: there is no need to prevent the development of battery to protect the liberty of protesters to commit a battery for the purpose of political communication.

Existing High Court jurisprudence strongly suggests that the vindication of the interest in bodily integrity is a legitimate end consistent with Australia's system of representative and responsible government.[271] Battery (or a request for appropriate compensation) is not attempting to merely 'regulate the civility of [political] discourse carried on by using' an air or truck horn.[272] I conclude that the tort of battery is 'reasonably appropriate and adapted'[273] to the protection of bodily integrity and thus consistent with the *Constitution* because: (1) there is a rational connection between the tort of battery and the vindication of bodily integrity (suitability); (2) for the reasons discussed in Part III, battery appropriately vindicates the interest in bodily integrity free from offensive noise under Barker's

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268 *Brown* (n 259). Kiefel CJ, Bell and Keane JJ characterised the burden as 'significant' without mentioning 'unlawful conduct': at 364–7 [105]–[118], 374 [152]. Gageler J rejected the relevance of 'unlawful conduct' and characterised the burden as 'direct', 'substantial', and 'discriminatory': at 382–9 [180]–[199]. On the other hand, Nettle J referred to the 'effective' burden as 'small' due to a 'substantial restriction on otherwise lawful protest activities': at 412 [269]. Edelman J found that 'legislation in relation to unlawful conduct cannot burden the implied freedom': at 502–3 [556]–[567].

269 The plurality acknowledged that protests concerning forest operations might involve 'physical interaction between protesters and machinery' and 'physical confrontations' with forestry personnel and it was activities of this kind that the legislation was directed to. However, Kiefel CJ, Bell and Keane JJ were most concerned with the breadth and vagueness of the anti-protest legislation, which would have captured lawful protest activities: ibid 353 [64]–[65].

270 Ibid 506 [563] (Edelman J).

271 See, eg, *Levy* (n 261) (regarding the maintenance of public safety or prevention of injury in the context of duck shooting); *Clubb* (n 261) 194–8 [44]–[60], 213–14 [120]–[123] (Kiefel CJ, Bell and Keane JJ), 235–6 [197] (Gageler J), 259–61 [256]–[259] (Nettle J), 328–9 [457]–[460] (Edelman J) (regarding the health, safety, wellbeing, privacy and dignity in the context of abortions); *Palmer* (n 263) (regarding the protection of citizens from disease or some other threat to health).

272 *Monis* (n 261) 173 [214] (Hayne J), citing *Coleman v Power* (2004) 220 CLR 1. Protecting bodily integrity from 'offensive' sound waves (even absent harm) is arguably distinguishable from the protection from 'emotional responses' from receiving 'offensive' mail, which are the 'ordinary and inevitable incidents of life': *Monis* (n 261) 131–2 [67] (French CJ), 163 [181] (Hayne J), 180–1 [242] (Heydon J). Hayne J also distinguished emotional responses from protection of bodily integrity and from psychiatric injury: at 170 [204], 171–3 [207]–[214].

273 *Farm Transparency* (n 263) 36 [153], 41 [172]–[173] (Gordon J).

vindicatory events 1 and 2 (necessity); and (3) the tort of battery achieves adequate balance between the 'obvious importance' of bodily integrity and the 'marginal benefit' of eliminating a 'small incursion' on the IFPC of potential tortfeasors, as discussed above.[274]

I am attentive to the concern that applying the tort of battery to noise interferences may have a minor but still normatively undesirable chilling effect[275] on the IFPC. Important social justice implications, for example, may arise if battery is used in strategic litigation against public participation ('SLAPP')[276] targeting marginalised groups that use sound as a tool to advance important causes, such as climate justice or Indigenous self-determination.[277] My response to this concern is two-fold. First, applying battery to noise-related interferences does not significantly increase the risk of a SLAPP being brought to silence a legitimate protest. Private nuisance, public nuisance, the economic torts, and defamation, not to mention criminal law, already apply and can impact 'noisy' protests. Adding a single dish to this existing legal buffet is unlikely to have an appreciable impact on SLAPP practices in Australia. Second, it makes little sense to restrict tort law's ability to vindicate bodily integrity across *all* contexts – especially those discussed in Part III(B) involving marginalised and vulnerable groups – over concerns that battery will possibly be used to support the illegitimate silencing of legitimate protests involving the same marginalised groups. And even if this were the case, a legislative response could help mitigate against this outcome without requiring undesirable inconsistencies within tort law's hierarchy of protected interests.[278]

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274 This analysis appears consistent with, for example, the proportionality enquiry in *Farm Transparency* (n 263) 15 [56] (Kiefel CJ and Keane J), 62–3 [263]–[264] (Edelman J).

275 The High Court has not 'fully grappled with how to address effectively the risk of a chilling effect on speech': Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 22, citing *Brown* (n 259) 409–10 [262] (Nettle J).

276 See, eg, Thalia Anthony, 'Quantum of Strategic Litigation: Quashing Public Participation' (2009) 14(2) *Australian Journal of Human Rights* 1 <https://doi.org/10.1080/1323238X.2009.11910853>. For an American perspective, see Timothy Zick, 'The Costs of Dissent: Protest and Civil Liabilities' (2021) 89(2) *George Washington Law Review* 233. See also Erica Goldberg, 'Competing Free Speech Values in an Age of Protest' (2018) 39(6) *Cardozo Law Review* 2163 <http://dx.doi.org/10.2139/ssrn.2925255>.

277 See, eg, Lawrence English, 'Voices, Hearts and Hands: How the Powerful Sounds of Protest Have Changed over Time', *The Conversation* (online, 10 June 2020) <https://theconversation.com/voices-hearts-and-hands-how-the-powerful-sounds-of-protest-have-changed-over-time-140192>; Kelsey Adams, 'Singing in the Face of Colonial Danger: Music's Place in Indigenous Resistance', *CBC Music* (online, 30 June 2022) <https://www.cbc.ca/music/singing-in-the-face-of-colonial-danger-music-s-place-in-indigenous-resistance-1.6504559>.

278 See, eg, *Protection of Public Participation Act 2008* (ACT) ('*PPPA*'). Whether such legislation is ultimately effective largely remains to be seen: see, eg, Evan Brander and James L Turk, 'Global Anti-SLAPP Ratings: Assessing the Strength of Anti-SLAPP Laws' (Research Paper, Centre for Free Expression, 23 March 2023) 8, 19–22 <https://cfe.torontomu.ca/publications/global-anti-slapp-ratings-assessing-strength-anti-slapp-laws> (concluding that Australia has weak anti-SLAPP law generally and relative to other countries and states); Anthony (n 276) (discussing limitations with the *PPPA* (n 278) and anti-SLAPP legislation generally).

V CONCLUSION

This article assessed a hypothetical battery claim for noise exposure in Australia using Canada's Freedom Convoy as a case study. I first set out the normative case for why battery ought to vindicate our interest in bodily integrity free from contact by offensive sound waves. My investigation revealed that, relative to private nuisance and negligence, battery: (1) more accurately 'marks' and 'declares' the plaintiff's right to bodily integrity and denounces the defendant's intentional wrong; and (2) improves access to appropriate compensation post-infringement for my hypothetical and other noise-related contexts. I then addressed the key doctrinal questions of whether and when noise exposure constitutes an actionable battery. I have shown that contact by sound waves is sufficiently immediate to fall within the common law's directness paradigm. I further demonstrated that physical contact by sound waves is capable of being 'offensive'. Finally, I addressed the concern that recognising a battery for noise-related interferences would be constitutionally impermissible. My hope is that this article offers guidance to Australian and other common law courts confronted by tort claims involving noise-related injuries.