

## TORTIOUS REMEDIES FOR DELIBERATE WRONGDOING TO VICTIMS OF HUMAN TRAFFICKING AND SLAVERY IN AUSTRALIA

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### I INTRODUCTION

Human trafficking, the modern day slave trade, is one of the most egregious human rights violations. Sadly, trafficking and slavery are perpetrated in Australia in the 21<sup>st</sup> century. People who are trafficked into forced labour or sexual servitude are deceived, abused physically and psychologically, frequently imprisoned and forced to work long hours with little or no wages, often under the most vile and inhuman conditions.

The true scale of human trafficking and slavery in Australia is not known but the Australian Federal Police force ('AFP') has established three Human Trafficking Teams<sup>1</sup> to investigate and combat trafficking in Australia and since 2004, the AFP has undertaken over 270 investigations of allegations of trafficking-related offences.<sup>2</sup> Victims are trafficked into Australia, most often from Asian countries, for exploitation in many ways including sexual servitude, domestic labour and forced labour in the construction, hospitality and agriculture industries.<sup>3</sup> Victims are lured into the human trafficking trade by deception and coercion. They are highly vulnerable because of poverty and their often desperate circumstances in their countries of origin. Victims are traumatised and suffer physical and psychological injury, in many cases lasting a lifetime. Human trafficking, slavery and servitude are grave violations of human rights which are perpetrated in Australia, often by Australian citizens. Australia has clear

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1 Australian Federal Police, *Stopping Human Trafficking* (2011) <<http://www.afp.gov.au/policing/human-trafficking.aspx>>; Australian Federal Police, 'Annual Report, 2008/09' (Report, Australian Federal Police, 2 September 2009) ch 3; Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government Response 1 May 2009 – 30 June 2010* (2010) 26.

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2010, 3188–91 (Brendan O'Connor).

3 Anti-People Trafficking Interdepartmental Committee, above n 1, 25.

obligations pursuant to international law to provide assistance and compensation to victims.

This article considers what tortious remedies in respect of deliberate wrongdoing are available to victims of human trafficking and slavery in Australia and the difficulties which victims might face in the pursuit of those remedies. Causes of action in respect of negligently inflicted harm are not considered because the conduct of traffickers and exploiters which causes harm to their victims is almost invariably deliberate or at the very least reckless and is therefore best redressed by tortious remedies in respect of deliberate wrongdoing. The tortious causes of action which would provide suitable remedies for victims of trafficking and slavery include the trespass to person, torts of assault, battery and false imprisonment as well as the cause of action first identified in *Wilkinson v Downton*<sup>4</sup> and the torts of deceit and conspiracy by unlawful means.

Certainly, tort law offers the prospect of suitable remedies for victims of trafficking and slavery in these causes of action but in such cases there are of course, many obstacles to any claim by a victim. These obstacles arise from the very nature of the cases and from the parlous situations in which victims find themselves: isolated from the community, physically and mentally distressed, having no money or financial security of any kind, and very fearful of incarceration or deportation because of their immigration status, often as unlawful non-citizens.<sup>5</sup> Further, many victims of trafficking remain unidentified or do not have access to legal advice and representation.<sup>6</sup> Other obstacles to civil suits arise out of the adversarial nature of the civil litigation process, the complexity and anonymity of trafficking syndicates, and the apparent lack of assets of many perpetrators.

Ultimately, there is no doubt that tort law has the capacity to provide a significant remedy for a victim of trafficking or slavery. Nevertheless, the practical advantage of a claim in tort will depend to a great extent on the availability of suitable legal representation and on the determination of the victim to see the litigation process through to a conclusion. The identification of defendants with sufficient assets to meet an award of damages will be crucial.

Not every victim of trafficking or slavery will be in a position to commence and maintain a common law claim, even with the benefit of expert pro bono legal advice. Legal advisers to victims need to be mindful not only of appropriate causes of action in tort and the evidentiary challenges they might face but also the practical difficulties in the prosecution of civil claims by victims. In many cases a common law claim will not be the answer. A victim may be better advised to pursue a claim under one of the Australian states' victims of crime

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4 [1897] 2 QB 57.

5 Anne T Gallagher, 'Prosecuting and Adjudicating Trafficking in Persons Cases in Australia: Obstacles and Opportunities' (Speech delivered at the National Judicial College of Australia Twilight Seminar on Human Trafficking, Sydney, 15 June 2009)  
<<http://njca.anu.edu.au/Professional%20Development/People%20Trafficking/Gallagher%20Judicial%20College%20Seminar.pdf>>.

6 Ibid.

compensation schemes or pursuant to employment legislation or in the event of a criminal prosecution, an application for an order for reparation pursuant to the *Crimes Act 1914* (Cth).<sup>7</sup> The establishment of a federal compensation scheme for victims of federal crimes would be a constructive and valuable measure to provide a certain pathway to compensation for victims of trafficking and slavery. Such a scheme would certainly ensure that Australia meets its international legal obligations to victims and would underscore Australia's commitment to human rights.

The first part of this article considers what constitutes human trafficking and slavery and the nature and extent of the problem in Australia as well as the Australian legislative response to its international obligations concerning trafficking and slavery. There follows a brief overview of available statutory avenues for compensation for victims. Part II of the article examines the advantages of a claim in tort with discussion of the most appropriate tortious causes of action in respect of intentional harm to victims as well as the issue of damages, in particular, exemplary damages. Part III of the article then investigates the obstacles and difficulties which may be encountered by a victim in bringing and maintaining civil proceedings for a claim in tort.

Before a detailed consideration of the appropriate tortious remedies, it is useful to consider the nature and extent of human trafficking and slavery in Australia and the legislative framework criminalising these human rights breaches, which has been enacted in response to Australia's international obligations.

## II HUMAN TRAFFICKING AND SLAVERY IN AUSTRALIA

### A Human Trafficking Defined

Human trafficking, as defined in the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*,<sup>8</sup> consists of three elements. The first element is the recruitment, transfer, harbouring or receipt of persons. The second element is the control of those persons by means of threats or force or abduction or deception or abuse of power or vulnerability or the provision of payments or benefits. The third element is the exploitation of the victim which includes at a minimum, by prostitution or other forms of sexual exploitation or forced labour or other services or slavery (or similar practices) or the removal of organs. So, movement of a person, combined with control by wrongful means and exploitation of that person amounts to human trafficking.

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7 Though this is a discretionary matter for the court: *Crimes Act 1914* (Cth) s 21B.

8 Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) art 3 (*Trafficking Protocol*).

Persons who are trafficked to Australia are typically recruited by deceptive means in one of several South East Asian countries,<sup>9</sup> then transported to Australia with passports, airline tickets and visas (many obtained fraudulently) often arranged by agents or traffickers located offshore.<sup>10</sup> On arrival in Australia in custody of local members of the trafficking syndicate (which might be a very loose association), victims are required to work without any or adequate payment, often under threat or in fear for their own safety and wellbeing or that of family members in home countries.<sup>11</sup> Most victims to date have been women who have been trafficked into the sex industry but increasingly, victims are men who are trafficked to work in various industries including construction, hospitality and agriculture.<sup>12</sup>

### **B Victims of Human Trafficking and Slavery in Australia**

The true extent of human trafficking and slavery in Australia is not known. There is little reliable data either at international or domestic levels. The 2010 Trafficking in Persons Report,<sup>13</sup> compiled by the US Department of State, marks the 10<sup>th</sup> anniversary of the United Nations adoption of the *Trafficking Protocol*.<sup>14</sup> The State Department report estimates that there are 12.3 million adults and children in forced labour, bonded labour, and forced prostitution around the world with 56 per cent of these victims being women and girls. The report further estimates that the annual trade in people trafficking is worth \$US 32 billion.<sup>15</sup>

In Australia between January 2004 and June 2010 the AFP conducted more than 270 investigations and assessments of human trafficking related offences leading to 39 cases being referred to the Commonwealth Director of Public Prosecutions.<sup>16</sup> The majority of these cases related to sexual servitude but a number involved labour exploitation.<sup>17</sup> These figures would represent only a proportion of actual cases of human trafficking in Australia, which, like other crimes against the person, would doubtless be significantly under-reported.<sup>18</sup> The circumstances of victims of trafficking and slavery make it especially likely that

9 Anti-People Trafficking Interdepartmental Committee, above n 1, 12.

10 Andreas Schloenhardt, Genevieve Beirne and Tony Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009) 32 *University of New South Wales Law Journal* 27, 33.

11 Ibid.

12 Anti-People Trafficking Interdepartmental Committee, above n 1, 25. See also Fiona David, 'Labour Trafficking' (Report No 108, Australian Institute of Criminology Research and Public Policy Series, 2010) 15.

13 Department of State (US), 'Trafficking in Persons Report' (Report, Department of State (US), 2010) <<http://www.state.gov/g/tip/rls/tiprpt/2010>>.

14 *Trafficking Protocol* annex II.

15 See also United Nations Office on Drugs and Crime, 'Global Report on Trafficking in Persons' (Report, United Nations, February 2009) <[http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf)>.

16 Anti-People Trafficking Interdepartmental Committee, above n 1, 25.

17 Ibid; Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to All Forms of Trafficking: Towards Rights-Centred Reform' (2010) 84 *Australian Law Journal* 712, 713–4.

18 Janet Phillips and Malcolm Park, 'Measuring Domestic Violence and Sexual Assault against Women: A Review of the Literature and Statistics' (E-Brief, Parliamentary Library, Parliament of Australia, 2004); David, 'Labour Trafficking', above n 12, 15.

they would be unknown to authorities and very reluctant to report their circumstances themselves. They are generally isolated from the community, most have limited English language ability and are very often fearful of authorities.

### C Australia's Criminal Law Framework

Whilst slave trading has been a criminal offence in Australia since when the *Slave Trade Act 1824* (UK) 5 Geo 4, c 113 was enacted by the English Parliament,<sup>19</sup> the Australian government recognised the growing problem of contemporary human trafficking in 1999 and in accordance with its international law obligations,<sup>20</sup> enacted legislation to criminalise human trafficking and modern day slavery in Australia.

Human trafficking (in persons and children),<sup>21</sup> domestic trafficking (in persons and children),<sup>22</sup> slavery,<sup>23</sup> and related offences of sexual servitude,<sup>24</sup> deceptive recruiting for sexual services<sup>25</sup> and debt bondage<sup>26</sup> are all crimes pursuant to schedule 1 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). The offence of trafficking in persons consists of the organisation or facilitation of the entry or receipt of a person into Australia through the use of force or threats<sup>27</sup> or deception<sup>28</sup> to obtain the victim's compliance. It is an offence to deceive a person about the fact that, on entering Australia, they will be required to provide sexual services, or exploited or subject to debt bondage or that their identity or travel documents will be confiscated.<sup>29</sup> Exploitation is defined to include forced labour, slavery, sexual servitude and organ removal.<sup>30</sup> Maximum penalties for these offences range from seven to 25 years in prison.<sup>31</sup>

Slavery is defined in section 270.1 of the *Criminal Code* as 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person'. This provision was considered and interpreted by the High Court of Australia in 2008 in the case of *R v Tang*.<sup>32</sup> Wei Tang had been

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19 The *Imperial Slave Trade Enactments* included *An Act for the Abolition of the Slave Trade 1807* (UK) 47 Geo 3, c 36; *Slave Trade Act 1824* (UK) 5 Geo 4, c 113; *Slave Trade Act 1843* (UK) 6 & 7 Vict, c 98; and *Slave Trade Act 1873* (UK) 36 & 37 Vict, c 88.

20 See below Part I(D) – Australia's International Obligations.

21 *Criminal Code Act 1995* (Cth) ss 271.1–271.4 ('*Criminal Code*').

22 *Criminal Code* ss 271.5, 271.7.

23 *Criminal Code* s 270.2.

24 *Criminal Code* s 270.6.

25 *Criminal Code* s 270.7.

26 *Criminal Code* s 271.8.

27 *Criminal Code* s 271.2(1).

28 *Criminal Code* ss 271.2(2), 271.2(2B).

29 *Criminal Code* s 271.2(2A).

30 *Criminal Code* Dictionary.

31 *Criminal Code* s 270.7(1) (inducing a person to enter into an engagement where they are deceived about providing sexual services) and s 270.3(1) (possess or exercise right of control over a slave) respectively.

For a discussion of all the relevant provisions, see Bernadette McSherry, 'Trafficking in Persons: A Critical Analysis of the New *Criminal Code* Offences' (2007) 18 *Current Issues in Criminal Justice* 385.

32 (2008) 237 CLR 1 ('*Tang*').

convicted of a slavery offence because she required five Thai women to work in her brothel without payment until they had each repaid a very substantial 'debt', effectively being the costs of having them trafficked to Australia. The High Court identified various powers attaching to the right of 'ownership'. Those were the power to use a person's labour in an unrestricted manner; to buy and sell a person; to control and restrict a person's movement; and entitlement to a person's labour without payment commensurate with the value of the labour.<sup>33</sup> The Court concluded that the nature and extent of the powers exercised by the defendant in the *Tang* case did amount to slavery.<sup>34</sup> The Court referred to the 'commodification'<sup>35</sup> of the victims in that case and the 'exercise of powers of control over movement which extend[ed] well beyond ... the most exploitative of employment circumstances, as well as the absence or extreme inadequacy of payment for services'.<sup>36</sup> The High Court's interpretation of the slavery provisions in the *Criminal Code* is relatively broad and flexible as it allows a consideration of the totality of the powers of ownership exercised over a victim without the requirement of any single or prescribed set of universal identifiers of enslavement.<sup>37</sup>

#### D Australia's International Obligations

The Australian criminal legislation concerning human trafficking and slavery is the direct response to the Australian government's international obligations pursuant to the *Trafficking Protocol* and other UN conventions including the *Convention to Suppress the Slave Trade and Slavery*,<sup>38</sup> the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956*,<sup>39</sup> the *Universal Declaration of Human Rights*<sup>40</sup> and the *International Covenant on Civil and Political Rights*.<sup>41</sup> All these prohibit slavery and servitude. Australia also has obligations pursuant to the International Labour Organisation *Convention concerning Forced or Compulsory Labour*.<sup>42</sup>

Pursuant to these international human rights treaties, Australia has an obligation to ensure effective remedies for victims of human trafficking and slavery in order to compensate them for harm suffered as a result of their

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33 Ibid 17–9 (Gleeson CJ).

34 Ibid 25 (Gleeson CJ).

35 Ibid.

36 Ibid 24 (Gleeson CJ).

37 For a discussion of the case, see Jean Allain, 'R v Tang: Clarifying the Definition of Slavery in International Law' (2009) 10 *Melbourne Journal of International Law* 246; Irina Kolodizner, 'R v Tang: Developing an Australian Anti-Slavery Jurisprudence' (2009) 31 *Sydney Law Review* 487.

38 Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 9 March 1927).

39 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957).

40 GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

41 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

42 Opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

experiences.<sup>43</sup> The United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that victims of crime have the right to timely redress for harm suffered.<sup>44</sup> The *Trafficking Protocol* itself requires states to ensure that their domestic legal systems offer victims the possibility of obtaining compensation<sup>45</sup> but does not stipulate how compensation is to be provided or from what source. The United Nations Working Group on Trafficking in Persons has suggested that various types of recovery action might meet the requirements of the *Trafficking Protocol*.<sup>46</sup> These include enabling victims to sue under statute or common law for civil damages; allowing criminal courts to make orders for restitution; and establishing victims' compensation schemes funded by the state.<sup>47</sup>

### E Statutory Compensation Options for Trafficking or Slavery Victims in Australia

Recourse to compensation by victims of human trafficking and slavery in Australia to date has been relatively rare.<sup>48</sup> This is because the Australian government's response to its international obligations has been focused on prevention, detection, investigation and criminal prosecution of perpetrators.<sup>49</sup> Whilst the Australian government has instigated and financed a support program

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43 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3) provides that where a person's rights have been violated, that person has a right to an 'effective remedy' including where appropriate, compensation: Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (29 March 2004) [15]–[16].

44 GA Res 40/34, UN GAOR, 3<sup>rd</sup> Comm, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, Agenda Item 98 (29 November 1985).

45 *Trafficking Protocol* annex II, art 6.6.

46 United Nations Working Group on Trafficking in Persons, *Report on the Meeting of the Working Group on Trafficking in Persons Held in Vienna on 19 October 2010*, UN Doc CTOC/COP/WG.4/2010/CRP.1 (30 March 2011).

47 The United States of America ('US') has created a special civil right of action for victims of trafficking: 18 USC § 1595. See Jennifer S Nam, 'The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims' (2007) 107 *Columbia Law Review* 1655.

48 See below fins 51, 52. Compensation claims are more common in the US where various avenues are open to victims: Daniel Werner and Kathleen Kim, *Civil Litigation on Behalf of Victims of Human Trafficking* (Southern Poverty Law Center, 3<sup>rd</sup> ed, 2008). See also the general discussion in Note, 'Remedying the Injustices of Human Trafficking through Tort Law' (2006) 119 *Harvard Law Review* 2574. The position in the United Kingdom is discussed in Janice Lam and Klara Skrivankova, 'Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK' (Report, Anti-Slavery International, October 2008).

49 Anti-People Trafficking Interdepartmental Committee, above n 1.

for victims,<sup>50</sup> the issue of compensation has not been at the forefront of its efforts.

In Australia, there is no government funded national scheme of compensation for victims of crime at the federal level and none is proposed, though it has been suggested from various quarters.<sup>51</sup> Any claim for compensation against a victim of crime compensation scheme must be made pursuant to one of the numerous state or territory schemes.<sup>52</sup> In NSW and Victoria there have been to date, only two cases of trafficking victims making successful claims under the statutory criminal victims' compensation scheme,<sup>53</sup> though there are several cases which have now been commenced in those states and are awaiting resolution.<sup>54</sup> Such claims by trafficking victims against state criminal injuries compensation schemes will no doubt become more numerous in the future, at least in cases which can be brought within the state statutory parameters. Given that the crimes of human trafficking and slavery are such gross violations of human rights committed within Australia, a federal compensation scheme making specific provision for victims would be desirable and in compliance with Australia's international obligations to victims.<sup>55</sup> Funding for such a scheme might be sourced at least in part, from proceeds of crime funds confiscated by the Commonwealth pursuant to the *Proceeds of Crime Act 2002* (Cth) which establishes a scheme to trace, restrain and confiscate proceeds of Commonwealth

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- 50 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Anti-People Trafficking Strategy* (6 January 2011) <<http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx>>. The Australian government's Support Program for Victims of Trafficking provides accommodation, financial assistance and access to legal advice for trafficked persons. The Australian Red Cross administers the program together with the Office for Women: Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government Response January 2004 – April 2009* (2009) 29.
- 51 Anti-Slavery Project, *Strengthening Australia's Response to Human Trafficking: Report to the Australian Women's Coalition* (2010) 30; Law Council of Australia, Submission to Attorney-General's Department, Australian Government, *Consultation on the Criminal Justice Response to Slavery and People Trafficking: Reparation and Vulnerable Witness Protections*, 30 March 2011. See also Frances Simmons, 'The Criminal Justice Response to Trafficking and Reparations: Pathways To Justice for Trafficked People' (Paper presented at Forced Labour Seminar, Anti Slavery Project, University of Technology, Sydney, 18 February 2011) <<http://www.antislavery.org.au/newsflash/158-the-criminal-justice-response-to-trafficking-and-reparations.html>>.
- 52 *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 2006* (NT); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA).
- 53 In May 2007, The Age reported that a 'former child sex slave has become the first person in Australia to be compensated as a victim of sex trafficking': Natalie Craig, 'Sex Slave Victim Wins Abuse Claim', *The Age* (Melbourne), 29 May 2007, 4. The award of compensation made by the NSW Victims Compensation Tribunal was not in respect of a trafficking offence but rather because the young woman was a victim of sexual assault with a minor, a state criminal offence. In Victoria in 2010 a trafficked woman was awarded almost \$30 000 under the *Victims of Crime Assistance Act 1996* (Vic): see Simmons, above n 51.
- 54 Associate Professor Jennifer Burn, Director of the Anti Slavery Project at the University of Technology, Sydney, who provides legal advice and representation to victims, advised the author that there are several cases awaiting resolution in 2010–11 in the NSW Victims Compensation Tribunal.
- 55 Anti Slavery Project, above n 51, recommendation 3, 39.



crime. These funds have been used to finance various projects to assist victims of crime,<sup>56</sup> but the Act does not at present allow for confiscated proceeds of crime to be used to compensate victims.

Pursuant to section 21B of the *Crimes Act 1914* (Cth), if a person is convicted of a federal offence the court may in addition to any penalty imposed on the offender, order that the offender make reparation to any person in respect of any loss suffered as a direct result of the offence. The order for reparation is to be treated as a final judgment of the court and is enforceable accordingly. To date no such order has been made in relation to a trafficking or slavery offence.<sup>57</sup> The power to order reparation is discretionary and as the court may take into account the defendant's financial situation,<sup>58</sup> an order may not reflect the victim's actual loss. Further, section 21B does not explicitly provide for reparation orders to include non-economic loss such as pain and suffering or loss of amenity of life though it has been suggested that there is an implicit inclusion of such injury in the term 'loss suffered'.<sup>59</sup> The Australian Attorney General has recently called for submissions in response to a discussion paper which addresses, amongst other issues, the question of whether section 21B of the *Crimes Act 1914* (Cth) adequately provides for reparation orders to be made for victims of people trafficking.<sup>60</sup>

There is scope within the Australian industrial legislation, the *Fair Work Act 2009* (Cth) for victims of labour exploitation to recover unpaid wages from a perpetrator, notwithstanding that their immigration status may be irregular.<sup>61</sup> The Office of the Fair Work Ombudsman undertakes investigations and assists workers to recover unpaid entitlements.<sup>62</sup> The Fair Work Ombudsman undertook more than 800 such investigations involving foreign workers (some of whom would certainly have been trafficking victims, though there is no statistic) in 2009–10. More than \$500 000 in unpaid entitlements was recovered and repaid.<sup>63</sup> In addition, there has been at least one successful prosecution by Fair Work

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56 Attorney-General's Department, *Overview of the Proceeds of Crime Act 2002* (20 September 2011) <[http://www.ema.gov.au/agd/WWW/ncphome.nsf/Page/POCA\\_funding\\_for\\_Non-Government\\_Agencies](http://www.ema.gov.au/agd/WWW/ncphome.nsf/Page/POCA_funding_for_Non-Government_Agencies)>.

57 Simmons, above n 51.

58 *Vlahov v Federal Commissioner of Taxation* (1993) 26 ATR 49.

59 Attorney-General's Department (Cth), 'The Criminal Justice Response to Slavery and People Trafficking: Reparation; and Vulnerable Witness Protections' (Discussion Paper, Australian Government, 25 November 2010) 21–4 ('Criminal Justice Response to Slavery and People Trafficking').

60 *Ibid.* See also Law Council of Australia, above n 51.

61 *Fair Work Act 2009* (Cth) pts 2-2, 4-1.

62 Anti-People Trafficking Interdepartmental Committee, above n 1, 18.

63 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2010, 3188–91 (Brendan O'Connor).

Australia in a case of extreme labour exploitation in circumstances where a trafficking or slavery conviction was not able to be obtained at criminal law.<sup>64</sup>

In addition to these statutory avenues of compensation, a victim will have a remedy under the common law of tort, which in appropriate cases will have some significant advantages over those other remedies.

### III TORTIOUS REMEDIES FOR VICTIMS OF TRAFFICKING AND SLAVERY IN AUSTRALIA

#### A Advantages of a Claim in Tort

There is no doubt that a trafficking or slavery victim will face some significant hurdles to a claim in tort. These arise by virtue of the very nature of a common law claim in the adversarial system, which will almost inevitably lead to cross-examination of the victim. In many cases victims will wish to avoid the discomfort of a civil trial involving facing their traffickers and perhaps even re-traumatisation.<sup>65</sup> A plaintiff needs to be steeled to see the often lengthy civil litigation process through to a conclusion. Other procedural and practical obstacles to a claim in tort are discussed in Part III below.

Yet, there are distinct advantages of a claim in tort. Tort law offers a remedy in damages which are significant and which have an incalculable vindicating effect for the individual plaintiff.<sup>66</sup> Tortious damages offer the possibility of an award which would be significantly larger than the maximum sums available pursuant to statutory compensation schemes.<sup>67</sup> Tort law provides justice for a victim and punishment at least financially, of a perpetrator, especially in cases where no criminal prosecution has been brought by federal police or where it may have been unsuccessful because of evidentiary or other difficulties. The possibility of an award of aggravated or exemplary damages against a defendant provides not only vindication and retribution but also must have some deterrent effect.<sup>68</sup>

Additionally, an apology might be considered. Whilst the common law courts do not have the power to order an apology, one might be given on settlement of a claim. There is growing recognition of the value of an apology in civil proceedings especially where the plaintiff has suffered injury to dignity and

64 In the case of *R v Yogalingam Rasalingam* (Unreported, District Court of New South Wales, Puckeridge DCJ, 2 November 2007), the defendant was acquitted by a jury of a trafficking in persons charge, though he was convicted of a lesser charge of misleading a Commonwealth official in the immigration process.

In *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288 (13 March 2008), the defendant's company was ordered to pay a penalty in respect of 10 breaches of the relevant award.

65 Attorney-General's Department, 'Criminal Justice Response to Slavery and People Trafficking', above n 59, 11.

66 For a discussion of vindication and tortious damages generally, see Normann Witzleb and Robyn Carroll, 'The Role of Vindication in Torts Damages' (2009) 17 *Tort Law Review* 16.

67 Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, 2001).

68 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

violation of human rights.<sup>69</sup> At common law, admissions of regret or apologies will not necessarily constitute admissions of liability.<sup>70</sup> Parliaments clearly acknowledge the worth of an apology as one in a suite of remedies available in various kinds of civil proceedings<sup>71</sup> and in most Australian jurisdictions an apology in a negligence claim will not be admissible as an admission of liability.<sup>72</sup>

The law of tort has shown itself to be particularly adept at evolving to accommodate changing social demands and emerging notions of justice. Indeed McHugh J has lauded the ‘genius of the common law’ whereby ‘principles are modified and expanded by the pressure of changing social conditions and the experience of their practical application in the life of the community’.<sup>73</sup> The tortious causes of action discussed below would in the main, accommodate a claim by a victim of trafficking or slavery without the need for extension of existing common law principles. In a case where some extension or modification of existing law would be warranted to do justice to a claim, the common law certainly has that capacity.

To date there have been no reported cases of trafficked persons successfully seeking tortious damages at common law in Australia, though there have now been isolated successful cases in England.<sup>74</sup>

There are several tortious causes of action at common law which would be available to victims of trafficking and slavery in Australia, depending on the circumstances of their cases. Clearly in many cases, victims will have been subjected to physical threats and abuse which would give rise to claims in tort for assault and battery and of course, in many instances victims will have been falsely imprisoned. Other tortious causes of action which might be considered are the action on the case in *Wilkinson v Downton*<sup>75</sup> in respect of psychiatric injury and the torts of deceit and conspiracy by unlawful means. These various causes of action would allow recovery of damages for personal injury where appropriate

69 Prue Vines, ‘The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?’ (2007) 1 *Public Space: The Journal of Law and Social Justice* 3 <<http://eprint.lib.uts.edu.au/ojs/index.php/publicspace/article/viewFile/535/482>>; Robyn Carroll, ‘You Can’t Order Sorrowiness, So Is There Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases’ (2010) 33 *University of New South Wales Law Journal* 360; Craig Brown, ‘Apology Legislation: Oiling the Wheels of Tort’ (2009) 17 *Tort Law Review* 127; Chris Wheeler, ‘The Power of Sorry’ (Paper presented at the Local Government Governance Gathering, Sydney, 16 February 2011).

70 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317.

71 By way of examples, apology orders are available pursuant to: *Anti-Discrimination Act 1977* (NSW) s 108(2)(d); *Anti-Discrimination Act 1991* (Qld) s 209(1); *Federal Court of Australia Act 1976* (Cth) s 23 (in federal anti-discrimination cases); *Privacy and Personal Information Protection Act 1998* (NSW) s 55(2)(e).

72 *Civil Liability Act 2002* (NSW) s 69; *Civil Liability Act 2003* (Qld) s 72; *Civil Liability Act 1936* (SA) s 75; *Civil Liability Act 2002* (Tas) s 7; *Wrongs Act 1958* (Vic) s 14J; *Civil Liability Act 2002* (WA) s 5AH; *Civil Law (Wrongs) Act 2002* (ACT) s 14; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 13.

73 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 585 (McHugh J).

74 *AT v Dulghieru* [2009] EWHC 225 (QB).

75 [1897] 2 QB 57.

as well as for financial losses and property damage. In some instances aggravated and exemplary damages may be available especially given that human trafficking and slavery are such gross violations of human rights.

The following part of this article considers the most appropriate tortious common law actions which would be available to victims of trafficking and slavery in Australia and the types of damages which might be recoverable.

## B Trespass to Person – Assault and Battery

In many trafficking and slavery cases victims would have actionable tort claims against the perpetrators in trespass to person for assault or battery (which in many cases will be sexual battery). There have been criminal and employment law prosecutions in Australian trafficking cases where proven facts clearly demonstrate the elements of the torts of battery or assault.<sup>76</sup> The victims could have succeeded in civil claims in tort had they had the opportunity and means to commence and maintain proceedings. Of course, such tortious claims are only practically worthwhile in cases where the defendants have the means to satisfy any award of damages, though in several of the cases mentioned above, the defendants clearly had businesses or assets which should have been available to satisfy a judgment.<sup>77</sup>

To succeed in a claim for battery a plaintiff need simply prove an intentional act by the defendant, which directly causes a contact with the plaintiff's body.<sup>78</sup> In the 2010 Queensland case of *R v Kovacs*<sup>79</sup> where the defendant husband and wife were convicted (at a re-trial following a successful appeal) of using and possessing a slave,<sup>80</sup> the victim was a woman who had been brought to Australia by the defendants by way of a sham marriage. She was required to work at the defendants' home and in their business without payment, being effectively imprisoned. The original trial court had heard evidence that the male defendant had repeatedly sexually assaulted the victim.<sup>81</sup> Clearly a claim at common law in battery would be maintainable by the victim, as would a claim in false imprisonment.

A tortious assault is constituted by an intentional act by a defendant, which directly causes an apprehension of imminent physical contact by the plaintiff.<sup>82</sup> A victim of slavery and trafficking will often have been subjected to threatening conduct or words, which would amount to tortious assaults. The case of *R v*

76 *R v Kovacs* [2009] 2 Qd R 51; *Tang* (2008) 237 CLR 1; *R v McIvor* [2010] NSWDC 310 (17 December 2010); *R v Dobie* (Unreported, Queensland District Court, Clare J, 18 December 2008) (unsuccessful appeals [2009] QCA 394 (18 December 2009), [2010] QCA 34 (26 February 2010)).

77 *R v Kovacs* [2009] 2 Qd R 51; *Tang* (2008) 237 CLR 1; *R v McIvor* [2010] NSWDC 310 (17 December 2010).

78 *Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218.

79 *R v Kovacs* [2009] 2 Qd R 51.

80 Zoltan Kovacs entered a plea of guilty and was sentenced in the Queensland District Court on 18 February 2010 and Melita Kovacs was convicted by a jury after a re-trial in the Queensland District Court on 14 February 2010.

81 *R v Kovacs* [2009] 2 Qd R 51, 62–3.

82 *New South Wales v Ibbett* (2006) 229 CLR 638, 644 (Gleeson CJ).

*McIvor*<sup>83</sup> provides a useful example. There, the defendants were convicted of possessing and using slaves. They had brought five Thai women to Australia, with the assistance of an agent in Thailand. The women were required to work in brothels to pay off 'debts' of between AUD \$35 000 and \$45 000. The sentencing judgment records that the victims were kept in confinement at the defendants' premises or at the brothels at which they worked. Some victims were subjected to humiliating and degrading treatment by the defendants and were subjected to threats that they, or their families in Thailand, would be harmed if they escaped.<sup>84</sup> Claims in tort for false imprisonment (discussed below) and assault and battery would be appropriate in these cases.

The plaintiff in an assault claim must establish that the defendant's threat caused a reasonable apprehension of imminent physical contact.<sup>85</sup> For the victims in the *McIvor* case, and for others in similar situations, this issue is one which must be carefully addressed. The threats in the *McIvor* case do not seem to have been couched in 'immediate' terms. Rather the threat is of unspecified danger or ill treatment of the victim at some uncertain point in the future. There is however Australian authority to the effect that a threat which will be carried out at some unknown future time may nevertheless be a threat of imminent contact where the plaintiff has no way of knowing how closely in time or where the threat might be carried out.<sup>86</sup> In *Zanker v Vartzokas*, White J opined that there would be an assault where:

fear was a continuing fear induced by [the] original words in a situation where [the defendant] remained in a position of dominance and in a position to carry out the threatened violence at some time not too remote, thus keeping the apprehension, the gist of the assault, ever present in the victims mind.<sup>87</sup>

This characterisation of the nature and effect of the threat required to ground an assault claim, is a useful one in a trafficking or slavery case. There, the threat once made, or repeated intermittently, has a continuing effect on the victim who remains in fear of personal injury, in the event of an attempt to leave the defendant's premises or general control.

The threats made in these situations are usually conditional in the sense that the victim is told that the threat will be carried out if he or she runs away or tells anyone of the exploitative situation, the inference being that if the plaintiff is compliant there is no likelihood of injury. There is ample authority to the effect that conditional threats are nevertheless capable of being assaults.<sup>88</sup>

### C False Imprisonment

To succeed in an action in the tort of false imprisonment, a plaintiff must prove total deprivation of liberty directly brought about by intentional actions of

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83 [2010] NSWDC 310 (17 December 2010) ('*McIvor*').

84 *Ibid* [20], [22], [26], [33] (Williams DCJ).

85 *Stephens v Myers* (1830) 172 ER 735; *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98.

86 *Zanker v Vartzokas* (1988) 34 A Crim R 11.

87 *Ibid* 18.

88 *Rozsa v Samuels* [1969] SASR 205; *Read v Coker* (1853) 13 CB 850.

the defendant.<sup>89</sup> Because it is one of the trespass to person torts (like assault and battery), false imprisonment is actionable without proof of any actual damage.<sup>90</sup> This aspect distinguishes the trespass torts from the actions on the case discussed below or negligence, which require proof of damage as an element of the torts. The tort of false imprisonment will provide a remedy for most victims of trafficking or slavery because some degree of restriction of freedom of movement is almost universally imposed on victims by traffickers or those who enslave.<sup>91</sup> Where the degree of restriction of movement can be shown to be total, the victim will have a remedy in the tort of false imprisonment.

Some victims of human trafficking and slavery may be literally imprisoned and kept under lock and key for varying periods of time by those who traffic or exploit them. But many victims may be less obviously held captive by those who exploit them, who may use more subtle means of control. The victim is however, arguably, no less incarcerated. The modern tort of false imprisonment<sup>92</sup> should provide a remedy in these situations where the imprisonment is not physical but psychological. In such cases the victim succumbs entirely to the power and authority of the exploiter by virtue of fear of apprehension by authorities or of deportation or of some unspecified consequences that might befall the victim or family members in a country of origin.<sup>93</sup>

In the case of *Tang*,<sup>94</sup> the High Court referred to the findings of fact of the trial judge as to the circumstances in which the five female victims of Wei Tang were confined to the premises of the defendant:

The complainants' passports and return airfares were retained by the respondent. This was done so that the passports could be produced to immigration authorities if necessary, and also so that the complainants could not run away. The complainants lived in premises arranged by the respondent, where they were lodged and fed, and their medical requirements attended to. The evidence was that the complainants were well-provisioned, fed, and provided for. The complainants were not kept under lock and key. Nevertheless, the trial judge said that, in the totality of the circumstances, the complainants were effectively restricted to the premises. On rare occasions they ventured out with consent or under supervision. The circumstances to which the trial judge referred included the hours of work involved, as well as control by way of fear of detection from immigration authorities, fear of visa offences, advice to be aware of immigration authorities, advice to tell false stories to immigration authorities if apprehended, and instructions not to leave their accommodation without the respondent, DS or the manager of the brothel.<sup>95</sup>

89 *Bird v Jones* (1845) 7 QB 742.

90 *Murray v Ministry of Defence* [1988] 1 WLR 692, 703 (Griffith LJ); *Myer Stores Ltd v Soo* [1991] 2 VR 597, 633 (Murphy J). See also David Howarth, 'Trespass and Intentional Interference with the Person' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10<sup>th</sup> ed, 2011) ch 2.

91 Schloenhardt, Beirne and Corsbie, above n 10.

92 Francis A Trindade, 'The Modern Tort of False Imprisonment' in Nicholas J Mullany (ed), *Tort in the Nineties* (Lawbook, 1997) 229.

93 Threats of force to persons other than the plaintiff or to property have been held to be sufficient for criminal false imprisonment: *R v Garrett* (1988) 50 SASR 392, 402 (King CJ), 405 (Von Doussa J). See also the Canadian decision in *Chaytor v London, New York & Paris Association of Fashion Ltd* (1961) 30 DLR (2d) 527 where the court referred to a "psychological type of imprisonment".

94 (2008) 237 CLR 1.

95 *Tang* (2008) 237 CLR 1, 14–15 (Gleeson CJ).

It is submitted that these circumstances would constitute the tort of false imprisonment. In *McFadzean v Construction, Forestry, Mining & Energy Union*<sup>96</sup> the Victorian Court of Appeal observed that:

Although the idea of false imprisonment is sometimes expressed in terms of a restriction on liberty which must be total that does not mean that a restriction short of lock and key may not be actionable. In each case, it is a question of fact as to whether a restriction is so severe as to be characterised as false imprisonment.<sup>97</sup>

There is significant authority to support the assertion that where, in the absence of any physical restriction on movement, a person wholly submits to the authority and control of another, that will amount to imprisonment.<sup>98</sup> In *Watson v Marshall* for example, the High Court exercising original jurisdiction, found:

the plaintiff had a justified apprehension that, if he did not submit to do what was asked of him, he would be compelled by force to go [with the defendant] ... Therefore a restraint was imposed upon the plaintiff which amounted to an 'imprisonment' of him by the defendant.<sup>99</sup>

Similarly, in *Symes v Mahon*,<sup>100</sup> Murray CJ of South Australia held that 'where there has been no application of physical force to the person alleging imprisonment, there must be evidence of complete submission by him to the control of the other party'.<sup>101</sup>

This aspect of the tort of false imprisonment was dealt with at some length by the Victorian Court of Appeal in *McFadzean*.<sup>102</sup> This was a case concerned with the question of whether a group of 'anti-logging' protesters were imprisoned in a forest by the intimidating actions of a group of 'pro-logging' workers. Ultimately, the Court held that the plaintiffs had not been falsely imprisoned because they had a reasonable means of egress by a physically difficult but in the circumstances, not unreasonable, walk out of the forest. Importantly the Court held that the plaintiffs had remained in the forest not primarily because of the defendants' actions but rather because the plaintiffs had their own reasons for remaining at the site, independent of the defendants' conduct. The Court held that:

it remains that the essence of the action of false imprisonment is the compelling of a person to stay at a particular place against his or her will. Accordingly, where a plaintiff has full knowledge and comprehension of the defendant's coercive conduct amounting to total restraint, the action depends upon proof that, were it not for the defendant's conduct, the plaintiff would not have submitted to the restraint. Consequently, it is not sufficient in law that conduct of the defendant have [sic] contributed to or influenced the plaintiff's decision to remain unless the conduct has overborne the plaintiff's will. It must be shown that, but for the defendant's conduct, the plaintiff would not have yielded to the total restraint; that the plaintiffs' determination to remain was a coercive consequence of the defendant's acts.<sup>103</sup>

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96 (2007) 20 VR 250 (*McFadzean*).

97 Ibid 264 (Warren CJ, Nettle and Redlich JJA).

98 *Watson v Marshall* (1971) 124 CLR 621; *Symes v Mahon* [1922] SASR 447.

99 *Watson v Marshall* (1971) 124 CLR 621, 626 (Walsh J).

100 [1922] SASR 447.

101 Ibid 453.

102 (2007) 20 VR 250.

103 (2007) 20 VR 250, 264 (Warren CJ, Nettle and Redlich JJA).

This analysis is especially relevant to the case of a victim of trafficking or slavery who is not physically imprisoned but who remains in the custody of traffickers or exploiters because of fear of apprehension by authorities or of unspecified repercussions for overseas family or simply because she or he has been made to feel overwhelmingly alienated and isolated from the outside world. It is submitted that all these reasons are the result of the conduct of the trafficker: that the victim remains as a 'coercive consequence' of the trafficker's actions. The victim of trafficking has no truly independent personal reason for remaining in the custody of a trafficker. Accordingly, the tort of false imprisonment should provide a remedy.

Returning to the description of the plight of the victims in the *Tang* case discussed above,<sup>104</sup> and the finding of the trial judge that 'in the totality of the circumstances, the complainants were effectively restricted to the premises',<sup>105</sup> it is clear that the plaintiffs could prove the elements of the tort of false imprisonment. They would need to identify and prove the specific actions of the defendant trafficker or her agent, being threats or words or actions, which directly resulted in the plaintiffs' total submission to the will of the defendant. For Wei Tang's victims, those actions would be the withholding of passports, air fares, identification and personal documents; control by way of fear of detection from immigration authorities; fear of visa offences; instructions not to leave the premises without a representative of the defendant; and constant supervision. The plaintiffs would be able to demonstrate that their restriction to the premises was a direct 'coercive consequence' of the defendants' actions, in the sense that they had no reason to remain other than their complete submission to the will of the defendant, brought about entirely by the actions of the defendant. It is notable here that the Court in *McFadzean* made the following observation:

It is important to keep in view the ultimate concern of the tort of false imprisonment, namely, protection against the unlawful total restraint on the liberty and freedom of movement of the plaintiff. In the end, it is a matter of degree in all the prevailing circumstances.<sup>106</sup>

For a victim of trafficking or slavery, the argument is simply that in all the prevailing circumstances, the degree of control exercised by the trafficker or enslaver amounts to imprisonment: a deliberate and direct total deprivation of the liberty of the victim. Interestingly, there are instances in the US where the courts have taken a fairly broad approach on the question of what will constitute imprisonment in a trafficking context.<sup>107</sup> In one case it was held that a plaintiff had properly pleaded a claim in false imprisonment where for a period she had even had a key to the premises in which she lived whilst her traffickers were out of the country. It was held that the defendants' threats of arrest and prosecution and the plaintiff's fear of the defendants effectively imprisoned her during that

104 *Tang* (2008) 237 CLR 1, 14-5 (Gleeson C.J).

105 *Ibid* 14.

106 (2007) 20 VR 250, 273 (Warren CJ, Nettle and Redlich JJA).

107 *Zavala v Wal-Mart Stores Inc*, 393 F Supp 2d 295, 334-5 (D NJ, 2006); *Chellen v John Pickle Co*, 446 F Supp 2d 1247, 1274-5 (ND Okla, 2006).



time.<sup>108</sup> Arguably this interpretation would be acceptable in Australia as within the parameters suggested in the *McFadzean* case.

### D Action on the Case for Intentional Infliction of Psychiatric Injury

The cause of action in *Wilkinson v Downton*<sup>109</sup> is uniquely suited to provide a remedy for victims of trafficking and slavery in circumstances where a defendant has used threatening and intimidating behaviour and words toward the victim. This conduct may fall short of actual assault or battery but may cause the victim psychiatric injury, often in the form of post traumatic stress disorder. Conduct of a defendant such as veiled threats of injury or disadvantage to members of the victim's family or as to the kind of treatment a victim might experience at the hands of immigration or police authorities, may not necessarily amount to the tort of assault but are clearly calculated to frighten and intimidate the victim and would have the obvious capacity to cause mental harm to a victim. Such behaviour would come squarely within the scope of liability under *Wilkinson v Downton* and would satisfy the elements of the action. Damages recoverable would include compensatory damages and, in appropriate cases, aggravated and exemplary damages.<sup>110</sup>

In *Wilkinson v Downton*, the defendant falsely represented to the plaintiff that her husband had been involved in a serious accident. This was meant to be a practical joke. As a result of this statement the plaintiff suffered what was then termed 'nervous shock'. Despite finding there was no precedent for this action, Wright J held that damages should be awarded on the ground that:

The defendant has ... wilfully done an act calculated to cause physical harm to the plaintiff ... and has in fact caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act.<sup>111</sup>

So there are three elements to the cause of action, namely: a wilful act by the defendant; which is calculated to cause harm; and which does in fact cause harm to the plaintiff, the harm being a psychiatric injury.

The cause of action in *Wilkinson v Downton* has been used in recent years in Australia in a variety of situations to provide remedies to plaintiffs who have suffered psychiatric injury as a result of threatening or confronting behaviour or words by a defendant. These situations have included a claim for workplace humiliation and harassment<sup>112</sup> and a claim by protesters following intimidating

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108 *Deressa v Gobena* (United States District Court for the Eastern District of Virginia, 13 February 2006) slip op 14–5. See discussion in Werner and Kim, above n 48.

109 [1897] 2 QB 57.

110 In *McFadzean*, the Victorian Court of Appeal awarded aggravated damages in a claim based on the rule in *Wilkinson v Downton* but refused to award exemplary damages in all the circumstances. The Court nevertheless acknowledged the possibility of an award of exemplary damages in such a case: *McFadzean* (2007) 20 VR 250, 286–8. For discussion of the restrictions on the availability of exemplary and aggravated damages in tort law reform legislation in Australian jurisdictions, see below Part III(G).

111 [1897] 2 QB 57, 58. The principles of *Wilkinson v Downton* were adopted and applied in the High Court of Australia in *Bunyan v Jordan* (1937) 57 CLR 1, though there, the plaintiff was unsuccessful.

112 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471.

behaviour and threatening conduct by defendants, causing post-traumatic stress disorder.<sup>113</sup>

The notion of ‘calculation’ to cause harm on the part of the defendant has been problematic: what is the nature of the defendant’s intent required to ground a claim and how objectively is it to be determined? *Wilkinson v Downton* suggests that once the level of likelihood of harm is recognisable in relation to an act, that act is ‘calculated’, on an objective view, to cause the harm and therefore intention can be imputed to the defendant. It is this notion of ‘calculation’ with its imputed intention to cause harm that distinguishes this tort from negligent acts resulting in physical harm through mental distress. In *Carrier v Bonham*,<sup>114</sup> a majority of the Queensland Court of Appeal held that the concept of an act ‘calculated to cause harm’ enunciated in *Wilkinson v Downton* imported a purely objective test which meant that the deluded mental state of the particular defendant in that case was irrelevant. In *Wong v Parkside Health NHS Trust*,<sup>115</sup> the English Court of Appeal held that conduct ‘calculated’ to cause harm would need to be such that the harm is ‘likely to result’.<sup>116</sup> In the NSW Court of Appeal, in *Nationwide News Pty Ltd v Naidu*,<sup>117</sup> Spigelman CJ held that ‘calculated’ means more than ‘reasonably foreseeable’ though it may not have to constitute a ‘substantial certainty’.<sup>118</sup> Chief Justice Spigelman held in that case that the defendant’s acts amounted to ‘a reckless indifference to result’ so that they were clearly ‘calculated’ to cause harm.<sup>119</sup> His Honour referred to ‘the nature and scale of [the defendant’s] ... conduct [which] was such ... as to constitute a recognised psychiatric injury as a natural and probable consequence of that course of conduct’.<sup>120</sup> It is hard to imagine a situation of trafficking or slavery where the actions or threats of a defendant would not meet this threshold.<sup>121</sup>

Unlike the position in the US,<sup>122</sup> in Australia and other common law countries, the courts have not been prepared to allow recovery for mental distress without actual injury (which may be a psychiatric injury). The reason for this refusal is undoubtedly the fact that the cause of action in *Wilkinson v Downton* is an action on the case and therefore actual damage is the gist of the action. This

113 *McFadzean* (2007) 20 VR 250.

114 [2002] 1 Qd R 474.

115 [2001] 3 All ER 932.

116 *Ibid* 938 (Hale LJ).

117 (2007) 71 NSWLR 471.

118 *Ibid* 487.

119 *Ibid*.

120 *Ibid* 488 (Spigelman CJ).

121 For a discussion of the meaning of intention in tort law, see Peter Cane, ‘Mens Rea in Tort Law’ (2000) 20 *Oxford Journal of Legal Studies* 533.

122 Section 46 of the Second Restatement of Torts imposes liability for ‘outrageous’ conduct causing ‘severe mental distress’ without the requirement for a resulting physical harm or likelihood of physical harm: American Law Institute, *Second Restatement of the Law – Torts*. For a comparative discussion see Richard Townshend-Smith, ‘Harassment as a Tort in English and American Law: The Boundaries of *Wilkinson v Downton*’ (1995) 24 *Anglo-American Law Review* 299; P R Handford, ‘*Wilkinson v Downton* and Acts Calculated to Cause Physical Harm’ (1985) 16 *University of Western Australia Law Review* 31.

issue has been considered by both English<sup>123</sup> and Australian<sup>124</sup> courts in recent years and in both jurisdictions the courts have firmly held that a plaintiff cannot recover under the cause of action in *Wilkinson v Downton* unless he or she has suffered actual damage: in cases of mental harm, that must be a recognised psychiatric illness.

The High Court of Australia briefly referred to the action in *Wilkinson v Downton*, in obiter, in *Magill v Magill*, where Gummow, Kirby and Crennan JJ stated that ‘developments in Anglo-Australian law recognise these cases as early examples of recovery for nervous shock, by reference to an imputed intention to cause physical harm, a cause of action later subsumed under the unintentional tort of negligence’.<sup>125</sup>

So, there may be some doubt about the long term survival of the cause of action in *Wilkinson v Downton*, at least where the intention of the defendant to cause harm is something less than a deliberate attempt to harm the plaintiff. In such a case, a suit in negligence may be a preferred action. But where a defendant’s act is a deliberate attempt to harm the plaintiff psychologically, then the *Wilkinson v Downton* cause of action provides a particularly apposite and useful remedy.<sup>126</sup> Chief Justice Spigelman in the NSW Court of Appeal acknowledged the comments of Gleeson CJ in *Magill v Magill* but nevertheless held ‘that [the Court of Appeal] should follow the acceptance by the High Court of the authority of *Wilkinson v Downton* in *Bunyan v Jordan* and in the joint judgment in *Northern Territory v Mengel*’.<sup>127</sup>

The cause of action on the case for the intentional infliction of psychiatric injury, first recognised by the common law in *Wilkinson v Downton*, would therefore provide a remedy in cases of human trafficking or slavery where the actions of a defendant could be shown to have been deliberately carried out with the intention of causing harm to the victim who has suffered a diagnosed psychiatric injury. In most instances of trafficking and slavery, victims have been coerced into service by the use of threats of various kinds: of physical force to themselves or of harm to their families in a home country or of apprehension by immigration or other authorities, or of imprisonment or deportation. Those threats would, on any objective view, demonstrate an imputed intention to harm the victims.

## E The Tort of Deceit

Victims of trafficking and slavery are induced to cross national borders or to travel with a trafficker to a place where they are to be exploited, by deception as to job prospects or the nature and conditions of the anticipated employment or

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123 *Wong v Parkside Health NHS Trust* [2001] 3 All ER 932; *Wainwright v Home Office* [2004] 2 AC 406.

124 *Giller v Procopets* (2008) 24 VR 1.

125 *Magill v Magill* (2006) 226 CLR 551, 589.

126 For a discussion of the ‘interesting future’ of the cause of action in *Wilkinson v Downton*, see Penelope Watson, ‘Searching the Overfull and Cluttered Shelves: *Wilkinson v Downton* Rediscovered’ (2004) 23 *University of Tasmania Law Review* 264.

127 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 486-7.

the financial rewards available at the destination. Further deceptions about the dire consequences of leaving employment or the existence of a large debt are usually employed by those who subsequently enslave or exploit victims. The tort of deceit<sup>128</sup> will offer a remedy in many of these circumstances and would enable recovery of economic loss as well as compensatory damages for personal injury and property damage and even aggravated and exemplary damages.<sup>129</sup>

In order to succeed in a claim for deceit a plaintiff will have to establish that the defendant knowingly or recklessly made a false representation of fact, by words or conduct, intending to induce the plaintiff to act on the representation and that the plaintiff did so act, thereby suffering actual damage,<sup>130</sup> which may be purely financial or physical or psychiatric. The tort of deceit was developed largely to protect commercial and property interests of plaintiffs<sup>131</sup> and has now been somewhat dormant in this arena since the advent of trade practices and consumer protection legislation,<sup>132</sup> which provide remedies for the kinds of claims that would previously have found a remedy in deceit. Nevertheless, the tort of deceit remains a useful cause of action and is certainly one which would offer a remedy to victims of trafficking and slavery in appropriate cases.

The most recent High Court consideration of the tort of deceit was in 2006 in the case of *Magill v Magill*.<sup>133</sup> The case was a novel claim in deceit in a family law context where the tort had apparently not been relied upon in the past in Australia.<sup>134</sup> The High Court dismissed the appeal by a man who had claimed that his former wife's deceit as to the paternity of two children born during their marriage, was actionable to enable him to recover damages, being the child support that he had paid in respect of the children as well as pain and suffering resulting from a depressive illness. The High Court considered that on the evidence adduced, all the elements of the tort had not been made out and further that significant social policy considerations mitigated against allowing such a claim in a marital context, particularly given the 'no fault' premise upon which the *Family Law Act 1975* (Cth) is based.

128 The modern tort of deceit is generally acknowledged to have been first recognised in *Pasley v Freeman* (1789) 100 ER 450; J G Fleming, *The Law of Torts* (Lawbook, 9<sup>th</sup> ed, 1998) 694–5.

129 *James v Hill* [2004] NSWCA 301 (17 September 2004).

130 *Magill v Magill* (2006) 226 CLR 551; *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706; *Pasley v Freeman* (1789) 100 ER 450; *Derry v Peek* (1889) 14 AC 337; *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205.

131 See Sir John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens & Haynes, 1907). See comments of Gleeson CJ in *Magill v Magill* (2006) 226 CLR 551, 562 referring to the 'business context in which the action on the case for deceit emerged and in which it had and still has a natural place'.

132 *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 pt 2-1 s 18 prohibits misleading or deceptive conduct in trade or commerce and liability for breach is strict. A wide range of remedies is included in pt 5-2, in particular, s 237 which provides for compensation orders for persons who suffer loss or damage as a result of conduct in contravention of the relevant provisions.

133 (2006) 226 CLR 551; Lisa Young, 'Sex Lies and Money: The High Court Considers Deceit and Paternity Fraud in *Magill v Magill*' (2007) 15 *Torts Law Journal* 1; Lisa Young and Stephen Shaw, '*Magill v Magill*: Families and Deceit' (2005) 19 *Australian Journal of Family Law* 44.

134 There is an English case where the claim was allowed: *P v B (Paternity: Damages for Deceit)* [2001] 1 FLR 1041.

The *Magill* decision is instructive on the usefulness of the cause of action in deceit in that the High Court confirmed that the tort would be available as a remedy in many situations outside the commercial sphere in which the tort originally operated, including even possibly in some domestic circumstances, though the Court left that question open.<sup>135</sup> Further, the Court addressed the elements of the cause of action and emphasised the necessity for the plaintiff to be able to isolate and prove one or more discrete deliberate misrepresentations made by the defendant upon which the plaintiff actually relied.<sup>136</sup> The plaintiff bears the onus of proving that the representations relied upon were material and that the plaintiff was induced to rely upon them.<sup>137</sup>

In a trafficking case this means that the plaintiff will have to adduce evidence of the promises made or lies told by the defendant and of the fact that the plaintiff specifically relied on those promises or lies, not other information, to his or her detriment. In many cases of trafficking or slavery, the only evidence of these matters will be the plaintiff's own testimony, without the benefit of corroboration. In addition to establishing the fact of the representations and the plaintiff's reliance on them, the plaintiff will also have to establish a causal connection between the plaintiff's damage and the false representations made by the defendant. A difficulty of this aspect is demonstrated by *Magill*, where the High Court failed to find a sufficient connection between the false misrepresentation made in that case and the plaintiff's depressive illness, which was caused by other additional circumstances. In trafficking and slavery cases there will usually be many circumstances which have contributed to a plaintiff's loss, particularly where the damage includes a psychiatric injury which medical evidence may attribute to several causes or events which may have been ongoing for a significant period of time. These may be obstacles to a claim in deceit.

Success in a claim for deceit will require that the evidence allow for an inference that the plaintiff's damage flowed directly from the plaintiff's reliance on the defendant's false misrepresentation.<sup>138</sup> There is some uncertainty in Australian law as to the test for remoteness of damage in the tort of deceit: whether there is an element of reasonable foreseeability or whether the plaintiff's loss must simply be the direct result of the defendant's misrepresentation. The High Court in *Gates v City Mutual Life Assurance Society Ltd*<sup>139</sup> held that a plaintiff's damages in a claim for deceit would extend to 'all the consequential loss directly flowing from his reliance on the representation ... at least if the loss is foreseeable'.<sup>140</sup> However in *Palmer Bruyn & Parker Pty Ltd v Parsons*,<sup>141</sup>

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135 *Magill v Magill* (2006) 226 CLR 551, 574–5 (Gummow, Kirby and Crennan JJ), 622–3 (Heydon J dissenting).

136 *Ibid* 56–9 (Gleeson CJ), 594 (Gummow, Kirby and Crennan JJ), 596 (Hayne J).

137 *Gould v Vaggelas* (1984) 157 CLR 215, 236 (Wilson J).

138 *Clark v Urquhart* [1930] AC 28, 58 (Lord Atkin) cited in *Magill v Magill* (2006) 226 CLR 551, 568 (Gleeson CJ); see also *Aldersea v Public Transport Corporation* [2001] VR 499, 507 [44] where a plaintiff recovered damages for personal injury in a deceit claim arising out of events concerning the termination of the plaintiff's employment.

139 (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ).

140 *Ibid* 12 (Mason, Wilson and Dawson JJ).

Gummow J took the view that the notion of reasonable foreseeability was not relevant to the issue of damage in such a case.<sup>142</sup>

The remedies available in a deceit claim extend to damages for economic loss as well as damages for personal injury and property damage.<sup>143</sup> Damages for pecuniary loss have been the common pursuit in claims in deceit as the tort has historically been used in commercial contexts. A victim of trafficking might be well advised to rely on the tort of deceit, where the elements of the tort can be satisfied, in order to recover damages for the pecuniary losses incurred as a result of the unpaid work by the plaintiff, particularly in situations of sexual servitude where the plaintiff could arguably seek to recover not only ‘wages’ unpaid but all moneys including ‘profit’, generated as a direct result of the false representation on which the plaintiff relied. The argument would be that these moneys were ‘lost’ by the plaintiff as a direct result of reliance on the defendant. In deceit cases where a plaintiff has been induced to purchase a business because its value has been misrepresented, the measure of damage has been the difference between the actual value of the business and the price the plaintiff paid.<sup>144</sup> Arguably, the ‘actual value’ of the plaintiff’s loss in cases of sexual servitude or extreme labour exploitation would include the whole value of the plaintiff’s work, that is the ‘profit’ generated, not simply the wages lost.

There may in some instances be an overlap between the tort of deceit and the action in *Wilkinson v Downton* where a defendant’s false misrepresentations are a cause of the plaintiff’s psychiatric injury and where the defendant’s conduct can be shown to have been calculated to cause the psychiatric injury. The same conduct may also ground an action in deceit where the defendant’s conduct can be shown to have been intended to induce the plaintiff to act in a particular way to his or her detriment.

## F Unlawful Means Conspiracy

The tort of conspiracy by unlawful means is an action on the case that was developed to provide a civil remedy to a person who is harmed as the result of a conspiracy of two or more persons which involves the commission of an unlawful act, where the conspirators intend to harm the plaintiff’s trade, business or other economic interests,<sup>145</sup> though that need not be the dominant purpose of the conspiracy.<sup>146</sup> The cause of action is one of the so called “economic torts”<sup>147</sup> and was developed in the sphere of industrial law<sup>148</sup> and competition law<sup>149</sup> to

141 (2001) 208 CLR 388.

142 Ibid 408. This is the view of the English courts: see *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254.

143 *Gould v Vaggelas* (1984) 157 CLR 215; *Magill v Magill* (2006) 226 CLR 551; *Aldersea v Public Transport Corporation* [2001] VR 499.

144 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 (Denning MR).

145 *Williams v Hursey* (1959) 103 CLR 30, 78 (Fullagher J) and 122 (Menziez J).

146 Ibid; *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 681–2.

147 John Dyson Heydon, *Economic Torts* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1978).

148 *Allen v Flood* [1898] AC 1; *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25.

149 *Quinn v Leatham* [1901] AC 495.

provide a remedy for victims of unlawful acts intended to damage a business or some commercial interest.<sup>150</sup> But the tort has been developing in recent years to provide a remedy in other situations (for example, to enforce a debt).<sup>151</sup>

Examining the elements of the cause of action of unlawful means conspiracy, it can be concluded that it would provide a remedy for victims of trafficking in cases where more than one person had been involved in the trafficking and exploitation of the victim by way of criminal or tortious acts. The typical trafficking case will involve more than one perpetrator acting together to recruit the victim, to obtain travel documents and visas and to transport the victim to a place of exploitation. Where this process involves ‘unlawful acts’ such as breaches of the criminal law or of immigration laws, or tortious acts including for example, trespass to the person of the plaintiff or his or her property, the requisite elements of the conspiracy tort can be established.<sup>152</sup> The intention of the conspirators in such cases is clearly to harm the plaintiff in his or her business or commercial interests, given that the plaintiff is being trafficked to work without any or at least, proper, payment. Further, the plaintiff suffers actual pecuniary loss in the form of the wages or other money he or she should have been paid and was no doubt promised.

The type of unlawful act required to satisfy the elements of the unlawful means conspiracy tort has been the subject of some debate,<sup>153</sup> though it now appears settled that the act may be a criminal act and even a tort.<sup>154</sup> Members of a trafficking syndicate will have committed at least one of the trafficking related offences in the *Criminal Code*. Further, in trafficking cases there will often be visa applications containing false statements or in false names or relying upon other falsified immigration documents. The use of such documents would constitute offences under the Australian immigration legislation<sup>155</sup> and those offences would arguably be sufficient to satisfy the requirements of the tort of

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150 See discussion in Peter Edmundson, ‘Conspiracy by Unlawful Means: Keeping the Tort Untangled’ (2008) 16 *Torts Law Journal* 189; Simon Deakin and John Randall ‘Rethinking the Economic Torts’ (2009) 72 *Modern Law Review* 519; R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2009) [21.43]–[21.56]; Peter G Heffey, ‘The Survival of Civil Conspiracy: A Question of Magic or Logic’ (1975) 1 *Monash University Law Review* 136.

151 *Fatimi Pty Limited v Bryant* (2004) 59 NSWLR 678.

152 There was a claim for unlawful means conspiracy by the plaintiffs in the English case of *AT v Dulghieru* [2009] 1 All ER (D) 194, though there was no hearing of the substantive claim as to liability.

153 *Sorrell v Smith* [1925] AC 700, 716; *Galland v Mineral Underwriters Ltd* [1977] WAR 116 and *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409; all of which held that a conspiracy to injure the plaintiff by way of commission of a tort was no more than an example of a case of joint tortfeasors and that therefore the claim for the conspiracy was superfluous.

154 *Williams v Hursey* (1959) 103 CLR 30, 78–9; see discussion at Balkin and Davis, above n 150, [21.50]–[21.54].

155 *Migration Act 1958* (Cth) s 234; *Criminal Code* ss 135.1(1)–135.1(7). In *R v Rasalingam* (Unreported, District Court of New South Wales, Puckeridge DCJ, 2 November 2007) the defendant was convicted of an offence of ‘misleading a Commonwealth official in the immigration process’ under the *Criminal Code* s 135.1.

unlawful means conspiracy.<sup>156</sup> Difficulties arise where the victim/plaintiff has also been complicit in any immigration fraud, as is sometimes the situation in trafficking cases, where the victim has been schooled in what false information to give to immigration authorities.<sup>157</sup> Though, in such cases there would no doubt be some element of coercion by way of fear of consequences of failure to cooperate, on the victim's part.

In the recent House of Lords decision *Revenue & Customs Commissioners v Total Network SL*,<sup>158</sup> it was held that even though the criminal conduct of the defendants was not independently actionable it was sufficient to ground the tort of conspiracy.<sup>159</sup> The plaintiff must prove however that the defendants knew that their actions were unlawful and that the unlawful acts would cause loss to the plaintiff.<sup>160</sup>

This cause of action would enable a plaintiff to sue those members of a trafficking syndicate who may have had no personal contact with the plaintiff, provided they can be identified and joined to the proceedings and provided they can be shown to have been aware of and part of the conspiracy. Such an action may give a plaintiff legal access to the individuals at the top of the trafficking hierarchy and those making the real profit from the enterprise.<sup>161</sup>

There is High Court authority to the effect that where conspirators act in concert to injure the plaintiff by way of the commission of the same tort that will suffice as the unlawful act on which to base a pleading of conspiracy.<sup>162</sup> Of course, they would also be joint tortfeasors, where they have acted in concert, and could be sued as such in tort.<sup>163</sup> Where either action would be possible, it is doubtful that there would be any advantage in suing in the tort of conspiracy rather than in suing joint tortfeasors.<sup>164</sup> The measure of damages would be the

156 In Australia, various types of unlawful act have been held to be sufficient to ground an action in conspiracy by unlawful means, including breaches of conveyancing legislation and the corporations law (*Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 683–5); receiving a secret commission (*Coomera Resort Pty Ltd v Kolback Securities Ltd* [2004] 1 Qd R 1, 37); breach of directors duties (*Chen v Karandonis* [2002] NSWCA 412 (18 December 2002) [28]–[30]). However, Campbell J, at first instance in *Fatimi Pty Ltd v Bryant* [2002] NSWSC 750 (20 September 2002) [193], expressed the view that to allow all types of statutory breach to ground an action in tortious conspiracy might be too broad an approach.

157 This was so for the 11 Thai victims who made false claims for refugee status under Australian immigration law in *R v Netthip* [2010] NSWDC 159 (30 July 2010) [10].

158 [2008] 1 AC 1174.

159 For an Australian authority on this point: *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2003] FCA 1537 (19 December 2003).

160 *Meretz Investments NV v ACP Ltd* [2008] Ch 244.

161 There may of course be difficulties in enforcing remedies across borders. See discussion below at Part IV(G).

162 *Williams v Hursey* (1959) 103 CLR 30, 78–9; see also discussion in Balkin and Davis, above n 150, [21.50]–[21.54].

163 In *Sorrel v Smith* [1925] AC 700, 716 Lord Dunedin held ‘if a combination of persons to do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage’. This statement has been cited with approval in the High Court in *Cabassi v Vila* (1940) 64 CLR 130, 143 (Starke J) and 151 (Williams J) and *O'Brien v Dawson* (1942) 66 CLR 18, 27.

164 See J W Neyers, ‘The Economic Torts as Corrective Justice’ (2009) 17 *Torts Law Journal* 162; Heffey, above n 150; Balkin and Davis, above n 150, [21. 52].



same. The damages available will include actual pecuniary loss as well as loss of earning capacity and in appropriate cases, aggravated and exemplary damages.<sup>165</sup>

### G Tort Reform Legislation in Australian Jurisdictions and Intentional Acts by Defendants

A distinct advantage to a victim of slavery or trafficking who is considering a tortious cause of action is the availability of aggravated and exemplary damages. Whilst tort reform legislation<sup>166</sup> in various Australian jurisdictions prohibits the award of such damages in claims in respect of negligently caused harm, there is no such prohibition with regard to claims for deliberate harm,<sup>167</sup> except in the Northern Territory where no exemplary or aggravated damages may be awarded for personal injury.<sup>168</sup>

In the early part of the 21<sup>st</sup> century following a so called ‘insurance crisis’<sup>169</sup> and much public discussion and criticism of the costs associated with tortious recovery by accident victims, together with a perception about the capricious nature of tortious liability, all Australian jurisdictions enacted some reform of the common law,<sup>170</sup> though the legislative response was by no means uniform.<sup>171</sup> These reforms were chiefly concerned with aspects of the common law tort of negligence and imposed severe limitations on personal injury damages recoverable. The reforms across Australian jurisdictions excluded certain causes

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165 *Latham v Singleton* [1981] 2 NSWLR 843, 875–8 (Nagle CJ at CL); *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636.

166 See Commonwealth, *Review of the Law of Negligence: Final Report* (2002) [13.165] <<http://revofneg.treasury.gov.au>>, which recommended a provision which would abolish exemplary and aggravated damages in respect of negligently caused personal injury. Such a provision was enacted in *Civil Liability Act 2002* (NSW) s 21, *Civil Liability Act 2003* (Qld) s 52, *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19 and *Competition and Consumer Act 2010* (Cth) s 87ZB. The award of exemplary damages is also prohibited in NSW by the *Workers Compensation Act 1987* (NSW) s 151R in respect of workplace injuries and by the *Motor Accidents Compensation Act 1999* (NSW) s 144 in respect of motor accident claims.

167 *Civil Liability Act 2002* (NSW) s 21; *Civil Liability Act 2003* (Qld) s 52.

168 *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19.

169 See Chief Justice James Spigelman, ‘Negligence: Is Recovery for Personal Injury Too Generous?’ (Speech delivered at the 14th Commonwealth Law Conference, London, 14 September 2005).

170 The reform legislation was based on the recommendations of the *Review of the Law of Negligence: Final Report*, above n 165.

171 *Civil Liability Act 2002* (NSW); *Civil Liability Act 1936* (SA); *Civil Liability Act 2003* (Qld); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

of action from the reform legislation<sup>172</sup> and in NSW the exclusions included those where liability arises from ‘an intentional act that is done by the person with the intent to cause injury or death or that is sexual assault or other sexual misconduct’.<sup>173</sup> So in NSW, a plaintiff’s claim in respect of one of the trespass torts or indeed in respect of any deliberate wrongdoing will not be subject to the very significant restrictions on personal injury compensatory damages imposed by Part 2 of the *Civil Liability Act 2002* (NSW). The prohibition on the award of exemplary, punitive and aggravated damages in section 21 of the NSW legislation would not apply either. That applies in respect of negligent conduct alone.<sup>174</sup> In Tasmania, Victoria and Western Australia the position is similar to that in NSW.<sup>175</sup>

In NSW, any claim which might be brought by a victim of trafficking or slavery, whether it is in respect of extreme labour exploitation or sexual exploitation, would be covered by the exception. The exclusion from the tort reform legislation of civil liability amounting to sexual assault is explicit. In all other cases the conduct of the trafficker or persons imposing conditions of slavery will be deliberate intentional conduct carried out with the intent to cause injury to the victim, or at the very least with reckless indifference as to whether injury will result.<sup>176</sup> The intention requirement for causation of injury, including psychological injury, in tortious causes of action will be satisfied where the intention can be imputed to the defendant having regard to all the circumstances in which the conduct takes place. In *McCracken v Melbourne Storm Rugby League Football Club*,<sup>177</sup> Hulme J held that an illegal ‘spear tackle’ during a rugby league match was intentional and done with intent to cause injury to the plaintiff so that section 3B(1)(a) of the *Civil Liability Act 2002* (NSW) operated to remove the plaintiff’s claim for damages from the restrictions imposed by the Act. His Honour relied upon the evidence in a video recording of the incident to infer the requisite intention. In cases of trafficking and slavery, the requisite

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172 In South Australia, the legislation applies only to accidents caused wholly or in part by negligence (*Civil Liability Act 1936* (SA) s 51(a)(ii)(A)) or some other unintentional tort (*Civil Liability Act 1936* (SA) s 51(a)(ii)(B)). In Queensland, the *Civil Liability Act 2003* (Qld) applies to ‘any civil claim for damages for harm’ (s 4(1)) so that apparently the intentional torts are not excluded though it has been argued that the relevant provisions can be interpreted otherwise: Tina Cockburn and Bill Madden, ‘Intentional Torts to the Person, Compensation for Injury and the Civil Liability Acts – Recent Cases and Contemporary Issues’ (2007) 18 *Insurance Law Journal* 1. Similar approaches apply in *Civil Law (Wrongs) Act 2002* (ACT) s 93 and *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 4(1). Provisions in *Civil Liability Act 2002* (Tas) s 3B(1)(a) and *Wrongs Act 1958* (Vic) ss 28C(2)(a), 28LC(2)(a) and *Civil Liability Act 2002* (WA) s 3A(1) all take an approach similar to the NSW legislation excluding intentional acts done with intent to cause injury.

173 *Civil Liability Act 2002* (NSW) s 3B(1)(a).

174 A similar prohibition exists in the Northern Territory: *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19; and Queensland: *Civil Liability Act 2003* (Qld) s 52.

175 *Civil Liability Act 2002* (Tas) s 3B(1)(a); *Wrongs Act 1958* (Vic) ss 28C(2)(a), 28LC(2)(a); *Civil Liability Act 2002* (WA) s 3A(1).

176 *New South Wales v Ibbett* (2005) 65 NSWLR 168, 172 [33], [43] (Spigelman CJ), 175 [129] (Ipp JA).

177 [2005] NSWSC 107 (22 February 107). There was an appeal on other issues relating to negligence and assessment of damages.

intention will have to be imputed from the victim's evidence as to the conduct of the perpetrator.

The NSW provision excluding claims in respect of intentional acts from the operation of the *Civil Liability Act 2002* comprises two elements: first, an intentional act on the part of the defendant and secondly, an intention on the defendant's part to cause injury to the plaintiff. A literal reading of the section would make a claim in respect of an intentional act done without intention to cause injury, subject to all the provisions in the legislation including the restrictions on damages recoverable. But the trespass torts are actionable *per se*: there is no requirement to prove any actual or even intended injury apart from an intention to interfere with the plaintiff's rights. In cases where there has been no actual physical or psychological injury to a plaintiff, the NSW courts have adopted a broad definition of the term "injury" used in section 3B(1)(a) of the *Civil Liability Act 2002* (NSW). In *Houda v New South Wales*,<sup>178</sup> a claim in respect of a wrongful arrest where the plaintiff claimed false imprisonment and assault, Cooper AJ held that 'injury' was not confined to physical injury.<sup>179</sup> His Honour held that the police constable in that case acted with the intent to injure the plaintiff in the sense of depriving him of his liberty, forcefully restraining him, humiliating him and causing him emotional upset. Accordingly, the plaintiff's claim was excluded from the operation of the *Civil Liability Act 2002* (NSW). This construction of the section was affirmed in the NSW Court of Appeal in *New South Wales v Ibbett*<sup>180</sup> where Spigelman CJ, referring to the decision in *Houda*, held that the term "injury" in section 3B(1)(a) would include the harm of an apprehension of physical violence.<sup>181</sup> In the same case Ipp JA held that the term included anxiety or stress<sup>182</sup> and Basten JA held it was not restricted to personal injury.<sup>183</sup>

In cases founded on a defendant's conduct which amounts to trafficking or slavery, there is little doubt that the claim would not be subject to the restrictions on damages in the *Civil Liability Act 2002* (NSW) because there would always be at least an imputed intention to cause some injury to the plaintiff. Even where the only injury proved or intended was emotional distress or humiliation or deprivation of human rights not amounting to physical injury, the plaintiff's claim in the trespass torts would not come within the limiting provisions of the *Civil Liability Act 2002* (NSW). Given that the provisions in Tasmania, Victoria and Western Australia<sup>184</sup> are similar to the NSW provision excluding deliberate acts from the tort reform legislation, the position with respect to claims in trafficking and slavery cases in those states would be the same as in NSW.

178 [2005] Aust Torts Reports ¶81-816 ('*Houda*').

179 *Ibid* [346].

180 (2005) 65 NSWLR 168. There was an appeal to the High Court on other issues: *New South Wales v Ibbett* (2006) 229 CLR 638.

181 *New South Wales v Ibbett* (2005) 65 NSWLR 168, 171.

182 *Ibid* 175.

183 *Ibid* 184.

184 *Civil Liability Act 2002* (Tas) s 3B(1)(a); *Wrongs Act 1958* (Vic) ss 28C(2)(a), 28LC(2)(a); *Civil Liability Act 2002* (WA) s 3A(1).

## H Aggravated and Exemplary Damages

As trafficking and slavery are such contemptible abuses of human rights, victims would be well advised to pursue aggravated and exemplary damages awards in any claims against perpetrators.

Aggravated damages are a form of general damages awarded to compensate a plaintiff who has been treated in a 'high handed, malicious, insulting or oppressive way'<sup>185</sup> or who has been subjected to humiliation<sup>186</sup> and emotional distress.<sup>187</sup> Aggravated damages are provided by way of compensation for injury which may be intangible, resulting from the circumstances and manner of the defendant's wrongdoing.<sup>188</sup> Exemplary damages are punitive damages. Whereas aggravated damages focus on the humiliation and emotional distress of the plaintiff, exemplary damages focus on the reprehensible conduct of the defendant and are awarded as retribution and deterrence.<sup>189</sup> In the context of a trafficking or slavery case, these types of damages are an appropriate, indeed crucial, consideration for plaintiff's lawyers and the courts.

The English High Court has made an award of exemplary damages in one case of a tortious claim by victims against their traffickers. That decision is instructive for Australian lawyers and courts, although Australian law as to the nature and purpose of exemplary damages<sup>190</sup> differs in important major respects from the English position.<sup>191</sup>

### I The English Case: *AT v Dulghieru*

In the English case of *AT v Dulghieru*,<sup>192</sup> four young female Moldovan victims of trafficking for sexual exploitation obtained a judgment against two of their traffickers in the tortious cause of action of unlawful conspiracy, though the facts establishing the conspiracy would also have established the several torts of deceit, assault, battery, false imprisonment, and the action on the case in *Wilkinson v Downton*, discussed above. The judgment of Treacy J was delivered following a hearing for assessment of damages at which there was no appearance by or on behalf of the defendants. It is not evident from the judgment how

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185 *Broome v Cassell & Co Ltd* [1972] AC 1027.

186 *Lamb v Cotogno* (1987) 164 CLR 1, 8.

187 *New South Wales v Corby* (2010) 76 NSWLR 439, 449.

188 *New South Wales v Ibbett* (2006) 229 CLR 638, 646.

189 *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 81 (Isaacs J).

190 See, eg, *Uren v John Fairfax & Sons Limited* (1966) 117 CLR 118.

191 See, eg, *Rookes v Barnard* [1964] AC 1129.

192 [2009] EWHC 225 (QB) (19 February 2009) ('*Dulghieru*').

liability issues had been resolved, as there is no reference to any hearing, though apparently the plaintiffs had obtained summary judgment.<sup>193</sup>

The four plaintiffs were awarded a total of £601 000 in damages comprising compensatory damages for psychiatric injury, the periods of false imprisonment, pain and suffering and loss of amenity due to sexual abuse, as well as aggravated damages and exemplary damages. The plaintiffs had been tricked into travelling from Moldova to London on the promise of work as dancers. Until they escaped, they were treated in a vile manner by their traffickers and had been subjected to the most degrading and cruel treatment for periods of one or two months during which they were kept imprisoned in a basement flat and forcibly taken to brothels to work.

The judgment deals carefully with the questions of when in English law, aggravated and exemplary damages are appropriate and the relationship between the two. Justice Treacy was at pains to demonstrate that the plaintiffs were not being compensated twice for the same injuries and that the defendants, who were serving substantial prison terms, were not being punished twice for their unlawful behaviour.

Justice Treacy held that an award of aggravated damages was appropriate in the case because:

the behaviour of the Defendants amounted to insulting and arrogant treatment of these claimants, trampling, as it did, upon their rights as autonomous human beings and subjecting them to repeated episodes of degrading non consensual sexual activity over a significant period of time.<sup>194</sup>

His Honour held that the psychiatric harm, which was included in the award of general damages, should be distinguished from ‘the injury to feelings, humiliation, loss of pride and dignity and feelings of anger or resentment caused by the actions of the Defendants’<sup>195</sup> and that it was this later injury that should be the subject of the award of aggravated damages, which are compensatory in nature rather than punitive.

On the issue of exemplary damages, the judgment in *Dulghieru* creates some uncertainty about the function of these damages in England: are they punitive or do they have a restitution purpose? Justice Treacy referred to *Rookes v Barnard*,<sup>196</sup> in particular Lord Devlin’s second category of case in which exemplary damages may be awarded, namely where ‘a Defendant with cynical

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193 Tsachi Keren-Paz refers to email correspondence with the plaintiff’s solicitors in which it was disclosed that the first defendant had filed a defence whilst the second did not defend. Summary judgment was ordered against both defendants: Tsachi Keren-Paz, ‘*AT v Dulghieru – Compensation for Victims of Trafficking, But Where is the Restitution?*’ (2010) 18 *Torts Law Journal* 87, 89. See also Tsachi Keren-Paz, ‘*An Essay on Banalization of Slavery, Devaluation of Sex-Workers Labour and Deprivation of Victims of Trafficking*’ (Working Paper, Concord Research Institute for Integration of International Law Israel, 2009) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=980075](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980075)>. See also Anne O’Driscoll, ‘*AT v Dulghieru: Accounting for the Profits of Sex Trafficking*’ (2010) 40 *Victoria University of Wellington Law Review* 695.

194 *Dulghieru* [2009] EWHC 225 (QB) (19 February 2009) [59].

195 *Ibid* [57].

196 [1964] AC 1129.

disregard for a claimant's rights has calculated that money to be made out of his wrongdoing will probably exceed the damages at risk'.<sup>197</sup> Justice Treacy also held that the rationale for this second category of case where exemplary damages might be awarded is 'not the punishment of the Defendant but the prevention of his unjust enrichment'.<sup>198</sup> Accordingly, on the basis that the defendants had deliberately disregarded the plaintiffs rights in order to make a very significant profit for themselves, which would be far beyond any sum that might subsequently be recovered by the claimants in any legal process, Treacy J awarded a sum of £60 000 by way of exemplary damages to be divided equally amongst the four claimants. His Honour considered that this rationale of prevention of unjust enrichment also justified the making of the award for exemplary damages even though the defendants had been prosecuted successfully under the criminal law, because the criminal prosecution did not result in any compensation order for the claimants.<sup>199</sup> There had also been confiscation orders made in the criminal proceedings but Treacy J held that such orders did not preclude an award of exemplary damages, again having regard to the rationale behind awarding exemplary damages being the prevention of unjust enrichment.<sup>200</sup>

## J The Australian Approach to Exemplary Damages

The way in which Treacy J treated the question of exemplary damages in this case is markedly different from the approach which would be taken by an Australian court, given High Court authority on the nature and purpose of exemplary damages. The High Court of Australia has expressly rejected the House of Lords approach in *Rookes v Barnard* concerning the restricted circumstances in which exemplary damages will be awarded in *Uren v John Fairfax & Sons Pty Ltd*<sup>201</sup> and *Australian Consolidated Press Ltd v Uren*.<sup>202</sup> The High Court has held that exemplary damages may be awarded where a defendant's conduct is 'high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights'.<sup>203</sup> The High Court has stressed that there must be evidence of positive conduct on the part of the defendant 'in contumelious disregard of another's rights'<sup>204</sup> before an award of exemplary damages would be made. Exemplary damages have been awarded in many different tortious causes of action in Australia including in some of the causes of action discussed above, namely deceit,<sup>205</sup> conspiracy,<sup>206</sup>

197 *Dulghieri* [2009] EWHC 225 (QB) (19 February 2009) [67].

198 *Ibid* [68], relying on *Borders (UK) Ltd v Metropolitan Police Commissioner* [2005] EWCA Civ 187 (3 March 2005) [26] (Sedley LJ).

199 [2009] EWHC 225 (QB) (19 February 2009) [71].

200 *Ibid* [68], referring to *Borders (UK) Ltd v Metropolitan Police Commissioner* [2005] EWCA Civ 187 (3 March 2005) [26] (Sedley LJ).

201 (1966) 117 CLR 118.

202 (1966) 117 CLR 185.

203 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129 (Taylor J).

204 *Ibid* 154 (Windeyer J).

205 *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251.

battery<sup>207</sup> and false imprisonment.<sup>208</sup> The High Court has held that an award of both aggravated and exemplary damages is permissible and does not amount to a ‘double punishment’ where the quantum of each is not excessive, because the two are different in kind.<sup>209</sup>

In Australia, the High Court has explicitly held that the purpose of exemplary damages is to punish and deter a defendant.<sup>210</sup> There is no Australian authority to suggest that another rationale might be to prevent the defendant's unjust enrichment or to provide a form of restitution to a plaintiff. Further, High Court authority demonstrates that an award of exemplary damages, where a defendant has already been convicted or is likely to be convicted and punished in respect of a criminal offence arising from the same events in respect of which exemplary damages are sought, may be unjust: a double punishment. In such cases the High Court has held that a trial judge should not award exemplary damages. Justice Kirby has held that in such circumstances because the object of exemplary damages is to punish a defendant, a court must take into account the fact that the defendant has already been punished by conviction.<sup>211</sup>

There is a further related question as to the effect of an order for confiscation of a defendant's assets as proceeds of crime pursuant to the *Proceeds of Crime Act 2002* (Cth) on the issue of exemplary damages. Given that the Australian courts are inclined to regard a criminal conviction as a significant factor weighing against an award of exemplary damages, it is perhaps unlikely that exemplary damages would be awarded where a defendant's assets had been confiscated as proceeds of crime, on the basis that the result would be a double punishment. This was an issue in *Dulghieru* though there the Judge held that the confiscation did not preclude an award of exemplary damages because the profits made by the defendants at the expense of their victims had been far in excess of the sums confiscated and that the defendants would not be ‘mulcted in the same sum twice’.<sup>212</sup> In Australia the problem would be overcome if the *Proceeds of Crime Act 2002* (Cth) were amended to allow confiscated assets to be available to satisfy an award of exemplary damages in favour of a victim, thereby overcoming the ‘double punishment’ argument.

It appears therefore that in Australia, exemplary damages will be available in a case where a tortious remedy is sought by a victim of trafficking or slavery, except where the defendant has already been or is likely in the future to be convicted of a criminal offence or possibly where assets have been confiscated as proceeds of crime. The measure of the exemplary damages in Australia will not be a sum to provide restitution to the plaintiff in respect of unjust enrichments

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206 *Williams v Hursey* (1959) 103 CLR 30.

207 *Henry v Thompson* [1989] 2 Qd R 412.

208 *AW v New South Wales* [2005] NSWSC 543 (5 July 2005). For commentary, see Cockburn and Madden, above n 172.

209 *New South Wales v Ibbett* (2006) 229 CLR 638, 648.

210 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 470.

211 *Gray v Motor Accident Commission* (1998) 196 CLR 1, 33–4 (Kirby J).

212 *Dulghieru* [2009] EWHC 225 (QB) (19 February 2009) [73].

obtained by a defendant. Rather, it will be a sum deemed by the court to be a suitable punishment for the defendant's conscious and contumelious disregard for the plaintiff's rights: in trafficking cases, the basic human rights of the plaintiff. The question is whether Australian courts might be prepared to look to the unjust enrichment by the trafficker – the profit made at the expense of the plaintiff – as a means of quantifying the exemplary damages in order to punish the defendant.<sup>213</sup>

Further, it might be argued that in trafficking and slavery cases where a defendant has been convicted of a criminal offence, that fact should not be a bar to an award of exemplary damages but rather one factor to be weighed in the assessment of what might be a suitable quantum of exemplary damages; given that in trafficking and slavery cases defendants will commonly have made substantial profits at the expense of the most outrageous deprivation of their victims' human rights.

The common law of tort provides some valuable opportunities for victims of trafficking and slavery to pursue remedies and compensation from the perpetrators of their human rights abuses. The availability of aggravated and exemplary damages makes the common law a particularly suitable avenue for redress because of the punitive and deterrent effects of such damages awards. Yet, for many victims, the pursuit of a claim in tort may present considerable challenges, which are the focus of the following discussion.

## IV OBSTACLES TO TORTIOUS CLAIMS

### A Availability of Timely Pro Bono Legal Advice

One of the major obstacles to victims of trafficking and slavery instituting claims for compensation is the obvious difficulty of the availability of legal advice,<sup>214</sup> which of necessity, must be on a pro bono basis. Victims who are identified in the community or by Australian police or immigration authorities are generally referred to one of several non-government organisations who offer practical assistance and support.<sup>215</sup> Whilst those organisations may flag the availability of legal advice, victims who are traumatised by their experiences may not avail themselves of the opportunity. Research shows that trafficked women in

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213 See discussion of the relationship between restitutionary and exemplary damages in the context of a 'proprietary tort' in Andrew Phang and Pey-Woan Lee, 'Restitutionary and Exemplary Damages Revisited' (2003) 19 *Journal of Contract Law* 1. See generally, Michael Tilbury, 'Reconstructing Damages' (2003) 27 *Melbourne University Law Review* 697. There is also the possibility of the equitable remedy of an account for profit in cases of unjust enrichment: *Attorney General v Blake* [2001] 1 AC 268; Sarah Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62 *Modern Law Review* 218.

214 Law Council of Australia, above n 51.

215 NGOs include the Anti-Slavery Project at the University of Technology Sydney, Australian Red Cross, Salvation Army, Sisters of St Joseph, Scarlet Alliance, Australian Catholic Religious Against Trafficking in Humans, and Project Respect: see Anti-people Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government Response 1 May 2009 – 30 June 2010* (2010) 39.



particular, suffer the effects of trauma long after their escape from the situation of trafficking and recovery from their physical injuries.<sup>216</sup> The lengthy psychological recovery process is itself an obstacle to the commencement and maintenance of a civil claim. Victims' fear of facing perpetrators, undergoing cross examination and unfamiliarity with the legal process are all factors which mitigate against civil claims unless legal advisors are able to offer the most sensitive support having regard to cultural background and language difficulties.

Where a victim does decide to pursue a claim in tort there may well be several practical difficulties to be overcome in the prosecution of the claim through the courts. These difficulties stem from the problem of identifying individual traffickers who would have assets sufficient to satisfy a judgment, who are able to be joined to proceedings and served with process. Complex arrangements amongst persons involved in trafficking and exploitation lead to difficult questions of vicarious liability and agency. The possibility of an order for security for costs against an impoverished plaintiff resident outside the jurisdiction is a critical problem and there are some evidentiary problems which would be common to these types of claims.

### **B Discovery before Action: Who Are the Defendants/Conspirators?**

Trafficking schemes are most often multi-tiered in the sense that there are various persons involved, at different times and often in different countries, in the recruitment, transport and exploitation of a victim.<sup>217</sup> This was the situation in *Tang*.<sup>218</sup> Obviously there will be severe difficulties encountered by victims' lawyers in identification and process service of traffickers, particularly those who are located offshore. A victim will not always be aware of all those who might have been complicit in a conspiracy to traffic and enslave: only first names might have been used in the victim's presence or the victim might never have met some of the persons involved. The difficulties are obvious and will in some cases present a very significant hurdle for a plaintiff who wishes to join all perpetrators to civil proceedings, particularly where the 'deepest pockets' may reside in those individuals at the top of the tier.

Some of these difficulties might be overcome by the use of preliminary discovery and inspection. In NSW for example, the *Uniform Civil Procedure Rules 2005* (NSW) Part 5 will apply where a plaintiff has made reasonable inquiries and is unable to ascertain the identity or whereabouts of a person for the purpose of commencing proceedings against that person. In such circumstances the plaintiff may make an application to the court for orders that another person, having information or possession of documents tending to assist in ascertaining the identity or whereabouts of a possible defendant, attend the court to be

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216 C Zimmerman et al, 'Stolen Smiles: A Summary Report on the Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe' (Report, London School of Hygiene and Tropical Medicine, 2006).

217 Jacqueline Larsen, Jade Lindley and Judy Putt, 'Trafficking in Persons Monitoring Report, July 2007 – December 2008' (Report, Australian Institute of Criminology, October 2009).

218 (2008) 237 CLR 1, 12–3 (Gleeson CJ) ('*Tang*').

examined or give discovery of documents that are, or have been in the other person's possession, and that relate to the identity or whereabouts of the possible defendant. Other Australian jurisdictions have similar procedural rules,<sup>219</sup> which might assist a victim to identify the more shadowy members of a trafficking group.

### C Issues of Multiple Tortfeasors, Vicarious Liability and Agency

Those perpetrators at the bottom of the tier of responsibility will often have the fewest assets available for enforcement of any judgment. However, in labour trafficking cases the position may be different. The ultimate employer within Australia may be a corporation or an individual with substantial assets. In such cases, unscrupulous labour hire contractors may be the traffickers or at least the exploiters in the destination country,<sup>220</sup> whilst corporations or individuals who use workers supplied by these labour hire contractors may have some knowledge, or at least prefer not to know, of the situation of trafficked workers.

If there is an agency relationship between a labour hire contractor and the person to whom the labour is supplied then vicarious liability will apply in respect of torts committed against the victims of trafficking. In the US, there have been some successful claims in cases of labour trafficking against parties where a principal and agent relationship has been relied upon.<sup>221</sup> Where no agency relationship can be established, and that will usually be the case, given that an arrangement with a labour hirer will generally be in the nature of an independent contract arrangement, the plaintiff's only option would be to join the ultimate 'employer' and the labour hire contractor as joint tortfeasors where it could be established, on the balance of probabilities, that there was knowledge and the requisite imputed intention to commit a tort on the part of the ultimate 'employer'.<sup>222</sup>

### D Plaintiffs Outside the Jurisdiction

Whilst Australia now has a special trafficking visa framework to assist victims of trafficking,<sup>223</sup> eventually many victims will return to their home countries, either because they are not able to obtain further visas or remain in

219 *Court Procedure Rules 2006* (ACT) div 2.8.6; *Supreme Court Rules 1987* (NT) o 32; *Supreme Court Rules 2000* (Tas) pt 13 div 2A; *Federal Court Rules 1979* (Cth) o 15; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 32; *Supreme Court Civil Rules 2006* (SA) ch 3 pt 2 r 32; *Rules of the Supreme Court 1971* (WA) o 26A, r 3.

220 Attorney-General's Department, 'Criminal Justice Response to Slavery and People Trafficking', above n 59, 18–9.

221 See, eg, *Does I v Gap Inc* (United States District Court for the Northern Mariana Islands, No CV-01-0031, 10 May 2002) slip op 19–20 where in a trafficking case, agency between a retailer and a manufacturer was held to be properly pleaded. See discussion in Werner and Kim, above n 48.

222 See the discussion regarding labour hire arrangements in Attorney-General's Department, 'Criminal Justice Response to Slavery and People Trafficking', above n 59, 18–9.

223 *Migration Regulations 1994* (Cth) sch 2, Provisions with Respect to the Grant of Subclasses of Visas, Subclass 060 Bridging F. See also Jennifer Burn and Frances Simmons, 'Prioritising Protection – A New Visa Framework for Trafficked People' (2009) 41 *Immigration Review Bulletin* [570].

Australia or because they prefer to return home to families. Where a plaintiff is not able to remain in Australia, there are severe practical difficulties in taking legal advice and instructing lawyers. Even the most determined plaintiff and the most generous pro bono lawyer will find the dictates of long distance communication in a different language extremely difficult. The procedural difficulties to be surmounted are numerous. Constant communication with a lawyer is essential. There are documents to be signed and served, oral and documentary evidence to be marshalled and there are inevitable delays where a plaintiff is not present in the jurisdiction.

There is no Australian visa category which would enable victims to remain in or to return to Australia to maintain a civil case against a trafficker. The introduction of some type of temporary residence permit to allow victims to remain in Australia to initiate and maintain claims for compensation against traffickers would be a worthwhile step toward enabling victims to pursue just compensation, in accordance with Australia's international law obligations.<sup>224</sup>

### E Security for Costs

A significant difficulty for a civil claimant who is residing outside the jurisdiction is the spectre of an order for the payment of security for costs. All Australian jurisdictions have civil procedure or court rules pursuant to which a court may order that a plaintiff who is ordinarily resident outside the jurisdiction provide security for costs.<sup>225</sup> The purpose of such an order is to ensure recovery by a defendant in the event of an adverse outcome of a plaintiff's case.<sup>226</sup> In NSW for example, the relevant rule provides that where in any proceedings it appears to the court that a plaintiff is ordinarily resident outside NSW, 'the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given'.<sup>227</sup>

The exercise of the power to order security for costs is discretionary in all Australian jurisdictions with the guiding principle being that persons have the right to bring and maintain actions to enforce their rights through the courts.<sup>228</sup> In particular, the courts will be extremely circumspect about ordering security for costs where the effect of the order may be to shut a plaintiff out of the litigation

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224 Anne T Gallagher, 'The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy' (Research Paper, United Nations Office of the High Commissioner for Human Rights, 2010).

225 *Court Procedure Rules 2006* (ACT) div 2.17.8; *Supreme Court Rules 1987* (NT) o 62; *Supreme Court Rules 2000* (Tas) pt 34 div 2; *Federal Court Rules 1979* (Cth) order 28; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 62; *Supreme Court Civil Rules 2006* (SA) ch 7 pt 14; *Uniform Civil Procedure Rules 1999* (Qld) ch 17 pt 1; *Rules of the Supreme Court 1971* (WA) o 25; *Rules of the Supreme Court 1971* (WA) o 25.

226 *Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248, 255; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

227 *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(a).

228 *Pearson v Naydler* [1977] 1 WLR 899, 902.

process because of poverty.<sup>229</sup> The court is required to balance the possible injustice to an impecunious plaintiff, whose right to litigate might be stripped away, with fair and adequate protection to a defendant in the event that the plaintiff's case is found to be deficient.<sup>230</sup> The general principles which the courts will consider in deciding whether to exercise the discretion to order security for costs include the financial means of the plaintiff,<sup>231</sup> the bona fides of the claim,<sup>232</sup> whether an order would stifle the plaintiff's claim,<sup>233</sup> the prospects of success of the plaintiff,<sup>234</sup> whether the plaintiff's financial situation is the result of the defendant's conduct,<sup>235</sup> whether the plaintiff is resident outside the jurisdiction,<sup>236</sup> whether the plaintiff sues in a representative capacity,<sup>237</sup> delay by the defendant,<sup>238</sup> any public interest in the proceedings,<sup>239</sup> and the disparity in the resources of the parties.<sup>240</sup> Naturally, the relevance of and weight to be afforded to the different factors will vary from case to case.

A victim of trafficking or slavery will obviously be a person of very limited financial means and where such a person has returned to a home country, a tortious claim may very well be met by an application for security for costs by a defendant. In deciding whether to exercise the discretion to order security in such a case, the major issues to be weighed by the court will be the plaintiff's impecuniousness and the consequent likelihood that a security for costs order will have the practical effect of barring the plaintiff's claim. This effect has been held to be a significant factor in the exercise of the discretion in favour of the plaintiff.<sup>241</sup> Further it has been held that there is no inflexible rule that an order for security for costs ought to be made when a plaintiff is ordinarily resident outside the jurisdiction.<sup>242</sup>

Certainly, where a plaintiff is ordinarily resident outside the jurisdiction, the provisions in the *Uniform Civil Procedure Rules 2005* (NSW) and similar rules in other Australian jurisdictions, have the effect of enlivening the court's power

229 *Ibid*; *Cowell v Taylor* (1885) 31 Ch D 34; *Jazabas Pty Ltd v Haddad* (2007) 65 ACSR 276, 294; *Hession v Century 21 South Pacific Ltd (in liq)* (1992) 28 NSWLR 120, 123.

230 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 (13 September 2001) [47].

231 *Ibid* [60].

232 *Bhagat v Murphy* [2000] NSWSC 892 (7 September 2000), [20]–[21].

233 *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564, 581–2.

234 *Lynnebry Pty Ltd v Farquhar Enterprises Pty Ltd* (1977) 3 ACLR 133, 135–6.

235 *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324.

236 *Cheng XI Shipyard v The Ship 'Falcon Trident'* [2006] FCA 759 (19 June 2006) [9]–[10]; *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992 (20 September 2006); *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245 (26 March 2008) [6].

237 *Riot Nominees Pty Ltd v Suzuki Australia Pty Ltd* (1981) 52 FLR 265, 269–70; *Andrews v Caltex Oil (Aust) Pty Ltd* (1982) 60 FLR 261.

238 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 (13 September 2001) [68].

239 *Devenish v Jewel Food Stores Pty Ltd* (1990) 94 ALR 664, 665.

240 *P M Sulcs and Associates Pty Ltd v Daihatsu Aust Pty Ltd (No 2)* [2000] NSWSC 826 (22 August 2000) [82].

241 *Yandil Holdings Pty Ltd v Insurance Co of North America* (1985) 3 ACLC 542, 545; *Weston v Beaufile* (1993) 43 FCR 292, 298.

242 *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463, 468; *Logue v Hansen Technologies Ltd* (2003) 125 FCR 590, 598.

to order security for costs, but the discretion may nevertheless be exercised in favour of the plaintiff, as was the case in *Corby v Channel Seven Sydney Pty Ltd*.<sup>243</sup> There the plaintiff in defamation proceedings was ordinarily resident outside NSW and was without regular income. The Court held that the effect of an order for security in the sum sought by the defendant might 'well prevent the plaintiff from continuing to prosecute her claim'.<sup>244</sup> Further the court held that the delay by the defendant in bringing the application for security and the 'strong financial position of the corporate defendant'<sup>245</sup> were factors weighing in favour of the plaintiff. Significantly, the court found that the defendant could, if necessary, absorb the costs of enforcing a judgment in Bali where the plaintiff resided. Finally, the court held that the interests of justice between the parties did not require the provision of protection to the defendants in respect of the costs of enforcing a judgment overseas.

The stultification factor, that is the propensity for an order for security to preclude the plaintiff's claim altogether, would surely be given much weight by a court where an order for security was sought in a trafficking or slavery case, particularly given a plaintiff's poverty and the likelihood that it was, in large part, caused by the defendant's treatment of the plaintiff.

## **F Evidentiary Problems: Corroboration, Credibility and Conviction**

In a civil case in tort the plaintiff's evidence will of course be critical to proving on the balance of probabilities all elements of the cause. Unfortunately in many trafficking or slavery cases there will be little, if any, corroborative evidence available. The search for corroborative evidence would be expensive and may be difficult and time consuming. A review of Australian trafficking criminal prosecution transcripts, undertaken by the Australian Institute of Criminology, revealed that prosecutors had obtained corroborative evidence from a number of sources including brothel clients whom trafficked women had asked for help, mobile telephone records confirming victim's movements, financial records confirming money transfers, photographs of premises and other documentary material.<sup>246</sup> There is no reason why a lawyer in a civil case would not be able to seek out such evidence, though of course the search may be limited by a lack of financial and other resources.

Issues of the plaintiff's credibility will almost certainly be raised by a defendant and the plaintiff's lawyer will need to ensure that the victim is allowed to explain any prior inconsistent statements that might have been made to criminal investigators or immigration authorities or to an organisation that may be supporting the victim. According to the Australian Institute of Criminology's research, there have been several Australian trafficking criminal prosecutions

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243 [2008] NSWSC 245 (26 March 2008) [41]. See also *O'Keefe v Seafresh Holdings Pty Ltd* [2009] NSWSC 1090 (15 October 2009) [16].

244 *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245 (26 March 2008) [35].

245 *Ibid* [39].

246 Fiona David, 'Prosecuting Trafficking in Persons: Known Issues, Emerging Responses' (Research Paper No 358, Australian Institute of Criminology, June 2008) 5.

where victims had given several statements to investigators that differed in significant ways, therefore amounting to prior inconsistent statements.<sup>247</sup> There are many reasons why a victim might make an incomplete or even false statement when first discovered by authorities or when relying on NGO support: trauma causing confusion and memory loss, fear of deportation or incarceration, and/or fear of retribution by traffickers against victims or their families.

Leaving aside questions about how any documentary statements might come into the hands of defendants, a plaintiff's lawyer would be well advised to ensure that any documentary statements made by a victim are obtained and considered for inconsistency and that the plaintiff has an opportunity to explain any such inconsistency. The types of statements mentioned above will not be privileged and will be admissible on cross-examination on the issue of credibility.<sup>248</sup>

An additional evidentiary consideration in a civil claim brought by a victim against a trafficker or enslaver is whether a criminal conviction of the defendant on a trafficking or slavery or related charge will be admissible at the civil trial. Findings of fact in previous proceedings are inadmissible at common law in subsequent proceedings, except where an issue estoppel arises between the parties.<sup>249</sup> There will be no issue estoppels between the parties to a civil claim where the previous proceeding was a criminal one.

In the Northern Territory, Queensland and South Australia by legislation, a conviction will be admissible in civil proceedings.<sup>250</sup> In proceedings in a federal jurisdiction or the ACT, NSW, Tasmania or Victoria, evidence of a decision or a finding of fact in a prior proceeding is not admissible to prove the existence of any fact that was in issue in the prior proceeding.<sup>251</sup> Though, in those jurisdictions, in civil proceedings evidence of a prior decision will be admissible to prove that a party has been convicted of an offence (provided there is no appeal pending or the conviction has not been quashed or set aside).<sup>252</sup> So, whilst a plaintiff will be able to rely on a conviction to prove a slavery or trafficking offence by the defendant, any findings of fact in the criminal trial or the conviction itself, will not be admissible to prove the facts constituting the elements of a tortious cause of action.

## G Pyrrhic Victories: Enforcing Judgments against Traffickers

A significant potential challenge at the conclusion of a successful case is of course, the recovery of the verdict money from the defendant. In some instances,

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247 Ibid 3.

248 *Evidence Act 1995* (Cth) ss 103, 104; *Evidence Act 1995* (NSW) ss 103, 104; *Evidence Act 2001* (Tas) ss 103, 104; *Evidence Act 2008* (Vic) ss 103, 104.

249 *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, 594–5, 601–2, though, in Western Australia the position is different: *Mickelberg v Director of Perth Mint* [1986] WAR 365.

250 *Evidence Act 1939* (NT) s 26A; *Evidence Act 1977* (Qld) div 5, ss 78–82; *Evidence Act 1929* (SA) s 34A.

251 *Evidence Act 1995* (Cth), s 91(1); *Evidence Act 1995* (NSW) s 91(1); *Evidence Act 2001* (Tas) s 91(1); *Evidence Act 2008* (Vic) s 91(1).

252 *Evidence Act 1995* (Cth) s 92(2); *Evidence Act 1995* (NSW) s 92(2); *Evidence Act 2001* (Tas) s 92(2); *Evidence Act 2008* (Vic) s 92(2).

defendants in trafficking or slavery cases will have business or personal assets which would be available to satisfy a judgment debt but as with other aspects of the litigation process, it may be costly and difficult for the plaintiff to pursue a defendant determined to avoid payment.

In cases where there has been a criminal conviction it would be to a victim's advantage if assets of the defendant were confiscated as proceeds of crime and then made available to satisfy the victim's judgment debt or perhaps a reparation order pursuant to section 21B of the *Crimes Act 1914* (Cth). The *Proceeds of Crime Act 2002* (Cth) establishes a scheme to trace, restrain and confiscate proceeds of Commonwealth crime. At present, the Act provides that confiscated funds are to be used for crime prevention, law enforcement, measures relating to treatment of drug addiction and diversionary measures relating to illegal drug use in Australia.<sup>253</sup> Whilst funding has been used to finance various projects to assist victims of crime,<sup>254</sup> the Act does not allow for confiscated proceeds of crime in individual cases to be used to compensate victims or to satisfy civil damages judgments in favour of victims. Reform of this aspect of the proceeds of crime legislation in Australia would be a measure which would enhance the prospects of successful recovery of tortious damages in cases where a criminal prosecution had been successful.<sup>255</sup> In the UK there is provision for a court to order that forfeited asset proceeds be paid to a person who has suffered personal injury or damage as the result of an offence<sup>256</sup> or where a compensation order has been made by the criminal court.<sup>257</sup> A provision of this kind in the Australian *Proceeds of Crime Act 2002* (Cth) would be of obvious benefit to victims in those cases in which prosecutions are successful.

## V CONCLUSION

The issue of compensation for victims of trafficking and slavery is crucial, especially given Australia's commitment to human rights and its international obligations which include the responsibility to ensure effective remedies for victims. The provision of functional and viable pathways to compensation for victims should be an essential element of the Australian human rights based response to the problem of human trafficking and slavery.

At present in Australia, the surest way for a victim to recover at least a limited amount by way of compensation, is pursuant to one of the Australian States' victims of crime compensation schemes. But the amounts recoverable under these schemes are not as generous as the amounts which would be available following a successful tortious claim at common law. Nevertheless, for

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253 *Proceeds of Crime Act 2002* (Cth) s 298.

254 Attorney-General's Department, *Overview of the Proceeds of Crime Act 2002*, above n 56.

255 Calls for reform have been made by the Anti-Slavery Project, University of Technology, Sydney: Anti Slavery Project, above n 51.

256 *Powers of Criminal Courts (Sentencing) Act 2000* (UK) c 6 s 145.

257 *Proceeds of Crime Act 2002* (UK) c 29 s 13(6).

those victims for whom the difficulties of pursuing a claim at common law are insurmountable, the state victims of crime compensation schemes provide a viable option for recovery. But these state schemes do not specifically provide for compensation in respect of the federal crimes of trafficking and slavery. Rather, a victim needs to bring a claim within the parameters set by the state schemes. A better solution and one in keeping with Australia's international obligations would be a Commonwealth scheme to compensate victims of federal crimes, including human trafficking and slavery crimes. Such a scheme would ensure not only Australia's compliance with its international obligations but would constitute recognition by Australia of the need to ensure that the human rights of victims are restored. From a human rights perspective, Australia must investigate and prosecute perpetrators and support victims, as it does. It must also aim for restoration of fundamental human rights, at least by way of adequate compensation.

Tortious remedies have an important role to play in the provision of just recompense for victims because they offer the prospect of significant compensatory damages as well as aggravated and exemplary damages. The tortious causes of action discussed above clearly provide opportunities for victims to obtain adequate and proper compensation for the human rights abuses they have suffered. Yet, there are inherent difficulties in the commencement and maintenance of such claims, including personal issues for traumatised victims who may be outside the jurisdiction, the difficulty of identifying and serving defendants, evidentiary challenges and the obvious grave problems of recovering a judgment debt. At least in the rare cases where the plaintiff's personal and procedural difficulties can be overcome and where the defendant has been convicted of a criminal offence, the recovery of a judgment debt could be assured where assets of the defendant were confiscated as proceeds of crime and then made available to satisfy the victim's judgment debt. Amendment of the *Proceeds of Crime Act 2002* (Cth) to allow for confiscated proceeds of crime in individual cases to be used to satisfy civil damages judgments in favour of victims would not only be of great practical assistance but would be in accordance with Australia's international obligations.

Tortious causes of action for intentional harm to victims of slavery and trafficking certainly provide valuable opportunities for recovery of compensation. Lamentably, except in a very few cases, the prospect of recovery of substantial damages may well be outweighed by the practical difficulties of instituting and maintaining such civil claims and the uncertainty of recovery of a judgment debt. Commonwealth legislation to provide compensation to victims would be the surest way for Australia to meet its human rights obligations in those cases where tortious claims are not feasible.