

Comparing the Fault Elements of Trespass, Action on the Case and Negligence

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The overlap between trespass, action on the case, and negligence makes the relationship between these torts confusing, requiring a careful scrutiny of their similarities and differences. This has, in turn, produced attempts to simplify the law by creating bright lines distinguishing one tort from another or else absorbing one tort in another. Rather surprisingly, these efforts have been performed without first defining clearly the nature of the fault (that is, blameworthiness¹) elements of these torts. These are the concepts of intention and negligence. All too often, in the judgments and commentaries on the interrelationship between trespass, action on the case and negligence, the meaning of these concepts and their differences are assumed to be known to the reader. This, it will be shown, has added to the confusion rather than reduced it.

This article seeks to define the concepts of intention and negligence as fault elements of the torts of trespass, action on the case and negligence. In doing so, it will distinguish the fault element of intention from other types of mental states which are sometimes confused with intention. The distinction between intention and negligence will also be clearly delineated, as will the different types of negligence contained in the torts under consideration. Only after a clear articulation of these various concepts and distinctions can one be confident of the directions the law in this area can and should take.

This exercise in conceptualisation and distinction of the fault elements of intention and negligence will be assisted by reference to comparable insights in the criminal law. Further assistance is gained by an evaluation of two recent Australian case authorities on tort law. The first is the Tasmanian Full Court case of *Wilson v Horne*², which decided that an intentional and direct act causing harm could support an action in the tort of negligence. The second is the Queensland Court of Appeal case of *Carrier v Bonham*³, which viewed the type of

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¹ Fleming, JG, *The Law of Torts*, 9th ed, LBC Information Services, Sydney, 1998, p 6.

² (1999) 8 Tas R 363.

³ [2001] QCA 234; Appeal No 7606 of 2000.

action on the case first propounded in *Wilkinson v Downton*⁴ as possibly absorbed in the tort of negligence.

I. The fault elements of intention and negligence under tort law

Simply stated, the fault element of intention comprises a conscious purpose to achieve a result which is proscribed by law. Any other state of mind which lacks both the features of (1) a conscious purpose, and (2) to achieve a legally proscribed result, does not comprise the fault element of intention. For example, it is the absence of (1) which distinguishes “recklessness” from “intention”, with recklessness denoting conscious awareness of a risk of a proscribed result occurring yet proceeding nevertheless to take that risk.⁵ Likewise, it is the absence of (1) which distinguishes “negligence” from “intention”, with negligence denoting a failure to meet the standard of care expected of a reasonable person to avoid the risk of a proscribed result occurring.

An example of a state of mind which satisfies (1) but not (2) is where a person purposely (as opposed to recklessly or negligently) performs conduct but lacks any aim or objective that such conduct will achieve a proscribed result. Thus, A may purposefully extend her arm but without aiming to strike B. Sometimes, A’s act of extending her arm is described as having been done intentionally but, in truth, it does not constitute fault based intention since it lacks the feature of engaging in conduct to achieve the proscribed result of striking B. Obvious as this distinction may seem, there appears to be a certain laxity by judges and commentators in using the term “intention”. Take, for instance, the following statement from a leading tort text:

“Proceeding from the assumption that fault in the sense ... of intention to do the act ... is a key element of the tort of trespass in all its forms, the question arises whether actions in trespass are confined to intentionally caused harm.”⁶

⁴ [1897] 2 QB 57.

⁵ Trindade, F, and Cane, P, *The Law of Torts in Australia*, 3rd ed, Oxford University Press, Melbourne, 1999, pp 33-34, acknowledge this distinction between recklessness and intention. However, they contend that the recklessness can be regarded as intentional for the purpose of the tort of trespass. However, the case authorities they cite in support of their contention are unpersuasive since they treat recklessness and intention disjunctively.

⁶ Balkin, RP, and Davis, JLR, *Law of Torts*, 2nd ed, Butterworths, Sydney, 1996, p 23. An example of judicial laxity is contained in the judgment of McPherson JA in *Carrier v Bonham* [2001] QCA 234 which is quoted in the main text accompanying note 54 below.

Although the words “intention” and “intentionally” are used, we need to appreciate that they denote different types of intention, with only the second mentioned type comprising the fault element of intentional trespass. A way of avoiding the ensuing confusion is to confine the use of the word “intention” and its derivatives to fault based intention consisting of a conscious purpose to achieve a proscribed result, leaving purposely performed conduct without more to be described by some other word such as “voluntariness”.⁷ Certainly, voluntariness is an essential element that has to be proven by a plaintiff for an action in trespass, action on the case or negligence to succeed. However, such a concept is not concerned with fault but serves as a precursor to establishing the fault based element of intention.

Restricting the fault element of intention to a conscious purpose to achieve a proscribed result also explains the distinction between motive and intention. Whatever may have been the reason for a defendant’s conduct, the conduct will be regarded as intentional so long as the dual features of conscious purpose and achievement of a proscribed result are met. So, it has been held that the motive which prompted a defendant to commit an act, however beneficent, will not negate intention.⁸

Turning now to the fault element of negligence, this may be defined as a failure to meet the standard of care expected of a reasonable person to avoid the risk of a proscribed result occurring. Like the fault element of intention, the alleged negligent conduct must involve the creation of a result or, more accurately, the risk of such a result. Also, as with the fault element of intention, the negligent conduct must have been voluntarily performed in the sense that the defendant must have purposely brought about the bodily movement which is the subject of the complaint. Given these similarities, it is essential that we identify the primary distinguishing feature between intention and negligence. It is that intention involves a state of mind with which the defendant acts (and is therefore described as a “subjective” measure of fault) whereas negligence involves a failure to comply with a standard of conduct (and is therefore described as an “objective” measure of fault).

⁷ As suggested by Trindade and Cane, note 5, p 30: “Voluntary here means that the defendant must consciously bring about the bodily movement that results in contact with the plaintiff for which the defendant is being held liable.” See further, *Hogan v Gill* (1992) Aust Torts Reports 91-182 at p 61,584 per Shepherdson J.

⁸ For example, see *Murray v McMurchy* [1949] 2 DLR 442.

This brief discourse of the fault elements of intention and negligence produces several propositions which will guide the remainder of this discussion. The first is that the inquiry into fault is intrinsically interwoven with the proscribed result or risk of such a result occurring. Any discussion of intention or negligence of the kind required to satisfy the fault elements of the torts of trespass, action on the case or negligence must invariably refer to the result complained of. Accordingly, simply describing a defendant's conduct as having been done intentionally or negligently without more, does not elevate such conduct to the status of having satisfied the fault elements of intention or negligence. Secondly, these two types of fault elements are sufficiently distinct to permit both to operate alongside each other in a given case. That is, it is entirely feasible for a set of facts to support both an intention on the defendant's part to achieve a proscribed result and to show that the defendant's conduct had exposed the plaintiff to a risk of injury by failing to meet the standard of care expected of a reasonable person. Thirdly, while the concepts of intention and negligence are subject to variations depending on the particular tort in question, the core features of those concepts, as detailed in this Part, remain the same.

II. The fault elements of intention and negligence under criminal law

Developments in the field of criminal law affirm the correctness of the above stated definitions of intention and negligence, the difference between these two types of fault elements, and the concluding propositions in the previous Part. Justification for relying on the criminal law for elucidation of matters concerned with tort law may be found in the High Court case of *Gray v Motor Accident Commission* where it was stated that the "sharp cleavage" between the criminal and the civil law is more apparent than real and, that the "roots of tort and crime" are "greatly intermingled".⁹

The criminal law, more so than tort law, has been required to pronounce clearly the nature of the fault elements of intention and negligence because the criminal law views intentional wrongdoing as more culpable than negligent wrongdoing.¹⁰ The criminal courts have defined intention as:

⁹ (1998) 196 CLR 1 at 7 citing Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 18 at 149.

¹⁰ See Husak, DN, "The Sequential Principle of Relative Culpability" (1995) 1 *Legal Theory* 493.

“a state of affairs which the party ‘intending’ ... decides, so far as in him [sic] lies, to bring about ... by his [sic] own volition”..¹¹

This definition clearly casts the concept of intention in terms of a conscious purpose to achieve a result, at the same time regarding voluntariness of the act as an essential but separate component of criminal liability.¹² So defined, intention is distinguishable from motive which the criminal courts have described as the emotional force behind a defendant’s conduct rather than a mental state in which the defendant acts with the conscious purpose of bringing about a result.¹³

As for the fault element of negligence, the criminal courts have defined it in the following terms:

“The requisite *mens rea* [that is fault element] is ... an intent to do the act which in fact caused the [physical injury] to the victim, but to do that act in circumstances where the doing of it involves a great falling short of the standard of care required of a reasonable man [sic] in the circumstances and a high degree of risk or likelihood of the occurrence of death or serious bodily harm if that standard was not observed ...”¹⁴

Once again, it is observed that this definition of negligence casts the concept in terms of a failure to comply with a standard of conduct which results in a risk of injury, at the same time treating voluntariness (evinced by the phrase “an intent to do the act”) as an essential but separate component of criminal liability.

Since the criminal law defines intention and negligence in quite distinct and distinguishable terms, there will inevitably be factual situations where the prosecution may lay alternative charges of crimes based on intention on the one hand, and negligence on the other. Take the New South Wales case of *R v D*¹⁵ where the defendant was the driver of a

¹¹ *Hyam v Director of Public Prosecutions* [1975] AC 55 at 74 per Lord Hailsham citing the civil case of *Cunliffe v Goodman* [1950] 2 KB 237 at 253 per Asquith LJ.

¹² Thus, in the High Court case of *Ryan v R* (1967) 121 CLR 205 at 213, Barwick CJ distinguished the concepts of voluntariness and intention by saying that the former required the act to “be willed, though its consequences may not be intended.”

¹³ *Hyam v Director of Public Prosecutions* [1975] AC 55 at 73 per Lord Hailsham.

¹⁴ *Nydam v R* [1977] VR 430 at 444 per Young CJ, McInerney and Crockett JJ .

¹⁵ [1984] 3 NSWLR 29.

half-cabin cruiser which collided with a dinghy occupied by the complainant, seriously injuring him. On these facts, the Crown, in the exercise of its prosecutorial discretion, could have charged the defendant with offences under either s 35 or s 54 of the *Crimes Act 1900* (NSW). The first and more serious charge under s 35 would be established if the defendant was proven to have rammed the rowing boat with the intention of causing grievous bodily harm to the complainant. However, on the same evidence, there was nothing to prevent the defendant from being found guilty, alternatively, of the lesser charge under s 54 of negligently causing the complainant grievous bodily harm. Such a charge would be made out by proving that the defendant's manner of driving the cruiser fell greatly short of the standard of care expected of a reasonable driver of such a vessel and created a high risk of grievous bodily harm to someone like the complainant.

The stage is now set to embark on an analysis of the fault elements of intention and negligence as they apply to the torts of trespass, action on the case and negligence. A comparison will first be made between trespass and negligence, followed by a comparison between an action on the case and negligence and, finally, between trespass and an action on the case. In particular, the roles given to intention and negligence for each tort will be explored with a view to clarifying the degree of overlap, if any, between the torts.

III. The fault elements of trespass and negligence

Since the law recognises both intentional and negligent trespass, the fault elements of each will be compared in turn with the fault element of the tort of negligence.

Intentional trespass and the tort of negligence

Based on the preceding discourse, the fault element of intentional trespass can be defined as a conscious purpose to achieve a result, specifically, "contact" for the trespass of battery, and "threat" for the trespass of assault.¹⁶ This subjective mental state is readily distinguishable from the objective measure of duty and standard of care required by the tort of negligence. However, the question remains whether it is possible for the same set of facts to give rise to both an action in intentional trespass and in negligence.

¹⁶ Since trespass is actionable *per se*, it is unnecessary to prove that the defendant intended to cause physical injury to the plaintiff.

Professors Trindade and Cane have answered this question in the negative, contending that an action in negligence “is totally inappropriate for situations involving conduct that is deliberate or intentional.”¹⁷ They rely on the statement by Lord Denning in the English Court of Appeal case of *Letang v Cooper* that “if intentional it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.”¹⁸ They also refer to the same judge’s comment made several years later in *Gray v Barr* that:

“Whenever two men have a fight and one is injured, the action is for assault, not for negligence. If both are injured, there are cross-actions for assault. The idea of negligence ... is quite foreign to men grappling in a struggle.”¹⁹

Regrettably, Trindade and Cane do not explain why they prefer these bald judicial statements to the submission by two leading English commentators that *Letang v Cooper* “should not be taken to mean that an intentional tort cannot be pleaded as negligence.”²⁰

As noted previously, there is nothing in the nature of the fault elements of intention and negligence which creates a conceptual impediment to allowing an action in negligence to be brought for an intentional act. Since the two concepts are quite different, a plaintiff should be left to decide whether to bring an action in intentional trespass or in negligence. If the choice is made to sue in intentional trespass, the proceedings will be concerned with whether the defendant had purposely committed an act to achieve a proscribed result. The fault element of negligence would be entirely irrelevant in this determination.²¹ Likewise, if the choice is made to sue in negligence, the proceedings will be concerned with whether the defendant had

¹⁷ *The Law of Torts in Australia*, note 5, p 63.

¹⁸ [1965] 1 QB 232 at 239-240, referred to by Trindade and Cane, note 5, pp 21-22.

¹⁹ [1971] 2 QB 554 at 569, referred to by Trindade and Cane, note 5, p 21. See also the New Zealand High Court of *Cousins v Wilson* [1994] 1 NZLR 463 where the defendants had intentionally removed mature trees from property which had been purchased by the plaintiff. The court rejected an attempt by the plaintiff to frame an action in negligence after noting that the damage had been intentional and as such actionable solely in trespass.

²⁰ Williams G, and Hepple, BA, *Foundations of the Law of Tort*, Butterworths, London, 1976, p 44, fn 3.

²¹ Certainly, proof that the defendant had inadvertently done the act causing the proscribed result will negate intention. However, such inadvertence has nothing to do with the fault element of negligence with its special feature of measuring the actions of a defendant against a standard of conduct.

failed to meet the requisite standard of conduct expected of a reasonable person in the circumstances. The fault element of intention would be irrelevant in this inquiry.

This question was recently settled in favour of the above view in the Tasmanian Full Court case of *Wilson v Horne*.²² The plaintiff had been sexually abused as a child by the defendant from 1973 to 1980. The plaintiff suffered psychiatric illness in 1994 after revelations by her sister that she had also been sexually abused by the defendant. The plaintiff commenced legal action in 1996. Since the *Limitation Act 1974* (Tas) imposed a six-year limitation period for actions in trespass, the plaintiff was statute-barred from suing in trespass because the last trespassory act of sexual abuse on her had occurred in 1980. She therefore sued the defendant in negligence, which was available to her since the psychiatric illness had developed in 1994 and thus fell within the three-year limitation period imposed by the statute. The trial judge rejected the defence counsel's submission that trespass was the only available cause of action in cases involving a direct and intentional act such as the present one. On appeal before the Tasmanian Full Court, defence counsel relied on the following statement by the High Court in *Williams v Milotin*²³ in support of his submission:

“[t]here is no suggestion that the defendant intended to strike him. If that had been the allegation the action could have been brought in trespass and not otherwise.”²⁴

Evans J in the Full Court rejected this submission, agreeing wholeheartedly with the trial judge's observation that the said statement in *Williams v Milotin* was:

“authority for the proposition that *prior to the introduction of the Judicature system* a direct and intentional application of force only gave rise to an action for trespass. However, nothing in that judgment purports to declare that that remains the law today.”²⁵

Evans J added that “it would be most surprising if it was still the law today as it is not unusual for a plaintiff to suffer injuries as a consequence of a wide range of conduct by a defendant which may

²² (1999) 8 Tas 363.

²³ (1957) 97 CLR 465.

²⁴ Note 23 at 470 per Dixon CJ, McTiernan, Williams, Webb and Kitto JJ.

²⁵ (1999) 8 Tas R 363 at 381 (original emphasis).

include the intentional application of physical force.”²⁶ He expanded further on this point by noting that there had been many developments referable to the concept of negligence in the law of torts since the judicature system was introduced in 1873,²⁷ with the most significant development being the decision in *Donoghue v Stevenson*.²⁸ Evans J observed that *Donoghue v Stevenson* did not place any restriction of the kind asserted by the appellant in the present case on the nature of the conduct which may be relied upon to establish a negligent breach of duty of care.²⁹ The correctness of the decision in *Wilson v Horne* is strengthened considerably by the High Court’s ruling that there were insufficient prospects of success of an appeal to warrant a grant of special leave.³⁰

Negligent trespass and the tort of negligence

A comparison of the fault elements of negligent trespass and negligence involves differentiating the two types of negligence required by these torts, there being no issue of intention to contend with. As an exercise in simplification of the law, the stance taken by the English Court of Appeal in *Letang v Cooper* is attractive for abolishing actions in negligent trespass. Under English law, a plaintiff who complains of injury caused by negligent conduct must establish the elements of the tort of negligence, including the existence of a duty of care and damage caused by a breach of such a duty.³¹ This is, however, not the view of the High Court of Australia, the leading case of which is *Williams v Milotin*, which declared that negligent trespass cannot be absorbed in the tort of negligence because the two causes of action are not the same.³² As the court explained:

²⁶ Note 25 at 381 per Evans J. Cox CJ and Wright J, in separate judgments, agreed with Evans J that the plaintiff was entitled to proceed in negligence in respect of the defendant’s intentional trespass.

²⁷ By virtue of the *Judicature Act 1873* (UK).

²⁸ [1932] AC 562.

²⁹ (1999) 8 Tas R 363 at 381 per Evans J.

³⁰ *Wilson v Horne* H6/1999, High Court of Australia Transcript (19th November 1999).

³¹ [1965] 1 QB 232 at 239 and 242, per Lord Denning MR and Danckwerts LJ respectively, and endorsed in *Stubbings v Webb* [1993] AC 498 at 507 per Lord Griffiths.

³² (1957) 97 CLR 465 at 474 per Dixon CJ, McTiernan, Williams, Webb and Kitto JJ, and followed in *Venning v Chin* (1974) 10 SASR 299; *Ross v Warrick Howard (Australia) Pty Ltd* (1986) 4 SR (WA) 1. Cf. The obiter remarks by Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 667-668.

“The essential ingredients in an action of negligence for personal injuries include the special or particular damage – it is the gist of the action – and the want of due care. Trespass to the person includes neither. But it does include direct violation of the protection which the law throws around the person ... It happens in this case that the actual facts will or may fulfil the requirements of each cause of action. But that does not mean that ... only ‘one’ cause of action is vested in the plaintiff.”³³

The advantages of suing in trespass over negligence where negligent conduct is the subject of complaint have been canvassed in detail elsewhere.³⁴ The only advantage which need concern us here is the one produced by the different types of negligence found in the two torts. As alluded to by the High Court in *Williams v Milotin* in the above cited passage, the tort of negligence requires the plaintiffs to prove that the defendant owed them a duty of care in the technical sense of the term as originally derived from Lord Atkin’s celebrated statement in *Donogoe v Stevenson*. In contrast, plaintiffs relying on an action in trespass are not required to prove that the defendant owed them a duty of care; they need only prove that the defendant failed to exercise reasonable care. Hence, a trespasser,³⁵ a criminal being pursued by the police,³⁶ or a party to a crime³⁷ may not be owed a duty of care, so they would be better served suing a defendant who injures them in negligent trespass where ‘duty’ questions are irrelevant.

Before leaving this comparison of the fault elements of negligent trespass and negligence, it is worth mentioning that uncertainty remains over what constitutes “reasonable care” under negligent trespass.³⁸ One judge has ventured to suggest that the content of negligence should be the same for both trespass and negligence in cases where both claims are founded on the same facts.³⁹ This makes good sense from the viewpoint of achieving coherence and consistency in the law of torts. Furthermore, having identical contents for

³³ Ibid.

³⁴ See Trindade and Cane, note 5, pp 330-339; Balkin and Davis, note 6, pp 31-34.

³⁵ See *Woodward v Begbie* (1962) 31 DLR (2d) 22.

³⁶ See *Marshall v Osmond* [1982] 2 All ER 610.

³⁷ See *Ashton v Turner* [1981] 1 QB 137.

³⁸ See further Balkin and Davis, note 6, p 33.

³⁹ *Shaw v Hackshaw* [1983] 2 VR 65 at 114 per Gobbo J, a point which was not considered by the High Court (1984) 155 CLR 614 in the subsequent appeal.

negligence in respect of both torts will bring the eventuality of absorbing negligent trespass in the tort of negligence a step closer in Australia. However, there remain other material differences between the two torts, not least the duty question, which must be overcome before such a radical change to the law is made.

IV. The fault elements of action on the case and negligence

Action on the case developed out of the need to provide corrective justice to plaintiffs who would otherwise not have succeeded in an action in trespass because the defendant's act was indirect.⁴⁰ Although the traditional description given to action on the case fits the description of an intentional tort, a closer examination reveals that the fault element may be intention or negligence depending on the type of action on the case under consideration. Accordingly, the ensuing discussion will first compare the fault element of the tort of negligence with the fault element of an action on the case for wilful⁴¹ injury, followed by a negligence based action on the case.

Action on the case for wilful injury and the tort of negligence

A clear example of this type of action on the case is the Court of Common Pleas decision in *Bird v Holbrook*.⁴² The defendant had, without giving notice, set up a spring gun in his garden in order to injure a person who had been stealing his valuable flowers and roots. The plaintiff had entered the garden to retrieve a peahen belonging to a neighbour and was seriously injured when he tripped a wire causing the spring gun to discharge at him. An action in intentional trespass would not have succeeded because the injury to the plaintiff was consequential upon his tripping the wire, and therefore indirect. Nevertheless, the court held in favour of the plaintiff on the ground that, not only did the defendant deliberately set up the spring gun but that he had done so "for the express purpose of doing injury."⁴³

Since the fault element of this type of action on the case is indisputably intentional, there is no question of overlap between it and the fault element of the tort of negligence. Conceivably, had the case

⁴⁰ For an historical treatise on this development, see Milson, SFC, *Historical Foundations of the Common Law*, 2nd ed, Butterworths, London, 1981, pp 300-313.

⁴¹ This adjective denotes that the fault element comprises intention to cause harm.

⁴² (1828) 4 Bing 628; 130 ER 911.

⁴³ Note 42 at 641-642 per Best CJ.

been decided today, there would be nothing to prevent the plaintiff from framing his action in negligence. It would be easy enough to contend that the defendant owed a duty of care not to injure others by his use of such a dangerous contraption as a spring gun,⁴⁴ and had breached that duty by failing to give notice of the trap. The fact that the defendant's conduct was intentional would be immaterial, in much the same way as the recent case of *Wilson v Horne* held that an action in negligence could be brought in respect of intentional acts causing injury.

Negligence based action on the case and the tort of negligence

This type of action on the case is exemplified in the Court of Queen's Bench decision in *Wilkinson v Downton*.⁴⁵ The defendant, as a practical joke, informed the plaintiff that her husband had been seriously injured in an accident and that she should go immediately in a cab to fetch him home. As a result, the plaintiff suffered a violent shock resulting in vomiting and other more serious physical consequences. She sought compensation from the defendant for her illness and the cost of the railway fares of persons sent by her as a consequence of the false message. An action in trespass would not have succeeded because the damage suffered was inflicted indirectly through speech. However, Wright J held that the plaintiff could recover for the damages sought because the defendant had:

“wilfully done an act calculated to cause physical harm to the plaintiff ... and has in fact thereby caused physical harm to her.”⁴⁶

The word “wilfully” contained in what has become commonly described as the rule in *Wilkinson v Downton* has led commentators to view this type of action on the case as intentional in nature and belonging to the same category as cases like *Bird v Holbrook*. These commentators view the rule as merely an application of the principle in cases like *Bird v Holbrook* to statements.⁴⁷

A careful examination of the rule in *Wilkinson v Downton*, however, reveals that the fault element of this type of action on the case is based on negligence and not on intention. All that Wright J meant by the

⁴⁴ For example, see *Hackshaw v Shaw* (1984) 155 CLR 614 at 665 per Deane J.

⁴⁵ [1897] 2 QB 57.

⁴⁶ Note 45, 58-59.

⁴⁷ See Trindade and Cane, note 4, p 64; Balkin and Davis, note 5, p 51.

word “wilful” was to describe the defendant’s act or statement as being purposely performed conduct without more. This comprises “voluntariness” which is an essential feature of all torts but is distinguishable from “intention” as a measure of fault.⁴⁸ Rather, the fault element of the rule in *Wilkinson v Downton* is to be found in the word “calculated”, which denotes an objective standard of conduct akin to, if not identical with, the fault element of the tort of negligence. This is clearly evinced in subsequent decisions which have applied and interpreted the rule. Thus, in contrasting the facts of the High Court case of *Bunyan v Jordan* with those in *Wilkinson v Downton*, Dixon J observed that the harm suffered by the plaintiff in the former case was “not a consequence which might reasonably have been anticipated or foreseen.”⁴⁹

This and other judicial statements to like effect were referred to by the Queensland Court of Appeal in the recent case of *Carrier v Bonham*.⁵⁰ The defendant was a mentally ill patient who had stepped in front of a moving bus in order to commit suicide. The plaintiff was the bus driver who, as a result of the experience, suffered a psychiatric illness. The plaintiff claimed damages against the defendant in negligence and under the rule in *Wilkinson v Downton*. The trial judge rejected the contention by the defence that the facts did not support the application of the rule because the word “calculated” contained therein demonstrated a need to show an intention to cause, or at least actual foresight of the likelihood of causing, harm of some kind. On appeal, McMurdo P agreed with the trial judge, explaining that:

“Where ‘calculated’ describes a set of words, as in *Wilkinson v Downton*, ‘calculated’ describes the quality of those words and means ‘likely to have that effect’, rather than ‘intending to have that effect’.”⁵¹

⁴⁸ See note 7 and accompanying main text.

⁴⁹ (1937) 57 CLR 1 at 17. In *Bunyan v Jordan*, the plaintiff had overheard the defendant in another room say that he was thinking of shooting someone. Likewise, see Latham CJ (at 11) who said that, unlike the defendant’s statement in the case before him, the words in *Wilkinson v Downton* were of such a character and spoken in such circumstances that “it was naturally to be expected that they might cause a very severe nervous shock.”

⁵⁰ [2001] QCA 234.

⁵¹ Note 50, para [12], referring to a similar interpretation of the word “calculated” by Brennan J in the High Court case of *Northern Territory v Mengel* (1995) 185 CLR 307 at 357.

McPherson JA, with whom Moynihan J agreed, went further to suggest that the type of action on the case exemplified in *Wilkinson v Downton* could be absorbed in the modern tort of negligence. The relevant passage in McPherson JA's judgment is worth citing in full:

“The feature that is often singled out as peculiar about *Wilkinson v Downton* is that it was an intentional act which had reasonably foreseeable consequences that were apparently not in fact foreseen by the defendant in all their severity ... Most everyday acts of what we call actionable negligence are in fact wholly or partly a product of intentional conduct. Driving a motor vehicle at high speed through a residential area is an intentional act even if injuring people or property on the way is not a result actually intended. *Wilkinson v Downton* is an example of that kind. The defendant intended to speak the words in question to the [plaintiff]. Even if he did not intend to inflict the harm on her that followed, or perhaps any harm at all, he was plainly negligent as regards the result that followed ... What matters is whether the consequences of the conduct ... were reasonably foreseeable and are such as should have been averted or avoided. What we really have now is not two distinct torts of [negligence based action on the case⁵²] and negligence, but a single tort of failing to use reasonable care to avoid damage however caused.”⁵³

McPherson JA's opening comments on “intentional conduct” are really concerned with the concept of voluntariness. As those comments state explicitly, this type of intentional conduct does not require a conscious purpose to achieve a proscribed result such as injuring people or property, and therefore does not constitute the fault element of intention.⁵⁴ His Honour's later comments describe the fault element of the rule in *Wilkinson v Downton* which he sees as the duty to avoid engaging in conduct which produces a risk of reasonably foreseeable harmful consequences. This leads him to conclude that,

⁵² McPherson JA used the word “trespass” which does not seem correct because the whole tenor of his discussion was a comparison between the rule in *Wilkinson v Downton* and the tort of negligence. Furthermore, he could not have been referring to intentional trespass because of what he had said about “intentional conduct”; and neither could he have been referring to negligent trespass because it did not feature at all in his discussion.

⁵³[2001] QCA 234, para 27.

⁵⁴ On this basis, Trindade and Cane, note 5, pp 21-22, were incorrect in regarding *Williams v Humphrey*, *The Times*, 13 February 1975 as a case involving a direct intentional act. Rather, it was a case attracting the rule in *Wilkinson v Downton* or else the tort of negligence.

should the defendant in the present case not be legally responsible for the reasonably foreseeable consequences of his action in throwing himself in front of the bus, he would be no more liable under the rule in *Wilkinson v Downton* than “he was according to ordinary principles of the law of negligence.”⁵⁵

There is much to be said in favour of McPherson JA’s attempt to simplify the law by absorbing negligence based actions on the case in the modern tort of negligence. Not only does the fault element of negligence appear to be identical, these tort actions have in common the need for damage to have occurred, cast the burden of proving fault on the plaintiff in all cases, and do not require the defendant’s act to have been direct.⁵⁶ Furthermore, there is the historical explanation for the rule in *Wilkinson v Downton* which was devised well before the development of the modern tort of negligence with its recognition of a duty of care in respect of nervous shock.⁵⁷

V. The fault elements of trespass and action on the case

Since the primary and historical distinction of directness remains between trespass where it is required, and actions on the case where it is not,⁵⁸ there is scant need to compare the two torts in terms of their fault elements. However, for the sake of completeness, it would be appropriate to make a few brief comparisons between the elements of intention and negligence under these torts.

Intentional trespass and action on the case for wilful injury

As between intentional trespass and action on the case for wilful injury, the concept of intention is exactly the same for both, namely, a conscious purpose to achieve a proscribed result. Accordingly, it

⁵⁵[2001] QCA 234, para 28. One of the issues raised in *Carrier v Bonham* was whether the defendant’s mental illness should be taken into consideration when determining whether he should have reasonably foreseen that his conduct might cause injury to someone else. All three members of the Court of Appeal held that the mental illness should not be permitted to affect the objective inquiry, and that this applied equally to the same inquiry under the rule in *Wilkinson v Downton*.

⁵⁶ Contrast these features which distinguish negligent trespass from the tort of negligence: see above note 34.

⁵⁷ *Bunyan v Jordan* can also be explained on this footing, it being quite likely that, had the case been heard today, the plaintiff would have framed her an action in negligence rather than relying on the rule in *Wilkinson v Downton*.

⁵⁸ See *Hutchines v Maughan* [1947] VLR 131 at 133 per Herring CJ. For further factual illustrations of this distinction, see Trindade and Cane, note 5, p 62.

would be feasible to collapse both these torts into a single one except for the continuing need for a trespassory act to be direct, and for an action on the case to have resulted in physical injury. It suffices to say that in cases involving direct intentional acts causing physical injury, the plaintiff may choose to sue the defendant in intentional trespass, in action on the case for wilful injury, or in negligence.⁵⁹

Negligent trespass and negligence based action on the case

Since a negligence based action on the case is the forerunner of the tort of negligence,⁶⁰ the comparison between negligent trespass and such a type of action has already been dealt with in Part III. This would also be true as between negligent trespass and the rule in *Wilkinson v Downton* should McPherson JA in *Carrier v Bonham* have been correct in absorbing the rule in the tort of negligence. Consequently, where the facts involve a direct negligent act which has caused physical injury, the plaintiff has a choice of suing the defendant in negligent trespass or in negligence.

Conclusion

The piecemeal development of action on the case and negligence, in order to fill certain gaps created by the tort of trespass, has produced a confusing patchwork of overlapping and distinctive features among these various torts. A clear way through this patchwork emerges when the fault elements of the torts are carefully defined and compared. The positive outcomes of such an exercise include removing the concept of voluntariness from consideration as a type of fault element; promoting coherence and consistency in the definitions of the fault elements of intention and negligence; and having one type of tort action less to contend with by absorbing the rule in *Wilkinson v Downton* and other negligence based actions on the case in the modern tort of negligence.

Clear definitions of the fault elements of trespass, action on the case and negligence and any overlap between them, serves another major function. They facilitate a fuller understanding of the other

⁵⁹ This last cause of action was uncertain until the recent decision in *Wilson v Horne* discussed earlier.

⁶⁰ As exemplified in *Williams v Holland* (1833) 10 Bing 112,131 ER 848; *Williams v Milotin* (1957) 97 CLR 465 and cases cited therein.

distinguishing features among the torts, such as the need for direct acts or physical injury for some torts but not others. This understanding, in turn, will assist an inquiry into whether the law can and should be simplified by dismantling these distinguishing features, thereby permitting the tort of negligence to hold sway.