

# The Effect of the Decision in *McCracken v Melbourne Storm Rugby League Football Club* on Professional Sport in Western Australia

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## Abstract

*The 2005 NSW decision of McCracken v Melbourne Storm Rugby League Football Club generated much interest as it appeared to circumvent the provisions of the Civil Liability Act 2002 (NSW), the main purpose of which is to impose a cap on damages awards for personal injury claims and to place limitations on liability in negligence. Western Australia has the Civil Liability Act 2002 (WA), but the relevant section is slightly different to that of the NSW legislation. The purpose of this paper is to examine whether the McCracken case would be likely to be decided in the same way in Western Australia. If so, the administrators, clubs and players involved in professional sport in this jurisdiction should be mindful of the implications, such as the potential for more litigation as a result of injuries sustained in the course of play, or an increase in insurance premiums.*

## Introduction

Professional sport is 'big business' in Australia and anything that may have an effect on the economics of such a business is newsworthy. For this reason, the decision in the New South Wales (NSW) case of *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107 (*McCracken*) generated a lot of interest at the time because it appeared to circumvent the provisions of the *Civil Liability Act 2002* (NSW) (*CLA NSW*). As the main purpose of the *CLA NSW* is to impose a cap on damages awards for personal injury claims and to place limitations on liability in negligence, the outcome in the *McCracken* case has serious ramifications across Australia for participants in all professional contact sports. The possibility of players and their club employers being successfully sued in respect of injuries resulting from misconduct during games is an additional cost factor that must be considered by the administrators of the various codes, the clubs, the players and

the insurers of all. This is not a new situation and players have been sued for injuries resulting from their misconduct during games in the past. For example, in Canberra in 1971 an Australian Rules Football player who received a sharp blow to the head during a game sued another player for damages; in NSW in 1993 a professional rugby league footballer who received a badly broken jaw during a game sought damages from another player and the player's club.<sup>1</sup> However, it might well have been expected that legislation such as the *CLA* NSW, which is intended to impose limits on civil liability, would have extinguished this avenue for compensation or at least placed a statutory cap on any award of damages.

All Australian states and territories have statutes limiting civil liability, but there are variations in the legislation, as later discussed. Western Australia (WA) has the *Civil Liability Act 2002* (WA) (*CLA* WA), but the wording in the relevant section is slightly different to that of the NSW legislation. The purpose of this paper is to examine whether the *McCracken* case would be likely to be decided in the same way in Western Australia. If so, the administrators, clubs and players involved in professional sport in this jurisdiction should be mindful of the implications, such as the potential for more litigation as a result of injuries sustained in the course of play or an increase in insurance premiums.

This paper is in three parts. The first part discusses the facts and decision in the *McCracken* case. The second part looks at the background to the reform of the law of negligence in Australia, outlines the reforms that have now taken place and compares the relevant wording of the *CLA* NSW with the *CLA* WA. The third part examines the meaning of the wording in the WA Act with a view to establishing the intention behind the relevant phraseology. This requires reference being made to the definition sections of this Act and other legislation, and to Hansard and various legal sources including cases. Finally, the paper concludes that the case may well be decided in the same way in a WA court and that, therefore, clubs and players in WA should not assume that the wording in the *CLA* WA protects them from liability in similar circumstances.

## **Part 1 - The *McCracken* Case**

Mr Jarrod McCracken, the plaintiff, previously played for the Wests Tigers Rugby League Football Club. McCracken was injured as the result of a dangerous tackle carried out on him by two members of the Melbourne Storm during a first grade match and has not played rugby league again. McCracken sued the two players, Mr Stephen Kearney and Mr Marcus Bai, and the Melbourne Storm Club for damages in negligence and trespass.

There were no other remedies available to McCracken as it seems he may have been unable to make a claim under the NSW Sporting Injuries Scheme. This scheme is administered by the NSW Sporting Injuries Committee under the *Sporting Injuries Insurance Act 1978* (NSW) and applies when a sportsperson, who is a registered participant of a sporting organisation, suffers a compensable injury (section 19[1][a]). Although NSW clubs involved in the National Rugby League competition in which McCracken was playing are members of the Scheme (NSW Government, no date), the extent of McCracken's injury rendered him ineligible for cover. According to McCracken's lawyer Bernie Gross, in an on-air interview with Damian Carrick on ABC Radio National in

March 2005, McCracken suffered: 'Basically injury to the vertebrae of his neck that involves soft tissue and bony injury, which made it totally unsafe for him to ever go back on the football field'. The Scheme provides lump sum payments only for permanent disablement or death and although McCracken's injury was serious and prevented him from ever playing or training again, it did not meet any of the eligibility thresholds under Table A of the *Sporting Injuries Insurance Regulation 2004* (NSW).

The *McCracken* case was heard in the Supreme Court of NSW. There were difficulties obtaining information relating to the extent of the plaintiff's economic loss and, as waiting for the necessary documentation would have resulted in an adjournment, the parties agreed that issues relating to liability and issues relating to damages would be heard separately. On the issue of liability, the Judge, Hulme J, found in favour of the plaintiff. In doing so, he determined that the provisions of the *CLA* NSW were excluded from the case which meant that the various limitations imposed by the *Act* did not apply to the injured plaintiff.

The details of the facts and decision as set out in the case are as follows. In May 2000 the Wests Tigers were playing the Melbourne Storm at Olympic Park in Melbourne; McCracken was captain of the Wests Tigers at the time. McCracken had possession of the ball and was approximately ten metres from the Melbourne Storm's goal line. Together, Kearney and Bai tackled McCracken by lifting him up and tipping him over, causing him to fall down in a way that meant his head made contact with the ground first; in other words, a spear tackle. Kearney and Bai were charged by the National Rugby League (NRL) with having made a dangerous throw and both pleaded guilty. The details of the charge were that in 'effecting a tackle on ... Jarrod McCracken, (the Defendant) lifted him to a dangerous position causing him to fall head first to the ground' (*McCracken*: para. 23). Under Section 15 of the Laws of the Game of the Australian Rugby League, 'a player is guilty of misconduct if he uses any dangerous throw when effecting a tackle' (*McCracken*: para. 24). During the hearing, Kearney and Bai gave evidence by video link as both of them were in England playing rugby league at the time. The following exchange took place during the cross-examination of Bai (*McCracken*: para. 19):

*Q. Put aside the play the ball you were in, you are intending to put Mr McCracken hard on the ground in the tackle, are you not [sic]?*

*A. That's correct.*

*Q. You did not intend to cause him serious injury to his head or neck, did you?*

*A. No.*

*Q. Is it the intention that you intended to do some minor injury by at least driving him to the ground vigorously?*

*A. Yes.*

When he had summarised the evidence, Hulme J stated (*McCracken*: para. 37):

*Many of the matters to which I have referred lead inevitably to the conclusion that the Defendants breached the duty of care that they owed to the Plaintiff. I am further satisfied that the intent of both of the Defendants in the tackle was to injure the Plaintiff. I do not by that suggest that injury of the severity that occurred was intended, but the evidence of... Mr Bai... satisfies me that some injury was intended by each of the Second and Third Defendants.*

Hulme J then turned to the matter of whether or not the *CLA* NSW would apply. Section 3(B)(1)(a) states that the provisions of the Act do not apply 'in respect of an intentional act that is done with intention to cause injury or death...' After a brief discussion on the issue of whether the NSW Parliament had intended this to apply only to intentional criminal conduct, Hulme J gave the words of s 3(B) their ordinary English meaning (*McCracken*, 2005: para. 41). Section 3(B)(1)(a) of the *CLA* NSW has two limbs. The first is the 'intentional act'; this was satisfied in the *McCracken* case by Hulme J's acceptance that the actions of Kearney and Bai in executing the tackle manifested the intention that the plaintiff should come to the ground heavily (an intentional act). The second limb, 'with intention to cause injury ...', was satisfied by Hulme J's acceptance that Kearney and Bai intended some injury even if it was not of the seriousness that eventuated (Madden, 2005).

As a result, Hulme J found that the defendants had intended to cause injury, albeit not to the extent that had actually occurred, and so the provisions of the *CLA* NSW were excluded. Having decided in favour of the plaintiff against each of the defendants on the issue of liability, the matter of damages remained to be assessed (*McCracken*, 2005). Recent newspaper reports suggest that the claim was in the order of \$1.4 million for football earnings alone (Magnay & Lamont, 2005). In August 2005, there was a hearing on quantum, but as at October 2006 no judgment has yet been made. The amount of damages awarded to *McCracken* will determine whether or not the defendants decide to appeal.<sup>2</sup>

## **Part 2 - Background to the Reform of the Law of Negligence in Australia**

The so-called 'insurance crisis' in Australia brought about an explosive rise in premiums for some parties, such as organisations with high levels of public traffic, shopping centres (in relation to 'slip and fall' risks), local governments and the organisers of high-risk social activities (i.e., sky diving, horseback trail riding), and non-availability of insurance coverage for others, such as independent midwives (Senate Economic References Committee, 2002). In a report prepared for a meeting of ministers in March 2002, Trowbridge Consulting stated that premium increases of 20 percent were 'routine', 100 percent 'not uncommon' and increases of 500 percent to 1000 percent had occurred (Senate Economic References Committee, 2002: 21). One reason for the insurance crisis was believed to be the way in which judicial decisions in negligence cases had become increasingly plaintiff-orientated at the expense of the defendant, with the defendant's deep pocket insurer suffering the consequences (Spigelman, 2003).

In 2002, following meetings involving ministers from Australia's Commonwealth, State and Territory Governments, it was agreed that the Hon David Ipp would Chair a

panel of four eminent persons to review the operation of the law of negligence. The focus of the Panel's terms of reference was primarily on liability for negligently caused personal injury and death. The Panel of Eminent Persons handed down its report in two parts: one in August 2002 and the second in September 2002. The resulting *Review of the Law of Negligence Report* is referred to as the Ipp Report.

For the sake of national uniformity, the Ipp Report's first recommendation is that all the ensuing recommendations with respect to civil liability should be incorporated into a single statute to be enacted in each jurisdiction (Ipp Report, 2002). This has not occurred and there are variations in the provisions of civil liability legislation in the different Australian jurisdictions. In WA, the Ipp Report recommendations are incorporated, with some modification, into the *Civil Liability Act 2002* (WA) as amended by the *Civil Liability Amendment Act 2003* (WA) (both of which constitute the *CLA WA*).

Two of the principal objectives of the *CLA WA* which are of particular relevance to this paper are: placing limitations on liability in negligence; and imposing a cap on damages awards for personal injury claims. Where a plaintiff (the injured sportsperson) sues in negligence, the *CLA WA* makes changes, favourable to the defendant, to the way in which the judiciary can apply the law. In situations with facts similar to those of the *McCracken* case, Part 1A Division 6, headed 'Liability for harm caused by the fault of a person'/'Assumption of risk' has the potential to exclude a defendant's liability entirely:

*5N. Injured persons presumed to be aware of obvious risks*

- (1) In determining liability for damages for harm caused by the fault of a person, the person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.*
- (2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.*

Section 5G of the *CLA NSW* is virtually identical, except that it refers to 'negligence' rather than 'fault of a person'. An 'obvious risk' is defined in s 5F(1) of the *CLA WA* as 'a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person'. Section 5F(2) says 'Obvious risks include risks that are patent of a matter of common knowledge' and s 5F(3) states 'A risk of something occurring can be an obvious risk even though it has a low probability of occurring'. Section 5F of the *CLA NSW* is identical. Although it is not spelt out in so many words, the heading 'Assumption of risk' in both the WA and NSW legislation indicates that in the right circumstances the plaintiff assumes the risk or, in other words, consents to the defendant's behaviour and the defendant is, therefore, not liable for the injury caused.

The second objective of the *CLA WA* is accomplished by Part 2, which is headed 'Awards of personal injuries damages'. Part 2 of the *CLA NSW* has similar provisions. Part 2 Division 1 of the *CLA WA* states that the Part applies to an award of personal injury damages which are sought to be recovered in any civil action arising out of an incident that happens after the commencement of the provisions. This means the cap on damages is not limited to negligence actions and includes other torts, such as trespass to

person, as well as other civil actions such as breach of contract. Part 2 Division 2 restricts damages for non-pecuniary loss. This is listed in s 9(4) as pain and suffering, loss of amenities of life, loss of enjoyment of life, curtailment of expectation of life and bodily or mental harm. Part 2 Division 3 fixes damages for pecuniary loss, such as loss of earnings and the provision of home care services. Section 11(1) provides that the court 'is to disregard earnings lost to the extent that they would have accrued at a rate of more than 3 times the average weekly earnings at the date of the award'. Likewise, s 12(2) of the *CLA* NSW has the following wording:

*In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.*

These limitations are of great significance for a high-earning professional sports star if the injury finishes that sporting career.

The Ipp Report also states that the Panel had not 'considered liability for intentionally or recklessly caused personal injury and death' (Ipp Report, 2002: 13). This explains the exclusory provisions contained in s 3(B)(1)(a) of the *CLA* NSW; that defendants cannot benefit from the limitations on liability provided by the legislation if the act causing injury or death is intentional or reckless. The *CLA* WA equivalent of the *CLA* NSW provision was not included in the Bill that was tabled originally in the WA Parliament.<sup>3</sup> It was included later by an amendment to the Bill and appeared in the original version of the *CLA* WA as s 6 in Part 2 Division 1.<sup>4</sup> The 2003 amendments restructured the *CLA* WA so the provisions are now in s 3A 'Damages excluded from Act'.<sup>5</sup> The exclusions are set out in a table in s 3A(1) and the relevant wording is 'an unlawful intentional act that is done with an intention to cause personal injury to a person, whether or not a particular person'. Like the *CLA* NSW, this has two limbs: being 'an unlawful intentional act' and 'done with an intention to cause personal injury to a person'. The inclusion of the word 'unlawful' in the first limb, however, differentiates the two Acts and, on the surface at least, appears to make it harder for a plaintiff in WA to satisfy the requirements of the provision.

The two Acts differ in another way. The *CLA* NSW makes this Act retrospective, so it applies to any incident that occurred prior to the commencement of the Act except for decisions of a court made before the commencement day.<sup>6</sup> There was an exception in relation to claims made against the Crown, so the NSW Government did not benefit from the retrospectivity (NSW Parliamentary Hansard, 2002). The *CLA* WA, on the other hand, applies only to incidents happening on or after the date that the various Parts came into operation. This is effected by a section at the start of each Part in the *CLA* WA. Where a person (the plaintiff) has suffered personal injury or death due to the negligence of another (the defendant), this difference is of great significance. In NSW, all defendants benefit from the limitations on liability and damages imposed by the *CLA* NSW regardless of when the incident happened (subject to statutory limitation periods). In WA, the benefits for the defendant only apply if the incident occurs after the relevant provision of the *CLA* WA came into operation.

### Part 3 - The *CLA* WA and its Application to the *McCracken* Case

The question that needs to be examined in this part is whether the inclusion of the word 'unlawful' would bring about a different result if the *McCracken* case came before the courts in WA. As mentioned above, Hulme J in the *McCracken* case considered whether the NSW Parliament had intended the exception contained in s 3(B)(1)(a) of the *CLA* NSW to apply to criminal conduct only. This point (i.e., in relation to the intention that the exception would apply to criminal conduct only) had been raised by counsel for the defendant in reference to a comment made during the second reading speech when the Bill was progressing through the lower house of the NSW Parliament. Mr Bob Carr, then Premier of NSW, had said (NSW Parliamentary Hansard, 2002: 2085):

*Importantly, intentional acts done with intent to cause injury or death or acts involving sexual assault are excluded. This exclusion ensures that the compensation for injuries arising from serious criminal acts is not limited by this bill.*

The reference to criminal conduct is not reflected in s 3(B)(1)(a) of the *CLA* NSW which says only that the Act does not apply 'in respect of an intentional act', thus enabling Hulme J to grant a wider rather than a narrower operation to the section (*McCracken*, 2005: para. 41).

Therefore, by implication, the reference to an 'unlawful intentional act' in s 3A(1) of the *CLA* WA means it has a narrower operation than the equivalent provision in the NSW legislation. To determine the scope of the clause in the *CLA* WA, it is necessary to examine the meaning of the word 'unlawful' in that context. There is no definition of 'unlawful' in the *Civil Liability Act 2002* (WA) or the *Civil Liability Amendment Act 2003* (WA). Neither is there any definition in the *Interpretation Act 1984* (WA) or the *Acts Interpretation Act 1901* (Cth). The more obvious of the general legislation covering criminal acts, the *Criminal Code Act 1913* (WA) and the *Criminal Code Act 1995* (Cth), offer no definition either.<sup>7</sup>

As noted above, the provisions in 3A(1) of the *CLA* WA were not in the original Bill. The section was then incorporated by amendment into the part of the Bill confined to 'Personal Injury Damages'. The Hon Mark McGowan, who at the time was the Parliamentary Secretary to the WA Premier, said the following when introducing the amendment in the WA Parliament (WA Parliamentary Hansard, 2002: 1987):

*This... will ensure that the deductible provisions, the threshold and the other arrangements contained in the Bill that would affect plaintiffs do not apply to intentional or criminal acts; that is, the deductible provisions would not apply if someone were pursuing a person for a criminal offence. For instance, if I were to assault the member for Merredin and he pursued me through the courts, I would not benefit because I had committed a criminal offence and the deductible of \$12 000 would not be removed from his payout. These provisions are designed to apply to a case of negligence and not to a criminal situation.*

Thus, it may be assumed that the minister considered that 'unlawful' has the same meaning as 'criminal' in this context.<sup>8</sup> As also noted above, the 2003 amendments to the provisions were moved to the beginning so as to be of general application to the Act as a

whole. The application of 3A(1) of the *CLA WA* requires the plaintiff to show the defendant's act was not only intentional but criminal (the first limb) and that it was done with an intention to cause personal injury (the second limb).

The example of a criminal act used in the McGowan speech was that of assault and this is the offence most likely to be committed in a contact sport situation by one player against another. The relevant wording of s 222 of the *Criminal Code Act 1913 (WA)* defines assault as:

*A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent... is said to assault that other person, and the act is called an assault.*

Section 223 says 'An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law'.

To understand what is meant by 'unlawful' in the civil law system, it is necessary to look at some decided cases. The civil law equivalent of the criminal offence of assault is the tort of trespass to person. Trespass to person comprises 'assault', 'creating in another person an apprehension of imminent harmful or offensive conduct', and 'battery', when the threat transpires into action. In layman's language 'assault' is taken to mean both, but technically the two are different (Fleming, 1998). If a civil action for trespass (battery) is to succeed, there must be a positive act. An omission or inaction will not amount to trespass, but it is not necessary that the act be forcible, or hostile or that the defendant intended injury to result. If, for example, a player's arm injures another player, it is a trespass if the offending arm is swung deliberately, regardless of whether there is any intention to injure. If, however, the motion of the arm is involuntary, perhaps because of a tackle, this does not give rise to trespass because the act is unintentional.<sup>9</sup> On the face of it, any intentional physical contact in a sporting situation qualifies as an assault, but it is not unlawful because the circumstances authorise or justify the activities.

If the behaviour is outside the rules of the game, however, the situation is different. There are a number of cases in Australia on this point. For example, in *Rogers v Bugden* (1993) (*Rogers*), a civil action, Bugden was found to have assaulted Rogers during a Rugby League match. Rogers' jaw was broken requiring surgery and extensive dental work. The trial judge, Lee CJ, decided in favour of the plaintiff, concluding that the assault was a blow to Rogers' head by Bugden's forearm, done deliberately and with intent to hurt and contrary to the rules of the game (*Rogers*). An appeal to the NSW Court of Appeal on the issue of liability was dismissed and damages were increased. Bugden was ordered to pay \$79,154.60, which included \$7500.00 in exemplary damages, and Canterbury Bankstown Rugby League Football Club Ltd was ordered to pay \$71,654.60 (the club was vicariously liable as the employer of Bugden); costs were awarded against the defendants (*Rogers*).

'Consent' is the only defence to a trespass action, but how the defence works is not straightforward. It might be thought that compliance with the rules of the particular game would be a good indicator of whether or not the plaintiff 'consented' to the invasion of his/her person by the defendant. If the defendant 'intends to cause bodily harm or knows, or ought to know, that such harm is the likely result of his actions', the defence does not

apply.<sup>10</sup> This is clearly explained by Fox J in *McNamara v Duncan* (1976) (*McNamara*) (*McNamara*: 588):

*I do not think it can be reasonably held that the plaintiff consented to receiving a blow such as he received in the present case. It was contrary to the rules and was deliberate. Forcible bodily contact is of course part of Australian Rules football, as it is with some other codes of football, but such contact finds justification in the rules and usages of the game. Winfield (op cit) says (at 748) in relation to a non-prize fight, 'a boxer may consent to accidental fouls, but not to deliberate ones'. Street on Torts (4th ed p 75) deals with the presumed ambit of consent in cases of accidental injury 'A footballer consents to those tackles which the rules permit, and, it is thought to be those tackles contravening the rules where the rule infringed is framed to maintain skill of the game: but otherwise if his opponent gouges out an eye or perhaps even tackles against the rules and dangerously.' Prosser Law of Torts (3rd ed p 103) says, 'One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the rules of the game' [references omitted].*

In this case, the plaintiff was injured while playing Australian Rules football. The plaintiff had possession of the ball and kicked it away just before the defendant, who was playing for the opposing team, hit him in the head. In the evidence given by witnesses, there were some differences of opinion as to what actually happened, but Fox J was satisfied with the evidence of a field umpire who said that the defendant struck the plaintiff with his elbow (*McNamara*). The plaintiff's skull was fractured, he was operated on for an extradural blood clot that same night and six months later he had to have a protective plate inserted in his skull. He was, however, able to return to his job as a public servant after approximately six weeks and most of his symptoms wore off except for discomfort in the left leg due to nerve damage (*McNamara*). Finding in favour of the plaintiff, Fox J concluded that the defendant struck the plaintiff intentionally and contrary to the rules of the game. He dismissed the contention of the defendant's counsel that 'a little bit of foul play is a common, if not invariable, concomitant of a game of football' and 'the plaintiff must be treated as having accepted the risk that it would happen' (*McNamara*, pp. 587-588). Reasons given by Fox J for excluding the defence of consent are stated in the extract above. Damages of \$6000.00 were awarded to the plaintiff, with costs (*McNamara*).

It is demonstrated through the above decisions, and from the *McCracken* case, that if the activity of the defendant is found to infringe the rules of the game, it will amount to an assault (in the broad sense of assault including battery) on the plaintiff. If the defendant is found guilty of misconduct by the sporting body in control of that particular code, the decision by the judge is much easier to make. An assault on a person is an unlawful act in both the criminal law and the civil law, so for the purposes of the *CLA* WA, the 'unlawful intentional' act in these circumstances is no different to that of the 'intentional' act required by the *CLA* NSW. Therefore, where such a plaintiff in WA can show that the defendant's act was unlawful and intentional, which would be satisfied if the defendant acted contrary to the rules and intended to cause injury, the latter of which would be harder to prove, the *CLA* WA does not apply. There may be occasions where the facts of a case would bring about a different result in the two jurisdictions, but not in the

*McCracken* case. This paper argues that it is likely that the case would be decided the same way under the WA legislation.

## Conclusion

The purpose of both the *CLA* WA and the *CLA* NSW is to impose a cap on damages awards for personal injury claims and to place limitations on liability in negligence. It may have been thought by all those involved in professional sport in WA and NSW that any injuries incurred during fixtures by one player as a result of the actions of another player would be caught by the provisions of the respective legislation, precluding civil liability. The *McCracken* decision has shown that this cannot be taken for granted and, where the plaintiff in NSW can show that the act was intentional and in WA unlawful and intentional and intended to cause injury, the legislation is circumvented. The inclusion of the word 'unlawful' in the *CLA* WA is unlikely to make any difference in a case with similar facts to those in *McCracken*. All those involved in professional sport in WA must be aware that there are still circumstances in which the *CLA* WA provides no assistance to the defendant, so players and their club employers may be successfully sued in respect of injuries resulting from misconduct during games. The potentially large damages awards and costs resulting from such legal actions are an additional economic factor that must be considered by the administrators of the various codes, the clubs, the players and their insurers.

## Appendix A: Legislation

<b>Jurisdiction</b>	<b>Legislation</b>
Commonwealth	<i>Acts Interpretation Act 1901</i> (Cth) <i>Criminal Code Act 1995</i> (Cth)
Australian Capital Territory	<i>Civil Law (Wrongs) Act 2002</i> (ACT)
New South Wales	<i>Civil Liability Act 2002</i> (NSW) <i>Sporting Insurance Act 1978</i> (NSW)
Northern Territory	<i>Personal Injuries (Liabilities and Damages) Act 2003</i> (NT)
Queensland	<i>Civil Liability Act 2003</i> (Qld)
South Australia	<i>Civil Liability Act 1936</i> (SA)
Tasmania	<i>Civil Liability Act 2002</i> (Tas)
Victoria	<i>Wrongs Act 1958</i> (Vic)
Western Australia	<i>Civil Liability Act 2002</i> (WA) <i>Civil Liability Amendment Act 2003</i> (WA) <i>Criminal Code Act 1913</i> (WA) <i>Interpretation Act 1984</i> (WA)

Source: Original table.

## Appendix B: Cases

*Giumelli v Johnston* (1991) Aust Torts Reports 81-085.

*McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107 (22 February 2005).

*McNamara v Duncan* (1976) 26 ALR 584.

*Rogers v Bugden* (unreported, 14 February 1990 Supreme Court of New South Wales) and on appeal at (1993) Aust Tort Reports 81-246.

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WA Parliamentary Hansard, Legislative Assembly, 17 October 2002.

(various dates) *Australian Torts Reporter*. CCH, Sydney.

## Notes

<sup>1</sup> Respectively *McNamara v Duncan* (1976) 26 ALR 584 and *Rogers v Bugden* (unreported, 14 February 1990, Supreme Court of New South Wales) and on appeal at (1993) Aust Tort Reports 81-246.

<sup>2</sup> The authors would like to thank Robert Crittenden, lawyer for the three defendants at the time of the hearing, for providing information regarding the case (such as the assessment of damages and the issue of any appeal) (email correspondence between the authors and Robert Crittenden during October 2006). Crittenden also comments that it was surprising how quickly liability judgment was handed down (almost immediately after completion of the hearing); he had expected the decision to take a few months because it was such a 'tricky' case. He expects a finding on quantum before the end of 2006, but is also surprised that this aspect has taken so long (notes taken during a telephone conversation between the authors and Robert Crittenden: 19 October 2006).

After this article was completed it was reported that Jarrod McCracken had been awarded \$97,000 in damages. According to the report, 'McCracken had been seeking at least \$350,000 in damages' (CCH Daily Alert, 23 November 2006). A three month holding summons has been placed on the case during which time either party may appeal the decision. The holding summons expires on the 20 March 2007. It seems that both parties are unhappy with the verdict - the plaintiff is considering appealing against the finding relating to the award of damages, while the defendants are considering appealing against the original finding of liability (notes taken during a telephone conversation between the authors and James McLean of Moray & Agnew, current lawyer for the defendants, 23 February 2007).

<sup>3</sup> The situation in the other Australian jurisdictions is varied. Because of the wording in s 50 and s 93 of the *Civil Law (Wrongs) Act 2002* (ACT) and in s 4 of the *Personal Injuries (Liabilities and Damages) Act 2003* (NT), the limitations on civil liability could not be circumvented as they were in the *McCracken* decision. The wording in s 3(B)(1)(a) of the *Civil Liability Act 2002* (Tas) is the same as that in the relevant provision of the *CLA NSW*. Sections 28C(2)(a) and 28LC(2)(a) of the *Wrongs Act 1958* (Vic) and s 51 of the *Civil Liability Act 1936* (SA) have similar exclusions located in the parts of the respective Acts imposing a cap on the amount of damages that can be awarded. Section 52(2) of the *Civil Liability Act 2003* (Qld) has similar exclusionary wording to that of the *CLA WA*, but only in respect of the awarding of exemplary, punitive or aggravated damages. It is of particular note that the states and territories have ignored Recommendation 1 of the Ipp Report. The difference between the jurisdictions promises a minefield of litigation.

<sup>4</sup> Part 2 is headed 'Personal Injury Damages'; Division 1 is headed 'Preliminary'.

<sup>5</sup> Section 3A appears in Part 1, headed 'Preliminary'.

<sup>6</sup> *CLA NSW* Schedule 1 Clause 18(1) and Schedule 1 Clause 18(3)(a).

<sup>7</sup> The Commonwealth Acts (cited Cth) do not apply to WA legislation, but are used for illustrative purposes.

<sup>8</sup> The *Shorter Oxford Dictionary* (1972) defines 'unlawful' as 'prohibited by law; illegal; against rules' and 'criminal' as 'of the nature of or involving a crime or grave offence', respectively p 2306 and p 423. *Jowitt's Dictionary of English Law* (Burke, 1977: 1834) states that 'unlawful' and 'illegal' are generally the same.

<sup>9</sup> See commentary in the *Australian Torts Reporter*, 18, 501.

<sup>10</sup> This was stated in *Giumelli v Johnston* (1991) Aust Torts Reports 81-085, per King CJ, at 68, 709.