DRINK IF YOU DARE: THE CIVIL AND CRIMINAL CONSEQUENCES FOR THE VICTIM OF INTENTIONAL DRINK SPIKING

MANDY SHIRCORE AND MALCOLM BARRETT*

I INTRODUCTION

In Australia it has been estimated that there are between 3000 and 4000 suspected incidents of drink spiking annually.[1] Drink spiking occurs when a person adds drugs or alcohol to the drink of another without their knowledge or consent.[2] With the recent death of Dianne Brimble providing a graphic example of the potential dangers of drugs used in drink spiking, calls to outlaw this activity have been gaining in momentum.[3]

In July 2007, the Model Criminal Law Officers' Committee of Attorneys-General released its final report into drink and food spiking.[4] While acknowledging that various offences against the person adequately covered serious forms of drink spiking in most jurisdictions (with specific reference to the consequences of the drink spiking), the Committee recommended that a model law be enacted to cover the act of mere drink spiking, which is defined as involving no further criminal behaviour.[5] In Queensland, such an offence was enacted, prior to the Committee's final report, in December 2006.[6]

The Queensland Governments enactment of new criminal offences against the person validates community sentiment that such conduct is worthy of public condemnation

* Mandy Shircore is a Lecturer and Malcolm Barrett a Senior Lecturer in the School of Law at James Cook University, Cairns Campus.
[1] Taylor, Prichard and Charlton, *National project on drink spiking: investigating the nature and extent of drink spiking in Australia* (AIC 2004).
[2] Ibid ix.
[3] Dianne Brimble died on a P & O cruise after consuming a large quantity of the drug gamma-hydroxybutyrate, known as "GHB" or "fantasy", in suspicious circumstances. An inquest into her death has found that there is enough evidence to charge persons over her death and the matter has been referred to the Director of Public Prosecutions.
[4] Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Drink Spiking Discussion Paper* (May 2006).
[5] Ibid, 29.
[6] *Criminal Code 1899* (Qld) s 316A.

and warrants state sanction. It also signifies that the conduct must be deterred and that potential victims must be afforded the protection of the law. As the possible ramifications for the victim of drink spiking are so varied, both in form and severity, the extent of legal protection offered to victims, raises a number of different and difficult questions.

While there is no general principle that all criminal offences against the person must have a corresponding civil remedy, the recent emergence of a tort of invasion of privacy was premised on the basis of the existence of a relatively new criminal offence.[7] At first glance however, the nature of any analogous civil remedy available for the victim of intentional drink spiking is not obvious, particularly in relation to the newly created offence of mere drink spiking.[8] With altered mental state and memory loss a common effect of drink spiking, the potential consequences for the victim include not only victimisation by the offender or others, but induction of uncharacteristic and possible anti-social behaviour. In such circumstances it may be expected that the victim should be able to rely on the induced state of intoxication as a defence to any offence committed in such state, however the criminal law in Queensland provides otherwise. With these issues in mind this paper explores how well the law protects the victim of intentional drink spiking. In doing so, the paper is divided into three distinct parts.

II DRINK SPIKING AND THE LEGISLATIVE RESPONSE

A *The Nature of Drink Spiking*

The most comprehensive report on the nature and extent of drink spiking in Australia was prepared by the Australian Institute of Criminology (AIC) in 2004. The AIC applied a broad definition to drink spiking as 'drugs or alcohol being added to a drink (alcoholic or non-alcoholic) without the consent of the person consuming it.'[9] It was

[7] See *Grosse v Purvis* (2003) Aust Torts Reports 81-706 where Senior Judge Skoien held that an action in the tort of invasion of privacy was maintainable for conduct that amounted to the criminal offence of stalking.
[8] *Criminal Code 1899* (Qld) s 316A
[9] Taylor, Prichard and Charlton, above n 1, ix.

noted that under this definition no further criminal victimisation was necessary for an incident to be considered drink spiking.

Due to issues of proof, under-reporting and differences in data collection across the jurisdictions, the AIC could only 'roughly' estimate the number of drink spiking incidents that occurred annually. In doing so they concluded that between 2002 – 2003:

- 3000 to 4000 suspected incidents of drink spiking occurred in Australia
- approximately one third of these incidents involved sexual assault
- between 60 and 70 per cent of these incidents involved no additional victimisation
- between 15 and 19 suspected drink spiking incidents occurred per 100,000 persons in Australia during 2002/2003.[10]

They concluded further that while drink spiking occurs in a variety of places, it occurs most commonly in licensed premises with females aged under the age of 24 the most common victims.[11] Despite public perception that illicit drugs were commonly used in drink spiking, alcohol was referred to most often as the likely unknown additive.[12] The effects of drink spiking were most commonly said to include 'memory loss, nausea, vomiting, unconsciousness and dizziness'.[13]

B *The Legislative Response*

The Queensland parliament became the first jurisdiction to respond to the Model Criminal Code Officers Committee discussion paper on the issue of drink spiking by enacting the *Criminal Code (Drink Spiking) and Other Acts Amendment Act 2006*

[10] Ibid x.
[11] It was concluded that four out of five victims are female, with about half under the age of 24 and about one third between 25 and 34.
[12] Taylor, Prichard and Charlton, above n 1, xi. It was suggested that this may be because of the difficulty in detecting drugs in the body.
[13] Ibid ix. The committee noted that these effects also occur after voluntary consumption of alcohol and drugs which may distort a person's perception of whether their drink has been spiked. The committee noted further that victims stated 'that the effects that they had experienced were very different from the effects of voluntary alcohol consumption.

(Qld) (*Amending Act*).[14] The *Amending Act* introduced the offence of unlawful drink spiking into the *Criminal Code 1899* (Qld) (*the Code*).[15] *The Code*, has always contained offences that criminalized the administration of certain substances[16] to another however prior to the *Amending Act* all of those offences required proof that the accused had a further intention to either commit an offence or to victimise in some way the person subjected to the spiking.[17] The offence of unlawful drink spiking fills a gap that had existed where spiking takes place in the absence of any further intent to commit an offence or to victimise the person. As stated in the explanatory notes to the *Amending Act* the offence of unlawful drink spiking was introduced so as to protect individuals from the 'potential [non intended] harm that may flow to victims of drink spiking.'[18]

The physical element of unlawful drink spiking requires a person to administer or attempt to administer to another a substance, which is contained within a drink in circumstances where the other person does not have knowledge of the existence of the substance.[19] It was unnecessary to define the term administer as the section provides an inclusive and extended definition of the term attempt to administer.[20] The definition includes adding or causing a substance to be added to a drink in preparation for the administration of the substance. It also includes substituting a drink with another drink that contains the substance and taking steps to provide a drink containing the substance instead of another drink in preparation for its administration of the substance.[21]

The offence is limited to the spiking of drinks, therefore the spiking of food where there is no further intent to commit an offence or victimise the person is not a criminal

[14] Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Drink Spiking Discussion Paper* (May 2006).
[15] *Criminal Code 1899* (Qld) s 316A.
[16] The substances are described as "drugs or other things" or "stupefying or overpowering drugs", or "poison or other noxious things."
[17] *Criminal Code 1899* (Qld) ss 218(c), 316, 322, 323(b).
[18] Explanatory Memorandum, *Criminal Code (Drink Spiking) and Other Acts Amendment Bill 2006*.
[19] A person does not have knowledge of the substance in circumstance where they are entirely unaware of the substance and also where they are unaware of the particular quantity of the substance (see *Criminal Code 1899* (Qld) s 316A(1)(a).
[20] *Criminal Code 1899* (Qld) s 316A(6).
[21] *Criminal Code 1899* (Qld) s 316A(6), (7).

offence. The Model Criminal Law Officers' Committee[22] in its final report on drink and food spiking, released after the Queensland Parliament enacted the offence of drink spiking, recommended that all jurisdictions criminalize not only drink spiking but also the act of food spiking.[23]

The mental element of the Queensland offence of unlawful drink spiking requires the administration or attempted administration to be accompanied by the 'intent to cause the other person to be stupefied or overpowered.'[24] The offence therefore does not require that the alleged victim be in anyway stupefied or overpowered but rather that the accused intended such a result. The term causing the person to be stupefied and overpowered includes the circumstances where the person did not intend to be stupefied or overpowered at all.[25] It also includes causing the victim to be further stupefied or overpowered than they had intended or to a greater extent than they had intended. Stupefied or overpowered are defined so that the accused must intend to induce a state of intoxication where the substance to be administered is alcohol, a drug or another substance.[26] However where the substance to be administered is a dangerous drug within the meaning of the *Drugs Misuse Act 1986* (Qld) the accused need only intend to bring about a behavioural change.[27]

Although the enactment of the offence of unlawful drink spiking is a welcomed deterrent to would be spikers, the Queensland reforms do not go far enough in

---

[22] The Model Criminal Code Officers' Committee was renamed as the Model Criminal Law Officers' Committee in July 2006.

[23] The issue of food spiking was raised during the consultation process following the release of the Committees Discussion Paper (see Model Criminal Law Officers' Committee of the Standing Committee of Attorney-General, *Drink and Food Spiking Final Report* (July 2007) 2. The South Australian Parliament in its recently enacted *Criminal Law Consolidation (Drink Spiking) Amendment Act 2007* has adopted the recommendations. The relevant section states '[a] person is guilty of an offence if the person adds a substance, or causes a substance to be added, to any food or beverage....' *Criminal Law Consolidation Act 1935* (SA) s 32C.

[24] *Criminal Code 1899* (Qld) s 316A(1).

[25] *Criminal Code 1899* (Qld) s 316A(7) defines 'circumstances, where the other person is not intending to be stupefied or overpowered, including any circumstances of timing, place, condition, or way of stupefaction or overpowering.'

[26] The wording is unfortunate as it suggests that the Crown must prove beyond a reasonable doubt that the accused intend to bring about a state of intoxication rather than bring about a degree of intoxication.

[27] The offence also states that certain things are immaterial to the offence and that the act of drink spiking is not unlawful if it is carried out by a health professional in the course of their practice, it is carried out pursuant to an Act or it is carried out by a person performing their responsibilities as a parent or carer. The offence also extends the application of the excuse of mistake of fact where the substance administered or attempted to be administered was alcohol.

protecting victims of spiking. First, as already stated the law fails to criminalise the act of food spiking. Secondly, as argued below, the reforms do not protect the victim of drink spiking from the potential adverse consequences that may result from his or her victimisation and for which he or she should not be held responsible. As stated by the Tasmanian Law Reform Institute, 'it seems a basic principle of fairness that an individual who for example, has had their drink spike[d], should not be criminally or civilly responsible for what they do later'.[28]

III The Defence of Intoxication

A *Determining criminal responsibility*

Evidence that an accused committed an offence as a result of being subjected to drink spiking may be taken into account in all Australian jurisdictions in determining criminal responsibility.[29] Intoxication due to drink spiking may fall within what is variously described for the purpose of criminal responsibility as non-voluntary intoxication, non self-induced intoxication, involuntary intoxication or non-intentional intoxication. Despite the different language used the terms all include 'intoxication produced by trickery or fraud' of which drink spiking is a species.[30] In reference to *the Code* the state is correctly described as either non-intentional intoxication or unintentional intoxication.

B *Defence of intoxication*

[28] Tasmania Law Reform Institute, *Intoxication and Criminal Responsibility Final Report No 7* (August 2006) 97.

[29] *Criminal Code 1995* (Cth) s 8.5; *Criminal Code 2002* (ACT) s 34; *Crimes Act 1900* (NSW) s 428G(2); *Criminal Code 1983* (NT) s 43AV and *Criminal Code 1913* (WA) s 28. For law in Victoria and South Australia see the majority in *R v O'Connor* (1980) 146 CLR 64 (Barwick CJ 87-88; Stephen J 105; Murphy J 113-114; Aickin J 125-126). The decision was concerned with the role of voluntary intoxication in determining criminal responsibility, however in the absence of any authority that considers the question of non-voluntary intoxication the principles set out in *R v O'Connor* apply irrespective of how the state of intoxication was caused. Arguably the position in *R v O'Connor* also applied in Tasmania (see Snow [1962] Tas SR 271, 278 and the Tasmania Law Reform Institute, *Intoxication and Criminal Responsibility Final Report No 7* (August 2006), 34).

[30] Fairall P A and Yeo S, *Criminal Defences in Australia* (4th Ed 2005), 231. Non-voluntary intoxication may also include 'intoxication produced by, duress or coercion; the unforseen side-effects of a drug; or unwitting inhalation of fumes or gas.' See also *Criminal Code 1995* (Cth) s 8.1; *Criminal Code 2002* (ACT) 30; Victorian Law Commission, *Defences to Homicide: Final Report* (2004), 127 for a proposed definition of involuntary intoxication.

The Code includes a specific defence of unintentional intoxication. *The Code* also provides that evidence of unintentional intoxication and intentional intoxication can be taken into consideration in determining whether the Crown has proven the existence of intent where intent is an element of the offence charged. Section 28 of *the Code* states that:

> **Intoxication**
> (1) The provisions of section 27 [the defence of insanity] apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his or her part by drugs or intoxicating liquor or by any other means.
> (2) They do not apply to the case of a person who has, *to any extent* intentionally caused himself or herself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not *and whether his or her mind is disordered by the intoxication alone or in combination with some other agent.*
> (3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

Since *the Code* was enacted in 1899 the section has been the subject of only one substantive amendment with the *Criminal Law Amendment Act 1997* (Qld) adding the additional highlighted words. Although on first reading the section seems to provide substantial protection for victims of drink spiking who become perpetrators, in practice the section would apply in an extremely narrow range of circumstances.[31] There are at least five reasons why the section is unlikely to be of assistance to a victim turned perpetrator.

First the terms intentional intoxication or stupefaction have been interpretated by the Courts so as to limit the scope of s 28(1) and so as to give a wide application to the proviso found in s 28(2). Secondly s 28(1) has been held to be a defence, which requires the accused to prove its elements on the balance of probabilities. Thirdly the defence only applies to what are referred to as gross states of intoxication. Fourthly if the defence is proved the accused is not necessarily entitled to his or her freedom.

[31] The defence applies to all offences unless expressly excluded. For examples of expressly excluded offences see unauthorised dealing with shop goods, leaving a hotel without paying and unauthorised damage to property; *Regulatory Offences Act 1985* (Qld) ss 5, 6, 7 read in conjunction with *Criminal Code 1899* (Qld) s 36.

Fifth it has been widely accepted that s 28 'covers the field' as to the relevance of intoxication to criminal responsibility. The historical application of this concept means that although evidence of unintentional intoxication is relevant in determining the fault element of an offence where intent is an element, it is irrelevant in considering a wide range of offences where the fault elements involves knowledge, belief, wilfulness, dishonesty or negligence.[32]

1 *Intentional intoxication or stupefaction*

The terms intentional intoxication or stupefaction has received limited judicial consideration. In one of the few decisions to consider what is meant by the terms stupefy or intoxicate, Scott J of the Supreme Court of Western Australian relied on a dictionary definition.[33] The Shorter Oxford English Dictionary defines stupefy to mean '[t]o make stupid or torpid; to deprive of apprehension, feeling or sensibility to benumb, deaden. To become stupid or torpid; to grow dull or insensible.' The Oxford English Dictionary defines intoxicate to mean '[t]o stupefy, render unconscious or delirious, to madden or deprive of the ordinary use of the senses or reason, with a drug or an alcoholic liquor; to inebriate, make drunk.'[34] For the most part the dictionaries define the terms by reference to a state of being drunk, stupefied or inebriated. This interpretation is supported by the fact the section refers to an intentional or unintentionally caused state. On this basis an intentional state of intoxication or stupefaction is one where the accused set out to become drunk or inebriated whilst unintentional intoxication or stupefaction includes where the accused consumes to become convivial.[35]

Applied to drink spiking, an inebriated victim accused of committing an offence could rely on the defence in circumstances where they had not intended to consume any intoxicating or stupefying substance or where they had intended to consume such substances but not intended to consume to the point of becoming drunk or inebriated.

[32] It also has limited significance when raising an excuse or proving a defence. For a comprehensive discussion of this topic see Tasmania Law Reform Institute, *Intoxication and Criminal Responsibility: Final Report* (August 2006), 35-40; Tolmie J, 'Intoxication and Criminal Liability in New South Wales: A Random Patchwork' (1999) 23 *Criminal Law Journal* 218, 225-236; Fairall and Yeo, above n 30, 235-240.
[33] *Haggie v Meredith* (1993) 9 WAR 206.
[34] (1993) 9 WAR 206, 210.
[35] O' Regan R S, *Essays on the Australian Criminal Code* (1979) 71.

This interpretation of s 28(1) and (2) of *the Code* is arguably consistent with Griffith C J somewhat ambiguous statement in *R v Corbett*[36] that a jury should find an accused 'not guilty on the grounds of unsoundness of mind' if at the time of commission he/she was intoxicated 'under circumstances for which he could not be fairly held responsible.'[37] It is also in accordance with the courts consistent reference to intent as meaning 'to have in mind…having a purpose or design.'[38]

The 1997 amendment and judicial statements as to the operation of s 28(1) and (2), support a second narrower interpretation of the section. The Queensland Court of Appeal in *Re Bromage*[39] and *Re Pitt*[40] uses the term 'voluntary ingestion of alcohol' in substitution for the phrase 'intentional intoxication or stupefaction'.[41] Based on this interpretation the defence would not be available where an accused's intoxicated state had, to any extent, been contributed to by the voluntary consumption of drugs or alcohol even though the accused intention was to only consume in order to become convivial. The additional words *to any extent* enacted by the 1997 amendment tend to support such an interpretation.[42] As does the Queensland Court of Appeal's interpretation of the word stupefying within the context of the offence of stupefying in order to commit an indictable offence.[43] In *R v Arnold; ex parte AG (Qld)*[44] Mackenzie J, with whom the other members of the court agreed, held that 'stupefying in this context is that something has the effect of dulling the senses or faculties or blunting the faculties or understanding.'[45] This refers to a degree of intoxication rather

---

[36] (1903) St R Qd 246.
[37] (1903) St R Qd 246, 249
[38] *R v Willmot* (No.2) [1985] 2 Qd R 413, 418; *R v Glebow* [2002] QCA 442; *R v Reid* [2006] QCA 202, [92]. In *R v Reid* Chesterman J, observed that '[I]ntent and intention must have the same meaning wherever they appear in the Code.', [95].
[39] [1991] 1 Qd R 1.
[40] [2000] QCA 30.
[41] Ibid [3]. See Explanatory Notes to the *Criminal Law Amendment Bill 1996* (Qld). See also *Hubert* (1993) 67 A Crim R 181, 199; *Battle v The Queen* (1992) 8 WAR 449, 456; *R v Doyle* [1971] WAR 110, 111 where the Western Australian courts have substituted the word intention, as it appears in the defence of involuntary intoxication, with the word voluntary. In *R v Doyle* Burt J refers to the 'voluntary intake of alcohol' and in *Battle v The Queen* Pigeon J refers to 'intoxicants [being] voluntarily consumed by the applicant.'
[42] The Explanatory Notes to the *Criminal Law Amendment Bill 1996* (Qld) state that '[t]he amendment of section 28 will exclude from consideration a case in which voluntary intoxication is said to be one of a number of co-operating factors.'
[43] *Criminal Code 1899* (Qld) s 317.
[44] [2002] QCA 257.
[45] Ibid [39]. The decision is of interest by way of analogy only as Mackenzie J clearly states that his finding is restricted to the context of s 317 of *the Code*.

than the state of being stupefied. The interpretation of unintentional intoxication or stupefaction to mean involuntary ingestion probably limits the defence in the context of drink spiking to the scenario envisaged by Gibbs J in *R v O'Connor*[46] where his Honour stated that:

> [a] person who has become intoxicated without any intention to consume anything intoxicating – for example, because his drink has been 'surreptitiously laced', ...– is no more morally responsible for what he does than is a psychopath or a very young child.[47]

Arguable s 28(1) could also apply to a victim of drink spiking who intentionally consumes such a small amount of drugs or liquor, that the amount intentionally consumed could not in any meaningful way be said to have contributed to his/her intoxicated or stupefied state. This limited application of s 28(1) means that it would have little or no application where alcohol is the substance used to spike a drink because in most cases the victim would, at some stage during consumption, become aware that his or her drink had been laced with alcohol.

Accordingly the defence would not be open in a situation similar to that of the 1984 unreported decision of the Queensland Supreme Court decision of *Walsh.*[48] In that case the accused had been drinking alcohol following a win by his football team. On his return home he inflicted multiple stab wounds on his neighbour, a woman he had known since childhood. The accused claimed that his drinks had been spiked with a hallucinogenic drug. He was acquitted on the grounds of involuntary intoxication. However the defence, as currently applied, could not be successfully relied upon by a current day accused who committed an offence in similar circumstances to those of Peter Walsh as there was no dispute that Walsh had intentionally consumed a

[46] (1980) 146 CLR 64.
[47] (1980) 146 CLR 64, 92. Although the sentiment of His Honour's statement is clear the reference to psychopath is unfortunate. It has been held that psychopathy is not a mental disease therefore the psychopath is criminally responsible (see *R v Hodges* (1986) 19 A Crim R 129).
[48] The decision is discussed in Leader-Elliott I, 'Intoxication Defences: The Australian Perspective' in Yeo S, *Partial Defences to Murder* (1990) 221.

substantial amount of alcohol.[49] It is argued that most victims of drink spiking turned perpetrator would be in the same situation as Walsh, that is, their intoxicated state would in part be self induced and therefore s 28(1) would offer no defence. The AIC's finding that for the period 2002-2003 reinforce the argument that s 28(1) would have limited application to victims of drink spiking. The AIC found that two thirds of all suspected drink spiking took place in a licensed premises and the most common spiking substance was alcohol.[50]

2 *Section 28(1) is a defence*

In the context of *the Code* the term defence is used to describe an exculpatory provision where the onus of proof is on the accused.[51] The term excuse is used in reference to an exculpatory provision where the accused is simply required to meet the evidentiary onus. The evidential onus is discharged by pointing to evidence that enables a conclusion that the matter has been properly raised.[52] The exculpatory provisions of *the Code* are excuses unless the particular provision states that proof rests on the accused or a certain state of affairs is stated to be presumed.[53] Section 28(1) does not expressly reverse the onus of proof however it applies section 27, the insanity provision, to a person who's defence is based on unintentional intoxication or stupefaction. The courts have by way of *obiter* stated that the presumption of sanity found in s 26 of *the Code*, which reverses the onus of proof, applies not only to the defences of insanity but also to unintentional intoxication.[54] Consequently s 28(1) is a defence and accordingly the accused must prove on the balance of probabilities that he or she was not intentionally intoxicated and that at the time of commission of the

[49] See Leader-Elliott I, *The Commonwealth Criminal Code: A Guide for Practitioners*, Commonwealth Attorney-General's Department, (2002), 167 where the author states at footnote 183 that:
'[a]mendments to the Queensland Criminal Code since 1985 would probably deprive a latter-day Walsh of his defence.'

[50] Taylor, Prichard and Charlton, above n 1 x-xi.

[51] Cf with the term excuse which is used in reference to an exculpatory provision where the accused is simply required to meet the evidentiary onus.

[52] See *Loveday v Ayre* [1955] Qd R 264, 267.

[53] Kenny R G, *An Introduction to Criminal Law in Queensland and Western Australia* (6th ed 2004) 89-90.

[54] See *Dearnley v The King* [1947] St R Qd 51, 62, 66-67 (Philp and Matthews JJ). A degree of uncertainty is expressed by Philp J when his Honour states that the reversal of onus applies to unsoundness of mind and '(probably also in its extended sense, based on unintentional intoxication)'. See also *R v Miers* [1985] 2 Qd R 138, 142; *R v Foy* [1960] Qd R 225, 244 (Philp J); *R v Arnold; ex parte A-G (Qld)* [2002] QCA 357 [44] (Mackenzie J).

offence the state of intoxication had robbed them of one of the three capacities set out in s 27 of *the Code*.[55]

The difficulties of proving the defence of unintentional intoxication or stupefaction have been well documented. The Tasmanian Law Reform Commission in its recent report noted the resource implications in proving that the accused was unintentionally intoxicated or stupefied.[56] Ian Leader-Elliott argues that, as the effects of unintentional intoxication are not commonly known, reliance on the defence will in most cases require expert testimony.[57] The expert will be required to give evidence as to the effect of the likely substance or substances involved as well as its possible impact on the accused. Furthermore the claim that the conduct engaged in was caused by the substance that the accused did not intend to consume implies that the conduct was not characteristic of the accused. Therefore the defence would be required to lead evidence as to the accused character.[58] As it is both difficult and costly to establish the defence, it is likely that a victim turned perpetrator if charged with a minor offence such as wilful exposure,[59] being drunk in a public place,[60] trespass[61] throwing things at a sporting event[62] or even more serious offences such as common assault[63] would simply enter a guilty plea.[64] It is perhaps not surprising that the only reported case where the defence has been successful involved circumstances of medically induced

[55] There is a strong argument that the presumption of sanity should not apply to s 28(1) (see Fairall and Yeo, above n 30, 246). See also *Re Bromage* [1991] 1 Qd R 1 where the Court of Criminal Appeal held that the provisions of s 27 and s 28 do not have the effect of deeming unintentional intoxication to be a state of mental disease or natural mental infirmity as required by s 27 of *the Code*. Section 28(1) simply introduces a third state into s 27 that being intoxication or stupefaction without intent. It is also possible to argue that the reversal of onus does not apply to whether the accused was unintentionally intoxicated but only applies to the question of the absence of one of the three capacities (see *R v Arnold; ex parte A-G (Qld)* [2002] QCA 357 [44]).

[56] Tasmania Law Reform Institute, *Intoxication and Criminal Responsibility: Final Report No 7* (August 2006) 98.

[57] Leader-Elliott above n 49, 169.

[58] The House of Lords addressed the practical difficulties of relying on the defence in *R v Kingston* [1995] 2 AC 355, 376 (Mustill LJ).

[59] *Summary Offences Act 2005* (Qld) s 9.

[60] *Summary Offences Act 2005* (Qld) s 10.

[61] *Summary Offences Act 2005* (Qld) s 11.

[62] *Summary Offences Act 2005* (Qld) s 24.

[63] *Criminal Code 1899* (Qld) s 335.

[64] This conclusion is supported by the fact that most victims of drink spiking are young and therefore likely to have limited resources. About half the victims of drink spiking are under 24 years of age whilst a further third are between the ages of 25 and 34 (see Taylor, Prichard and Charlton, above n 1, x-xi).

stupefaction. In *R v Smith*[65] the accused was acquitted of a charge of driving a vehicle in a manner dangerous to the public on the grounds that he was of temporary unsound mind due to unintentional intoxication. The defence was able to establish that the accused was under the influence of drugs administered to him whilst he was a hospital patient.

3 *Degree of Intoxication*

As stated above it is not sufficient to simply prove that the accused was unintentionally intoxicated or stupefied. To come within the insanity provision, the defence must also prove that as a result of the intoxication or stupefaction the accused did not have the capacity to understand what he or she was doing or did not have the capacity to control his or her actions or did not have the capacity to know that he or she ought not have done the act or made the omission.[66] It is accepted that in order to prove the absence of one of these three capacities it is necessary to prove that the accused was severely intoxicated or stupefied.[67] Therefore the state of unintentional intoxication or stupefaction required would seem to be consistent with a state of unconsciousness or at least a state of semi-unconsciousness such that the person could be described as an automaton. A victim of drink spiking whose mind is merely deranged, so that he or she cannot resist the temptation to commit an offence, could not successfully rely on the unintentional intoxication defence.[68]

4 *Uncertain consequences of a section 28(1) defence*

Even if a victim turned perpetrator is able to successfully prove that he or she was unintentionally intoxicated or stupefied the consequences for that person remain uncertain. In *R v Smith*[69] the Court of Criminal Appeal held that successful reliance on the defence of unintentional intoxication results in the accused being acquitted on the grounds of insanity.[70] Consequently the accused does not 'walk free' but is to be detained according to a courts order before being dealt with in accordance with the

[65] [1949] ST R Qd 126
[66] *Criminal Code 1899* (Qld) s 27.
[67] See *R v Corbett* [1903] St R Qd 246, 249; Leader-Elliott above n 48, 222.
[68] In this respect *the Code* is consistent with the common law: see *R v Kingston* [1995] 2 AC 355.
[69] [1949] St R Qd 126.
[70] The decision was cited with approval in *R v Foy* [1960] Qd R 225, 244.

Mental Health Act 2000 (Qld).[71] In such circumstances the terms of the person's detention are at the discretion of the Governor in Council.[72] Leader-Elliot points to the example of Peter Walsh who was detained in custody for six months during which time he was subjected to psychiatric tests and treatment.[73] When Cabinet ordered his release it was made conditional on his abstaining from the use of alcohol or other drugs and on him continuing to receive psychiatric treatment.[74] Such an uncertain outcome of raising unintentional intoxication is a substantial disincentive from reliance on the defence, particularly if the accused faces relatively minor charges.

5 *Section 28 Covers the Field*

The courts have referred to s 28 of *the Code* as covering the field with respect to the role of intoxication as it relates to criminal responsibility.[75] In *R v Kusu*[76] the argument that s 28 covered the field was used to explain the relationship between ss 23, 27 and 28 of *the Code*.[77] An act occurring independently of a persons will within the terms of s 23(1) can be ascribed to a state of insanity, as defined by s 27(1), and to a state of intoxication within the meaning of s 28. In this context the covering the field argument means that the general gives way to the specific. Therefore if evidence is lead to establish that an accused was so intoxicated that his or her acts could be described as occurring independently of his her will then only s 28 could be applied and not s 23(1).

Decisions that have followed *R v Kusu*[78] have given the principle of covering the field a broader application.[79] Accordingly evidence of intoxication is not relevant to

---

[71] *Criminal Code 1899* (Qld) s 647(1).
[72] *Criminal Code 1899* (Qld) s 647(2).
[73] Leader-Elliott above n 48, 222.
[74] Leader-Elliott above n 48, 222, see footnote 32.
[75] See, eg *R v Kusu* [1981] Qd R 136, 140; *R v Miers* [1985] 2 Qd R 138, 142; *R v Mrzljak* [2005] 1 Qd R 308, 316. The term covers the field may have derived from the Tasmanian Court of Criminal Appeal decision of *Snow v The Queen* [1962] Tas SR 271, 283. In the context of the Criminal Code 1924 (Tas) (*Tasmanian Code*) the argument that s 17 covered the field was of particular importance as unlike the *Criminal Code 1899* (Qld) section 8 of the *Tasmania Code* allowed a defendant to rely on common law defences if those defences were not provided for under the *Tasmanian Code* (section 8 has recently been repealed).
[76] [1981] Qd R 136, 140-141. See also *Re Bromage* [1991] 1 Qd R 1, 5.
[77] Although some statements of the court if read out of context are capable of having a broader application (see *R v Kusu* [1981] Qd R 136, 141).
[78] [1981] Qd R 136.
[79] See *R v Miers* [1985] 2 Qd R 138, 142; *R v Mrzljak* [2005] 1 Qd R 308, 316

criminal responsibility unless it can be brought within the confines of s 28. On this basis evidence that an accused was the victim of drink spiking would only be relevant for the purpose of determining criminal responsibility in two circumstances.[80] First, as stated above, it would be relevant to the defence of unintentional intoxication. Second, pursuant to s 28(3) it would be relevant as to whether an accused actually formed an intention 'when an intention to cause a specific result is an element of an offence.'[81] Therefore evidence of intoxication whether completely or partially intentional or unintentional could be considered in determining whether an accused possessed the request intent for the offence of murder[82] or intentionally causing grievous bodily harm.[83] However evidence of intoxication would not be relevant to offences that do not have a mental element such as manslaughter[84] or causing grievous bodily[85] harm unless it was capable of supporting a defence within s 28(1). It also means that independently of s 28(1), intoxication is not relevant where an offence has a fault element other than intention. For example a victim of drink spiking charged with wilful damage to property[86] or negligent acts causing harm[87] could not point to evidence of intoxication to raise doubts that the prosecution had established beyond reasonable doubt that the accused had acted wilfully or negligently.[88]

IV CIVIL CONSEQUENCES

A *Defining the problem*

As Cane notes '[t]he dominant function of criminal law is the regulation of conduct by the imposition of penalties, whereas the dominant function of the civil law is the prevention of rights violation and the repairing of harm by the award of damages'.[89]

---

[80] See *R v Kusu* [1981] Qd R 136, 142 as to the relevance of intoxication to issues not going to the question of criminal responsibility.
[81] *Criminal Code 1899* (Qld) s 28(3).
[82] *Criminal Code 1899* (Qld) s 302.
[83] *Criminal Code 1899* (Qld) s 317.
[84] *Criminal Code 1899* (Qld) s 303.
[85] *Criminal Code 1899* (Qld) s 320.
[86] *Criminal Code 1899* (Qld) s 469.
[87] *Criminal Code 1899* (Qld) s328.
[88] See, eg, *R v O'Regan* [1961] Qd R 78 where the Court of Criminal Appeal held that evidence of intoxication was not relevant as to whether the accused possessed the requisite fault element of knowledge.
[89] Peter Cane 'Mens Rea in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533, 555.

The ability of the civil law to prevent and repair a violation of the right to bodily and mental integrity occurring through drink spiking, forms the focus of this section.

The protection of a person's bodily integrity has long been recognised as a fundamental right under tort law.[90] Where the violation has involved direct physical contact, the right is so sacrosanct that it is actionable per se.[91] A right to freedom from interference with mental integrity has also been recognised, although in carefully defined circumstances.[92] Where the defendant's conduct involves an intentional wrongdoing, there is little doubt that it is more morally culpable than unintentional or accidental harm, yet there is no general principle that intentional infliction of harm, without justification is tortious.[93] In fact the relationship between the mental state of intention and the required elements for tortious liability is often poorly defined and confused.[94]

In 1993, in *Grosse v Purvis*[95], Judge Skoien remarked

> It may be relevant to note that in perhaps all of the offences contained in the Code in which an individual person would be named in the indictment as the complainant (or victim) an actionable tort is encompassed so that the victim would have the right to sue in the civil court for damages. One might ask why would that not also apply to a new offence like stalking in which the victim suffers personal injury or other detriment?

---

[90] *Re F (Mental Patient Sterilisation)* [1990] 2 AC 1, 72E, (Lord Goff of Chiveley).
[91] The tort of trespass which involves direct and intentional (or negligent) contact with a person without consent is actionable without proof of damage.
[92] Both the tort of negligence and the action on the case for intentional infliction of harm require proof that the plaintiff has suffered a recognised psychiatric injury. See, eg, *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.
[93] Cane, above n 89, 533. See also Christian Whitting 'Of Principle and Prima Facie Tort' (1999) 25 *Monash University Law Review* 295 where he argues that a freestanding or 'prima facie tort' based on intentional infliction of harm without just cause or excuse should be tortious, but cf Cane where he criticises attempts to recognize a 'general principle 'of intentional tort liability as a 'potential source of serious confusion', 552.
[94] See, eg, Stanley Yeo 'Comparing the Fault Elements of Trespass, Action on the Case and Negligence' (2001) 5 *Southern Cross University Law Review* 142, 143; Cane above n 89.
[95] (2003) Aust Torts Reports 81-706, [420]

With the criminal law now recognising drink spiking as a criminal offence, what if any civil consequences arise from such conduct? As the possible consequences to the victim are so varied, the choice of action may initially depend on the type of harm suffered. For example, physical or sexual contact which occurs when a person has been 'stupefied' or 'overpowered' through the non-consensual administration of a substance would lack the element of consent necessary to avoid an action in battery.[96]

However the act of mere drink spiking without further criminal or tortious conduct, may involve only transient physical harm,[97] or mental anguish, humiliation and distress, particularly in circumstances where the victim engages in unpredictable and possibly unknown anti-social behaviour as a result of the intoxication. In these circumstances the conduct still involves a violation of bodily and mental integrity. Torts protecting the right to bodily and mental integrity include the tort of trespass to the person (namely battery), the innominate tort of action on the case for intentional infliction of harm, and negligence. The applicability of these torts to the act and consequences of drink spiking illustrates the overlap, and continuing uncertainty of the relationship between these three actions.[98]

B *Trespass to the person*

At the outset it is important to note that as trespass is actionable per se, the degree or type of resultant harm to the victim would not be a bar to an action in battery. Furthermore as limitations to damages awards arising under some of the civil liability acts may not apply to intentional torts, trespass, if applicable, may be a more attractive option than an action based in negligence.[99]

---

[96] In Australia consent is best viewed as a defence to an action in battery. See eg *McNamara V Duncan* (1979) 26 ALR 584, 588; *Department of Health & Community Services (NT) v JWB and SMB* (1992) 175 CLR 218, 310-311.

[97] Such as nausea, vomiting, headaches often associated with hangovers.

[98] See Yeo, above n 94, for a comprehensive discussion of the fault elements of trespass, negligence and action on the case.

[99] See eg, *Civil Liability Act 2002* (NSW) s3B(1)(a). For application of the section see *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107 SC 20071/03 (Unreported, Hulme J, 22 February 2005). In Queensland the *Civil Liability Act 2003* (Qld) restrictions on damages awards applies to intentional torts, s 50. Although the restriction on the availability of exemplary damages does not apply to 'an unlawful intentional act done with intent to cause personal injury; or an unlawful sexual assault or other unlawful sexual misconduct' s 52(2).

The intentional tort of battery, involves direct and intentional harmful or offensive contact with another.[100] Intention in this sense 'comprises a conscious purpose to achieve a result',[101] namely contact with the body of the plaintiff. Recklessness is also included which involves deliberate engagement in conduct with knowledge of the risk of certain consequences resulting but continuing to engage in the conduct.[102] For drink spiking the 'intention' required would involve the intention to make contact with the body of the plaintiff through the ingestion of the unknown substance.[103] As with all trespass actions, there is no requirement that the ensuing harm to the victim be intended.

In an American case concerned with experimental drugs (in the form of pills) administered to patients without their knowledge of the content, the court held that ingestion of the pills was sufficiently analogous to administration through a hypodermic needle (which clearly involves physical contact) to amount to battery. The court stated '[t]he act of administering the drug supplies the contact with the plaintiff's person'.[104] However the distinction between this case and the position in Australia is the requirement in Australia for the contact to be direct.[105] Directness of the defendant's act distinguishes trespass from case.[106] The line between what amounts to direct contact sufficient for trespass actions and indirect contact is not clear.[107]

The distinction is often defined by reference to the example given by Fortesque CJ in

---

[100] Harold Luntz *Torts: Cases and Commentary* (Revised 5th ed, 2006), 693.
[101] Yeo above n 94, 143.
[102] *Beals v Hayward* [1960] NZLR 131, 142; *R v Parker* (1976) 63 Cr App R 211, 214, both referred to in Trindade, Cane and Lunney *The Law of Torts in Australia* (4th ed, 2007), 42; See also Cane, above n 89, 535.
[103] This would also appear to include the situation where the contact 'is foreseen as substantially certain'. See Trindade, Cane & Lunney above n 102, 40 referring to Glanville Williams, *Criminal Law: The General Part*, (2nd ed, 1961), p 38.
[104] *Mink v University of Chicago* (1978) 460 F Supp 713, 718.
[105] *Williams v Milotin* (1957) 97 CLR 465; *Venning v Chin* (1974) 10 SASR 299, 307; *McHale v Watson* (1964) 111 CLR 384. Note that in *Mink v University of Chicago* (1978) 460 F Supp 713, 718. the court referred to the fact that there is no requirement for the contact to be direct, so did not directly address this point.
[106] *Hutchins v Maughin* [1947] VLR 131.
[107] See further eg in Trindade, Cane & Lunney above n 102 where they refer to the example given in the English Criminal Injuries Compensation Board's 11th and 9th Reports of the young woman who suffers severe brain damage as a result of drinking, at a party, the home-made beer laced with methyly alcohol , and ask is the act 'direct' for battery?

Reynolds v Clarke[108] of the defendant who throws a log onto the highway hitting the plaintiff (direct contact) and leaving the log on the highway whereby the plaintiff trips over it (indirect contact). Yet directness also encompasses those acts which set in motion a series of events which ultimately result in contact with the plaintiff.[109] In a case involving poisoning of the plaintiff's dogs through the placement of baited meat on land, the court noted that had the baits been given directly to the dogs the action would lie in trespass, rather than case.[110] Yet commentators have questioned whether this would apply to the poisoning of a human.[111] As the plaintiff is required to act by consuming the drink in order for the 'contact' to arise, the element of directness may be lost. While it may be said that there is an unbroken chain of events between the defendant providing the substance and the plaintiff's consumption, the plaintiff is not acting under compulsion when consuming the drink.[112] The act of contact is ultimately brought about by the plaintiff's own conduct so that trespass is unlikely to be successfully pleaded.

C *Negligence*

There are two schools of thought regarding the applicability of negligence claims to intentional conduct. The first is that there is no bar to a claim in negligence for intentional interference, direct or indirect. The second is that the law of negligence 'is totally inappropriate for situations involving conduct that is deliberate or intentional'.[113]

1 *Negligence: an appropriate tort for intentional conduct*

The argument that negligence applies to both intentional and unintentional conduct proceeds on the basis that negligence is not concerned with the mental state of the defendant, but with standards of care objectively imposed in accordance with community standards.[114] Accordingly whether the defendant's conduct falls below the relevant standard of care does not involve consideration of whether the conduct was

[108] (1725) 2 Ld Raym 1399.
[109] *Scott v Shepherd* (1773) 2 Wm Bl 892.
[110] *Hutchins v Maughin* [1947] VLR 131.
[111] Trindade, Cane & Lunney, above n 102, 77. *The Laws of Australia* [33.8.370].
[112] Unlike the situation in *Scott v Shepherd* (1773) 2 Wm Bl 892 or *Leame v Bray* (1803) 3 East 593.
[113] Trindade, Cane & Lunney, above n 102 p78
[114] *Blythe v Birmingham* See also, Yeo above n 94, 144; Cane above n 89, 536.

intentional or unintentional. The inquiry focuses on the existence and scope of any duty of care and whether it has been breached.

Support for this view can be found in the decision in *Wilson v Horne*[115] where the court held that an action in negligence was applicable to a claim that the plaintiff as a child had been subjected to sexual abuse by her uncle.[116] Similarly in the case of *Gray v Motor Accident Commission*[117] the court held that an action in negligence lay where the defendant intentionally drove into the plaintiff who was a pedestrian. The peculiar and distinctive circumstances applying to motor vehicle accidents, whereby fault must be established by the plaintiff irrespective of whether the claim is brought in negligence or trespass may better explain this latter case.[118] More recently McHugh J did not doubt the correctness of the proposition that an action in negligence lay for intentional interference.[119]

For the victim of drink spiking, establishing negligence will require proof that the defendant owed the plaintiff a duty of care not to provide him or her with an intoxicating substance without their knowledge; that the duty was breached; and that such breach was the cause of the plaintiff's harm. There is little controversy in the proposition that a person owes another person a duty of care in relation to the safety of the drink and food served to them, at least in relation to any physical harm that occurs.[120] Where the injury involves pure mental harm, it would be necessary for the victim to establish that it was reasonably foreseeable that she or he would suffer a recognisable psychiatric injury as a result of the defendant's conduct, before a duty

---

[115] (1998) 8 Tas SR 363 (FC)
[116] The action was framed in negligence to avoid the three year limitation period that applied to trespass claims. Note Evans J at [39] where he refers to an unreported decision of *Carroll v Folpp* (Supreme Court of New South Wales 10 February 1998) where Dunford J stated that '[*Williams v Milotin*] was not concerned with whether a defendant who has failed to take reasonable care for the safety of another can escape liability in negligence by showing that his actions were intentional; and I know of no case where it has been held to be a good defence.'
[117] (1998) 196 CLR 1.
[118] *Williams v Milotin* (1957) 97 CLR 465; *Venning v Chin* (1974) 10 SASR 299.
[119] *New South Wales v Lepore* (2003) 195 ALR 412, [162]. It should be noted that this statement was made in the context of determining the scope of a school authorities' non-delegable duty of care owed to its students. Justice McHugh was alone in concluding that a non-delegable duty applied to the authority for the intentional and unlawful conduct by a teacher towards a student.
[120] *Southern v Unilever Aust Ltd* [2007] ACTSC 81.

would arise.[121] If negligence was actionable it would be considered a breach of duty to serve substances that could knowingly stupefy without the persons knowledge.

As damage is the gist of a negligence action, the difficulty facing a victim of drink spiking will be establishing that they suffered a legally recognised form of harm, namely physical injury or psychiatric injury. It is unlikely that the transient nature of involuntary intoxication or altering of the mind through drugs would be considered a physical injury. Even when combined with physical illnesses commonly associated with a hangover, obvious limitations apply as the damages sought would be so slight. It is only where more serious consequences arise for the victim that an action in negligence would arise.

The extent of damages recoverable by the victim will depend on the reasonable forseeability of the type of harm suffered.[122] It is not difficult to imagine situations where the plaintiff's involuntary intoxication could result in physical injury, such as a motor vehicle accident or serious fall. The possibility of falling victim, in such a state, to sexual or criminal predators, other than the person responsible for the drink spiking is also readily conceivable. However the ability to recover in negligence for unlawful sexual interference without physical or recognised psychiatric injury is questionable.[123]

In situations where the victim's involuntary intoxication leads to anti-social behaviour including the possibility of the commission of criminal offences, policy considerations would factor in determining recoverability for any harm resulting from the conduct, such as criminal conviction or imprisonment.[124] In *Hunter Area Health Service & Anor v Presland,*[125] the Court of Appeal denied the plaintiff's claim that the Health Authority was negligent in failing to detain him when he was clearly in a psychotic state. The plaintiff claimed damages for the distress, economic loss and

[121] *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.
[122] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388.
[123] See, eg, *Wilson v Horne* (1998) 8 Tas SR 363 (FC), where the plaintiff was only able to recover in negligence for sexual abuse which occurred as a child, when she later developed post traumatic stress disorder, which amounted to a recognizable psychiatric injury.
[124] See, eg, *Hunter Area Health Service & Anor v Presland* [2005] NSWCA 33.
[125] [2005] NSWCA 33.

imprisonment that resulted from him killing his brother's fiancé shortly after release from the hospital. The majority held that although the plaintiff was not criminally responsible for the murder, 'it would be unjust to render the appellants as defendants legally responsible for a non-physical injury traced back to unlawful but not criminal conduct'.[126] As the defendant's conduct is more morally culpable for intentional drink spiking, than a negligent act, it may be arguable that it is not unjust to hold the defendant liable for the plaintiff's criminal conduct whilst involuntarily intoxicated.

2 *Negligence inappropriate for intentional conduct*

The second school of thought proceeds on the basis that while a trespass action can be maintained for negligent conduct, an action in negligence does not apply to intentional conduct.[127] While this view appears to ignore the argument that proof of negligence does not involve proof of the mental state of the defendant, recent comments by Gummow and Hayne JJ appear to support this view. In considering the scope of the non-delegable duty owed by school authorities to students Gummow and Hayne JJ stated

> As *Williams v Milotin* makes plain, negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.[128]

Commentators views also differ on this issue. While most seem to clearly take the view that negligence does include intentional interference,[129] Trindade, Cane & Lunney refer to negligence as 'totally inappropriate' for intentional conduct, although

---

[126] Ibid, Santow J. Cf Justice Spigelman CJ who dissenting said 'Where a person has been held not to be criminally responsible for his actions on the grounds of insanity, the common law should not deny that person the right to a remedy as a plaintiff and the acts which would otherwise constitute a crime do not break the causal chain'. See also *State Railway Authority of NSW v Weigold* (1991) 26 NSWLR 500; *Meah v McCreamer* [1985] 1 All ER 367 in these cases the plaintiff suffered compensable physical injury and the issue was whether responsibility extended to criminal activity.

[127] Attempts to adopt Lord Denning's view in *Letang v Cooper* [1965] 1 QB 232, 239 that negligence should be reserved for negligent conduct and trespass for intentional conduct, with the distinction between case and trespass discarded has not found favour in Australia. See eg, *Williams v Milotin* (1957) 97 CLR 465; *Venning v Chin* (1974) 10 SASR 299;*Huthchins v Maughan* [1947] VLR 131, 133 (Herring CJ); *Pargiter v Alexander* (1995) 5 Tas R 158, 161

[128] *New South Wales v Lepore* (2003) 212 CLR 511, [270], referring to *Williams v Milotin* (1957) CLR 465. Cf *Gray v Motor Accident Commission* (1998) CLR 1, [22] where exemplary damages were allowed for a claim in negligence brought for a deliberate driving into pedestrian. Although framed in negligence it was noted that the case was conducted as if trespass.

[129] See, eg, Yeo above n 94, 148. Note also his reference to G Williams & BA Hepple, *Foundations of the Law of Torts* (1976), 44.

they concede that the matter in Australia remains in doubt.[130] Sappidden and Vine refer to a case of deliberate running down a pedestrian by a motor vehicle as an action in battery,[131] and Luntz expresses surprise that *Wilson v Horne*[132] was maintainable as an action in negligence.[133]

Whether an action in negligence can be pleaded for intentional drink spiking is therefore uncertain.

C *Action on the case for intentional infliction of injury*

The remaining tort of action on the case for intentional infliction of injury covers situations where the act of the defendant is intentional but the interference occurs indirectly. Sitting between trespass and negligence, it has been touted as a tort that could develop as a 'remedy for intentionally inflicted injury resulting from invasion of dignitary interests'.[134]

Applying to both acts and words spoken by the defendant, the tort extends to the infliction of both physical and mental injury.[135] Despite calls for the tort to be extended to infliction of mental distress, as is the case in the United States,[136] it is clear that in Australia, the plaintiff must have suffered a recognisable psychiatric injury in order to maintain an action.[137]

---

[130] Trindade, Cane & Lunney, above n 102, 78, 30, 31
[131] Sappideen, et al *Torts: Commentary and Materials* (2006), [2.85], although it must be noted they do not specifically state that an action in negligence could not be brought.
[132] (1998) 8 Tas SR 363 (FC).
[133] Luntz, above n 100, [5.1.4].
[134] Penelope Watson 'Searching the Overfull and Cluttered Shelves: *Wilkinson v Downton* Rediscovered' (2004) 23 *University of Tasmania Law Review* 224, 245.
[135] *Bird v Holbrook* (1828) 4 Bing 628; *Wilkinson v Downton* [1897] 2 QB 57; *Bunyan v Jordan* (1937) 57 CLR 1. Yeo, above n 94, takes a different approach stating that *Bird v Holbrook* involves clearly intended harm and could be brought as an action in negligence following *Wilson v Horne* (1998) 8 Tas SR 363 (FC). *Wilkinson v Downton* he argues is akin to negligence as the fault element is objectively determined. See also *Carrier v Bonham* [2002] 1 Qd R 474.
[136] *Barnett v Collection Service Co* (1932) 242 N.W. 25 (Ia). See also Witting, above n 93.
[137] See, eg, *Bunyan v Jordan* (1937) 57 CLR 1; *Carrier v Bonham* [2002] 1 Qd R 474; *Grosse v Purvis* (2003) Aust Torts Reports 81-706. The position is similar in the United Kingdom, see, eg, *Home Office v Wainwright* [2001] EWCA Civ 2081; *C v D and SBA* [2006] EWHC 166 (QB).

Since the seminal case of *Wilkinson v Downton*[138] there has been much discussion of the required mental element for this tort. In finding the defendant liable for falsely advising the plaintiff that her husband had been injured in an accident, the news causing the plaintiff to suffer shock and resultant physical injury, Wright J stated

> [t]he defendant has, … wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has thereby caused physical harm to her.[139]

The word intention is not used in this definition of the tort, although the tort has traditionally been identified as an intentional tort. Wilful, in this sense has been interpreted to mean voluntary[140] and 'calculated' interpreted as 'likely to have [the] effect' of inflicting injury upon the plaintiff.[141] Determining whether the defendant's act is 'calculated' has thus been equated to an intention to bring about a proscribed result (namely injury to the plaintiff), an imputed intention akin to recklessness and 'an objective standard of conduct, akin to, if not identical with, the fault element of the tort of negligence.'[142]

At a minimum the victim of drink spiking would be required to establish that voluntarily spiking the victim's drink with the unknown intoxicating or stupefying substance was 'likely to have the effect' of causing the harm claimed. According to McPherson JA this would involve a question of whether the resultant harm was reasonably foreseeable.[143] It has been suggested, however that this test of remoteness of damage is not applicable to intentional torts and that the appropriate test is whether the resultant injury was intended or was 'the natural and probable consequence of the tortious act'.[144] Although the most natural and probable consequence of intentional drink spiking would arguably involve mental distress and humiliation, the tort will not extend to such harms, further strengthening the calls that the intentional tort of

---

[138] [1897] 2 QB 57.
[139] Ibid 58.
[140] See Yeo, above n 94, 154.
[141] *Carrier v Bonham* [2002] 1 Qd R 474, [12].
[142] Yeo, above n 94, 154. This later statement finds support in McPherson JA's judgment in *Carrier v Bonham* [2002] 1 Qd R 474, [27].
[143] Ibid.
[144] See Sappideen et al, above n 131, 67; quoting *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82, [100], (Spigelman J); *Palmer Bruyn & Parker Pty Ltd v Parsons* 76 ALJR 163.

infliction of injury should be extended to this significant but lesser form of mental harm.

While the offence of drink spiking fits most comfortably with the tort of action on the case as it involves indirect and intentionally inflicted harm, the courts dogged insistence on a recognisable form of harm will limit its application except in the serious cases of physical or psychiatric harm.

V CONCLUSION

The introduction of new criminal offences raises interesting questions regarding the nature and scope of protection offered by the law to the victims of crime. As this paper demonstrates, victims of drink spiking may find themselves particularly vulnerable in their state of involuntary intoxication. Criminal defences which generally apply in situations where a person is subject to non-voluntary intoxication may prove to be of limited application, leaving a person open to criminal prosecution where the intoxication leads to unplanned anti-social and unlawful conduct.

While there may be very few instances where a defendant's pecuniary position makes a civil suit worthwhile, the inability of tortious actions to protect a victim of drink spiking is evident when considering the particular limits of the torts that traditionally protect a person from interferences with their bodily and mental integrity. The historic requirement for direct contact in trespass, the uncertain application of negligence actions for intentionally caused harm, leaves the rarely used tort of action on the case for intentional infliction of injury the most applicable tort. Unlike the United States, courts in Australia and the United Kingdom have resisted calls to extend the torts application to the infliction of severe mental distress, falling short of a recognised psychiatric injury. In these circumstances the ability of torts law to provide a remedy to victims of crimes against the person is severely curtailed.