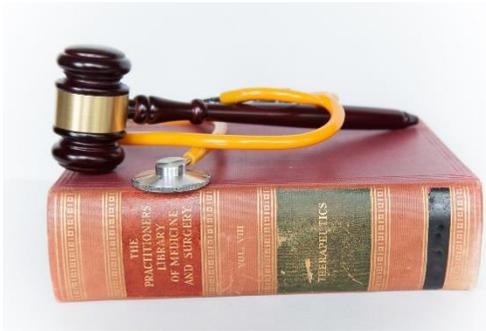


The Defence of Consent in the Intentional Torts

Research by Dr James Goudkamp of the Oxford Law Faculty influenced the New South Wales Court of Appeal in articulating the law governing consent in the context of intentional torts.



White v Johnston [2015] NSWCA 18 is a landmark decision of the New South Wales Court of Appeal (an intermediate appellate court in Australia). *White* concerned a woman who underwent dental treatment that the dentist knew had no therapeutic purpose. The case raised multiple issues in private law, and the Court's reasons are of interest throughout the common-law world.

A key question in the case was how the doctrine of consent should be understood. That doctrine was relevant because it was alleged that the dental "treatments" constituted assaults. Specifically, the Court asked which party carried the burden of proof in respect of the issue of consent. Did it fall to the claimant to show that she did not consent? Or did the dentist need to establish consent?

The Court of Appeal recognised that there was "no binding authority on the question" (at [94]). It therefore looked to academic writing, including Dr Goudkamp's book, *Tort Law Defences*. Goudkamp argues that all of tort law's liability rules are either "denials" or "defences". Denials seek to cast doubt on one or more of the elements of the claimant's cause of action. Conversely, defences are liability-defeating rules that apply even though all of the elements of the claimant's action are present.

Exploring the authorities on consent through this lens, Dr Goudkamp contended that the plea of consent, properly understood, is a denial. He reasoned that this classification means that the burden of proof in respect of the plea therefore rests on the claimant. This analysis was explicitly accepted by the Court of Appeal. Leeming JA, who delivered the principal reasons, described Dr Goudkamp as "The modern academic commentator who has, in my view, considered the question most carefully" (at [124]).

