

# Torts

LAWS1012

**SAMPLE ONLY**

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SAMPLE

**b) Assault**

An assault is committed where the defendant's intentional act creates in the plaintiff's mind the reasonable perception of an immediate application of unlawful force.

- Three essential components in proving assault
  - o A. Intention on behalf of the defendant
  - o B. Reasonable apprehension on behalf of the plaintiff
  - o C. Immediacy

\* In this context, immediate does not necessarily mean instantaneous or a relatively short period of time.

**(a) Apprehension/perception of immediate unlawful violence**

★ Relevant Case: *Hall v Fonceca*

**Facts:** The plaintiff and the defendant were both members of a curling club in Perth. At a general meeting, a dispute broke out between the plaintiff and the defendant regarding the finances of the club. The altercation between the two men became heated, and one man hit the other, upon which the second man fell to the floor and suffered a haemorrhage. The man who hit the victim was prosecuted for an assault under the WA Criminal Code. The defence of the defendant to the prosecution's case was that he acted in self defence. The question for the court then became, at the time the victim was hit, was the victim himself committing an assault which would then give rise to a legitimate act on behalf of the defendant to defend himself.

**Court Findings/Established Principle**

- Assault requires intention to cause the plaintiff to apprehend the imminent application of unlawful force. This can be either thought the defendant's own intent to use force, or merely the defendant's intent to ensure the other party apprehends they will.
- Must threaten by any bodily action or gesture AND must have the perceived ability to carry out this threat.
- Must have the intention to either apply force or create apprehension of the use of force.

**Relevant Principle: There must be an intention on behalf of the defendant.**

**① NON-VIOLENT ASSAULTS**

- Not every threat where there is no personal violence will constitute an assault.
  - o There **MUST** be a means of carrying the assault into effect.
- Whilst three elements are necessary to prove the tort of assault, the law remedies what may appear to be 'injustices' through the damages awarded to the plaintiff.
  - o Whilst a plaintiff may succeed in satisfying the requisites of assault, they might receive nominal damages.

★ Relevant Case: *Stephen v Myers*

**Facts:** At a local church meeting, the defendant was being particularly disruptive and unpleasant. The plaintiff, made a motion to remove the defendant from the meeting which was passed by a

majority. The defendant, in anger, announced he would rather pull the chairman out of the chair than be removed from the room and then advanced towards the chairman fist clenched. The man was stopped by another person in the room before he could cause harm. The question for the court was whether or not this constituted an assault, despite the defendant not having actually struck the plaintiff or having been successful in his attempt.

### Established Precedent/Court Finding

- 1) The court found for the plaintiff: the defendant was guilty of assault.
  - a. However, the court also held that not every threat of violence without violence occurring will amount to an assault.
  - b. Assault will lie only where the means of carrying the threat into effect are present.
    - i. Thus, an important question for the judge had been whether or not the defendant was advancing with the intent to do so.
- 2) The plaintiff was awarded 1 shilling in damages, which was representative of the 'harm' that the jury perceived him to have endured.

**Relevant Principle: Where the defendant threatens the plaintiff with immediate violence and at the time of the threat possesses the means or apparent means of carrying it out, this will constitute assault even if the defendant is restrained before he or she has an opportunity to carry out the threat.**

- Importantly, HOWEVER, when determining whether a case may lie for assault, where no physical contact or battery in fact takes place, several additional elements are required in addition to the necessary requisite that the individual has the means to undertake the threat.

★ Relevant Case: ACN 087 521 754 Pty Ltd v Chetcuti

**Facts:** Mr Chetcuti was catching a train. He entered the defendants railway station for the purpose of catching a train. An incident then occurred in which the plaintiff engaged in offensive and highly confrontational behaviour with two transportation officers. During this incident, the plaintiff spat on one of the two defendants. In the course of running away, the defendants officers in pursuit, the plaintiff fell and fractured his wrist before physically being restrained. It was the plaintiff's contention that he had run away for fear of retaliation for his act of spitting. The proceedings were remitted for retrial and appeal to the Victorian Court of Appeal.

### Court Finding/Established Precedent

- 1) A plaintiff seeking to establish a cause of action for the tort of assault, in circumstances where no physical contact or battery in fact takes place, must prove the following elements:
  - a. A threat by the defendant by words or conduct, to inflict harmful or offensive contact upon the plaintiff forthwith.
  - b. A subjective intention on behalf of the defendant that the threat will create in the mind of the plaintiff an apprehension that the threat will be carried out.
  - c. The threat must create in the mind of the plaintiff an apprehension that the threat will be carried out forthwith. It is not necessary for the plaintiff to fear the threat in the sense of being frightened by it.
  - d. The apprehension in the mind of the plaintiff must be *objectively* reasonable.
  - e. The plaintiff's reasonable apprehension caused injury, loss or damage to the plaintiff.
    - i. Find which judgement this is from: question whether necessary to prove this because it is actionable per se.

- 2) The plaintiff did not satisfy the requisite intention of intent. Whilst he may have feared of certain consequences, there was no intent on behalf of the defendants to create such apprehension within him.
- 3) The test for reasonability in tort cases of apprehension: Would a reasonable person, in the position of P, respond with the same apprehension?
  - a. *Exception for cases where the defendant knows the plaintiff to be timid?*

**Relevant Principle:** Where the mental element in assault is an intention on the part of the defendant to cause the plaintiff to apprehend the immediate application of unlawful force, the requisite intention is subjective not objective. (2) The plaintiff's apprehension of the imminent application of unlawful force must be a reasonable one.

- Importantly, the plaintiff's apprehension of force must be reasonable.
- An assault must take into account the context in which the assault is claimed to have been made.



### 3) CAUSATION

#### 1. ONUS OF PROOF: *Civil Liability Act (NSW) 2002 S5E*

##### 5E: Onus of Proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving on the balance of probabilities, any fact relevant to the issue of causation.

#### 2. FACTUAL CAUSATION: *Civil Liability Act (NSW) 2002 S5D(1)(a)*

##### 5D: General Principles (*Strong v Woolworths*)

- (1) A determination that negligence caused a particular harm comprises the following elements:
- That the negligence was a necessary condition of the harm (factual causation).
  - Conduct of the plaintiff does not necessarily remove causation (*Medlin*)

#### 3. SCOPE OF LIABILITY: *Civil Liability Act (NSW) 2002 S5D(1)(b)*

- That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

\*\* Established in *March v Stramare*: The negligence of the tortfeasor being a necessary condition is not itself substantial enough to prove causation.

##### 1. Remoteness

- Was the injury reasonably foreseeable on behalf of the defendant? (*Wagon Mound No 2*)
- Need only foresee the KIND of damage (*Smith v Leech Brain & Co*)
- NEED NOT foresee the specific occurrence of events (*Hughes v Lord Advocate*)

##### 2. Novus Actus

Breaks the chain of causation.

- Merely negligence of another does not necessarily break: *Chapman v Hearse*
- Criminal act may break chain of causation/increases probability of Novus (*State Rail Authority v Chu*)

##### 3. Intervening or unrelated injury or illness

An injury unrelated to principles of original injury limits liability: *Joblings*

##### 4. Policy Considerations

Incoherency of the Law etc

#### 5. CAUSATION IN FAILURE TO WARN CASES

- Must determine what the plaintiff would have done should the negligence not have occurred: CLA s 5D(3)
  - No causal connection will exist where the plaintiff would have undertaken the treatment irrespective of the warning (*Chapel v Hart*)

1. OR, if every alternative means give rise to equal probability of risk.