Scott v Shepherd (1773) – Direct act resulting in contact of another

- Shepherd (D) threw squib into a covered market, it landed on stall of Willis, he threw it across the market where it hit Scott (P) in the face and caused serious eye injury.
- Issue: *Is the defendants action sufficiently direct enough for action and for the defendant to be liable for damages given the squib was thrown by Willis into P.*
- It was found the subsequent actions from defending themselves resulted directly from D and the directness of the act was not broken until physical contact occurred with P. Therefore, satisfied action for Battery.

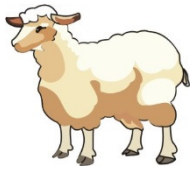
Williams v Milotin (1957) 97 CLR 465 – Negligent Trespass

- P, a cyclist, hit and injured by D's truck
- D relied on section 36 of the *Limitation of Actions Act* (SA): "All actions for assault trespass to the person battery wounding or imprisonment shall be commenced within three years next after the cause of such action accrued but not after"
- Leave was given to appeal to the High Court
- However, negligent battery has a higher limitation of 6 years.
- The court found that negligent acts can constitute battery also, without the need to prove fault.
- In negligent acts plaintiff must prove fault. In Battery, plaintiff must prove facts and defendant must prove lack of fault.

Venning v Chin (1974) 10 SASR 299 – Highway exception

- Woman injured when hit by a car in suburbs
- She sued the driver and her husband sued the driver for damages and loss of her services.
- At Trial – Defendant must prove that: The act was NOT intentional or negligent.
- This means the Plaintiff must prove elements of battery and the Defendant must show act was not intentional or negligent EXCEPT in highway accidents where the Plaintiff must prove fault.

Hutchins v Maughan [1947] VLR 131 – Action must be direct and not consequential



- P was driving a flock of ewes
- D warned P that the area he was flocking the ewes had laid poisoned balls, the dogs died from eating these balls.
- P awarded damages but case taken to appeal.
- Found action must be direct and not consequential, and in this case the laying the bait, and the dogs eating it was a consequence not a direct act.

Giller v Procopets [2008] VCSA 236 - Revenge Porn and intentional infliction of harm.

- Upheld claim for intentional infliction of emotional distress. In this case the Defendant and Plaintiff had been in a long term relationship and the defendant had video footage of sexual acts.
- On appeal she was successful in recovering damages. It was commented in the original trial that the Australian law does not support her in damages for psychological disturbances as a result of these actions due to lack of tort of privacy[1].
- He found seeking damages in this case was not contrary to the Australian law as stated in the original trial.
- **HELD:** The essence of a case such as the appellant's is the redress of the harm caused by the publication of private information, rather than the prevention of a person such as the respondent profiting from their wrongdoing. Further, the respondent's actions were intentional (he meant to cause the appellant harm); they were not the result of a careless act.
- The court's power to award such monetary compensation under the *Supreme Court Act 1986* (Vic), s 38, is not dependent upon the grant of an injunction. Rather, the court's ability to grant an injunction in all the circumstances of the case is an issue of jurisdiction. Once jurisdiction is established, then the court can grant either an injunction or money damages, as the case requires.
- In this case, the grant of an injunction would not be an appropriate remedy, as the breach had largely been committed before the appellant became aware of it. Further, given his arrest in connection with dissemination of the tapes, and the consequent confiscation of the tapes, the respondent was in no position to persist in breaching the appellant's confidence. The trial judge, therefore, erred in not awarding damages for the mental distress suffered by the appellant as a result of the respondent's wrongdoing.
- Even though intention may not have been present, in Giller the judge referenced that the courts often impute the intention onto the defendant; however he did not need to take this view as the defendant had acted in an intentional way[2].
- Intention to take the photos is clear and therefore no need to consider recognized psychological illness in any possible action. The judge was insistent he is not saying action could be brought without extreme and severe circumstances, but does state in obiter that he does not see a need for restriction[3]. This case in particular did not require the tort of privacy to be recognized as the law has developed in other ways to protect the circumstances as in the Lenah case[4], in particular the ability for action for intention to inflict mental distress and harm.

Groose v Purvis [2003] QDC 151 – Moving towards Torts action for Privacy.

- Plaintiff had established a University on the Sunshine coast. The defendant was an electrical salesman who eventually established SCRGAL.
- The plaintiff commenced a massage business. The defendant began to persist in contacts and engagement with the plaintiff advising of alleged investigations into her conduct as a claimed sex worker.
- The plaintiff alleged a persistent course of loitering by the defendant at or near her places of residence, work or recreation, instances of spying on her private life, instances of unauthorised entry to her house and yard, instances of unwelcome physical contact, instances of repetitious offensive phone calls to her, some at unreasonable times, instances of the use by him of offensive and insulting language to her and instances of his offensive behaviour to her friends and relatives.
- The 'stalking' conduct was said by the plaintiff to fall within an actionable civil claim for invasion of privacy[5]. Unlawful stalking was a covered criminal action in Queensland.

---

[1] *Giller v Procopets* (2008), 24, VR, 1, [4].
[2] *Giller v Procopets* (2008), 24, VR, 1, [33].
[3] *Giller v Procopets* (2008), 24, VR, 1, [38].
[4] *Giller v Procopets* (2008), 24, VR, 1, [167] [168].
[5] *Groose v Purvis* [2003] QDC 151, [415].

- Causation – No seat belt cases
- Intoxication – *Wrongs Act 1958,* s 14G
- Assessing the contribution

Cases

Davies v Swan Motor Company (Swansea) Ltd [1949] 2 KB 291 – No duty requirement

- Plaintiff's husband was a garbage collector who was killed when a bus smashed into the truck. The plaintiff was riding on the step of the truck against employer's instructions.
- Alleged death was result of negligent driving of the bus driver.
- Held the bus driver negligent but the plaintiff's husband was 20% contributory negligent.
- It suggests although the plaintiff was not under a duty to the defendant, he was under a duty to himself to take care for his own safety.
- The question is if the plaintiff **was acting as a reasonable man with reasonable care**, not if he was neglecting some legal duty to others.
- In this case he was not acting a reasonable man with reasonable care and the risk of the loss was reasonably foreseeable.

Shelley v Szelley [1971] SASR 430 – Agony of the moment

- Plaintiff was a passenger in defendant's car and was dozing in the front seat.
- Tire blew in the car and defendant slowed the car down by taking his foot off the accelerator.
- Plaintiff woke up and saw the car veering to wrong side of the road. They warned the defendant who just smiled. Plaintiff then grabbed the steering wheel and the car ran off the road and overturned.
- Held: Defendant was negligent and the plaintiff was not contributory negligent.
- Bray CJ: "In cases coming within the *Bywell Castle* rule the conduct of the party acting in an emergency may be viewed with more latitude, since in such cases there is almost an element of estoppel: it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in danger … If this is correct then the [P's] conduct would be viewed more indulgently than that of the [D], once granted that the [D] was guilty of negligence prior to the [P] seizing the wheel, which negligence was in part at least the cause of what the [P] did"
- As it was in the agony of the moment the plaintiff's actions were found to not be negligent at all as they had not created the danger and had simply reacted to it.

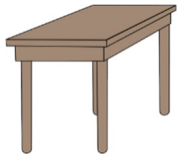
Avram v Gusakoski [2006] WASCA 16 – Agony of the moment.

- Two people in car, both were drunk. Defendant is driving carelessly. Heads towards a pole.
- The Plaintiff takes the seatbelt off prior to a crash as he doesn't want to be stuck in the car. The plaintiff due to this causes more damage than he would have with the seatbelt on.
- Court found this was modern application of the agony of the moment rule. Found not to be contributory negligent.

McLean v Tedman (1984) 155 CLR 306 – Employers/Employees

- Plaintiff was a garbage collector. He was hit by car whilst running across the road with a rubbish bin.
- The work practice was crossing the road whilst the truck stayed on the other side was the cheapest option.
- Plaintiff then sued the employer. Employer alleged the work practice was adopted by the employees and not instructed. Employer claimed the harm resulted from the plaintiff's own carelessness.
- Plaintiff was found to not be contributorily negligent.
- The defendant had failed to discharge its obligations to provide a safe system of work and to take precautions against the risk of injury from the motorist's negligence and the employee's failure to observe the motorist.
- It was established that whether there is contributory negligence by an employee in a case in which the employer failed to provide a safe system of work, the circumstances and conditions which the work had to be done must be considered.
- In this case, the employees were in circumstances where these actions had to occur and the employer should reasonably have known this and have put protections in against the risk.

Czatyrko v Edith Cowan University (2005) 214 ALR 349 – Employee/Employers



- Employee, duties involved moving furniture and distributing mail. Under pressure to work quickly the employee was injured.
- Work included lifting 30 boxes of books using hydraulic mechanisms.
- Plaintiff dell back off the truck as the platform did not have warning signals when moving.
- Held defendant was negligent and plaintiff was not contributorily negligent.
- Employer failed its duty of care by not providing a safe system of work and providing protective equipment. It was a case of creating a risk by failing to provide a safe system of work.
- There should have been protections in place and consideration to the task being performed was a repetitive one. As it was repetitive task there was a diminished state of awareness.
- The employer also did not advice the plaintiff to stop, turn and check if the platform was their prior to performing the task.
- The platform he went to step back on to had no signs of warning, and he failed to check it was still there to step back onto. His failure to check was irrelevant as the employers duty had been failed and it should have provided more safety for the circumstance
- *Contributory negligence by an employee is more difficult if the employer has failed its duty to provide a safe workplace.*