

- Plaintiff/defendant; tort committed; elements; apply the law to the facts; make a conclusion.
- May discuss damages; compensatory damages, exemplary (make an example), punitive (to punish), nominal (actionable per se; other side to pay costs) or aggravated (actions are particularly bad).

### The Common Law of Tort; Trespass to the Person; Assault, Battery & False Imprisonment

#### Trespass Torts Elements:

- A positive voluntary act;
  - Intentional deliberate act. No trespass without fault. *McHale v Watson*
- Which DIRECTLY;
  - Must be part of the D's act, not merely a consequence of it. *Scott v Shepherd*
- Interferes with the Plaintiff (person, land or goods);
- Is actionable *per se*. Damage is not an element in trespass.
- **Onus of proof in trespass cases in on the defendant, except for highway cases. *McHale v Watson***
- **Action on the case;** consequential damage. Damage is the gist of the action, onus on plaintiff (*e.g.* negligence is an action on the case)

#### Battery:

- Elements: a positive voluntary intentional (deliberate or negligent) act, directly causing unwanted physical bodily contact/interference with the plaintiff (*Cole v Turner, Rixon v Star City*)
- (without consent of the plaintiff)
  - Nature of the interference: *Collins v Wilcock*; any touching of another person, however slight.
  - Implied consent: *Collins*; physical contacts of ordinary life are impliedly consented to.
  - Nature of the intention: it is the act, not the injury which must be intentional.
  - Directness requirement: the injury sustained by the plaintiff was as a direct/immediate action. *Scott v Shepard*

#### Assault:

- Elements: a voluntary intentional act, directly causing, the plaintiff to reasonably apprehend, imminent physical bodily contact.
  - Mere words: It is a matter of circumstance/atmosphere of drama and suspense is enough to instil fear and constitute threatening acts, distinct from mere words. *Barton v Armstrong*
  - Apprehension: must be reasonable, objective tests, of **imminent** bodily contact. *Zanker v Vartzokas*.
  - The effect on the victims mind created by the threat is crucial to the issue of assault. (apprehension that the threat will be carried out forthwith)
  - Conditional threats. See *Rosza v Samuels*.
    - Threatened to punch queue jumper, produced knife. 'I will cut you to bits if you try it'. Because of the combination of words and actions that indicated an immediate threat. Defendant could have responded differently by moving taxi. Constitutes an offence.
  - Intention: comes from the defendant intending the consequences of the act, rather than doing the act itself.

#### False Imprisonment:

Example: after listing the relevant elements: 'In this case, there has been an intentional application of force by X, without Y's consent.

- A positive voluntary act of the defendant, which directly or negligently, causes total restraint of the plaintiff's liberty (total restraint).
  - There must be direct action by the defendant, *e.g.* as in *Watson v Marshall and Cade*, turning a key and locking the room where the plaintiff sits. Need to be physical, can be as a result of

psychological intimidation; *Symes v Mahon*, an omission (failing to release the prisoner at the end of sentence) *Cowell v Corrective Services*.

- Intention: the act which must be intended is the imprisonment. *Cowell v Corrective Services Commission*
- Total deprivation of liberty. *Bird v Jones*
- Complete submission of the plaintiff by the authority of defendant. *Symes v Mahon*
- No reasonable means of escape. *Bird v Jones, Balmain New Ferry Co*
- There is no imprisonment where the plaintiff voluntarily submits to a form of restraint. *Balmain New Ferry Co Ltd* (plaintiff not allowed to leave without paying fare).
- Directness: defendant must be 'active in promoting and causing the imprisonment of plaintiff'. *Ruddock v Taylor*
- Plaintiff need not be aware of imprisonment at the time the tort is committed. *Myer Store v Soo, McFadzean v CMFEU*

Trespass to Goods:

- Elements: an intentional act (deliberate), which directly, interferes with the goods in the plaintiff's possession.
  - Title to sue in trespass to goods: actual possession *Penfolds Wine*.
    - Constructive possession. *Hamps v Darby*.
- Note: there is also:
  - **Conversion**: where the owner of the goods is deprived from his right to possession or the right is **impaired** (retaining possession and deliberate damage)
  - **Detinue**: where a defendant wrongfully retains the goods of the plaintiff, **following the plaintiff's lawful demand of return**. (now merged with conversion) *Penfolds*.
- Rights to possession where there is a bailment:
  - Gratuitous bailment at will: bailor has immediate right to possession, bailee has actual possession, and both can sue in trespass. *Penfolds Wine*.
  - Bailment for a term or purpose (contract): Bailor will have immediate right to possession only at conclusion of term or purpose or on termination of the contact.
  - Bailee has actual possession (can sue in trespass).
- Note: Physical possession of personal property is transferred from the bailor the bailee, who subsequently has possession of the property.

Trespass to Land:

Example: trespass to land arises where there has been a direct, unauthorised interference with land in the possession of another *Plenty v Dillon*. Only a person with a right to exclusive possession in the property in question will have title to sue. There is nothing in the facts that suggest that X would not have the right to sue.

- The intentional or negligent act of the defendant, which directly interferes with the plaintiff's exclusive possession of land. Damage is irrelevant. *Coco v The Queen*
  - The possession of the land only extends as far up into the air and as far down into the subsoil as it reasonably necessary for the use and enjoyment of the land.
  - Standing to sue: exclusive physical possession exclusive possession of land (necessary title not sufficient), to the exclusion of all others. *Newington v Windeyer*
  - A voluntary intentional act:
    - Defendant's act must be voluntary. *Smith v Stone*.
    - No trespass without fault. *League Against Cruel Sports*
  - Directness: the interference must be direct, not consequential. *Esso Petroleum*
  - Nature of the interference: the act must constitute a physical interference with the land. *Bathurst City Council*.

- Trespass by licensee: licensee refused to leave when license was revoked. ***Cowell v Rosehill Racecourse Co Ltd.***
- Implied license to enter premises:
  - Path or driveway, leading to the entrance of an ordinary dwelling, is left unobstructed and the gate is unlocked, there is no notice or indication that entry is forbidden; the law imposes a license in favour of any member of the public to enter for the purpose of lawful communication. ***Halliday v Neville.***
  - Note: implied licence may be revoked. ***TCN Channel Nine.***
- Police powers and trespass to land:
  - Unless authorities by law, have no special right of entry without consent of the person in possession of the land. ***Halliday***
  - Unless authorised by law to remain, the officers must leave the premises within a reasonable time when requested to do so. ***Kuru v NSW***
  - If serving summons, must obtain the consent of the party in possession of the land.

Action on the case (for wilful injury)

Note: the act of the defendant may indirectly or consequently cause damage to the plaintiff. Actual damage needs to be shown (either psychological or physical), must be shown to have occurred as a result of the defendant's act. The plaintiff bears the **onus** of all the elements in the tort, including the fault of the defendant, on the balance of probabilities.

Plaintiff will need to bring an action under common law for nervous shock as a result of the defendant's intentional act. ***Wilkinson v Downton.*** The plaintiff will need to prove (above), as well as proving that the defendant's act:

1. Was wilfully done;
2. Was calculated to cause harm;
  - The court will decide whether the behaviour of the defendant was 'foreseeably likely' to produce actual nervous shock ***Bunyan v Jordan.***
  - Calculated intention may be imputed on an objective test: *Carrier v Bonham*
  - Only necessary to find the natural and probable consequence; ***Nationwide News v Naidu.***
3. Caused harm to the plaintiff: the plaintiff will need to prove that the cause and effect were not too remote in law to be regarded as a consequence for which the defendant is answerable.
4. Plaintiff's harm was in the form of nervous shock: which was interpreted to mean 'severe emotional stress that can be the starting point for a lasting disorder of the mind or body' ***Mount Isa v Pusey:*** cannot be mere sorry, grief or distress.

If the plaintiff can establish each of these elements on the balance of probabilities, the defendant will be held liable for damages, unless they can disprove any or all of the elements or raise a substantial defence.

***Wilkinson:*** court held that a party may seek recover for outrageous conduct that causes physical harm or mental distress.

False imprisonment:

***Zanker v Vartzokas:*** There was a reasonable means of escape; therefore, she did not get damages for false imprisonment. Nevertheless, she was successful in obtaining damages for assault.

Trespass to land:

***New South Wales v Ibbett***: Judge found entry without any lawful justification, amounted to trespass.

***TCN Channel Nine Pty Ltd v Anning***: They entered the property with cameras already filming (should have asked for permission when they first entered). Though they had an implied license to enter the premises (tyres), they didn't have one to enter and film.

***Lincoln Hunt Australia Pty Ltd***: Plaintiff was awarded damages alone/adequate. Interlocutory injunction was not necessary.

***Newington v Windeyer***: Deceased's estates belonged to neighbours/they had a possessory title as they had looked after it for so long. It was sufficiently considered to be theirs, and were awarded damages.

***Bernstein v Skyviews***: Ownership of land does not extend unlimitedly to the sky.

***Southport Corporation v Esso Petroleum***: No trespass to land as it was not a direct act of the vessel spilling oil in the river which caused the oil to wash up on Southport Beach. When the oil went in the river, the river carried the oil to the beach. Therefore, not a direct act.

Action on the case:

***Bird v Holbrook***: Little boy was chasing pea hen and he was shot and injured. Successful on the case, resulted in wilful physical injury.

***Nationwide News Pty Ltd v Naidu and Anor ISS Security Pty Ltd***: Awarded compensatory damages as he suffered psychiatric injury as a result of intimidation, threats of physical violence and racial vilification during his employment.