

DEFENCES – TORTS TO THE PERSON AND TORTS TO GOODS

CONSENT

- D will have a defence against a trespass tort if P consented to the act
- Cannot have consent above bodily harm (*Brown*)
- **Onus of proof:** D bears onus of proving consent (*Marion's Case*)
- **Forms of consent:**
 - o Express: statements or in writing
 - o Implied:
 - There is no indication that entry is forbidden (*Halliday v Nevill*)
 - Limited by reference to people or purpose (*Lincoln Hunt Australia Pty Ltd v Willesee*)
 - Rolling up sleeve when the doctor says they will take blood
- There's no rule as to how consent should be demonstrated, but P must be shown to have subjectively agreed
- Will not exist where the plaintiff has clearly indicated in advance that permission is refused (*Rinsale Pty Ltd v ABC*)
- **Trespass must fall within the scope of that consented to**
 - o Must cover the act in question (*McNamara v Duncan*)
- **Consent must be genuine**
 - o If consent is not wholly independent and genuine, it may be vitiated (*Latter v Bradell*)
 - o Not by fraud: intentionally misleading P about the nature and quality of act
 - Inaccuracy must go to the nature of the act → look at whether it is pertinent to the act that's about to occur
 - o Not by duress: being forced to give consent by the circumstances
 - E.g. threat of physical force
 - Difference in power status (maybe not enough alone)
 - Emotional / economic duress? (*Latter v Bradell*, *Aldridge v Booth*)

Consent: sport

- **Issues:** whether D's conduct falls within the ordinary rules and usages of the game

McNamara v Duncan: consent in sport

- M (P) was elbowed in the head by D who ran at him speedily – 10-day coma – skull fracture – emergency surgery – minor disability. D argued consent to rules of game and foul play.
- **Held:** P consented to conduct within ordinary rules and usages of game – this was clearly foul play → not common to the game → no consent – battery regardless of intention or negligence

Consent: medical procedures

- Consent is real if the patient has been informed in broad terms of the nature of the intended procedure – not necessary to outline risks involved (*Chatterton v Gerson*, confirmed in *Rogers v Whitaker*)
 - No defence if P signed form saying 'the effect and nature of which has been explained to me' but no explanation given → no consent (*Chatterton*)

Chatterton v Gerson: consent for medical procedures

- P told by specialist that he intended to inject spine to reduce pain – consented – new symptoms and didn't alleviate pain – argued battery
- **Held:** P consented – didn't need to outline risks involved

Consent: minors

- Minors are capable of giving informed consent when they have "achieved a sufficient understanding, and intelligence to enable him or her to understand fully what is proposed" (*Marion's Case*)
 - o Therapeutic procedures: alleviate a problem
 - o When a minor is unable to consent, parent or guardian can consent on behalf (to the extent that child can't consent)

- **Non-therapeutic procedures:** before a person has achieved that capacity, this generally requires court consent (determined in light of the best interests of the child)
- This principle can apply beyond the medical context

Marion's Case: consent of minors

- Re sterilisation of young, intellectually disabled woman
- **Held:** no age limit, because kids mature and develop at different rates – but parental power diminishes gradually as capacities grow
- Sterilisation non-therapeutic → not within scope of parental consent – court

Revocation of Consent

- Always free to revoke
- **Withdrawal of consent must be:** (*Cowell v Rosehill Racehorse Co*)
 - o Unambiguous
 - o Communicated to D
- If revocation would be dangerous or very inconvenient, may be irrevocable for a 'critical period'
 - o This may better explain the 'contract cases' (*Balmain, Herd*)

SELF-DEFENCE

- A response to force, actual or apprehended
- **A person is entitled to act in self defence where: (Zecevic)**
 - o There is an unlawful infliction of force to their person; OR
 - o He / she is under a reasonable apprehension that force is about to be unlawfully inflicted to her person
- **Burden:** on D to prove force used wasn't excessive

Is self-defence applicable? Zecevic test:

1. Whether D believed conduct was necessary
 - o Subjective element: did D honestly believe conduct was necessary?
 - o Minor defence of mistaken belief: can be argued provided that it was honest and reasonable (*Ashley*)
2. Whether D's belief was based on reasonable grounds
 - o Objective element: reasonable grounds as D would have perceived them (not a hypothetical reasonable person)

Reasonable grounds?

- Whether the defendant could have avoided the threat without using force (*Fontin, Rosza v Samuels*)
- Proportionality of the degree of force relative to the threat offered (*Fontin, Zecevic*)
 - o [Disproportionate force isn't always unreasonable – for a frail person a weapon may be the only option when dealing with an unarmed attacker.]
- Whether D declined further conflict and retreated from the use of force (*Zecevic, Fontin*)
- NB: what is reasonable will depend on the circumstances. Allowance must be made for D who responds to an attack in the heat of the moment.

Provocation:

- **Where D was provocateur:** e.g. Zecevic
 - o Unlikely to find self-defence unless original aggression has ceased
 - o BUT: could argue that cessation has occurred because the threat in return is so disproportionate → new thing
- **Where P was provocateur:** e.g. Fontin
 - o Just ask general Zecevic question

Zecevic v DPP: self-defence

- Neighbourhood dispute – Z knocks on V's door – V stabs Z in side – I'm going to blow your head off – Z went to unit, got gun – shot V when V standing in front of boot

- **Held:** When D is original aggressor, consider whether the original aggression had ceased so as to enable A to form a belief on reasonable grounds that his actions were necessary.

Fontin v Katapodis: self-defence

- P picked threw object at D – P raised object to hit again – D picked up off-cut of glass and threw it at P
- **Held:** no self-defence – D could have moved away to avoid attack – throwing glass was ‘out of all reasonable proportion to the emergency’ (McTiernan J)

Ashley v Chief Constable of Sussex Police: mistaken belief

- Armed raid of V’s house – V naked and unarmed – shot and killed by police
- **Held:** Where D acted under a mistaken belief, they must prove that it was not only honest but reasonable → then satisfy court that action was reasonable

Defence of another: just ask the general self-defence question

Defence of property: applies to real property and to moveables on land

- Person in possession of property has right to rely on this defence
- For people there with consent: no force justified until trespasser has refused to leave after warning, and had reasonable time to collect belongings (*Halliday*)
- For people there without consent (came forcibly): can resort to force

NOTE: CHOOSE ONE OF NECESSITY AND SELF-DEFENCE

NECESSITY

- **Test:** where the defendant’s conduct **was reasonably necessary to protect either people or property from the threat of real and imminent harm**
- **Rules:**
 - o **Must be urgent situation of real and imminent peril** (*Southwark*)
 - E.g. D’s actions involuntary or necessary for self-preservation (*Scott v Shepherd*) c.f. ongoing affair
 - Don’t have to contemplate the full extent of the peril
 - o **D’s steps must be reasonably necessary in the circumstances**
 - o Peril mustn’t have been caused by D’s own conduct (*Esso Petroleum*)
 - o Policy considerations are important in determinations of necessity
 - If defence is made out on principle, can still be barred if contrary to public interest issues (*Southwark*)
 - o Court is pretty lenient re people who intervene in a situation of real peril

Southwark London Borough Council v Williams: imminent peril

- Squatters argued homelessness was a situation of imminent peril
- **Held:** no necessity - deemed not – ongoing state of affairs
- Policy based on prioritisation of private property interests → necessity may become mask for anarchy (*Lord Edmund Davies*)

Property: high threshold - only favourable if to protect property from danger/damage (*Southwark*)

Reasonably necessary

- Assessed by reference to what was known at the time (by D)
- Consider if harm likely to be caused by D’s action is greater / less than harm that would’ve occurred if D took no action
 - o Limited weight to this if D acted on the spur-of-the-moment (*Proudman v Allen*)
- No requirement that D’s attempt was successful

Proudman v Allen: reasonably necessary

- D saw group of strangers trying to move car – car about to collide with other cars – jerked the steering wheel (averting the collision) – car rolled into sea

- **Held:** necessity – reasonably belief that interference justified – intended to benefit P – didn't matter that harm caused was probably greater

Necessity: Medical Procedures

- **For the defence of necessity in medical contexts, it must be:** (*In Re F*)
 1. **Impracticable to communicate with the person, and**
 - Could be because of emergency circumstance that has just come up (*Murray v McMurchy*); or
 - Can come from a longstanding state of affairs that means a P can't communicate anymore (*In Re F*)
 2. **Actions must be those of a reasonable person (doctor) acting in the best interest of the patient**
 - I.e. actions must be necessary
 - Court treats this as a very strict principle
 - Intervention unjustified: if more appropriate and willing person is available to act or intervention is contrary to the known wishes of the person (*In Re F*)

In re F (Mental Patient: Sterilisation)

- Sterilisation declaration granted – concerned here with action taken to preserve life, health or well-being of another unable to consent
- Where state of affairs permanent: this includes substantial medical treatment or surgery, routine medical or dental treatment or dressing and undressing
- **Necessary:** Only medical treatment that is necessary to protect a person's life or health may be justified (*Murray v McMurchy*)
 - o Tying of fallopian tubes unnecessary because risk only triggered if she became pregnant – here convenient and not necessity
- **Guardianship & Administration Act 1986 (Vic): s 42A(1) (reinforces CL) – for sterilisation**

Medical Treatment Act 1988 (Vic)

- Patients can refuse medical treatment (except palliative care – food, water, pain medication)
- Refusal of treatment certificate: signing must be witnessed by doctor and third person (s 5):
 - o Person must be over 18 and of sound mind and decide voluntarily
 - o Patient must be informed of medical conditions
- If Doctor administers treatment with knowledge of refusal, is guilty of medical trespass (s 8)
- Re euthanasia: this is different because euthanasia = taking active steps

Crimes Act 1958 (Vic)

- S 463B – everyone can use reasonable force necessary to prevent suicide

LAWFUL ARREST

Basics:

- Must have power to arrest under *Crimes Act 1958* (Vic)
 - o With warrant: s 457
 - o Without warrant: s 458 (anyone) / 459 (police)

Arrest without warrant: citizens

- Find another committing an offence and believe on reasonable grounds that the apprehension is necessary:
 - o To ensure the appearance of the offender before a court; or
 - o To preserve the public order; or
 - o To prevent the continuation or repetition of the offence, or the commission of a future offence; or
 - o For the safety or welfare of members of the public or of the offender
- Instructed to do so by a member of the police force with authority to arrest the person; or
- Believe, on reasonable grounds, that the person is escaping from legal custody or avoiding apprehension from a person with authority to arrest.

Police powers (s 459): may arrest if they believe a person has committed an IO

Finds committing (s 462): person found doing anything / so behaving / conducting himself or in such circumstances that the person finding him believes (on reasonable grounds) that the person found is guilty of an offence

If no offence committed: D's arrest will be lawful if, given P's conduct, D believes on reasonable grounds that P was committing an offence (s 461(1))

Reasonable force (s 462A)

Arrest must be made with no more force than reasonably necessary

Knowledge:

- A person arrested must, at the time of being arrested, be told of the grounds [in general terms] on which they are being arrested (*Christie v Leachinsky*)
- **Exceptions:**
 - o Person caught in commission of offence – it's self evident
 - o Person caught makes it impossible to provide the information – may be violent or drunk

Time in Custody: relates to false imprisonment

- **S 464A:** Every person taken into custody for an offence must be released unconditionally / on bail / brought before Mag Court within a reasonable time of being taken into custody // citizens must bring to police
- **CL:** trespass by the arrestor continues so long as he retains custody of the arrested person, and he must justify the continuance of his custody by showing that it was reasonable (*Dallison v Caffery*)

INEVITABLE ACCIDENT

- **No fault**
- **Rule:** If D can prove trespass wasn't intentional or careless, he will disprove fault on his part, and escape liability in trespass (See e.g. *National Coal Board v Evans*; *McHale v Watson*)
 - o Look at whether there was reasonable care and skill exercised by D
- For highway cases: D would be rebutting P's presumption
- For non-highway cases: D would use as a defence

National Coal Board v Evans

- Complained that excavators had committed trespass to land because they made contact with electricity cables laid by NCB – asked by council to do so
- Held: inevitable accident – never told about cables by NBC

McHale v Watson

- 12-y-o boy threw sharpened piece of metal at a post expecting it to stick in the post – hit girl standing nearby
- Held: boy had no intention of either hitting the girl or of frightening her – for his age, boy was a careful as could be expected → found inevitable accident