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INTENTIONAL TORTS (x3)

(1) BATTERY

Tort of Battery → Protects the Persons Body. The violation of being touched without consent is sufficient to bring this action

ELEMENTS – **Scott v Shepherd (1773)** To prove Battery, each element of the tort must be made out:

1. **A positive intentional voluntary act by a person not omission to act** (**Innes v Wylie (1844)**)
2. **which directly** (**Scott v Shepherd**)
3. **causes contact with the body of another** (**Cole v Turner (1704)**)

1. **A positive Act:** Battery must be a positive act not mere omission to act

2. **Intentional/Voluntary Act**

- Deliberate, reckless or negligent actions; sufficient that the D intends to perform the act, which caused the offensive contact.
- The acts of intermediaries arising directly and naturally out of the first act are a continuation of the defendant's initial act

Intentional

- **Weaver v Ward [1616]:** D shot P unintentionally when training with live ammunition.
- **Morriss v Mardsen [1952]:** D, 'a catatonic schizophrenic...lunatic' attacked and injured P.
- **McNamara v Duncan (1971):** D deliberately struck the P with ball during footy.
- **Fagan v Metropolitan Commissioner of Police [1969]:** F realised that he had driven onto the P.O's foot of and formed an intent to continue this act.

→ It is sufficient that the D intends to perform the act, which caused the offensive contact.

Reckless

- **NSW v McMASTER [2015]:** Recklessness where the consequences of the D are not certain BUT the D is so indifferent to the consequences of his/her act that the result must/ should have been foreseen.
- **Macpherson v Brown (1975):** Not reckless if D does not advert to consequences of conduct

Negligent

- **Williams v Milton (1957):** Where the circumstances of a case satisfy the elements of a cause of action in trespass as well as a cause of action in negligence, the P may sue in either/both torts (**Impossible** to recover more than 100% of damages).

2. **Directly Causing 'inherent and natural consequences'**

- Where the contact **'follows so immediately upon the act of the D that it may be termed part of that act'** (**Hutchins v Maughan (1947)**)

3. **Physical Bodily Contact/Interference**

- Positive and affirmative act which introduced contact that is offensive to the P outside the accepted usages and accidental contacts in daily life. Required act = unwanted contact whether hostile or not.

Includes:

- Spitting in someone's face (**R v Cotesworth (1704)**)
- Unwelcome kiss or hitting a person with a missile or object (waterbomb/stick)
- Taking something from P's hand (**Fisher v Carrousel Motor Hotel Inc (1967)**)
- Throwing boiling water resulting in scalding P and damaging clothes. No need for body contact 'other than by' the water to establish battery. (**Pursell v Horn (1838)**)
- Unwanted photograph: Shining light in someone's eyes can constitute battery even though there is no damage to P's eyesight (**Kaye v Robertson [1991]**)
- Use of weapon or instrument controlled by acts of D (**Fagan v C.M.P [1969]**)

DEFENCES TO INTENTIONAL TORTS

(1) Consent

Consent → Has the effect of transforming what would be unlawful into accepted and therefore acceptable behaviour (**Plenty v Dillon 1991**)

- Where P gives consent; there is **no** trespass to land, person or goods
- Can be **Expressed** (Written/oral) or **implied** (From conduct)
- May be **withdrawn** at any time – **clearly communicated to D**

ELEMENTS: - (**Plenty v Dillon 1991**)- To prove False Imprisonment, each element of the tort must be made out:

1. **Be Voluntary** (**Freeman v Home office (1984)**)
2. **Be given with knowledge** (**Papadimitropolis v r (1957)**)
3. **Come from a competent person** (**Gillick v West Northfolk Health Authority (1986)**)
4. **Be in relation to the act complained of** (**McNamara v Duncan (1971)**)

- Unreasonable but does not require hostility (**Rixon v Star City**) **1. Be Voluntary**

- Consent must be genuine (**Freeman v Home office (1984)**)

- Cannot be given by Fraud (**R v Williams (1923)**)
- Cannot be given by Duress (**Norberg v Wynrib (1992)**)

2. Be given with knowledge (**Papadimitropolis v R (1957)**)

- If the consent is given with knowledge of the act, the plaintiff later complains of, even if there are aspects the plaintiff may not have known/consented to, consent is valid

- Lack of knowledge vitiates consent
 - **Facts:** P agreed to marry D at registry where she believed a ceremony occurred and consented to intercourse but marriage was not authentic and therefore without consent (**Papadimitropolis v r (1957)**)
 - **Facts:** P attended dentist for minor chipping who carried out number of unnecessary consultations and knew that giving the advice was not reasonably necessary (**Dean v Phung (2012)**)

1. Come from a competent person (**Gillick v West Northfolk Health Authority (1986)**)

- Consent must be give by a person who has capacity to consent
- **Capacity:** A person must be able to understand what the consent is for (Persons may not be able to give effective consent if minors, intellectually disabled or unconscious)

- Consent is valid so long as the person could understand the advice given (**Gillick**) – **Facts:** P, 15 yr old girl (minor) could have given valid consent to seek medical advice to take contraceptive pill without parents knowledge/Consent
- Cannot provide consent to authorise treatment of a child, which is not therapeutic and clearly not in the child best interest (**Marions Case (1992)**) – **Facts:** P, Child of intellectual disability for to undergo underwent sterilisation by parents

2. Be in relation to the act complained of

- Consent must be given in relation to the act complained of (**McNamara v Duncan (1971)**)
 - Playing contact sport does not mean consent is given to all forms of bodily injury (**McNamara**)
 - P, principal of school for children with emotional/behavioural needs, did not impliedly consent to assault by hammer being waved in face or battery by being grabbed by the neck and choked by pupil (**H v Crown Prosecution Service (2010)**)

TRESSPASS TO LAND

Trespass to Land → It is a: **voluntary, intentional** (or **negligent**) **direct physical interference** with the plaintiff's exclusive possession of land.

Onus of Proof: Rests on the defendant, who claims to have the consent, leave or licence of the plaintiff to plead and prove that fact (**Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) (No 2)**)

Actionable Per se: Like other forms of trespass, it is actionable per se, meaning it does not require proof of damage.

ELEMENTS: To prove Trespass to land, each element of the tort must be made out:

1. **Voluntary, intentional (or negligent) act of D** (**Public Transport Commission v Perry (1977)**)
2. **Directly interfering** (**Southport v Esso Petroleum (1954)**)
3. **With P's exclusive possession of land** (**Newington v Windeyer (1985)**)

Nature of Land

- The right of a person in possession of land extend only as far up into the air or as far down into the subsoil as is reasonably necessary for the use and enjoyment of the land.
- **TEST:** Trespass as to the incursion into the plaintiffs space must be a height to which the ordinary 'use and enjoyment' of land is not interfered with (**Bernstein v Skyviews & General Ltd (1978)**) and to a depth where ownership becomes absurd (**Bocardo SA v Star Energy UK Onshore Ltd (2011)**)
 - **Underground:**
 - A person has substantial control over the land underneath his/her soil for a considerable depth (**Di Napoli v New Beach Apartments Pty Ltd (2004)**)
 - Reasonable until about 2800 ft (**Bocardo**)
 - **Airspace:** Trespass must not interfere at a height of ordinary use of airspace of property
 - 4.5m above ground = trespass (**LPJ Investments v Howard Chia Investments (1989)**)
 - Where D fires a bullet from his own property across the P's property to kill a cat on the roof (**Davies v Bennison (1927)**)
 - Taking an aerial photo will not impede on ordinary uses of land

1. Voluntary, intentional (or negligent) act of D (Public Transport Commission v Perry (1977))

- **Voluntary:**
 - Must be D's voluntary act and not that of an independent third party
 - D may be responsible for trespass committed by third party if D authorised the act (**League Against Cruel Sports v Scott [1986]**)
- **Intentional:**
 - An intention to commit the act which constitutes the trespass even though D may not subjectively appreciate that s/he is committing trespass
 - If the defendant **mistakenly believed** the land is there's may be trespass

→ Involuntary Acts

- **Smith v Stone (1647)** – D thrown in water and argued that he was carried on P's land and forced
- **Public Transport Commission of NSW v Perry (1977)** – D was waiting for a train on platform when she suffered epileptic fit, causing her to fall on railway track.
- **League Against Cruel Sports v Scott (1986)** – P's deer were disturbed when hounds from hunt intruded into deer sanctuary owned by D; however, D did not direct the entry of the hounds

2. Direct Interference (Southport v Esso Petroleum (1954))

- Direct interference by the defendant with the plaintiff's property
 - Consequential Interference **does not** amount to trespass (**Southport v Esso Petroleum (1954)**)
Facts: Oil, deliberately discharged into river estuary by the master of a stranded ship in an attempt to refloat it, was carried by the tide onto P's property
 - **Can be the first in an unbroken chain of events**
 - **Natural and probable consequence of D's act:** Where those events are caused naturally (**Gregory v Pipe (1829)**) – **Facts:** Rubbish left by defendant on his land dried and rolled onto P's land.

NEGLIGENCE

Tort of Negligence → A cause of action on the case; Liability deals with unintentional wrongdoing that amounts to more than mere carelessness but less than deliberate harm

→ **Donoghue v Stevenson (1932)**: Lord Atkin put forward a general proposition defining the relations between parties that would give rise to a duty of care

COMPONENTS: To prove an action in negligence, each element of the tort must be made out:

1. **The D The defendant owed the plaintiff a duty of care**
2. **The defendant breached that duty of care by negligent conduct; and**
3. **The defendant's breach caused the plaintiff actual damage**
4. **Damage was not too remote from the breach**

Facts: Mrs Donoghue went to a café where she drank a ginger beer manufactured by D. Part of the contents was poured in a glass and she drank it. When the remainder of the bottle was poured in the glass, the decomposing remains of a dead snail were discovered in the liquid. Mrs Donoghue suffered shock and gastroenteritis. She succeeded in appeal for her action which recognised a duty of care owed by the manufacturer to the ultimate consumer of a product.

LORD ATKIN'S NEIGHBOUR PRINCIPLE: You must take reasonable care to avoid acts or omission, which you can foresee would be reasonably likely to injure your neighbour, meaning people who are so closely and directly affected by your act that you ought to reasonably have them in contemplation as being so affected.

(1) DUTY OF CARE

ELEMENTS: Whether a duty of care exists is question of law. There are two legal determinations:

1. **If the relationship between the plaintiff and defendant is an 'established duty category'. The scope will vary within established relationships. (Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000))**
2. **If not an established relationship for duty of care, will it be necessary to establish that a duty was owed between the relationship in the circumstance?**

→ **Reasonably Foreseeable Test's for Negligence:** Applied at three different stages

- i. On the question of **Duty of Care**: Foresight = class of persons where P is one
- ii. At the **Breach of Duty** inquiry where the court asks whether risks of injury were reasonably foreseeable: Foresight = Risk of injury must not be 'far-fetched' or 'fanciful'
- iii. At the **Remoteness of Damage** inquiry where the issue is whether the kind of damage suffered by P was reasonably foreseeable: Foresight: Damage suffered by P is a result of D's breach

1. Established Categories:

- a. Motorist and other road users/pedestrians (**Chapman v Hearse (1961; March v Stramare (1991))**)
- b. Occupier of land and lawful entrant (**Modbury; Strong v Woolworths; Adeels Palace (2009)**)
- c. Manufacturer and consumer (**Donoghue v Stevenson (1932)**)
- d. Employer and Employee (**McLean v Tedman (1984)**)
- e. Doctor/Dentist and Patient (**Rogers v Whitaker (1992)**)
- f. Hospital and Patient
- g. Service Providers (**Woods v Multi-Sport Holdings (2002)**)
- h. School/Teacher and Pupil (**Commonwealth v Inrovince (1982)**)
- i. Duty during fertilisation (Waller v James)
- j. Negligence before conception: Negligence not-yet-conceived child (**X and Y v Pal (1991)**)
- k. Unborn Child – 3rd party (**Watt v James (1972)**)
- l. Child and Parent (**Lynch v Lynch (1991)**)

DEFENCES

(1) CONTRIBUTORY NEGLIGENCE

Contributory Negligence → D must prove P failed to take reasonable care for their safety, acting negligently and contributing to their injury. **PARTIAL DEFENCE**

Onus → D must prove that the P failed to take reasonable care for his or her own safety, thereby not acting negligently and contributing to his/her own injury.

ELEMENTS:

s 5R(1): To prove that P should be apportioned some fault and consequently, that the amount of damages the defendant has to pay should be reduced, D needs to show that:

- (a) The P failed to take the precautions a reasonable person would have taken for their own protection (that is, the standard care applicable to the P's act) and
- (b) The damage (risk of injury to the P) was **reasonably foreseeable** and partly **caused** by P's negligent act

(2): For that purpose:

- (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and the matter is to be determined on the basis of what that person knew or ought to have known at the time.

Step 1:

(a) P must fail to take precautions that a reasonable person would take for their own safety

Other Principles to Consider applying to the Standard of Care → **s 5R**

- **Children:** A child will be assessed against the standard of care of a reasonable child of a like age and experience
 - **Bye v Bates (1989)** **Facts:** 6 ½ yr old playing with electricity and electrocuted.
 - **RTA v Dederer (2007)** **Facts:** P, 14 yr old, suffered partial paraplegia when he divided into a river from the railing of a road and a pedestrian bridge constructed and maintained by D. It was known by D that young people regularly jumped off the bridge into the river below. **Held:** RTA was obliged to exercise reasonable care that the road was safe for *users exercising reasonable care for their safety*.
 - **Doubleday v Kelly (2005)** **Facts:** P, 7 yrs old, and guest of the D was injured whilst jumping on a trampoline whilst wearing roller skates. **Held:** Reasonable person in child's position
- **Policy:** The social utility of the D's act may be taken into account i.e. fulfilling a moral and social duty to render aid to those incapacities/injured (**Chapman v Hearse (1961)**)
- **Imminent Danger/Sudden Emergency:** Courts will often not hold a P negligent where the negligence of the D placed the P in a position of imminent personal danger
 - **Caterson v Comisisoner for Ralways (1973)** **Facts:** P injured when he jumped from train, which started to move to prevent being taken to the next station 128km away. P's 14 yr old son was alone on the platform 64km from home.
- **Disability:** Court excludes from consideration idiosyncrasies of temperament, behaviour or personality.
 - **Hedland v Hodder (No 2) (2012)** **Facts:** Hodder, 22yrs, had cerebral palsy, mild-moderate intellectual disability, deaf, mostly blind, virtually unable to speak and quadriplegic when left unattended at an Aquatic Centre and jumped off diving block in shallow end of the pool
- **Employer/Employee Cases:**
 - **Davies v Swan Motor Co (Swansea) Ltd (1949)** **Facts:** P's husband, a garbage collector, was killed when, contrary to the instructions of his employer, he rode on the step of a garbage truck and was crushed by a bus which ran into the truck. **Held:** While there may have been no duty of care owed by the p's husband to the bus driver, the P's owed a duty of care for his own safety
 - **McLean Tedman** **Facts:** P, a garbage collector, was injured when hit by a car – when he was hit he was carrying a bin on his shoulder and running across the road to and from the truck to empty the bin. Although dangerous it was a fast process.

CONCURRENT & PROPORTIONATE LIABILITY

Concurrent and Proportionate Liability → Where there are multiple tortfeasors

ELEMENTS:

There are two types of liability that can be imposed on D's due to contribution to P's damage:

1. Solidary Liability → only for personal injury claims

a. Occurs in three types of cases:

- i. **Joint tortfeasors** → Two or more act together in concert to cause the totality of P's damages (i.e. responsible for same tort)
- ii. **Several Concurrent tortfeasors** → Two or more commit separate torts (even if not acting in concert/together but together cause totality of P's damages (i.e. responsible for same damage – one is VL for the other))
- iii. **Several tortfeasors causing different damage** → Each commits a separate tort and causes separate damage to P.

2. Proportionate Liability → for every other claim

- a. Apportionable Claims
- b. A 'just' proportion of damage
- c. Concurrent Wrongdoers and Same Damage

1. Solidary Liability

- There are jointly and severally liable: Where more than one tortfeasor causes damages to the P, each tortfeasor is individually liable to P or the whole damage – P can sue for any or all tortfeasors

a. Joint Tortfeasors (Thompson v Australian Capital Television Pty Ltd (1996))

- Where D commits **one single tort**, P only has one cause of action → if one tort is not liable, none are liable because it is one tort.
- There is a joint tortfeasor where: There was 'a concurrence in the act/s causing damage, not merely a coincidence of separate acts which by their conjoined effect caused damage'
 - o **Facts/Held:** Ch 7 & 9 broadcasting a defamation under licence were joint tortfeasors in concert – the journalist, printer, publisher and distributor are joined tortfeasors in respect of the publication.

b. Concurrent Tortfeasors (Lister v Romford Ice & Cold Storage (1957))

- Court must assess the contribution payable by each wrongdoer as a 'just and equitable' amount having regard to the extent of the D's responsibility for the damage (**s 5(2) Law Reform (Miscellaneous Provisions Act) 1946 (NSW)**) + can **recover more than 100% of loss**
- May be claimed from a wrongdoer who has contributed to causing the 'same damage' even if no proceedings against them by P so long as D 'is or would, if sued, have been liable' – P doesn't need to commence proceedings against another wrongdoer (**Brambles v Helmers (1966)**)

c. Several Tortfeasors (Performance Cars v Abraham (1962))

- **Facts:** P's car was damaged twice on two separate occasions. First collision, damaged panel, which needed to be resprayed at the time of the second collision. **Held:** Each is responsible for the different damage caused. Damage and cost of respray was caused by first driver - second driver not responsible.

2. Proportionate Liability

- Where P suffers PEL or property damage caused by negligence of two or more D's, they can **recover only the proportion of loss caused by that D (s 34 CLA)**.

a. Apportionable Claims (Cassegrain v Cassegrain (2016))

- Where there is a claim PEL or property damage in an action for damages (**s 34 CLA**)

b. A 'just' proportion of damage (Yates v Mobile Marine Repairs Pty Ltd (2007))

- Based on responsibility of any wrongdoer – do not have to be party to proceeding (**s 35(1)(a) CLA**)

c. Concurrent Wrongdoers and 'Same' Damage (Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013))

- D must have contributed to the same damage, requiring the courts to identify the damage caused by each wrongdoer (**s 34(2) CLA**)