

Trespass (intentional trespass) and action on the case (negligence)

Differences;

Proof of damage: case – P must prove physical injury or damage to property. Damage is the gist of the action and therefore necessary to succeed Trespass – actionable therefore damage isn't necessary to be proven; rights and interests can be infringed.

Nature of interference: case – indirect or consequential interference; either intentional act of D indirectly causing injury to P or negligent act of D directly or indirectly causing injury to P. Trespass – direct interference; either intentional or negligent direct interference with P's person or property (*Reynolds*).

Onus of proof: case – P must prove D's actions and intention. Trespass – P must establish facts constituting the tort then D must show a lack of fault or establish a defence. In highway cases the onus of proving fault is on P.

Reynolds held that in trespass P complains of an immediate wrong by D whereas in case the wrong is the consequence of another act (intentionally throwing log at someone = trespass; throwing log on road which anyone could trip over = case; in this case damage must be linked to the consequences of D's behaviour).

INTENTIONAL TORTS

Intentional torts

Purpose? Protect individuals from unwanted interference committed intentionally. Protection of rights of persons over themselves and their property.

Elements: D's intentional or negligent act directly caused an interference with P's person, goods or land.

Fault (intentional or negligent act): if injury is caused by D's actions they are guilty of trespass (strict liability tort – *Leame*). D must show lawful justification for actions (either they didn't intend to harm or were not negligent in performing actions) after P establishes the facts (*Ruddock*). If there is no intention or negligence there is no fault and therefore no liability (*McHale*). *Weaver* held that trespass will only be excused if the injury was uttered without his fault. It's only when there is an involuntary act there is no intention.

What is intentional conduct? Includes deliberate, reckless or negligent actions. D must intend to perform the act which caused the injury, he need not have intended to cause harm but the action (*Sibley; McNamara*). Actions will be reckless even where the consequences as understood by D aren't certain but they are so indifferent to the consequences of their acts that the result should have been foreseen (*Marriss* – didn't know act was wrongful but knew nature and quality of act would harm in some way). Negligence refers to what the RP would have done in the same situation (*Williams* negligent trespass is possible; lack of due care when RP would have been more careful. Court also said; if direct injury caused unintentionally it can be pursued under negligence or trespass).

Burden of proof? P must prove facts of direct interference of D's acts. D must then show either lack of intention or negligence or that the act was involuntary. In negligent trespass P must establish D directly caused act and D must then establish lack of fault. In highway cases but the burden is wholly on P. P must prove facts of tort and D's fault.

Directness: trespass will be found when injury flows immediately from D's act to form a part of the act. It will be a consequential act when there is an intervening cause. There must be a direct link between D's conduct and interference with P (*Hutchins*). D's act must lead to a sequence of events which result in interference with P (*Scott v Shepherd*). It must be an unbroken chain of events, if there is an intervening act no directness will be found (*Hutchins*).

Loss or damage: trespass is actionable meaning loss or damage isn't an essential element of trespass. If there is no damage the only affect is that damages will be nominal and where there is an injury exemplary damages will be awarded as punishment and aggravated damages awarded to compensate for injured feelings (where actual loss or physical injury didn't occur) (*Henry Thompson*).

Onus of proof: onus is on P to prove facts constituting elements of trespass, establish that D's actions directly injured them (contact in battery, apprehension of imminent contact in assault and loss of liberty in FI). D must then establish the trespass wasn't intentional through excuse, authorisation or justification (*Marion's case; McHale*). *Venning* held that for highway cases P must prove fault of D, placing onus wholly on P.

Reform legislation: mostly left untouched by CLA (s 3B – intentional act done with intent to injure; which is widely defined as both physical and non-physical injury (*Houda*)). Applies also to VL (*Zorom*). Increases interest in pursuing intentional torts claims so as to escape rigor of CLA requirements, limitations and provisions.

Trespass to the person (protection from unlawful interference by others to their person; the intentional interference forms basis of tort)

Battery (protection of body, physical interference): direct and intentional or negligent act by another causing unwanted bodily contact with another. Harm can be physical or dignity and all 3 types of intention are recognised. It is an intentional voluntary act by a person which directly causes contact with body of another, without lawful justification or consent. Contact with body;

What is physical contact? Offensive behaviour (spitting, unwelcome kiss, hitting with object). Not every unwanted contact will give rise to battery; it must be a positive act which causes offensive contact to plaintiff outside acceptable usages and accidental contacts of daily life (exigencies of modern life: acceptable contact is an exception to trespass). It's the actual infliction of unlawful force on another (*Collins*).

Touching in anger: unwanted touching, in anger (even slightest) is battery. Least touching of another in anger is battery (*Cole*). Hostility isn't necessary for act of battery; only unwanted contact is (*Collins*). Non-hostile touching can amount to battery (*Rixon*).

Positive act: not a mere act or omission (*Innes*). Though an omission to act can become a positive act, constituting battery (*Fagan* – mere omission will constitute battery and battery can be inflicted through medium of weapon or instrument controlled by D).

Assault (protection of mental well-being, mental interference): direct threat (by words or actions) by person which intentionally or negligently creates in another a reasonable apprehension of imminent, harmful or offensive contact. P must have knowledge of threat to apply force. Whether RP in same situation would have apprehended contact (*MacPherson* – also, when D knows someone is especially timid, that person can still recover). Allows damages for emotional reaction caused by reasonable apprehension.

Intentional voluntary act or threat by D which directly creates in P a reasonable apprehension of imminent contact with that person's body without lawful justification or consent.

ACN v Chetcuti elements: a threat by D (words or conduct) to inflict harmful or offensive contact on P without consent or lawful justification (*Barton; Rixon*). Subjective intention by D that threat will create in mind of P an apprehension that the threat will be carried out, though they don't need to intend to carry it out (*Rozsa; Rixon*). Threat must create in mind of P an apprehension that threat will be carried out (*Brady; Rixon*). Apprehension in mind of P must be objectively reasonable (*Barton*). P's reasonable apprehension caused injury, loss or damage to them (*March*).

Intention: assault requires proof of intention to create in another an apprehension of imminent harmful or offensive contact, not intention to carry it through (*Rixon; Cranston*). P must show a direct threat made to them and that a reasonable apprehension arose in them of imminent bodily contact.

Act or threat: conduct includes threatening acts, words or both (*Ibbett*). In *Stephens* court said it's about whether there was an intention to strike not whether there was opportunity to.

Do words alone constitute a threat? Words may assist in proving that there is a threat where conduct is insufficient (*Fogden*). Words alone may constitute assault if oral threat directly causes apprehension of imminent bodily contact, it's a matter of circumstance (*Barton*). Silence in Eng constitutes assault.

Reasonable apprehension: it's necessary for intention to cause apprehension in P that battery is about to occur, even if D doesn't have means of carrying it out (*Brady*). There must be reasonable apprehension of imminent contact – focus is on P's mind. Although it doesn't matter whether D was going to follow through with the threat of physical control, they must be able to do so. Would a RP in P's position have been apprehensive of imminent contact (objective)? Threat must raise in mind of RP apprehension. The apprehension must be of imminent harmful contact. Immediacy of time isn't important; future violence can still be imminent (e.g. will occur at end of imprisonment) especially if it is a continuing fear (*Zanker*). Even if P doesn't know when physical violence will occur, it is still assault (*Barton*). Look at surrounding circumstances such as words, actions, conditional threats, ability to carry out threat, appearance of capacity from P's perspective. P must have actual knowledge of threat, but P need not be fearful.

Conditional threats: threats of harm accompanied by words. A direct threat isn't hard to establish. When words contradict conduct (e.g. when they contain a condition which must be met before threat will be carried out) it makes it more difficult (*Tuberville*). Sometimes a conditional threat though will be assault; whole of circumstances need to be considered (e.g. conditional threat with actions amounting to assault – *Rozsa*). Is it reasonable for P to anticipate imminent force if they disobey D? Even when D uses actions to manipulate P, it may be assault (*Greaves*).

Damages: damages awarded for conduct not causing physical interference, however this lack of actual damages will be reflected in compensation amount (*Stephens*).

False imprisonment (protection of liberty): provides a remedy to individuals whose personal liberty has been lawfully restrained (e.g. one subjects another to total deprivation of freedom of movement without lawful justification, interference with P's person and liberty, physical confinement and can be accompanied by assault or battery – *Trevorrow 07*). Protects individuals right to control their own person. Even if FI isn't carried out in bad faith (i.e. believe they were acting for right reasons), D will still be held liable.

A positive voluntary act of D directly causing total deprivation of liberty of P without lawful excuse or justification.

Directness and intention: directness may be problematic in some cases. In *Iqbal* union didn't cause strike leading to P's FI therefore not liable. In *Ruddock* cancellation of visa was held to be lawful and leads to subsequent detention even if later found visa shouldn't have been cancelled.

Policy: courts in appropriate circumstances consider matters of public policy in deciding where trespass is available (*Haskins* – military detention under invalid legislation, though not FI as part of military).

Total deprivation of liberty: imprisonment doesn't just mean in a prison, it could mean in a fast-moving car not being allowed to alight or held on boat (*Burtron; Macquarie*). It's about restriction on P's freedom of movement; it's about restraint within some limits defined by D (*Bird v Jones*). Whether there is total restraint depend on whether there is a reasonable means of escape (e.g. *Bird* P could have travelled another way). Whether or not escape is reasonable depend on risk attached to it; the means of escape must be safe, not involving danger to P (e.g. *Macquarie and Budge* D cast vessel with P on it off, P didn't know how to stop engine and swimming wasn't a reasonable means of escape – hazardous, therefore FI). Whether there is a reasonable means of escape depends on amount of knowledge available to P (e.g. *Balmain New Ferry* P could have existed through another route; *McFadzean* P had reasonable means of escape – though it was long and physically difficult it wasn't unreasonable).

Duration of FI: any form of deprivation is sufficient (can be for short periods of time, though the period of time is relevant for damages – *Murray*). Duration relevant in determining whether an initially lawful determination becomes unlawful, circumstances must be considered (*Nasr; Whitbread*).

Knowledge of deprivation: deprivation of liberty must be against P's will though they need not be aware at the time (*Murray; Meering; Hart*). Knowledge of imprisonment isn't essential though P's lack of knowledge affects damages (*Trevorrow 10; Soo*).

Acts constituting FI: coercion causing FI needn't be physical or involve force. FI is brought about by D's direct action. Psychological intimidation will suffice where D intends to detain P or recklessly give P impression that they believe are detained is reasonable in circumstances. Where person wholly submits to authority and control of another, imprisonment will be found (e.g. *Marshall and Cade* P felt if he refused he would be forced to go; *Symes* P accompanied by officer to station under belief he had no reasonable escape – therefore physical force isn't necessary and submission to control of D is sufficient). FI is the compelling of another to stay in a particular place against their will, it must be proven that but for D's conduct, P wouldn't have submitted to restraint (*McFadzean*). FI can also occur by omission (e.g. *Withers* failing to release; *Cowell* held mistake isn't a defence therefore a long as D knew they were confining P it doesn't matter whether they knew confinement was wrong). D must participate either directly or indirectly in FI (*Marshall and Cade; Ruddock; Thompson*).

Stolen generation: *Trevorrow* no FI as P wasn't restrained any more so than any other child. In other cases the argument failed for lack of evidence of consent (*Cubillo*).