

LAW1012 - TORTS

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HISTORICAL DEVELOPMENT/TRESPASS/ACTION ON THE CASE

AUTHORITIES:

Scott v Shepherd (squib); Reynolds v Clarke (log analogy); Hutchins v Maughan (dog poison baits); Bird v Holbrook (spring gun innocence); Williams v Holland; Williams v Milotin; Holmes v Mather (uncontrolled horse, with servant and master); Weaver v Ward (soldier shot in skirmish – no fault, no liability); Stanley v Powell (misdirected “powell” in pheasant shooting); Platt v Nutt (domestic disturbance and door); Blacker v Waters; Venning v Chin (highway cases);

PRINCIPLE DISTINCTION: TRESPASS V CASE:

TRESPASS	CASE
<p><i>Direct/Immediate (nature of harm) + intentional (nature of fault)</i> --Direct meaning direct application of force (Kitto J in <u>Darling Island v Lighterage</u>) -- Intent to do an act in trespass resulting in unintended, indirect consequences = case. (<u>Bird v Holbrook</u>)</p>	<p><i>Indirect/consequential (nature of harm) + unintentional/negligent (nature of fault)</i> --- Blackstone J in <u>Scott v Shepherd</u> “The settled distinction...where the injury is immediate, an action in trespass will lie; where it is only consequential, it must be an action on the case” – The nature of harm remains direct if in the first instance, a series of unbroken consequences are catalysed by a single act, <u>Scott v Shepherd</u> is in trespass, not case.</p>
<p>Actionable per se (w/o proof of damage) – the act itself is sufficient</p>	<p>Damage is the gist of the action/must be proved – evolves to modern day negligence COA. <u>Hutchins v Maughan</u> (Herring CJ) Had the poison baits been thrown at the dogs, rather than laid → direct. But the poison baits were laid and then consumed by the dogs → Not direct, not immediate but indirect and consequential = case. See also: <u>Platt v Nutt</u>.</p>
<p><u>Reynolds v Clarke</u>: (The timber log analogy from <u>Leame v Bray</u> used) – If I throw a log onto the highway an another man tumbles over it and is hurt, an action on case only lies. But if in throwing it I hit another man, he may bring trespass because it is an immediate wrong.” – a consequential act is not direct, a direct act immediately causes injury</p>	
<p>N.B (<u>Williams v Milotin (per curiam)</u>) applied the rule in <u>William v Holland</u> (UK Court of Common Pleas) allowing for actions in case (or trespass) to be elected in the rare event that an act is <i>immediate/direct + negligent/unintentional</i>). – Unsettled authority on negligent trespass e.g. negligent battery (<u>Ollier v Magnetic Island Country Club</u>). Still, intentional trespass must be framed in trespass, not negligence.</p>	

Direct + intentional = Trespass (Actionable per se) Scott v Shepherd

Indirect + unintentional = Case (damage is the gist) Bird v Holbrook

Direct + unintentional = Trespass or case (Williams v Milotin)

FAULT IN TRESPASS

Fault (in form of intent or negligence) is required in every trespass:

- No man is excused of trespass unless adjudged to be w/o fault? –No liability for trespassory act if no fault by defendant. (Weaver v Ward). A man is excused if there was no intention or negligence, that is, they exercised a reasonable standard of care. – Unlucky (Holmes v Mather)
- The plaintiff cannot recover in an action in trespass or case if intent and negligence are negatived e.g. it is not negligent to fire a gun when hunting. (Stanley v Powell)

HIGHWAY RULE/ONUS OF PROVING FAULT

HIGHWAY ACCIDENT	NON-HIGHWAY
<ol style="list-style-type: none"> 1. Plaintiff carries onus of proving trespassory act attributable to defendant; (On BOP prove injury is direct result of act or force of respondent) 2. Plaintiff proves fault element <u>Venning v Chin</u> 	<ol style="list-style-type: none"> i. Plaintiff carries onus of proving trespassory act (always: <u>Platt v Nutt</u>); ii. Onus shifts to Defendant to negative fault e.g. intention/negligence. <u>McHale v Watson</u>; <u>Platt v Nutt</u>; <u>Blacker v Waters</u>;

- Highway distinction for trespass. For negligence, entire onus is on plaintiff. Contra UK Fowler v Lanning: those who assert must prove, the Plaintiff bears onus in all elements of a COA.
- The nature of highways is the plaintiff assumes a certain level of risk simply by the act of being on it – Non-highway accidents tend to involve injuries to the victim which are not as apparent in public view and due to injuries, further outside the knowledge of the plaintiff (meaning proof of fault is difficult to construct).
- Construction of a ‘highway’ turns to factual permutations (Bray CJ in Venning v Chin) – Clearly: Motor accidents, car-pedestrian-adjoining property incidents. – General rule is it requires a large publicly accessible road – read the common law background purposively.

TRESPASS TO THE PERSON: BATTERY, ASSAULT AND FALSE IMPRISONMENT

AUTHORITIES:

Cole v Turner (anger touch now repealed); In Re F (consent in battery); Fontin v Katapodis (lawful justification in battery); Collins v Wilcock (inviolate body, the slightest touch can be battery); Rixon v Star City (conduct acceptable in course of everyday life); Stephens v Myers (parish assault); Hall v Fonceca: Connex Trains Melbourne Pty Ltd (now ACN# Pty Ltd) v Chetcuti (rail station assault); Brady v Schatzel (brave cop, obj test); Tuberville v Savage (angry words, conditional threats); Police v Greaves (query right to conditional threat); Barton v Armstrong; R v Ireland (threats mediated over telephone); Bird v Jones (trivial restraint not total deprivation); R v Macquarie; Burton v Davies (reasonable means of escape); Symes v Mahon (Submission of will to authority and control due to fear etc.); Balmain New Ferry v Robertson (consent to imprisonment); Herd v Weardale Steel, Coal and Coke Co; Bahner v Marwest Hotel Co (no imprisonment to enforce contract); Herring v Boyle; Meering v Grahame-White Aviation Co; Murray v Minister v Defence: State of SA v Lampard-Trevorror (no awareness for false imprisonment needed); Lamb v Cotogno; Gray v Motor Accident Commission; Henry v Thompson (exemplary and punitive, reeducate unethical policing); State of NSW v Ibbett; Myer Stores v Soo (racism and headstrong litigation causes hurt, harm and humiliation - aggravated); McDonald and Coles Myer

ELEMENTS OF BATTERY

- Positive act of defendant's direct application of force to plaintiff's body: (Does not require anger/mental element: Cole v Turner "the least touching of another in anger constituted a battery" overturned in Aus as no anger was required: Collins v Wilcock - Certain implied consent in parts of everyday life)
- Must be intentional or negligent/largely intentional + direct: Holmes v Mather
- No consent: In Re F (consent or implied consent in a context: e.g. sporting field, best interests medical treatment)
- No lawful justification: Fontin v Katapodis; In Re F (medical necessity may be a defence)
- Contact not ordinarily acceptable in the course of everyday life: Rixon v Star City
- Seriousness of touch/hostility/anger, if present, affects damages. I.e. if trivial or no harm (nominal):
- Typically complements assault but independent COA.

ELEMENTS OF ASSAULT

- Positive act (not omission): Holmes v Mather
- Defendant's subjective intention to directly, intentionally/carelessly cause the plaintiff to objectively apprehend imminent and unlawful/offensive contact to their person, this extends to words over telephone and other mediums as long as they satisfy the other elements, including immediacy, recurrence, atmosphere of suspense: Barton v Armstrong (Assuming apprehension is not enough: strongest case is threat and then carriage of threat, weakest is when someone is struck out of nowhere, apprehending anger does not equal apprehending imminent unlawful conduct.
- Apprehension of force must be reasonable; no consideration of subjective bravery-consider immediacy, proximity but must be intentional; ACN v Chetcuti, Brady v Schatzel
- If a condition nullifies the threat, no assault: Tuberville v Savage
- That the defendant had the means to carry out the threat and use force: Hall v Fonceca, constitutes an assault, irregardless of effective control or prevention by others: Stephens v Myers

ELEMENTS OF FALSE IMPRISONMENT

- Positive act (cf unsettled authority for negligent false imprisonment): Burton v Davies
- That is not a partial restraint on movement: Bird v Jones
- Total deprivation of liberty can be physical delimitation: Burton v Davies or total and wilful submission to the control and authority of another within defined boundaries: Symes v Mahon.
- Without reasonable means of escape: R v Macquarie, Burton v Davies (Q of fact, Townley J in Burton)
- Without lawful justification such as consent/implied consent (query occupier's right to impose conditions of restraint): Balmain New Ferry Co Ltd v Robertson
- Does not require awareness of deprivation of liberty: Murray v Ministry of Defence; Myer Stores v Soo; SA v Lampard Trevorror; but also does not apply to parent/carer-children relationships. Herring v Boyle held that cognizance of imprisonment was required, subsequently overturned on principle; Meering v Grahame-White Aviation Co, the latter case determined that false imprisonment can occur when one is asleep, drunk etc.

REMEDIES

- Damages can be claimed as of right: Vindicate suffering, restorative purpose to pre-accident status of living and additional utilities adjusted to severity of tort.
- Trivial interferences call for nominal damages based on qualitative assessments of the seriousness of the material wrong, where not serious (nominal) else substantial or exemplary (Nominal in Stephen v Myles), pecuniary loss e.g. serious injury/medical expenses call for special damages; general damages for breach of right e.g. trespass to land.
 - o The following herewith are heads of damages:
 - Compensatory Damages: For general and special damages. (cannot be reduced by provocation defence: Fontin v Katapodis; Only exemplary damages can be reduced or negated).
 - Aggravated Damages: Focus on victim's reputation after wrong: Was there further hurt, harm or humiliation to trial? (Lamb v Cotogno; exemplary can be used even if the defendant is insured and aggravated does not apply; Myer Stores v Soo no reasonable basis for police suspicion yet stubborn continuation of search warrants; Macdonald v Coles Myer; Mental illness implied by counsel results in humiliation etc.)
 - Exemplary Damages: Focus on tortfeasor to correct, punish, deter and re-educate: Was the action a conscious wrongdoing in its high handed, contemptuous disregard of rights? (Knox J in Whitfield v De Lauret) Henry v Thompson for abuse of state power, subjecting the plaintiff to racial undertones of harm, additional medical costs covered in compensatory damages, aggravated damages in hurt, harm and humiliation. Plaintiffs cannot claim exemplary damages if there are criminal proceedings (as the purpose is the same, punishment) and exemplary damages are to be awarded only for conscious wrongdoing even if there is negligence (Gray v Motor Accident Commission)
 - State of NSW v Ibbett (police officer, plain clothed, enters private property with revolver, causes shock) All damages awarded for perfunctory reeducation process – assault, trespass etc..
 - o Statutory Provisions
 - Motor Accident Compensation Act 1999 (s 144: Courts cannot award exemplary damages in respect of a motor accident) S 16 caps damages
 - CLA 2002, s 21: Courts cannot award exemplary damages and aggravated damages in negligence actions.
 - CLA 2002, s 3B: Courts cannot award exemplary damages and aggravated damages in cases of intentional torts excluded.

WILKINSON AND DOWNTON WILFUL INFLICTION OF PSYCHIATRIC INJURY

AUTHORITIES:

Wilkinson v Downton (it's a prank bro case); Carrier v Bonham (mentally ill person steps in front of bus and causes bus driver nervous shock, not intentional due to mental capacity but negligently inflicted psychiatric harm); Janvier v Sweeney; Bunyan v Jordan (gun goes off and scares somebody, but not liable); Wainwright v Home Office; Giller v Procopets; Nationwide News Pty Ltd v Naidu (racism case);

RULES:

- Nature of fault is intentional (not negligent as distinguished in Nationwide News v Naidu but applicable to racial vilification): Wilkinson v Downton; hence case failed in Bunyan v Jordan (no intent)
- A person who does an act calculated to cause physical harm to the plaintiff (no requirement for psychiatric injury, merely pure mental harm), including psychiatric injury, is liable to the plaintiff in damages for the harm inflicted. Here the harm is the one that is reasonably foreseeable: Wilkinson v Downton (Bird v Holbrook also applies for Wilful injury, liable for unintended consequences of an intentional act)
- Consider the character of words, were they directed at the claimant? Wilkinson v Downton. No duty to people who simply overhear statements not addressed to them.
- Calculated means objectively likely to, not intended to have that effect: Carrier v Bonham; Janvier v Sweeney
- Does inflict either indirect or consequential harm to the plaintiff: Wilkinson v Downton
- The act must be reasonably capable of causing mental distress to a person with ordinary sensibilities unless the plaintiff's particularly susceptible disposition is known to the defendant: Bunyan v Jordan (take defendant as you find them unless knowledge of eggshell mind and susceptibility)

STATUTORY AUTHORITIES:

- Law Reform (Miscellaneous Provisions Act) 1944 (NSW) ss3(1), 4(1), 5.
 - o Under S 3(1) Plaintiff is not barred from recovering damages merely because of injury arising wholly or in part from mental or nervous shock.
 - o Under S 4(1) Liability to parent/spouse of person so killed, injured or put in peril OR another member of the family of the person so killed, injured or put in peril within sight or hearing of such member of the family.
 - o Member of family has wide scope: Includes close family as well as step-siblings, de facto couples etc.
- CLA 2002 (NSW) s 3B, Schedule 1 clause 11
 - o Intentional/wilful psychiatric injury is a common law cause of action. The CLA s 3B exclusionary clause exempts its application to civil liability in respect of an intentional act that is done by the person with intent to cause injury or death.