

Torts

Trespass to the Person

Scott v Shepherd (1773) ER

Shepherd threw a lighted squib into a crowded market - Willis threw it away instantly and to prevent injury/damage - Ryal - Scott hit in the face and lost sight in one eye.

Held for Scott by majority - Trespass committed by Shepherd - Injury arises from the direct and immediate act - All that was done subsequent to original throwing is a continuation of the first act and force - Willis and Ryal not 'free agents' as they were acting under a compulsive necessity for their own safety and self-preservation.

Blackstone J dissenting / held for Shepherd - **Example:** throw timber on the highway, another man tumbles over it and hurt, is a consequential damage = action on the case; if timber hits man, direct = trespass. Willis and Ryal exceeded bounds of self-defence, not used sufficient circumspection in removing danger, unnecessary and incautious act.

Authority - Directness - Injury is direct = trespass - consequential = action on the case.

Reynolds and Clarke: settled distinction between trespass and case.

Hutchins v Maughan [1947] VLR

Hutchins' sheep dogs died as a result of picking up poisonous baits laid by Maughan.

Held for Maughan - Injury suffered is consequential upon Maughan's act - No trespass as it was not directly caused - Example of thrown timber log: trespass lies only if baits were thrown by Maughan onto dogs - Trespass not maintainable.

Authority - Directness. Consequential - obvious and visible intervening cause not part of Maughan's act.

Williams v Holland (1833) ER

Where the injury is direct, the P may elect to bring an action on the case (rather than trespass) provided that the act is careless/reckless - where the act is both direct and intentional, the only cause of action is trespass.

Williams v Milotin (1957) CLR

Principle in Williams v Holland is part of Australian law.

Where the injury is direct - and no suggestion that the D intended to strike the P - and only negligence of D is relied upon: action on the case - to recover special or particular damage caused by D's negligence; if intentional = trespass; if indirect = action on the case.

Weaver v Ward (1617) ER

No fault - no trespass. Fault is an essential element in trespass (and almost all action on the case).

Example: if a man by force take my hand and strike you. Here, P ran across the piece (bullet) when D was discharging (shot).

Venning v Chin (1974) SASR

General rule in trespass: McHale v Watson - onus on D to disprove fault.

Trespass on highway/ highway accidents are an exception to the rule - onus on P to prove D's fault - either intention or negligence - for damages for personal injuries.

Platt v Nutt (1988) NSWLR

Nutt standing on porch outside - Platt slammed the door shut from inside - whether Nutt put her hand on the door as a reflex action in a threatening situation or to thwart Platt.

Majority held for Platt: Nutt's injury resulted from her own independent actions and not Platt's conduct - Nutt failed to establish on the balance of probabilities that her injury was caused by Platt's use of force - Example: struck by a missile, any object set in motion by D - D sets in motion an unbroken series of continuing events, the last of which ultimately caused injury to P.

Kirby P dissenting - P had proved D's trespassory act and D's fault - does not apply McHale v Watson and Blacker v Waters - where onus is on D to disprove fault - wants to use general rule - those who assert must prove - follows Fowler v Lanning QB

Authority - Onus of proof of the trespassory act is distinct from onus of proof of fault - Onus of proof on P to establish her injury resulted from the trespassory act of D.

McHale v Watson, Blacker v Waters

Onus is on D to disprove fault

Croucher v Cachia [2016] NSWCA

Cachia injured by neighbour Croucher's gardening shears.

Role of fault in trespass - Onus on D to prove absence of intent and negligence (McHale v Watson, Blacker v Waters) - no good reason to confine scope of trespass to intentional acts (Fowler v Lanning) - battery may be established when conduct is either intentional (Civil Liability Act s3B(1)(a) applies) or negligent (does not apply).



Rixon v Star City [2001] NSWCA

Appeal dismissed - Star City employee placed hand on Rixon's shoulder did not constitute battery, assault, or false imprisonment - touching for the purpose of engaging his attention - using a degree of physical contact not greater than reasonably necessary in the circumstances for getting attention - touch to draw attention is generally acceptable - a physical restraint is not.

Examples: jostling in a supermarket, train station, busy street - hand seized in friendship or back slapped in a party (Tuberville v Savage) - Every person's body is inviolate, any slight touching is a battery (Collins v Wilcock) is subject to exceptions - Touching has to be in anger (Cole v Turner) is not satisfactory - Unlawful acts not always hostile - prank that gets out of hand; over-friendly slap on back; surgical treatment without consent.

Authority - Not battery - Defences - (1) physical contact which is generally acceptable in the ordinary conduct of daily life - (2) consent - (3) self-defence - Not assault - no intention of creating in Rixon's mind an apprehension of imminent harmful or offensive conduct - No FI - Statutory authority in Casino Control Act justified short detention until police arrived.

In Re F [1990] AC

F's mother and friend applied for a declaration that performance of a sterilisation operation without F's consent would not constitute an unlawful act/trespass - Official solicitor appealed.

Held for F to grant declaration sought.

Lord Brandon - Adults - unconscious or with mental disability - inability to consent - necessary to take such decisions for them - save their lives, ensure improvement or prevent deterioration in physical/mental health.

Lord Goff - Physical interference without consent may not be unlawful - Examples: chastisement of children - lawful arrest - self-defence - prevention of crime - railway accident - stroke patient incapable of speech or movement - public necessity (destruction of another house to prevent spread of catastrophic fire) - private necessity (entered another property to save his own person or property from imminent danger/fire - seize and drag man from the path of an oncoming vehicle - prolonged absence of communication to justify ship master's intervention to administer shipowner's affairs - Emergency is NOT the criterion or a pre-requisite - Not unlawful if necessity criteria fulfilled: (1) Necessity to act when not practicable to communication with assisted person and (2) action taken is such as a reasonable person could take, acting in the best interests of the assisted person - Cannot be justified when more appropriate person is available and willing to act; if assisted person is capable of rationally forming a contrary wish -

Authority - Defence to trespass - Principle of necessity - justify medical or surgical treatment - patient incapable of giving consent - (1) lack of consciousness - (2) mental disability - safeguard: best interests of the patient; do no more than is reasonably required before he recovers consciousness; consulted about long term measures.

Stephens v Myers (1830) ER

Held for Stephens - not near enough for fist to reach him - Where Myers threatened Stephens with immediate violence - possesses the means or apparent means of carrying out the threat - this constitutes assault - even though Myers is restrained before he has an opportunity to carry out the threat.

ACN v Chetcuti [2008] VSCA

Chetcuti spat on station officers and ran away, fearing assault - Held for ACN appeal.

Hargrave AJA: Chetcuti must prove these elements to establish a cause of action for assault:

- (1) Threat by ACN to inflict harmful or offensive contact - enough if threat is without consent or lawful justification - (2) Subjective intention of ACN that the threat will create in his mind an apprehension - not necessary to prove ACN in fact intends to carry out threat - (3) Threat must in fact create in his mind an apprehension - enough if he apprehends the threat will be carried out without his consent - not necessary for P to fear the threat - (4) apprehension in his mind must be objectively reasonable - (5) his reasonable apprehension caused injury, loss or damage.

Authority - Mental elements of intention and apprehension in assault - Intention of D to cause apprehension in P of an immediate and unlawful force is subjective - Apprehension of P must be reasonable.

Barton v Armstrong [1969] NSW

Armstrong made many phone calls to Barton in early hours - threaten in suspense - Held for Barton - gist of assault is putting a reasonable person into apprehension of impending physical contact from the threat - effect on the victim's mind - NOT whether Armstrong actually had the intention or means - may occur in the future, at times unspecified and uncertain - at a distance.

Authority - words over the phone may constitute assault where those words cause the listener to apprehend immediate and unlawful force.

Tuberville v Savage (1669) ER

“If it were not Assize-time, i would not take such language from you” - no assault because Savage will not assault as the judges are in town - Held for Tuberville.

Intention and act makes the assault - Example: hold hand against another in a threatening manner and say nothing = assault - intending to strike and miss = assault.

Condition nullify the threat - no assault

A decree **nisi** or **rule nisi** (from Latin **nisi**, meaning 'unless') is a court order that does not have any force unless a particular condition is met. Once the condition is met, the ruling becomes a decree absolute (**rule absolute**), and is binding.

Reasonable apprehension

This requirement means that an assault cannot be proved if the plaintiff is not aware of the threat. Moreover, the apprehension must be a reasonable one. Thus, if an unloaded gun or a toy pistol is pointed at the plaintiff, the defendant will not be liable where the plaintiff knows or has reason to believe that the gun is not loaded or is a toy: Logdon v DPP [1976] Crim LR 121.

The defendant pointed an imitation gun at a woman in jest. She was terrified. The defendant then told her it wasn't real - Held: An assault had been committed as the victim had apprehended immediate unlawful personal violence and the defendant was reckless as to whether she would apprehend such violence.