

# LAW5003

## Principles of torts

### T3 2018

#### Torts Unit:

1. Tort: Trespass to the person
  - a.
2. Tort: Protection of Land
3. Tort: Negligence
  - a. Duty of care
    - i. General Duty
    - ii. Pure economic loss
    - iii. Pure Mental Harm
  - b. Breach of Duty
  - c. Causation
  - d. Remoteness
  - e. Defences
  - f. Remedies
4. Tort: Vicarious liability

#### Objectives of Torts Law

1. Compensation
2. Deterrence
3. Corrective Justice – loss distribution
4. Appeasement

#### Standard of Proof:

- Balance of probabilities

#### Interest not protected:

- Privacy
- Mental Tranquillity

## TRESPASS TO THE PERSON

### BATTERY

1. Voluntary, positive, direct
2. Application of force
3. To another person
4. Fault: Intentional or negligent
5. Burden of proof

### ASSAULT

1. Voluntary, positive, direct conduct
2. Intentionally or negligently
3. Creating another person
4. Apprehension of physical contact
5. Harmful, offensive or imminent

### FALSE IMPRISONMENT

1. Voluntary, positive, direct
2. Unlawful total restraint
3. Of the freedom of movement
4. Of another person
5. That is intentional or negligent
6. Burden of Proof

### DEFENCES

1. Consent
2. Self-Defence, Defence of others and property
3. Necessity
4. Legal Authority – incl. lawful Arrest
5. Inevitable accident

## PROTECTION TO LAND

### TRESPASS TO LAND

1. Standing of plaintiff to sue
2. A voluntary, positive act
3. Directly
4. That is intentional or negligent
5. Interference with land

### PRIVATE NUISANCE

1. Standing of the plaintiff to sue
2. An unreasonable interference
3. With the use and enjoyment of
  - a. Material injury, **or**
  - b. Material interference with comfort and sensibilities
4. Capacity of defendant to be sued

## NEGLIGENCE

### DUTY OF CARE

Does a legal duty exist on the part of the Defendant to take reasonable care of the Plaintiff?

- Settled law

- Non Settled law

- General
- Pure Economic Loss
- Pure Mental Harm

### BREACH OF DUTY

Has the D acted sufficiently carefully to meet that duty of care to the P?

1. Establish standard of care
2. D meets or falls short of the expected standard of care

### CAUSATION

Has the D's failure to take reasonable care caused (in fact and in law) the P to suffer a legally recognised injury?

1. Factual Causation
2. Scope of liability (legal causation)

### REMOTENESS

Is the P's injury not too remote from the carelessness of the D?

1. Categorize kind or genus of harm
2. Reasonably foreseeable
3. Thin Skull Rule

### DEFENCES

- Contributory negligence
- Voluntary Assumption of Risk
- Illegality
- Good Samaritans & Volunteers
- Limitations of Actions

### REMEDIES -

- Compensatory Damages
  - 1) Non-Pecuniary
    - i. Pain and suffering
    - ii. Loss of Amenities
    - iii. Loss of Life Expectancy
  - 2) Pecuniary
    - i. General
    - ii. Special
  - 3) Caps
- Concurrent liability
  - Joint and several liability
  - Proportionate liability

## VICARIOUS LIABILITY

1. Tort is committed
2. Special relationship (ie. Employee/employer)
3. Connection between the act or omission and special relationship

# Trespass to THE PERSON

Types	Common Elements – Must Prove All
1. Battery 2. Assault 3. False imprisonment	1. Actionable <i>per se</i> 2. An Act of the defendant – Positive & Voluntary 3. Directness 4. Fault – <u>proved by defendant</u> 5. Burden of Proof

## 1. Battery

### Battery

The tort of battery is committed by D's positive and voluntary act that directly and intentionally or negligently brings about a harmful or offensive contact with the person of another

**WRITE:** "P has to prove on the balance of probabilities that D's unlawful vol pos act directly interfered with P through physical contact. D has to prove there was no fault."

### **MUST PROVE ALL:**

- 1) A **voluntary, positive**, and **direct**
  - 2) Application for **force**
  - 3) To **another person**
  - 4) That is **(Fault) intentional or negligent**
  - 5) Burden of Proof
- 
- Unless - **physical contact ... is generally acceptable in the ordinary conduct of daily life**" (*Collins v Wilcock*)

### **1. Positive act**

- Not mere omission or passivity (*Innes v Wylie*)

### **1. Voluntary**

- D must **consciously** bring about the bodily movement which results in the contact with the P

### **1. Directness**

- Action **directly** caused trespass, not merely consequential (*Hutchins v Maughan*)
- *Whether D's act, on its own, was sufficient to bring about the injury to the P?*
- Intervening Act
  - Human Actions, including plaintiffs (*Scott v Shepherd*)  
→ Except those taken in reflexively and in self-defence
  - Natural Forces (*Southport Corporation v Esso Petroleum Co* – oil carried by the tide)

## 5. \* Apprehension of physical contact \*

- Must create a **reasonable expectation of physical contact** –
  - Objective test – Reasonable person from plaintiff's perspective would have entertained the apprehension
  - Actual or apparent '**present ability**' to make good the threat
  - Unless, D knew V was a particular way (ie. Timid) and played on it
- Lack of fear does not negate assault – 'hero personality'

## 6. Harmful or offensive and imminent

- Apprehension must be of **physical contact that is imminent**
- Or, Continuing Apprehension (*Zanker v Vartzokas* – Mate will 'fix her up')

## 3. False Imprisonment

### False Imprisonment

A false imprisonment is committed by the direct, intentional or negligent total restraint of the freedom of movement of the Plaintiff by the defendant, without legal authority

WRITE: "P has to prove that D directly, intentionally or negligently restrained the total freedom of movement of P, without legal authority. D has to prove there was no fault."

### MUST PROVE ALL:

1. A voluntary, positive, direct
2. And (unlawful) total restraint
3. Of the freedom of movement
4. Of another person
5. That is intentional or negligent
6. Burden of Proof

### 1. Positive Act

- Not mere omission or passivity (*Innes v Wylie*)

### 1. Voluntary

- D must consciously bring about the bodily movement which results in the false imprisonment of the Plaintiff

### 1. Directness

- Action **directly** caused trespass, not merely consequential (*Hutchins v Maughan*)
- *Whether D's act, on its own, was sufficient to bring about the injury to the P?*
- Intervening Act
  - Human Actions, including plaintiffs (*Scott v Shepherd*)
    - Except those taken in reflexively and in self-defence
    - **Truly voluntary actions** by the Plaintiff may constitute intervening act (*Myer Stores v Soo* – Store office = FI, voluntarily to police)

# PROTECTION OF LAND

## Types

1. Trespass to Land
2. Private Nuisance

## 1. TRESPASS TO LAND

### Trespass to land

- A **voluntary and positive act** of the D that **directly and intentionally** or **negligently interferes** with the P's **exclusive possession of land**.
- Actionable *per se*

### Elements:

1. Standing of [plaintiff to sue](#)
2. A **voluntary, positive** act
3. **Directly**
4. That is **intentional** or **negligent**
5. Interference with **land**

### 1. Standing of Plaintiff to sue

- Exclusive possession at the **time of the interference**
- Owner or tenant – NOT mere licensee (invited for a specific purpose and time, do not have the right to exclude)
- Even if trespass began *before* came into possession (e.g. new tenant: ***Konskier v Goodman***)
- ***Newington v Windeyer 'the groove'*** → Acts of possession gave them exclusive rights, subject only to someone with a better title

### 2. Positive Act

- Not mere omission or passivity (*Innes v Wylie*)

### 2. Voluntary

- D must ***consciously*** bring about the bodily movement which results in the trespass to land

### 3. Directness

- **Continuing trespass**: remaining, or causing objects to remain on land (***Konskier v Goodman*** – builders left rubbish on roof, new homeowner)
- But, **initial act must directly cause interference**, not merely consequential
- Intervening Act
  - Human Actions, including plaintiffs (***Scott v Shepherd***)
    - Except those taken in reflexively and in self-defence
    - **Truly voluntary actions** by the Plaintiff may constitute intervening act (***Myer Stores v Soo*** – Store office = FI, voluntarily to police station)
    - **Principle's agent's** action, which resulted in the tort, does not necessarily disrupt the initial action of the principle (***Coles Myer Ltd.***)

# NEGLIGENCE

**WRITE: "P must prove on the balance of probabilities that P's injuries (be specific) were caused by a breach of D's duty of care to P."**

## ELEMENTS:

Plaintiff to Prove	Defendant to Prove
<ol style="list-style-type: none"> <li>1. <b>D owed P a duty to take reasonable care</b></li> <li>2. <b>And D breached that duty</b></li> <li>3. <b>Causing (factually &amp; legally)</b></li> <li>4. <b>P to suffer legally recognised harm</b></li> <li>5. <b>That was not too remote</b></li> </ol>	<ol style="list-style-type: none"> <li>6. <b>Defences</b> <ul style="list-style-type: none"> <li>• <b>Contributory Negligence</b></li> <li>• <b>Voluntary Assumption of Risk</b></li> <li>• <b>Illegality</b></li> <li>• <b>Good Samaritans &amp; Volunteers</b></li> </ul> </li> </ol>
	<ol style="list-style-type: none"> <li>7. <b>Limitation of Actions</b></li> </ol>

## 1. DUTY OF CARE

**Duty of care:** Does a legal duty exist on the part of the Defendant to take reasonable care of the Plaintiff?

**WRITE:** "D's act of ... must have constituted a falling short of the standard of care D owed to P."

DOC determined by:

1. Settled law that DOC
2. Settled law that DOC does NOT exist
3. General duty = Reasonably foreseeability + Salient Features
4. Particular duty of PEL or Mental harm = made out through rules

### Determining Duty Approach

<b>IS THIS A SETTLED LAW SITUATION?</b>	<b>YES:</b> Settled law determines if DOC is/is not owed	
	<b>NO:</b> Is this a particular duty situation?	<b>YES:</b> Approach adopted is dictated by the <u>rules created for that category of case (PEL/Mental harm)</u>  <b>NO:</b> Reasonably foreseeable + Salient Features Approach

# VICARIOUS LIABILITY

## Elements:

- 1) Has a **tort been committed**?
- 2) Is **another person vicariously liable**?
  - a. Are they in a **relationship** that the law recognises as **sufficient**
  - b. Is there a **connection between the act or omission** of the actual wrongdoer and **the special relationship** with the defendant

## Employee/Employer

**WRITE:** "Assuming D is liable for the tort of ..., P can sue Y under the principle of Vicarious Liability."

- 1) The **employee** must have **committed a tort**;
- 2) She/he **must be an employee** not an independent contractor ('recognised relationship');
- 3) The **act must be one for which the employer is liable**: conduct in the course of employment.

## 2. Must be an employee:

- **Employee v Independent Contractors:**
  - Contract **of** service = employee
  - Contract **for** service = Independent contractor
  - **Balancing a variety of indicia** to determine the character of the worker:  
**Hollis v Vabu** (Cyclist case)
    - Indicia:
      - **Control** – the emphasis being on capacity to exercise, rather than actual control, centrality of work
      - **Holidays** and other **independence over working hours** - need formal application?
      - **Skill level** – the more skill needed tends toward IC
      - **Identification** – whether the worker is presented as an emanation of the person paying her
      - The **provision of equipment** and how expensive it is/ its nature
      - **Pay Arrangements** - Cash, fixed salary, tax withheld?
      - Ability to **delegate and obligations to work**
- **Borrowed Employees**
  - (**Mersey Docks & Harbour Board v Coggins & Griffith**): Court looked at the totality of factor and the relationship