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## TOPIC 2A: TORTS OF TRESPASS TO THE PERSON – BATTERY, ASSAULT, FALSE IMPRISONMENT

### 2.1 Torts of Trespass to the Person – Types

**Theory:** There are three types of trespass to the person –

- 1) **Battery** – **physical contact** with the person, whether bodily or otherwise;
- 2) **Assault** – creating the **apprehension** of physical contact with the person i.e. interfering with the person's mental state; and
- 3) **False Imprisonment** – depriving a person of **freedom of movement**.

These torts aim to protect the plaintiff from intentional interference with his or her person, ascribing paramount importance and value to bodily integrity and the liberty of the individual.

### 2.2 Torts of Trespass to the Person – Common Elements

**Theory:** There are four common elements to *all torts of trespass* –

- I. **Actionable per se** – torts of trespass *do not require damage to be actionable*. This means that simple proof of the trespass – via demonstration of the elements – is all that is required to bring an action.
  - a. **EXAMPLE:** Battery merely requires touching; damage will not necessarily always result.<sup>1</sup>
- II. **An Act by the Defendant** – the defendant's act is what constitutes the trespass. To constitute a trespass, two qualities must be evident:
  - a. **Act must be positive** – trespass *cannot be committed by omission*. The plaintiff must be able to show that the defendant positively acted i.e. actively did something in bringing about the interference.\*
  - b. **Act must be voluntary** – the defendant must have acted of his own volition in bringing about the trespass i.e. the defendant must have *intended* to commit the act.<sup>2</sup>
- III. **Directness** – the interference with the interest must have come about as a direct consequence or result of the defendant's positive and voluntary act. This correlates with causation somewhat.
- IV. **Fault** – the defendant must have intended the relevant interference. Recklessness and carelessness can still evince fault.

**\*Case: *Innes v Wylie (1844)*:** Innes wanted to enter a country club that he had been a member of. Previously, there had been a dispute between him and other members, and these latter members did not want to grant Innes entry on that specific occasion. As such, a policeman at the door was stationed to prevent Innes from entering. Innes claimed there was a tort of trespass by the policeman.

However, the court found that because there was **no positive act** i.e. the policeman did not physically restrain him from entering, there could not have been a trespass – *Defendants successful*.

**Principle of Case:**

- Trespass will not be found where no positive act is evident.

<sup>1</sup> This element demonstrates the paramount importance ascribed to bodily integrity.

<sup>2</sup> Impaired consciousness – such as a drunken state – does not necessarily indicate a lack of intention to trespass. It is a matter of *degree*.

## 2.2.1 The Directness Element

**Theory:** The relevant interference must be a direct result of the defendant's positive and voluntary act. But how close must the relationship between act and interference be to constitute directness?

### *Case: Hutchins v Maughan (1947)*



#### **Principles of Case:**

- Where the injury or interference suffered by the plaintiff **immediately** follows from the defendant's act i.e. is part of the act, an action of trespass will arise; however, where the injury is **only consequential** to the defendant's act, there will merely be an action on the case.
- Where the plaintiff suffers injury through their own voluntary act, said act will be deemed an **intervening act** and directness will not be found. The question to be asked is:

Was the defendant's act on its own sufficient to bring about the interference, or was there some *visible intervening act*?

### 2.2.1.1 Intervening Acts

**Theory:** Intervening acts can be characterised as human actions, including actions taken by the plaintiff. However, there are exceptions where the intervening act principle should not be considered:

- 1) Where actions taken by the plaintiff are **reflexive and in self-defence**;
- 2) Where **natural forces** arise.

### *Case: Southport Corporation v Esso Petroleum (1954)*



#### **Principles of Case:**

- The principle of intervening acts does not apply in cases involving natural forces.
- Directness between the defendant's act and the plaintiff's injury will not be found where natural forces are evident.

## Case: *Scott v Shepherd* (1773)



### Principles of Case:

- The intervening act principle will not apply where 3<sup>rd</sup> parties act reflexively and in self-defence.
- The directness chain will not be broken by the acts of 3<sup>rd</sup> parties acting in reflexive self-defence.

### 2.2.2 The Fault Element

**Theory:** The second major element of trespass is fault i.e. the defendant must be at fault for the injury/interference inflicted on the plaintiff. To assess fault, there must be a distinction between the following:

- a) **Intending** (*or being careless as to*) the act in question; with
- b) **Intention** (*or carelessness*) as to the outcome of the act.

In tort, the defendant must have intended – or have been careless with regard to – the **outcome** of his actions, *not the just the actions themselves*. This creates the distinction between the element of **voluntariness** and the element of **fault**. This way, a defendant may not be held liable if he did not intend to affect the outcome his actions created.

#### 2.2.2.1 The Meaning of ‘Intention’

**Theory:** Intention is broken down into 2 categories –

- 1) **Actual Intention** – the subjective desire to make contact with the person (**battery**) or to create apprehension of contact (**assault**). This is the highest level of intent.
- 2) **Possibly Deemed Intention** – in certain situations, there will be a lack of information as to whether the interference was intended, there may still be enough information available to show a *state of mind* of **deemed intent**. There are two ways of proving such:
  - a. **Doctrine of Substantial Certainty** – an objective test; where a **reasonable person** in the **defendant’s position** would believe that a particular result was *substantially certain to follow*.

EXAMPLE: A reasonable person would believe that if a gun is shot into a crowded room, it is substantially certain that the bullet would make contact with someone.

- b. **Recklessness** – where a person knows that a **certain outcome might ensue** from particular actions, but **undertakes those actions regardless**.

EXAMPLE: If a person is being physically and legally restrained by police and lashes out, their lashing out would be deemed reckless enough to evince intention.

### 2.2.2.2 The Meaning of 'Negligence'

**Theory:** Negligence is shown in circumstances where the person, in undertaking the relevant actions, acted with **less care than** the care with which a **reasonable person** would have acted in the circumstances. Thus, the test of negligence is an objective one, benchmarked by the level of care expected of a *reasonable person*; that is, reasonable people act carefully as they ascertain that certain outcomes are foreseeable.

The issue of intention in the tort of trespass has been a matter of great debate. As a result, the controversial tort of **negligent trespass** has arisen.

### 2.2.3 Negligent Trespass

**Theory:** Negligent trespass is a tort wherein intention is not present, but fault – together with all other elements of trespass – are ascribed to the tortfeasor. It is a controversial topic, with differing approaches in the UK and Australia.

#### The English Position – Negligent Trespass

##### *Case: Letang v Cooper (1965)*



#### Principles of Case:

- In England, there is no such tort as *negligent trespass*. Where the action against the defendant is **unintentional**, the plaintiff must rely on the specific tort of negligence, not trespass.

## CONTRASTING PRECEDENT:

### *League against Cruel Sports v Scott (1986)*



\*ENGLISH CASE\*

**Facts:** The master of a hunt allowed his hounds to enter the plaintiff's property. The plaintiff sought to sue in negligence; however, because there was no substantial damage, he could not do so. Therefore, he was forced to sue in **trespass**; specifically, **negligent trespass** to land.

**Ruling:** The master of a hunt is liable in trespass if he either *intended* for his hounds to enter into the plaintiff's land, or *negligently* failed to prevent them from entering. However, as no substantial damage was alleged, the plaintiff cannot sue in negligence. Therefore, the only ground available is negligent trespass, in which the master of the hunt – the defendant – is liable. *Plaintiff successful.*

### The Australian Position – Negligent Trespass

#### *Case: Williams v Milotin (1957)*



#### Principles of Case:

- If a defendant acts **intentionally**, the only available cause of action is *trespass to the person*.
- If a defendant acts **negligently**, the plaintiff can sue in *either trespass to the person or in the tort of negligence* (limitation statutes notwithstanding).
- In Australia, negligent trespass has been retained, whereas it has been abolished in the UK.

#### 2.2.3.1 Is negligent trespass still needed?

AGAINST	FOR
<i>Creates inconsistencies within tort law – facilitating fault into an intentionless tort.</i>	<i>Addresses conduct that is 'wrong' for distinct reasons, and therefore no incongruence – careless interference with no damage is still inherently wrong.</i>
<i>A wrong with neither damage nor intent should not be eligible to receive compensation – trespass is already actionable per se; if no damage is suffered, and no intent is present – as is with negligence – no compensation should be available.</i>	<i>Will cover situations that negligence fails to capture, including:</i> <ul style="list-style-type: none"><li>a) Sometimes <b>careless trespass without damage</b> should be actionable;</li><li>b) Where there is <b>no duty of care for policy reasons</b>;</li><li>c) Where there may be <b>challenges proving fault</b>.</li></ul>

## 2.2.4 Fault: The Burden of Proof

**Theory:** The burden of proof in civil – and thereby tortious – actions has had differing approaches in the UK and Australia.

### Burden of Proof: England

#### *Case: Fowler v Lanning (1959)*



#### Principles of Case:

- In England, the burden of proof with respect to fault is **always on the plaintiff**; that is, the plaintiff must prove the defendant intended to cause the injury, or was negligent in doing so.

### Burden of Proof: Australia

#### *Case: McHale v Watson (1964)*



#### Principles of Case:

- In Australia, the burden of proof with regard to fault is **generally** on the **defendant**; that is, the defendant must show that they *did not* intend to cause the injury, nor were negligent in causing the injury.

#### *Case: Platt v Nutt (1988)*



#### Principles of Case:

- There is still some doubt as to whether the burden of proof generally rests on the defendant in non-highway cases.
- There is argument for Australia to adopt the English approach to burden of proof with respect to fault i.e. that the burden is **always on the plaintiff**.

### 2.2.4.1 Highway Cases

**Theory:** In Australia, the burden of proving fault in highway accident cases has a different approach to proving fault in other tort litigation. A highway accident will have occurred where:

- i. There is a collision **between vehicles** on the highway;
- ii. There is a collision **between a vehicle and a pedestrian** on the highway;
- iii. A vehicle **runs off the highway** and **damages property** adjoining the highway; or
- iv. There is a contract between goods carried **out of a property adjacent to the highway**, and people using the highway.

In legal terms, a highway can be any sort of road. However, it is not a highway case simply because it happened on the road eg. Two people fighting on the road does not constitute a highway case.

#### Case: *Venning v Chin (1974)*



#### Principles of Case:

- In highway cases, the onus of proof falls on the **plaintiff** to show the defendant either intended to cause injury, or was negligent in doing so. This is because any person who ventures on to the roads is assumed to be willingly embracing the risks thereof (*Nickells v Melbourne Corporation*).

## 2.3 BATTERY

**Theory:** Battery is a *voluntary* and *positive* act of the defendant which **directly** and **intentionally or negligently** results in contact with the plaintiff's person without lawful excuse. Thus, battery has the general elements common to all forms of trespass. Namely:

- ✓ Positive and Voluntary act;
- ✓ Directness;
- ✓ Fault; and
- ✓ Prohibited contact with the plaintiff's body.

The primary concern of battery is the physical interference with the person of the plaintiff. Hence, the *interests* protected by battery include **physical integrity** and **personal dignity**.

BATTERY: a voluntary and positive act of the defendant which directly and intentionally or negligently results in contact with the plaintiff's person without lawful excuse.



### 2.3.1 Contact

**Theory:** The gist of the trespass of battery is contact with the person. A typical example of battery is where one person hits or pushes another without lawful justification. However, it is not necessary that the defendant's *body* physically touch the plaintiff's body i.e. there is **no need for direct hand-to-hand contact**; an instrument to the body will also suffice eg. Throwing a sharpened piece of steel at someone's body (*McHale v Watson*).

#### 2.3.1.1 Degree of Force

**Theory:** The degree of touching i.e. force is *incredibly low* in tort. This demonstrates that bodily integrity is fundamentally important to law.

#### PRECEDENT:

*Coles v Turner (1704):* "The least touching of another is sufficient" (*Holt J*).

There is one major difficulty with the above principle. In interacting in everyday life, people will necessarily inflict *some* degree of force on another or on each other eg. Walking into each other in a crowded area. Therefore, some sort of guiding principle was necessary to distinguish between the different types of touching.

##### 2.3.1.1.1 Proposition 1: Hostility

**Theory:** The first guiding principle proposed was that of hostility; that is, for contact to constitute batter, it should be attended with some **element of hostility** eg. A punch, slap, kick. However, this principle has problems, including:

- *There are interferences with a person's body that aren't attended with hostility* – for example, sexual assault, where contact is more compassionate and caring.

Thus, the principle has since been rejected; there is no need for the infliction of force to be attended by hostility or anger to constitute battery.

##### 2.3.1.1.2 Proposition 2: Implied Consent

**Theory:** This proposition is based on the notion that people who move about in society *impliedly consent* to the sort of inflictions of force that occur in everyday life eg. Bumping into other people in the street. However, this proposition also has it problems, specifically:

- **Human autonomy** – consent is about *human autonomy* i.e. what we choose and don't choose. Implied consent removes human autonomy.
- **Intellectual capacity** – people who don't have intellectual capacity to imply consent shouldn't be deemed to be impliedly consent. For example, infants.

**NOTE:** Implied and actual consent is a **defence** to the tort of battery.



### 2.3.1.1.3 Proposition 3: The Exigencies of Life Exception

**Theory:** This proposition suggests that conduct which is generally acceptable in the ordinary course of everyday life does not violate physical integrity, and thus should be the battery benchmark. Nonetheless, this must still be considered in the **context of the incident in dispute** i.e. whether such generally acceptable contact amounts to battery or not must be considered on a *case by case basis*.

#### Case: *Collins v Wilcock (1984)*



#### Principles of Case:

- Contact considered *generally acceptable in everyday life* – even where it is unwanted – may not necessarily amount to battery. However, this must be assessed on a **case by case basis**.

#### Case: *Rixon v Star City (2001)*



#### Principles of Case:

- Contact deemed generally acceptable in the ordinary course of everyday life – such as a touching of the shoulder - will not usually be considered battery.

## 2.4 ASSAULT

**Theory:** Assault is defined as the *voluntary* and *positive* act by the defendant that **directly** and **intentionally or negligently**, causes the plaintiff to reasonably apprehend imminent physical contact of their person without *lawful excuse*.

Thus, the elements of assault, much like the elements of trespass, are as follows:

- ✓ **Voluntary and Positive Act**
- ✓ **Directness** - of threat.
- ✓ **Fault**
- ✓ **Reasonable apprehension of Imminent Contact** – the plaintiff's apprehension must be *reasonable* - an objective test – and the threatened interference must be relatively immediate.



**NOTE:** For assault to occur, it does not require contact be made; reasonable apprehension of physical contact without lawful excuse is enough.

### 2.4.1 Reasonable Apprehension of Contact

**Theory:** An assault is a threat that produces in the threatened person a *reasonable expectation* i.e. apprehension of physical contact (no emotional context is necessary). Thus, apprehension must be:

- a) **Reasonable** – was it reasonable for the threatened person to apprehend contact?
- b) **Imminence** – the contact must be relatively imminent i.e. occurring relatively soon after apprehension.

Therefore, the question to ask in considering whether there was a reasonable apprehension is:

Would a **reasonable person** in the *plaintiff's position* have anticipated physical contact?

In determining such, it is important to consider:

- i. **Present Ability** – the present ability of the defendant to carry out the threat i.e. what is the defendant's physical capacity to make good on the threat? Also, the defendant may sometimes have the **capacity**, but not the imminent ability to make good on the threat.

*EXAMPLE:* Shaking a hand in a threatening manner at someone on a platform whilst on a moving train.

- ii. **Actual or apparent present ability suffices** – because the question is asked from the plaintiff's perspective.

*EXAMPLE:* Where a defendant points a toy gun at the plaintiff, but the plaintiff does not know it is a toy gun. The apprehension is there, as well as the apparent present ability of shooting, but the actual present ability is not. Arguably, assault will still be present.

**Case: *Rixon v Star City (2001)*** – the actions of the defendant's employee lacked the 'requisite **intention** in relation to assault' i.e. the intention to create in the plaintiff apprehension of imminent harmful or offensive contact. Placing a hand on the plaintiff's shoulder without force would create no apprehension of imminent harmful contact – *Defendant successful*.

### 2.4.2 Imminent Interference

**Theory:** To constitute assault, the apprehended contact must be *imminent*. This means that the **threat** – which constitutes the assault – must create an impression in the victim's mind that the contact will be happening immediately following the threat.

## Case: *Zanker v Vartzokas* (1998)



### Principles of Case:

- The threat of imminent (immediate) contact is required for the tort of assault to be made out.
- Where the threat is not so immediate, but one party induces another into a **continuing fear** of threatened contact, the tort of assault will be present so long as the ***apprehension of contact is kept alive***. The chain of ‘imminence’ will not be broken in such circumstances.
- Where one party **dominates** another, and the other party is not at liberty but rather at the first party’s **mercy**, no intervening act can arise which will break the causal link between threat and expected harm.

### FURTHER PRECEDENT:

**Barton v Armstrong (1969)** – the defendant was an MP and a business person who was in dispute with the plaintiff, who was also a businessperson. The defendant wanted the plaintiff to execute a deed which would hand over all the plaintiff’s shares to the defendant. The defendant accompanied this desire with a **threat** – *that the plaintiff and his family were under surveillance, and the defendant had the power to inflict harm or death at a moment’s notice*. The plaintiff brought an action of assault against the defendant.

**(Taylor J):** “Some threats are not capable of arousing apprehension of violence in the mind of a reasonable person unless there is an immediate prospect of the threat being carried out. Others, I believe, can create the apprehension, **even if it is made clear that the violence may occur in the future**. Being able to immediately carry out the threat is but one way of creating apprehension, **but it is not the only way**.<sup>3</sup>

#### 2.4.3 Defendant’s Act – The Threat

**Theory:** In essence, the wrong by the defendant is the *threat*. The threat may come in form of 3 different forms –

- (1) **Acts alone;**
- (2) **Mere words** – but must raise in the plaintiff’s mind the *apprehension* of physical interference by the defendant.
- (3) **Words in combination with Acts** – this depends on the *context*. Sometimes words can **nullify acts** (*Tuberville v Savage*).

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<sup>3</sup>Taylor J went on to say that **reasonableness of apprehension** is the ultimately the only requirement of assault i.e. imminence is not essential. However, this has been considered *bad law*; the requirements are vital, and keep the law of torts to specific circumstances.

### Case: *Tuberville v Savage* (1669)



#### Principle of Case:

- **Words are the determining factor in threats:**
  - The use of words can render conduct that would *otherwise be unthreatening*, threatening.
  - Conversely, actions that may *appear threatening* may be rendered unthreatening by the use of certain words i.e. words can have a nullifying effect on the act.

#### FURTHER PRECEDENT:

**Read v Coker (1853):** Words spoken between parties in each other's presence may constitute assault. **Jervis CJ:** "*There was a threat of violence, exhibiting an intention to assault, and a present ability to carry the threat into execution*".

#### 2.4.3.1 Assault – the Directness Requirement

**Theory:** There are conflicting theories regarding *directness* in the context of assault. However, the following is generally considered the test for proving directness under assault –

**The threat must directly cause the plaintiff to apprehend imminent physical contact with his/her person**

This means that the threat must be to make *direct, not indirect*, contact with the plaintiff (Trinade, Cane & Lunney); that is, the threat **must cause the apprehension without there being an intervening act**. Where assault would require the plaintiff to *bring themselves to harm*, such an action will constitute an intervening act, and assault will not be made out. OR;

**EXAMPLE:** If one person says to another "I've laid a trap, and when you walk out this door, it will trap your leg", leaving the room would constitute a positive, voluntary act on the plaintiff's behalf, and the defendant could not be held liable under assault for the plaintiff bringing himself to harm.

#### 2.4.4 Conditional Threats

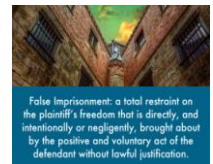
**Theory:** A conditional threat is a threat that **contact will be made unless the plaintiff acts**, or refrains from acting, in a certain way.

## Case: *Rozsa v Samuels* (1969)



### Principles of Case:

- There is a **2 part test** conducted in assessing whether conditional threats amount to assaults –
  - **Does the threatener have a legal right to be making the condition?** – A conditional threat of force which the defendant is entitled to is *not assault*. Thus, an occupier of land may legitimately threaten a criminal trespasser on his land with the use of **reasonable force** in order to induce the trespasser's departure.
  - **If the threatener carries out their legal right and makes the threatened physical conduct, would it be lawful?** – This is an issue of **proportionality**. The threatened physical contact must be proportional to the interference.
- Before resorting to threatened physical harm in response to conditional threats, it is incumbent upon the person being threatened to take whatever reasonable means possible to *avoid the threatened force*.



## 2.5 FALSE IMPRISONMENT

**Theory:** False Imprisonment, the third of the three trespasses to the person, is defined as a total restraint on the plaintiff's *freedom of movement* that is **directly**, and **intentionally or negligently**, brought about by a positive and voluntary act of the defendant without lawful justification.<sup>4</sup>

Thus, the elements of false imprisonment are –

- ✓ **Voluntary and Positive Act**
- ✓ **Directness**
- ✓ **Fault** – intentionally or negligently
- ✓ **Total Restraint** on the plaintiff's freedom of movement. Where the plaintiff *submits* to the defendant's control, as opposed to *consents*.

### 2.5.1 Total Restraint

**Theory:** For the tort of false imprisonment to be committed, there must be a total restraint of movement of the person in question. Total restraint requires the *absence of a reasonable means of escape*.

<sup>4</sup> Being detained **lawfully** will not constitute false imprisonment eg. In prison.

### Case: *Bird v Jones* (1845)



#### Principles of Case:

- False imprisonment requires the **total restraint** of a person's freedom of movement, not a partial obstruction of will.
- There will be no imprisonment if a person *merely obstructs the passage of another in a particular direction*; the person will still be free to either stay where he is or proceed in the opposite direction.
- A prison – even for the purposes of false imprisonment – must have a **boundary** which the imprisoned party is prevented from passing.

#### 2.5.2 Means of Egress

**Theory:** False imprisonment will not be found where there is a *means of egress* i.e. another means of exit or escape from the place of restraint. However, the means of egress must be reasonable. In assessing whether the means of egress is reasonable, factors that can be considered include –

- (1) **Dangerousness** – if the alternative means of exit is *very dangerous*, it would not constitute a reasonable means of egress. For example, if the means of egress would be to escape from a window 10 stories high – *a very dangerous means of exit* – it will not be considered reasonable. With that said, dangerousness is assessed based on the *subjective qualities* of the plaintiff.
- (2) **Apparent or Obvious** – if there are no reasonable means of knowing that an exit was available, or if the exit was *not reasonably apparent or obvious*, it cannot be considered a reasonable means of egress.

### Case: *McFadzean v CFMEU* (2007)



#### Principles of Case:

- False imprisonment **requires some form of compulsion/submission of the plaintiff's will** i.e. submission of will to keep the plaintiff restrained in the place of imprisonment.
- If a plaintiff is ever without a reasonable means of egress, he will be considered falsely imprisoned unless and until he is released.
- If there is a reasonable means of egress, but the plaintiff hesitates to use it, the period of hesitation *will not constitute false imprisonment*.
- If there is not a reasonable means of egress, and the plaintiff hesitates to use it before doing so, the hesitation will be included in constituting false imprisonment.
- There are 4 factors that need to be considered in determining whether a means of egress is reasonable:
  - Threat or danger to oneself (or others);
  - Threat or danger to one's own property (or another's);
  - Legality;
  - Distance and Time.

### 2.5.2.1 Additional Factors when assessing Means of Egress

**Theory:** Additional factors that may be considered when determining whether a means of egress is reasonable (*McFadzean v CFMEU* – above) include:

- 1) **Threat or danger to oneself or others** – i.e. whether the means of egress are threatening to a person’s wellbeing. The means of egress does not have to be a threat to life, which would make the means of exit wholly unreasonable, but at the same time, *merely being inconvenienced* will not make the means of egress unreasonable.
- 2) **Threat or danger to one’s or another’s property** – if by using a certain means of egress a person would have to leave their property behind, unattended, in a hostile environment, the means of egress will be deemed unreasonable. However, merely having to abandon property when it can be *re-accessed later* will not make the means of exit unreasonable.
- 3) **Legality** – if by using a certain means of egress the law would have to be broken - eg. *Trespass on private property, potential criminal damage to private property* – the means of egress will be considered unreasonable.
- 4) **Distance & Time** – i.e. in utilising an exit. The subjective capabilities of the plaintiffs must be assessed in deciding whether an exit is reasonable or not.<sup>5</sup>

### 2.5.3 Space and Time

**Theory:** The factors of space (area) and time (duration) of false imprisonment are considered -

- a) **Area** – the area in which the restraint occurs *is irrelevant*; whether restrained in a small or large space, if a person is totally restrained, false imprisonment will be found. A person can totally restrained in a room, house or island, it wouldn’t matter; all would constitute false imprisonment.<sup>6</sup>
- b) **Duration** – where there is total restraint, time is *irrelevant*; whether 5 minutes or 2 hours, as long as there is total restraint, false imprisonment will be found.<sup>7</sup>

### 2.5.4 The Contractual Cases

**Theory:** When a person enters into a contractual agreement, a term of the agreement may have the effect of compelling the person to give up a portion of their freedom - EG. Buying a ticket to travel on an enclosed train carriage. If the person later wants to leave the enclosed area – and thereby breach their contact – there is contention as to **whether being restrained would constitute false imprisonment**.

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<sup>5</sup> **NOTE:** Because it is a subjective question, the defendant does not need to possess knowledge of the subjective qualities of the plaintiff.

<sup>6</sup> There is a limitation: Eventually the area of movement will get **so big** that the total restrained element will have reached its limit and a person will not be considered totally restrained. For example, a person cannot be considered ‘totally restrained’ when they have freedom to move around a country.

<sup>7</sup> There may be false imprisonment as long as there is total restraint, for “**however short a period of time**” (*Bird v Jones*).

**Case: *Balmain New Ferry v Robertson* (1906)**



**Principles of Case:**

- A party may enter into a contract, a condition of which would mean surrendering a portion of their liberty of movement for a time. If the party attempts to leave and thereby regain their liberty before the contract has been fulfilled, the other party is justified in forcibly preventing exit in protection of their legal rights, so long as the force used in doing so is **reasonably necessary** i.e. *proportionate*. No false imprisonment can be found in such circumstances.

**Case: *Herd v Weardale Steel Coke and Coal* (1915)**



**Principles of Case:**

- Freedom of movement is paramount and should not be interfered with without the authority of law.
- However, **other areas of law must be safeguarded**. If providing freedom of movement conflicts with other areas, it may not be so clear that a false imprisonment has arisen.
- It is not a false imprisonment to hold a man to the terms of contract he accepted, even where enforcing such terms results in the forcible prevention of movement.



### 2.5.4.1 Critique of the Contractual Cases

**Theory:** Tort law principles in the contract cases represent a troubling precedent. Below are some of the rationalisations of the contractual case principles, as well as the problems therein.

Argument	Rationalisation	Problem
<i>The Purpose of the Contract</i>	<p>When the <u>purpose</u> of a contract is at its heart about the <b>willingness to give up movement</b>, it should be distinguished from contracts other kinds. Thus, restraint as a means to fulfil the contract should not constitute false imprisonment.</p> <p>EG: A contract to be transported by train in an enclosed carriage – is about the willingness to give up freedom of movement, and false imprisonment should not be found merely because the train does not stop at the passenger’s desired stop.</p>	<p>Contract law operates – for the most part – under Common Law. It is established that, unless <u>legislation</u> entitles one party to restrain the other in compulsion of contractual fulfilment, one party <b>may not imprison the other so as to force the latter to comply with a term</b>, or so as to punish the breaching party.</p>
<i>Consent</i>	<p>If both parties <u>consent</u> to the deprivation of liberty, existence of consent should evince that false imprisonment is not present.</p>	<p>Consent is <b>subjective</b> – there are no means of assessing whether a party objectively consents. Furthermore, consent <b>can be revoked at a moment’s notice</b>.</p>
<i>Reasonable Means of Egress</i>	<p>Where a reasonable means of egress is available, restraint to compel a party to perform contractual obligation should not evince a false imprisonment.</p> <p>EG: <b>Robertson</b> – was argued that he could have swum, or taken the <u>next ferry</u>.</p>	<p>May be argued in some contexts.</p> <p>However, if it is an issue of <b>time</b> – (<b>Robertson case</b> – could have waited 20 minutes for the next ferry = arguable reasonable means of egress), it will not make a difference; a party will be taken to be falsely imprisoned even for the shortest period of time possible (<i>Bird v Jones</i>).</p>
<i>Mere omission</i>	<p>The torts of trespass to the person require a <b>positive</b> act i.e. for the defendant to <u>do</u> something to the plaintiff. This is <b>argued to exclude not doing something</b> i.e. omission (<b>Herd case</b> – employer omitting to provide a lift back to the surface).</p>	<p>A fallacy. Would create an indefensible distinction between act and omission – a party could never bring a tort of trespass for omission.</p>

### 2.5.5 Psychological Restraint

**Theory:** All cases discussed thus far have revolved around *physical restraint*. Physical restraint is found – as discussed – **where there are no reasonable means of egress**. However, there is a second category of restraint to be aware of: **Psychological Restraint**.

Psychological restraint involves the *submission of the plaintiff to the defendant's will*. This must be a complete submission i.e. non-consensual; otherwise, if there is any consent, it will not be considered psychological restraint and false imprisonment will not be found.

In distinguishing submission from consent, the court may consider:

- a) **Official capacity of the defendant** – if the defendant holds a position of authority which the plaintiff fears (eg. Police officer), the plaintiff submitting to the defendant's power may evince psychological restraint.
- b) **Language used by the parties** – psychological restraint may be found where the language used is submitting, not consensual, in nature (eg. 'I guess I'll have to').

#### Case: *Symes v Mahon (1922)*



- Psychological restraint in the context of false imprisonment involves the plaintiff's **completely submission to the defendant's power**, where the plaintiff thinks that there are no means of escape from the situation available to him.
- Psychological restraint can be evidenced by the plaintiff seeking permission of the defendant in all endeavours, and submitting to the requests of the defendant at all times; that is, **psychological restraint exists where there is no consent**.

#### 2.5.5.1 Knowledge of Restraint

**Theory:** It is not required that the plaintiff *know* about their restraint for it to constitute *psychological* false imprisonment.

#### Case: *South Australia v Lampard-Trevorrow (2010)*<sup>8</sup>



#### Principles of Case:

- If is not a required element of false imprisonment for the plaintiff **to know** of their restraint.
- However, the tort of false imprisonment cannot extend into the area of foster care. A child requires care, regardless of the carer.

## 2.5.6 Directness & Agency – False Imprisonment

**Theory:** *Directness* is a required element of all torts of trespass to the person. The false imprisonment suffered by a plaintiff must come about as a consequence of the defendant's **positive and voluntary act**. However, under the tort of false imprisonment, the fact that a tort is committed by the defendant *or the defendant's agent* **does not disrupt the element of directness in respect of the principal** i.e. the principal is held liable for the agent's act.

To ascertain directness, however, it is required that the principal **caused and procured** the wrongful detention of the plaintiff via their agent.

### *Case: Coles Myer v Webster (2009)*



#### **Principles of Case:**

- When an agent acts on behalf of the defendant (principal) in executing a false imprisonment, or actively promotes the imprisonment, the defendant will be held liable for the imprisonment.

### *Case: Myer Stores v Soo (1991)*



#### **Principles of Case:**

- The principal is vicariously liable for a false imprisonment executed by the agent.
- Consensual restraint is not total restraint. False imprisonment accusations will not stand in such circumstances.