TOPIC 1: ELEMENTS OF TRESPASS TORTS

1.1 Directness

Case: *Hutchins v Maughan (1947)*

Facts: Plaintiff drove a flock of sheep to graze on unfenced land belonging to the defendant. The defendant warned the plaintiff that he had laid poisoned baits on the land. The plaintiff thought the defendant was bluffing, and brought his sheep and sheep dogs on to the land. The sheep dogs ate the poisoned bait and died. The plaintiff brought a claim of trespass to goods. The defendant appealed.

Issue:

- *Did the defendant's laying of baits directly result in the tort of trespass to the plaintiff's goods i.e. the death of his sheep dogs?*

Ruling:

(Supreme Court of Victoria):

Where the injury or interference is **immediate**, an action of trespass will arise; where it is only **consequential**, there will merely be an action on the case. For example, if a man throws a log onto a highway and it hits another person, that will constitute trespass; however, if after being thrown, a person travelling along the road receives an injury by falling over the log, it will not be a trespass, but an action on the case.

The question in this case is whether the injury suffered by the plaintiff in the loss of his dogs was **immediate** – directly caused by the defendant's acts in laying the bait – or **merely consequential**. The baits were laid *before* the plaintiff ventured on to the defendant's land. Had the plaintiff not ventured on to the land, he would not have suffered injury. Hence, the doing of the act – setting the baits – did not directly cause the injury; the plaintiff had to perform an **intervening act** - by coming on to the land and bringing his dogs – in order for him to suffer his injury.

Therefore, the injury suffered by the defendant cannot be said to have followed so immediately as to be termed part of the act; rather, it is *consequential* to the act, meaning the laying of the baits did not constitute a trespass – *Defendant successful*.

1.1.1 Intervening Acts

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

Facts: Esso had a ship carrying significant amounts of oil. The ship became stuck in an estuary and was on the verge of breaking in half whilst in the estuary. To prevent it from doing so, oil had to be dumped. Esso made the decision to dump 400 tons of oil into the sea. This oil travelled with the tide, washing up on and causing damage to the foreshore of land owned by Southport. In order to clean up the mess, Southport had to incur significant expenditure. Therefore, it brought an action against Esso, claiming that their positive and voluntary act in dumping oil constituted a trespass to land.

Issue:

- *Did the oil wash up on Southport's land as a **direct consequence** of Esso's dumping?*

Ruling:

(Denning LJ):

The oil washing up on Southport's land did not constitute a trespass to land. The oil was *not discharged directly* on to the foreshore, but was carried by the tide. This made the interference **consequential**, and the tide carrying the oil an **intervening act**. Directness cannot be found – *Esso successful*.

Case: *Scott v Shepherd (1773)*

Facts: Shepherd threw a small firework (a 'lighted squib') into a crowded marketplace, intending to cause mischief. The squib fell on Yates' stall. Willis, who owned a stall next to Yates', threw the squib away in an effort to protect their wares. The squib subsequently fell on Ryal's stall, who instantly threw it again. The squib then struck Scott in the face and burst, taking out his eye. Scott brought a claim in trespass against Shepherd. Shepherd argued that there was no trespass because the throwing of the squib by the 2 previous stall owners amounted to an intervening act.

Issue:

- *Were Willis' and Ryal's throws of the squib intervening acts between Shepherd's act and Scott's injury?*

Ruling:

(King's Bench - *majority*):

Shepherd's act in throwing the squib **directly resulted** in the injury suffered by Scott. That the 2 stall owners acted in the course of the squib reaching Scott is irrelevant; they were not acting as free agents, but under a reflexive necessity for their own safety. Shepherd is liable in trespass to Scott – *Scott successful*.

1.2 Fault

1.2.1 Negligent Trespass

1.2.1.1 English Position

Case: *Letang v Cooper (1965)*

Facts: The plaintiff was busy sunbathing on a carpark. The defendant drove into the carpark, driving over and breaking the plaintiff's legs. The limitation action for **negligence** in the UK – 3 years – expired before the plaintiff brought her action. The plaintiff sought to overcome this bar by suing in **trespass**, which had a longer limitation period – 6 years. The plaintiff argued *negligent trespass*.

Issue:

- *Could the plaintiff argue that the defendant's actions amounted to trespass, the limitation period for negligence having expired?*

Ruling:

(Denning LJ):

If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault or battery. If he does not intentionally inflict injury, but only unintentionally, the plaintiff has **no cause of action in trespass**; his only cause of action is in negligence.

Therefore, the only cause of action in the present case – where the injury was unintentional – is negligence, which is barred by the limitation period – *Defendant successful*.

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*.

1.2.1.2 Negligent Trespass – Australian Position

Case: *Williams v Milotin (1957)*

Facts: The plaintiff, a cyclist, was struck and injured by the defendant's truck. The plaintiff's brought an action alleging that the collision was due to the defendant's negligence – **more than 3 years but less than 6 years** after the collision. At the time, an action in trespass was barred by 3 years, whereas negligence was not barred. Thus, the only cause available to the plaintiff was in negligence – despite it being a case of trespass.

Issues:

- *Could the plaintiff bring an action in negligence, the limitation period for trespass having expired?*

Ruling:

(High Court):

The defendant is claiming that the action the plaintiff has brought could only have been a trespass to the person. However, the plaintiff is alleging that he was directly hit by the plaintiff's truck as a result of the defendant's *negligence*. Indeed, there is no suggestion that the defendant intended to strike the plaintiff – if that had been the allegation, only an action in trespass could have been brought.

However, in the **absence of intention**, a violation occurring in the course of traffic is may be actionable as either trespass or in the tort of negligence. Either way, the plaintiff's actions will succeed – *Plaintiff successful*.

1.2.2 Fault – The Burden of Proof

1.2.2.1 English Position

Case: *Fowler v Lanning (1959)*

Facts: The plaintiff and defendant were out hunting together. Whilst out, the plaintiff was accidentally shot by the defendant. The plaintiff sought to sue the defendant. On his statement of claim, the plaintiff merely alleged that the 'defendant shot the plaintiff'. The defendant pleaded that this was an incorrectly filled out claim, as the plaintiff failed to disclose whether the shooting was intentional or negligent, and should therefore be thrown out. The plaintiff disagreed, asserting that the burden of proving intention or negligence rested with the defendant.

Issue:

- *Does the burden of proving fault rest with the plaintiff or defendant?*

Ruling:

(Diplock J):

The plaintiff's injuries were sustained at a shooting party, suggesting that they were unintentional. Therefore, it must be considered whether the onus rests on the plaintiff to prove that the defendant was negligent, or whether it is up to the defendant to show that the injuries were not due to his negligence. If it is the former, the statement of claim would be deficient in omitting an allegation of negligence.

In highway claims, the onus rests on the plaintiff to prove negligence where the trespass is unintentional. I see no reason to depart from this rule. Accordingly, without an allegation of intention or negligence in his statement of claim, the plaintiff cannot succeed – *Defendant successful*.

1.2.2.2 Australian Position

Case: *McHale v Watson (1964)*

Facts: A sharpened piece of steel, thrown by a 12 year old boy, struck the eye of a girl aged 9, with whom the boy was playing. The girl's parents sued the boy in trespass and negligence, and the boy's parents in negligence.

Issue:

- *In Australia, did the plaintiff or defendant bear the burden of proof in showing fault?*

Ruling:

(Windeyer J):

Is it for the plaintiff to establish that the missile with which she was hit was thrown with **intent** to hit her or so **negligently**, or is it for the defendant who threw it to prove an **absence of intent and negligence** on his part? I think the latter view is correct. On this view, the defendant – Watson – is liable for the consequences of his actions if he cannot prove on the balance of probabilities that he did not intend to hit her and that he was not negligent in throwing – *McHale successful*.

Case: *Platt v Nutt (1988)*

Facts: The plaintiff, the defendant's mother-in-law, was moving out of the defendant's house, together with her daughter and granddaughter. The plaintiff stood at the front door, keeping a wire gauze door open while her daughter carried luggage to their car. When the daughter and granddaughter had left the house, the defendant made a parting remark to the plaintiff and slammed the door shut. In reaction, the plaintiff thrust her arm out. Her hand went through a glass panel of the door as it was closing, and she was injured. The plaintiff sued the defendant in trespass to the person.

The trial judge found that the defendant did not intend to strike the plaintiff, but was unable to determine whether the plaintiff had thrust her arm out in self-protection, or as an independent act to stop the door being slammed (and thus breaking the **chain of directness**). However, the judge found the defendant could not discharge the onus of disproving negligence, and found for the plaintiff. The case was appealed by the defendant.

Issue:

- *Was the chain of directness broken i.e. had the plaintiff acted independently in thrusting her arm through the door?*
- *Who bore the onus of proving fault, plaintiff or defendant?*

Ruling:

(Clarke JA, Hope JA):

Because the trial judge could not determine whether the plaintiff's thrusting was a reflex or independent action, the plaintiff is deemed to have failed to prove the defendant **caused** her injury. Hence, the plaintiff's action failed before an issue of negligence arose, and it is unnecessary to decide the onus of proof. However, whilst the court does recognise the support behind the decision in *Fowler v Lanning* (**the**

onus of proof always rests with the plaintiff), I prefer to reserve this decision for another day – *Defendant successful.*

(Kirby P):

The rule in *Fowler v Lanning should be adopted* i.e. the **plaintiff** should bear the onus of proof in all cases where the injury was caused – either by intent or negligence – by the defendant. This will bring the law into line with the now clearly established highway cases.

1.2.2.2.1 Highway Cases

Case: *Venning v Chin (1974)*

Facts: The plaintiff was injured in a highway collision with the defendant and sought to sue for trespass to the person.

Issue:

- *In highway cases, which party bore the onus of proof – defendant or plaintiff?*

Ruling:

Generally in trespass, the onus lies on the *defendant* to disprove negligence (*McHale v Watson*). However, the weight of authority favours the proposition that highway accidents are an **exception** to this rule i.e. in trespass for injury on the highway, the onus is on the *plaintiff* to prove that the defendant either intended to cause the injury, or was negligent in doing so.

TOPIC 2: TORTS OF TRESPASS TO THE PERSON

2.1 BATTERY

2.1.1 The Exigencies of Life Exception

Case: *Collins v Wilcock (1984)*

Facts: Two police officers saw a woman apparently soliciting men in the street. The officers approached her, but had no intention to arrest her; merely to give her a warning. The woman expressed to the officers that she had no intention of speaking to them, and walked off. The policemen followed her, whereupon one of them grabbed her arm, halting her from moving on. The woman sought to sue the officers on a claim of battery.

Issue:

- *Did the policeman's act of grabbing the woman's arm amount to battery?*

Ruling:

(Lord Goff):

The fundamental principle, plain and incontestable, is that every person's body is **inviolate**; any amount of touching, however slight, may amount to battery. With that said, there is a general exception in respect of physical contact which is **generally acceptable** in the ordinary conduct of daily life. In this case, the policemen did not intend to arrest the woman, and therefore had to observe the conduct of ordinary civilians. Placing a hand would have been an acceptable interference, but grabbing was not. The claim of battery is found – *Plaintiff successful*.

Case: *Rixon v Star City (2001)*

Facts: Under the *Casino Control Act 1992*, the operator of a casino could in certain circumstances make an 'exclusion order' preventing a person from entering the casino. It was an offence for an excluded person to enter a casino. If such a person entered the casino premises, a casino employee could remove said person using *'no more force than is reasonable in the circumstances*'.

The plaintiff, an excluded person, was seen by employees of the defendant in the defendant's casino. An employee approached the plaintiff, informed him that he was excluded, and took the plaintiff to an interview room until police officers arrived. Policemen arrived and took the plaintiff to a station.

The plaintiff brought a case against the defendant, alleging – inter alia – battery. The Court of Appeal held that the exclusion order was valid and his detention met with the requirements of the Act. The battery action was based on the initial encounter between plaintiff and employee i.e. the employee was alleged to have placed his hand on the plaintiff's shoulder.

Issue:

- *Did the employee touching the plaintiff's shoulder amount to battery?*

Ruling:

The placing of a hand on the shoulder could amount to a battery. As Holt CJ said in *Cole v Turner* 'the least touching of another in anger is battery'. On the other hand, as Holt CJ, if one touches another gently, it will be no battery. In accordance with this finding, it **cannot be said** that the conduct of the employee in the circumstances – found clearly for the purpose of engaging the plaintiff – **that it was not generally acceptable in the ordinary course of everyday life**. Such contact falls within the exigencies of life exception, and therefore does not amount to battery – *Defendant successful*.

2.2 ASSAULT

2.2.1 Imminent Interference

Case: *Zanker v Vartzokas* (1998)

Facts: A young woman (*the plaintiff*), who had just missed a lift from her sister, accepted a lift from a stranger in a van (*the defendant*). The two got into the van, whereupon the plaintiff asked the defendant to follow his sister's car.

The defendant accelerated the van and soon after it was under way, he offered the plaintiff money for sexual favours. The plaintiff rejected the offer, but the defendant persisted. The plaintiff demanded that the defendant stop and allow her out of the car, but he drove on, accelerating as he did so. The plaintiff again demanded that she be let out the car, and opened the passenger door slightly, threatening to jump. The defendant sped up once more so that the door would close.

The defendant then said: "I am going to take you to my mate's house. He will really fix you up". In the circumstances, the threat put the plaintiff in such a fear that she opened the door and jumped. She suffered minor bodily injuries as a result.

The plaintiff then brought a claim in **assault** based on the words of the defendant. Whilst conceding that he had *falsely imprisoned* the plaintiff, the defendant argued that the *wrong charge of assault had been laid*, as he had not touched her or gestured towards her. The Magistrate found that the defendant's words had created the apprehension in the plaintiff's mind of violence later on, but because the threat was as to the **indefinite future**, there was no imminent threat, and therefore assault could not be found. The plaintiff appealed.

Issue:

- *How immediate must the threatened violence be after the utterance of the threat which creates the fear?*

Ruling:

(White J):

The [plaintiff] was in **immediate** and **continuing fear** so long as she was imprisoned by the defendant. The threat was to be carried out *in the future*, but there was no indication of how far away the 'mate's house' was. A **present fear of relatively immediate violence** was instilled in the plaintiff's mind from the moment the words were uttered and that fear was kept alive in her mind in the continuing present as they travelled towards the house where the fear sexual violence was to occur.

Additionally, the plaintiff in this case was not at liberty; instead, the defendant was always in a position of dominance, and the plaintiff at his mercy. There was no escape, no possibility of an ***intervening act*** that would break the causal link between the threat and expected harm.

Thus, the defendant's words uttered in the circumstances constituted an assault. The defendant induced in the plaintiff a **continuing fear**, and remained in a **position of dominance** and in a position to *carry out the threatened violence* at some time not too remote, thus keeping the **apprehension**, the gist of assault, *ever present in the victim's mind – Plaintiff successful*.

2.2.2 Defendant's Act – The Threat

Case: *Tuberville v Savage* (1669)

Facts: The defendant and plaintiff were arguing in a public square. During the course of the argument, the plaintiff placed a hand on the hilt of his sword exclaiming "were it not an **assize** time I would not take such language from you". The defendant responded by taking out his sword and poking the plaintiff in the eye. The plaintiff brought an action of assault against the defendant. The defendant attempted to justify the poke as being **in self-defence** to the plaintiff's provocation of touching his sword (act) combined with an alleged threat (words).

Issue:

- *Did the plaintiff's words, in combination with his acts, constitute an assault, justifying the defendant's act of self-defence?*

Ruling:

(Court):

The plaintiff's words – in spite of his gesture – showed that he **did not intend to use his sword to attack the defendant**. In fact, the plaintiff's words had the effect of *nullifying* his act! This was further substantiated by the fact that it was tax time i.e. government officials and soldiers were in town, making it unlikely that the plaintiff would have attacked the defendant with such authority around. Thus, the defendant cannot rely on self-defence – *Plaintiff successful*.

2.2.3 Directness – Conditional Threats

Case: *Rozsa v Samuels* (1969)

Facts: Rosza and Drummond – who worked for Samuels – were taxi drivers situated at a taxi rank. Drummond was in front of the taxi rank queue. In disregard for Drummond's position in the queue, Rosza placed his taxi at the front of the line, instead of waiting his turn. At this, Drummond got out of the taxi and remonstrated with Rosza, who replied "I am here and I am staying here". To this Drummond responded that he would punch Rosza in the head. Rosza then reached into his dashboard and pulled out a knife, threatening to cut Drummond if he attempted to hit him. Rosza started to get out of his car, but Drummond stopped him by shutting his door. Drummond brought a case of assault against Rosza, and won. Rosza (*'the appellant'*) appealed.

Issues:

- *Did Rosza have a legal right to make the conditional threat to Drummond?*
- *Was the physical conduct of Rosza lawful in the circumstances?*

Ruling:

(Hogarth J):

The gist of the offence of assault is the **creation of fear in the mind of the plaintiff/respondent** that unlawful force is about to be used against him. In this case, the question is whether a threat to use force, accompanied by words that indicate the threat is *conditional* upon an unlawful act, can constitute assault in the eyes of the law.

In this case, the test used to determine whether there was an assault is as follows:

If the respondent had attempted to strike the appellant in the manner threatened, would the appellant have been justified in using his knife in self-defence? – If he would have been justified, he was entitled to make the conditional threat, and there would be no assault.

Based on the fact that:

a) The respondent threatened to punch the appellant;
b) The appellant started to get out of his taxi and made the threat to use his knife if the respondent attacked him;
c) The appellant's move was halted by the respondent shutting the door;

It can only be said that the appellant's threat **went beyond the realms of self-defence**. Before applying force in self-defence, it is incumbent upon the person threatened to take whatever reasonable means possible to *avoid the threatened force*. In the present case, the appellant could clearly have avoided the threatened force if he consented to move his taxi to the back of the queue, locked the door, closed the window etc. In any event, the threatened use of the knife went beyond what was reasonably necessary in self-defence – *Respondent (Drummond) successful*.