

TORTS FINAL NOTES

GENERAL NOTES

- Plan the ENTIRE question before writing so you know you have chosen the correct tort and have a clear understanding of the content/time it will take.
- **Start each question with:**
“Jim may be liable in the tort of XYZ following his actions of ABC. This requires the Plaintiff to prove a number of elements on the balance of probabilities.”

I = Issue.

- The legal problem that needs to be answered to reach an outcome.
- Typically titled as a question or a “whether...” as the issue needs to be answered by the conclusion.
 - E.g. “Does Jim owe Kathy a duty of care?”
 - E.g. “Whether Jim owes a duty of care to Kathy.”
- **Start each issue with:**
“The first issue to decide is whether Jim owed a duty of care to Kathy after his actions of ABC.”

R = Rule.

- The relevant law (statute or case law) applicable to answering the issue.
- CASE LAW: Each case learned will have precedent/s that are the authority to later cases. When using case law authority, look to the *ratio decidendi* (and possibly also *obiter dicta*) of the case (i.e. the precedents established), NOT the trivial facts and outcome of the case, as these are rarely relevant.
 - E.g. when distinguishing *Felthouse v Bindley*, only required to make a distinction that silence did not constitute acceptance – rather than discussing facts as to the sale of the horse.
- STATUTE: When using legislation authority, don’t summarise the entire section/Act – instead, apply it specifically and concisely.

A = Application.

- Applying the rule set out in case law and statute law to the MATERIAL facts of the problem question.
- Occasionally, there will be more than one rule and application of that rule in answering a single issue.
 - E.g. when answering the issue of whether there was a contract, we simultaneously applied law of offer and acceptance to the facts.

C = Conclusion.

- From applying the rule/s to the relevant facts, reaching a answer to the issue.
- **To conclude:**
“Therefore, Jim is likely liable in negligence following his actions of ABC.”

Note: often there will be multiple issues needing to be addressed in a problem question in order to reach an outcome/provide comprehensive advice.

ASSAULT

“The Defendant may be liable in the tort of assault following his/her actions of ABC. This requires the Plaintiff to prove a number of elements on the balance of probabilities.”

ELEMENT 1: Was there a positive and direct threat?

“The first issue is whether the Defendant positively and directly threatened the Plaintiff. A threat can be words, a physical act, or both.”

A threat can be words, a physical act, or both:

LEADING CASE: *White and Ors v State of South Australia* – “Words alone can constitute an assault, or words coupled with gestures.”

SIGNIFICANT CASE: *Barton v Armstrong* – must take context of threats into account; includes verbal threats over the phone.

IF RELEVANT TO QUESTION: *Tuberville v Savage* – words can render actions that might otherwise constitute assault as harmless.

IF RELEVANT TO EXAM QUESTION: A threat can be conditional:

LEADING CASE IF RELEVANT TO QUESTION: *Police v Greaves* – actions may constitute assault even though the Defendant’s threat of violence is conditional on the Plaintiff doing/refraining from an act.

ELEMENT 2: Did the Defendant have an intention to use force or create apprehension in the Plaintiff?

“The second issue is whether the Defendant had the intention to or was reckless in using force or creating apprehension in the Plaintiff.”

Proof of assault requires proof of intention:

LEADING CASE: *Hall v Fonceca* – “An intention on the part of the assailant either to use force or to create apprehension in the complainant is an element of assault.” Affirmed in *Rixon v Star City Pty*.

IF RELEVANT TO QUESTION: *Macpherson v Beath* – If a Defendant knows their victim to be exceptionally timid and still intentionally instils fear, the unreasonableness of this fear doesn't acquit the Defendant.

IF RELEVANT TO QUESTION: *Morris v Marsden* – distinguishes intention from involuntariness (e.g. actions that cannot be controlled).

IF RELEVANT TO QUESTION: Recklessness can satisfy the requirement of intention:

LEADING CASE IF RELEVANT TO QUESTION: *White and Ors v State of South Australia* – “A defendant who lacks the requisite intent will still be liable if the plaintiff's apprehension was foreseeable, and recklessness as to causing that apprehension can make the defendant liable.”

ELEMENT 3: Did the Plaintiff reasonably apprehend imminent contact?

“The third issue is whether the Plaintiff was reasonably apprehended as to the imminent contact by the Defendant. The apprehension must firstly cause a reasonable and objective belief of imminent harm.”

The apprehension causes reasonable belief of imminent harm (objective test):
SIGNIFICANT CASE: *Barton v Armstrong* – “Threats which put a reasonable person in fear or apprehension of physical violence can constitute assault, although the victim did not know when that physical violence may be affected.”

- Threats over telephone (i.e. not close proximity) can constitute an assault.

LEADING CASE: *Zanker v Vartzokas* – “A threat to strike a person even at such a distance as to make contact impossible may constitute an assault if it instils a fear of immediate violence in the mind of the hearer.”

“The apprehension must also subjectively incite the Plaintiff to believe the Defendant has the ability to carry the threat into effect imminently.”

The Plaintiff must believe the Defendant has the ability to carry the threat into effect imminently (subjective test):

LEADING CASE: *Brady v Shatzel* – mere appearance of harm is enough.

IF RELEVANT TO QUESTION: *R v Everingham* – where Defendant points a toy pistol at Plaintiff, who believes the pistol is real, liable in assault.

“As the Defendant has/has not satisfied these three elements, he/she is/isn't liable in assault against the Plaintiff.”