

# 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.”***