

Defences to intentional tort

Consent

Onus is on defendant to prove consent. Can be express, implied, oral or written. Premised on fundamental right to self-determination and autonomy

Elements:

- Volition
 - Autonomy is valued so highly that patient cannot be compelled to have treatment even where death will result (**Malette v Shulman** = Jehovah's witness succeeded in battery for receiving a blood transfusion)
 - There are possible exceptions for pregnant women who may be harming the foetus: In **re T** and in **re S**. It was held in Australia that pregnant women were not an exception in **R v Collins**.
- Information
 - In Australia, doctors must inform patients 'in broad terms' of nature of procedure: **Chatterton v Gerson, Ellis v Wallsend District Hospital, Rosenberg v Percival**
 - **Chatterton v Gerson**: Justice Bristow "once the patient is informed in broad terms of the nature of the procedure which is intended and gives her consent, that consent is real...of course, if information is withheld in bad faith, the consent will be vitiated by fraud.
 - Failure to warn of risks is negligence not trespass unless goes to basic nature and character of procedure if it vitiates consent: **Rogers v Whitaker**
- Capacity
 - Adults are presumed to have capacity
 - Children and intellectually disabled the authorities are
 - **Gillick v West Norfolk Area Health Authority**: just because someone has a mental illness does not mean they do not have capacity. "A minor is capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed."
 - **Marion's case**: issue was whether sterilisation was an exception falling outside parental power to consent. It was found in **Gillick** that a child can give consent if they have sufficient understanding and intelligence to enable him/her to fully understand what is proposed. On the facts of this case there was no capacity of valid informed consent. The question becomes whether the parents have the ability to give consent on behalf of the child. There must be subjective consent of the parents and an objective test of the welfare of the child. It was held that non-therapeutic sterilisation is a special circumstance where there is no parental power to consent

Consent may not be exceeded

- **Murray v McMurchy**: plaintiff consented to a caesarean section but at the same time the doctor also performed sterilisation for medical reasons though there was no imminent threat of life. The court found that what the doctor did exceeded the patient's consent and thus he was liable in battery.

Parens Patriae

- Empowers court to give consent on behalf of minors or other persons unable to consent e.g. disability, unconsciousness
- **MAW v Wester Sydney Area Health Service**: court order sought to permit taking of sperm from dying comatose patient to impregnate wife after his death it was refused with O’Keefe J saying: *parens patriae* jurisdiction ‘does not extend to authorising a non therapeutic surgical procedure ...[which] is not a procedure that will preserve the life of the patient ...[nor] which will safeguard, secure or promote...the physical or mental wellbeing of the patient...recognition of yet another special case [in addition to sterilisation in *Marion’s case*, would] operate to weaken the general principle of inviolability of the body of the individual.’ pars [41] and [42])
- Sports
 - Issues usually relate to degree of force in contact sports especially contact made outside the rules outside of the game.
 - Players do not consent to blows which are both deliberate and outside the rules: **McNamara v Duncan, Guimelli v Johnson**
 - There is a stronger case for implied consent for rough sports e.g. boxing: **Pallante v Stadiums Ltd**: distinction between blows mainly intended to injure and blows of skill in accordance with rules.
 - **McNamara v Duncan**: plaintiff succeeded in a case of trespass for a head high tackle in rugby.
- Revocation
 - **Lincoln Hunt Aust P/L v Willessee**: consumer dispute – unhappy client went to P’s premises with TV reporter and film crew who harassed staff and filmed including opening interior doors. P applying for injunction to stop film being shown on TV because prejudice to business goodwill. The issue was whether the licence to enter was revoked. On facts, implied invitation to members of public by business to enter for legitimate business purposes only, not purposes of own contrary to interests of occupier. P showed *pima facie* trespass but not shown irreparable damage. The injunction was refused.

Necessity

- In ***In re F*** Lord Goff distinguishes the three different types of necessity
 - Public necessity where an individual’s property is destroyed to prevent widespread damage to other property (or throwing things off a boat to stop it sinking)
 - Private necessity: where a person acts to protect their own property
 - Preservation: where a person acts to preserve the health or life of a person unable to consent.
- D’s act must be reasonable in circumstances and proportionate to risk
- It is a complete defence as opposed to a partial defence
- **Proudman v Allen**: Action for trespass to goods – Ds car parked in by P’s car. 3 people pushed the car out of the way and lost control of it on slope, there was a likely crash so D tried to put n hand brake but failed so turned car away from other car. Car ran over embankment into the sea. At trial there was a finding for D action was reasonable in the circumstances. It was appealed but this was dismissed because it was reasonable and does not require an interest in the property.
- **London Borough of Southwark v Williams**: homeless family had squatted in P’s empty house. P sought court order for immediate possession but defence of necessity

was raised. Necessity is defence to trespass to land in some cases of great and imminent danger.

- **R v Dudley & Stephens**: necessity cannot be argued as a defence against murder of another
- **Mouse's case**: throwing other's possessions overboard a sinking ship was reasonably necessary and thus there was no tort action available here.
- **Malette v Shulman**: this case concerns a Jehovah's witness patient who was able to succeed in a claim of battery against the doctor who gave her a blood transfusion against her wishes. He claimed it was necessary as a defence but was unsuccessful because it was found that an individual's autonomy is valued so highly that a patient cannot be compelled to have life-saving treatment if it against their values.
- **Marion Case**: sterilization is such a personal decision that it cannot be consented by parents or a doctor even if they believe it is in the best interest of the patient (commonly the mentally ill) and thus one must obtain a court order.

Self-defence

- Defence of self
 - o Whether reasonable for D to defend self
 - o Whether reasonable proportionate force
 - o **Fontin v Katapodis**: argument between shop assistance F and customer K. K hit F on arm with set square, F threw glass at K and made a serious cut on the hand. K sued F for assault and battery and employers re vicarious liability. D argued self-defence. Appeal by D was denied. This was because the defence was excessive for the original threat.
- Defence of others
- Defence of property: it is okay to use reasonable force to eject trespasser/deter entry
- Covered in statute.
 - o **Civil liability act 2002 (NSW) s 52-54.**

Provocation

- There was provocative conduct
- Defendant lost control as a result of the conduct
- The response to the provocation was reasonable in the circumstances
- Is a partial defence: can be used to reduce or prevent exemplary damages: **Whitebread v Rail corporation of NSW.**

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Contributory negligence:

s **5S of the Civil Liability Act 2002 (NSW)** provides that a court is entitled to allow a calculated reduction in damages by reason of contributory negligence. A court will determine to what extent the defendant be allowed a reduction of damages awarded, expressed as a percentage. A successful plea of contributory negligence will attribute some portion of the harm caused to the plaintiff to his/her own negligence. An entirely successful plea could result in the claim being defeated (The reduction of which being 100%).

Does contributory negligence operate as a defence to intentional torts?

Contributory negligence is prima facie not a defence to intentional torts. Contributory negligence, as a general rule, is not a defence to intentional torts (**Horkin**) unless the injury is unintentional and indirect on the part of the defendant (**NSW v Riley**). In **Horkin**, a man was thrown out of a club violently after becoming intoxicated and refusing to leave. It was decided that the refusal of the man to leave the club did not constitute contributory negligence. It was ruled that in a case of battery, contributory negligence cannot stand as battery is always intentional. In **NSW v Riley**, Riley was handcuffed and placed in the back of a police wagon. At this point he began throwing himself side to side, sustaining injuries. The police were found guilty of assault and false imprisonment, however, in the civil case, damages were reduced on the grounds of contributory negligence as the injuries sustained from Riley throwing himself at the walls of the police wagon were not the direct result of the actions of police, nor were they intended or foreseen.