

PART 1

INTENTIONAL TORTS TO THE PERSON

Battery

3 elements

- (1) Direct contact
- (2) Physical interference with the person
- (3) Accompanied by fault: intentional or recklessly indifferent in bringing it about

Rules

- moral intent is irrelevant
- actionable *per se* – there needn't be actual harm caused
- context and consent very important

- **Direct contact**

- If people are acting out of compulsive necessity, battery will be attributed to person who started original chain – *Scott v Shepherd* [1773] – Shepherd threw a firecracker, which set off a train of events, eventually landing on Scott's stall
- Ricochet can constitute direct contact – *McHale v Watson* (1964) – two children playing; Watson (12 years) threw a metal rod which ricocheted off tree and hit McHale in the eye, causing damage
- Contact must be direct rather than consequential – *Reynolds v Clarke* (1726) – a log thrown at someone versus a log placed on the road (direct and indirect contact)

- **Fault**

- There is no need for hostility in an action for battery – *Boughey v R* (1986) – Boughey killed woman but claimed it was accidental and performed for sexual satisfaction
- Context is highly significant; there is an implied consent to contact in everyday life – *Brian Rixon v Star Pty Ltd* (2001) – Rixon was tapped on shoulder by casino security guard who then asked to wait in a room for an hour and a half

Assault

3 elements

- (1) Direct act by the defendant
- (2) Directly produces apprehension of an imminent battery in the mind of the plaintiff
- (3) Must be intention to cause apprehension

Rules

- Actionable *per se* – needn't be actual harm caused

- **Apprehension**

- It doesn't matter whether there is an intention to actually commit the battery – *Brady v Schatzel* [1911] – woman aimed an unloaded gun at a man and threatened him
 - The effect on the mind is the material factor in an assault, the apprehension of imminent violence – *McPherson v Beath* (1975) – Students circle around a lecturer at Flinders University in order to intimidate him
 - If the plaintiff is especially timid, assault will still occur where plaintiff knows of this disposition
 - A completed battery is not necessary and there must be the means to carry the threat into effect – *Stephens v Myers* (1830) – turbulent parish meeting where man was ejected and came to chairman with clenched fist but was restrained by others; held liable in assault
 - Words alone can constitute assault – *Read v Coker* (1853) – Read owed rent; Coker ordered him off the premises and Read refused; Coker ordered some employees to see him off the land; they surrounded him and threatened to break his neck
 - A conditional threat can still constitute assault – *Police v Greaves* [1964] – Police responded to a domestic call; Greaves held his knife at the police and said if they didn't leave he would stab them
 - Actions can negate an apparent assault – *Tuberville v Savage* (1669) – 'if it were not assize time I would not take such language from you'
 - Words can remove ambiguity from actions – *Fogden v Wade* [1945] – man following woman made sexual comments and then advanced on her
 - If there is ambiguity there can be no assault – *Innes v Wylie* (1844) – police officer stood outside a room guarding exit
 - There must be an intention to create apprehension – *Brian Rixon v Star Pty Ltd* (2001)
- **Direct act**
 - Phone call could constitute an assault, but not generally – *Barton v Armstrong* [1969] – series of threats made over telephone coercing plaintiff to sign deed or life would be taken
 - NOTE: in the age of modern communications, this rule could easily be different today
 - The effect on the victim's mind is the material factor in determining directness – *Zanker v Vartzokas* (1988) – man offered young woman a ride in van; man then asked for sexual favours and girl refused; man said if she didn't he'd take her to his mates house and he'd 'fix her up'
 - Continuing fear of battery represents ongoing immanency; doesn't matter if the battery actually wasn't about to take place

False imprisonment

3 elements

- (1) Direct, voluntary act
- (2) Total deprivation of free movement
- (3) Without lawful justification

Rules

- Actionable *per se*
 - Unlawful restraint is dependant on the facts of the specific case
 - The onus of proof for lawful justification is on the defendant
- **Direct act**
 - The act which restrains need not be physical; fear of authority are sufficient to constitute total restraint – *Symes v Mahon* [1922] – police ordered man to go to Adelaide by train; had mistakenly identified him as a suspect; was not handcuffed or physically restrained during the entire procedure; held to be totally imprisoned
 - Restraint need not be physical; fear and authority are sufficient to constitute total restraint – *Myer Stores v Soo* [1991] – policemen and Myer employee blocked Soo and escorted him to a back room for questioning; held to be false imprisonment
 - **Total restraint**
 - Restraint will not be total where there is a reasonable escape route – *Bird v Jones* (1845) – public road closed for boat race; man wanted to pass but police would not let him; could have entered by other means
 - Where the conditions of entry are clear, then people who enter an area agree to those conditions and are not necessarily falsely imprisoned despite having free movement restricted – *Robinson v Balmain New Ferry Co Ltd* [1910] – man entered turnstile for \$1 but missed his ferry; wanted to leave but didn't want to pay exit fee; refused exit
 - **Authority to restrain**
 - There may be legislative authority to restrain – *Rixon v Star Pty Ltd* (2001)
 - Cannot restrain in order to pay a bill – *Sunbolff v Alford* (1838)
 - **Liability for false imprisonment**
 - Anyone who directed the imprisonment, was a party to it, or gave oral or written instructions directing the imprisonment is liable – *Maine v Townsend* (1883) – FACTS
 - Sufficient nexus between defendant's actions and plaintiff's false imprisonment – *Ruddock & Others v Taylor* (2003) – Taylor's visa was cancelled on two separate occasions; there was deemed to be a sufficient nexus
 - It does not matter if the defendant is not aware of false imprisonment – *Murray v Minister of Defence* [1988] – for a period, the plaintiff was in detention in her house despite not being aware of it; was held to still be falsely imprisoned

Defences

Types

- Self-defence
- Consent
- * Mistake is generally not a defence

- **Self defence**

- Self-defence must be reasonable and necessary in the circumstances; there is a legal right to defend oneself – *Fontin v Katapodis (1962)* – Fontin wrongly accused Katapodis of not paying for goods; Katapodis broke wooden t-square on Fontin's shoulder; Fontin threw a shard of glass
- **Consent**
 - There is an implied consent to everyday contact – *Collins v Wilcock [1984]* – a police woman took hold of a woman's hand to stop her walking off; woman scratched police woman; police woman held to have battered woman
 - There is also implied consent to contact in the sporting arena, including some contact slightly outside of the rules of the game; does not extend to physical violence or where there is intent to cause bodily harm – *Giumelli v Johnston (1991)* – in a football game, defendant hit plaintiff with raised elbow
 - Also *McCracken v Melbourne Storm Rugby League Football Club [2005]* – two rugby players tackled McCracken and threw his head into the ground; was held to be beyond the level of consent implied in the sporting arena
- **Mistake**
 - Mistake is generally not a defence; there is strict liability in torts (culpability regardless of intent) – *Cowell v Corrective Services Commission (1988)* – incorrect incarceration

Damages

4 types

- (1) Compensatory – compensate for actual damage or injury
- (2) Aggravated – compensation for injured feelings or outrage
- (3) Exemplary – indicates disapproval of defendant's conduct
- (4) Nominal – no real damages but awarded to recognise wrongfulness of defendant's actions

NEGLIGENCE – (1) DUTY OF CARE

Actions in negligence

- Physical harm
- Nervous shock (mental harm)
- Property damage
- Pure economic loss

Test

Objective – what a reasonable person would have done or foreseen

Two levels of enquiry

- (1) Issue of law – is this the kind of situation in which a duty can exist?
- (2) Does there exist a duty on the facts of the case?

Physical harm

• **Procedure of inquiry**

- Reasonable foreseeability test
- *Tabet v Gett* [2010] – affirmed neighbourhood principle in *Donoghue v Stephenson* (1932)
- ‘Is it reasonably foreseeable that the defendant could be harmed if I act in this way?’
 - If yes – a duty is owed
- ‘It is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence’ – *Chapman v Hearse* (1961) – Chapman crashed into car and man flew out; doctor stopped on road to help with car crash victim; was subsequently hit by Hearse; Chapman owed a duty of care as the consequence was of the general character that could be expected
 - The precise sequence of events need not be foreseen, only that some harm may occur
- NO *Civil Liability Act 1936* (SA) for physical harm

• **Established duty categories**

- Duties of law
- Employer/employee – *Koehler v Cerebos* (2005)
- Doctor/patient – *Rogers v Whitaker* (1992)
- Driver/passenger – *Cook v Cook* (1986); *Imbree v McNielly* (2008)
- Prisoner/prison authority – *New South Wales v Bujdosso* (2007); *New South Wales v Godfrey* [2004]
- Occupier/invitee – *Neindorf v Junkovic* (2005); *Hargrave v Goldman* (1963)
- Hotel/patron – *Spedding v Nobles* (2007)
- Parent/child – *Smith v Leurs* (1945); *Robertson v Swincer* (1989)
- If the specific facts fall outside of the established duty categories in law, the go to the facts

Mental harm

- **Procedure of inquiry**
 - Is plaintiff eligible for mental harm damages? **s 53**
 - Damages may only be awarded if injured or a parent, spouse or child of a person injured, killed or endangered
 - If yes, then there must be a recognizable psychiatric illness
 - If yes, then go to **s 33**
 - Reasonably foreseeable? (Normal fortitude test)
 - If yes, then consider circumstances of the case

- **S 33 common law influence**
 - **S 33 (1)**
 - Normal fortitude test – *Tame v NSW & Annetts v Australian Stations Pty Ltd* (2002)
 - **S 33 (2)(a)**
 - (i) Sudden shock – *Tame & Annetts*; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003)
 - (ii) Witnessed someone being killed or put in peril – *Mt Isa Mines v Pusey* (1970)
 - (iii) Nature of relationship between P and other person – *Jaensch v Coffey* (1984); *Gifford*
 - (iv) Pre-existing relationship – *Gifford*

PART 2

NEGLIGENCE

Procedure of inquiry

I. Act or omission?

II. Look at the type of harm suffered

- A. Physical harm
- B. Mental harm
- C. Pure economic loss (negligent statement)

III. Duty of care

Heading: Plaintiff v Defendant – physical harm (Parties and actual harm suffered)

* Reasonable foreseeability here is directed to the **class of people** – whether P was a person that D could reasonably foresee would suffer harm as a consequence of their careless actions

- A. Physical harm – *Tabet v Gett* – is it reasonably foreseeable that my careless actions could cause harm? Alternatively, look to existing duty categories

E.g. “Rupert owes Ian a duty of care, as it is reasonably foreseeable that leaving an unapproved sword available at a swordplay event could cause physical injury to a person who uses that sword (*Tabet v Gett* (2010) 240 CLR 537 (*Tabet*))”

OR “Callum owes Ian a duty of care as per the established duty category between an occupier of land and an entrant (*Neindorf v Junkovic* (2005) 222 ALR 631 (*Neindorf*))”

Existing duty categories (duty of law)

- Employer/employee (*Koehler v Cerebos* (2005) 222 CLR 44)
- Driver/passenger (*Imbree v McNeilly* (2008) 236 CLR 510; *Cook v Cook* (1986) 162 CLR 376)
- Prisoners/prison authority (*New South Wales v Bujdos* (2005) 227 CLR 1)
- Occupier/invitee (*Neindorf v Junkovic* (2005) 222 ALR 631)
- Home owner/neighbour (re hazards) (*Hargrave v Goldman* (1963) 110 CLR 40)
- Licensee/3rd party
- Parents/children (low threshold) (*Smith v Leurs* (1945) 70 CLR 256; *Robertson v Swincer* (1989) 52 SASR 356)

B. Mental harm – s 53 (eligibility) then s 33 (normal fortitude test)

53—Damages for mental harm

- (1) Damages may only be awarded for mental harm if the injured person—
 - (a) was physically injured in the accident or was present at the scene of the accident when the accident occurred; or
 - (b) is a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident.
- (2) Damages may only be awarded for pure mental harm if the harm consists of a recognised psychiatric illness.
- (3) Damages may only be awarded for economic loss resulting from consequential mental harm if the harm consists of a recognised psychiatric illness.

33—Mental harm—duty of care

- (1) A person (the *defendant*) does not owe a duty to another person (the *plaintiff*) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness.
- (2) For the purposes of this section—
 - (a) in a case of pure mental harm, the circumstances of the case to which the court is to have regard include the following:
 - (i) whether or not the mental harm was suffered as the result of a sudden shock;
 - (ii) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
 - (iii) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
 - (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant;
 - (b) in a case of consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose.
- (3) This section does not affect the duty of care of a person (the *defendant*) to another (the *plaintiff*) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

E.g. “As Frank has suffered mental harm, s53 of the *CLA* will be considered. Frank is eligible for damages, as he was present at the scene of the accident, and has been diagnosed with clinical depression. The court would then apply the reasonable foreseeability test in s33(1). It is reasonably foreseeable that if JazzyFloors installed floors poorly, they might collapse, and cause mental harm to an onlooker of reasonable fortitude. As Frank has suffered pure mental harm, the court would consider s33(2). Frank satisfies all of the legislative criteria – the collapse of the floor caused a sudden shock, and he witnessed Claire in peril. The pair had a close, pre-existing relationship.”

C. Negligent statement - Foreseeability is not enough. Analysis of control factors/salient features/policy – overarching question is: was the reliance reasonable in the circumstances?

*This is the main section for negligent statement inquiry

E.g. “Quinn may sue Rockery for negligent statement. A duty of care may arise from negligent statements when reasonable reliance can be established (*Mutual Life and Citizens’ Assurance Co Ltd v Evatt* (1968) 162 CLR 340) (*Mutual*). Reasonable foreseeability of loss on its own is not sufficient to give rise to a duty of care (*Ensanda Finance v Peat Marwick Hungerfords* (1997) 188 CLR 241) (*Ensanda*). A duty of care is owed when the following elements are satisfied: 1) the representor realises or ought to realise that the representee will trust in his advice; 2) it is reasonable for the representee to accept and rely on that information; 3) it is reasonably foreseeable that the representee is likely to suffer loss should the statement turn out to be incorrect, or the advice unsound. (*San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986) 162 CLR 340) (*Sebastian*). In order to establish reasonable reliance and whether a duty is owed, the salient features and policy interests need to be considered.”

THEN go on to look at salient features supporting an opposing a duty:

E.g.

- Was there an inducement to rely on the information – usually sufficient on its own to support a duty
- Advisor must know the recipient of the advice
- Must know, or ought to know, that the advice would be relied upon
- Was there a qualification (disclaimer)? – This does not stop a negligent statement
- Is D in the business of giving information? – Can still impose a duty in the absence of a special skill
- Is there another source of information or advice? – Less chance a duty is owed
- Identify the relevant positions of parties (vulnerability) – not always P
- Special skills? – Changes breach
- Was there a request for information, or was it proffered? – *San Sebastian* and *Tepko*
- Context of discussion – highly important!
- Financial gain or kickback for D? – More likely a duty is owed (*Heldey Byrne*)
- Did advisor assume responsibility for advice? “You can rely on me”
- Did P assume some responsibility? – P goes somewhere else for independent advice

D. Omissions – is it reasonably foreseeable that an omission to act could lead to harm

* Control is the key aspect of this relationship

* A duty will exist in special relationships, or where there is a special relationship between D and a 3rd party such that D is required to take positive action to ensure the 3rd party does not harm others

E.g. “The Commonwealth Law does not impose a positive duty to protect the safety of others. Exceptions exist where there are relationships of control. The relationship between Aaron and the Prison Authority (PA) is one such exception, as the PA has control over its prisoners, establishing a duty to protect prisoners from Aaron (*Dorset Yacht Co Ltd v Home Office* [1970] AC 1004)”

Other special relationships

- Parent and child
- Teacher and student

- Occupier and invitee (house and pubs)
- Gaoler and prisoner

IV. Breach of duty

* Reasonable foreseeability here is directed to the **risk of injury** – looks at the occurrence of the event that causes the injury

A. General standard – ss 31/32

31—Standard of care

(1) For determining whether a person (the *defendant*) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

(2) The reasonable person in the defendant's position will be taken to be sober unless—

- (a) the defendant was intoxicated; and
- (b) the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and
- (c) the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs, and, in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant.