

## LAWS1012: Torts Summary Notes

### 1. INTRODUCTION

**Tort:** a civil wrong for which the law provides a remedy, usually in the form of an action for damages by way of compensation for loss suffered.

Definition

Elements of assault

General principles

Cases

### 2. HISTORICAL DEVELOPMENT OF TORT LAW

#### Trespass

**Direct injury + intentional fault = trespass**

**Direct injury + negligent fault = trespass or negligence**

**Actionable per se without proof of damage** (can bring a trespass claim even if you can't show any damage or loss)

#### Action on the Case

**Indirect injury + intentional fault = action on the case for wilful injury**

**Indirect injury + negligent fault = negligence**

**Damage is the gist of the action** (if you cannot show any damage or loss, you cannot bring a case claim)

#### Elect either Trespass or Case:

In situations where the **injury is direct**, but **fault was negligent or careless**, the plaintiff may make an election to bring an action in trespass or case (**Williams v Holland; Williams v Milotin**)

#### Need to know the facts to determine the proper course of action

- E.g. **Reynolds v Clarke (1725) (Fortescue J's analogy)**
  - If a man throws a log on the highway and it hits a person at the time it's being thrown, it's trespass
  - If a man throws a log on the highway and afterwards a person injures themselves by falling over it, it's case

#### Cases

##### a) Distinction between trespass and action on the case (direct vs indirect injury)

**A direct injury** → is sustained in the course of the defendant's act, not after the force of action is over (**Reynolds v Clarke; Scott v Shepherd**).

**An indirect injury** → is not sustained in the course of the defendant's act, but is consequential. The injury is consequential when some obvious and visible cause intervenes so that it is not part of the defendant's act (**Hutchins v Maughan**).

#### Reynolds v Clarke (1725)

**Facts:** D erected eaves on his house and the water collected in those eaves drained onto P's land.

**Issue:** Should the plaintiff's action be framed in trespass or case?

#### Principle:

- Where an act by the defendant directly causes injury to the plaintiff's person, house or land... it is trespass.
- Where a consequence from the act by the defendant causes injury to the plaintiff's person, house or land... it is action on the case.

### **Scott v Shepherd (1773)**

**Facts:** D (Shepherd) threw a lit squib in a market, squib thrown around by other parties, squib exploded on P's (Scott) face and lost sight in one eye. P sued the D for trespass.

**Issue:** Whether the injury was directly caused by the defendant's act.

**Majority Held:**

- The Court determined that the injury was directly caused by the defendant's act, notwithstanding the two intervening actions by the other parties. The unlawful act of throwing the squib by the defendant is responsible for the subsequent conduction such that the subsequent throws are a continuation of the first force and first act. The Court did not consider the intermediaries as free agents, but acting under a compulsive necessity for their own safety and self-preservation.

**Dissent (Blackstone):**

- The distinction between trespass and case is whether the injury is immediate or consequential. The injury was immediately caused by the intermediary (batting the squib away) and consequential upon the defendant's act. The action should be categorised as case.

**Principle:**

- An act that sets in motion an unbroken series of continuing consequences, the last of which causes the injury, can be regarded having directly caused the injury (trespass).
  - For example, a mad ox set loose in crowd makes the person who set it loose answerable to trespass (example given by Nares J in Scott v Shepherd).
  - The initial act of the defendant throwing X is the source of the subsequent conduction, such that the occurrence of X rebounding off of Y is a continuation of the initial force set in motion by the defendant.

### **Hutchins v Maughan [1947]**

**Facts:** D had laid poisonous baits on unfenced land. P's sheep dogs then ate the baits and died. P brought an action in trespass against D.

**Issue:** Was the action properly categorised as trespass? That is, whether the injury suffered in the loss of dogs was directly occasioned by the defendant's act in laying the bait or was merely consequential

**Principle:**

- In applying the settled distinction between trespass and case, an injury is said to be direct when it follows so immediately in terms of causation upon the defendant's act as to be part of that act.
- An injury is said to be consequential when some obvious and visible cause intervenes so that it is not part of the defendant's act.

### **Southport Corp v Esso Petroleum Co [1954]**

- **Facts:** D discharged barrels of oil to free a boat. The oil was carried by the tide to the coastland and damaged P's property.
- **Issue:** What was the proper cause of action - trespass or case?
- **Held (Denning LJ):**
  - An action in trespass could not lie against the defendant, because the discharge of oil was not done directly to the plaintiff's foreshore. An action on the case instead would lie against the defendant because the injury was consequential.
- **Principle:**
  - In order to constitute trespass, an injury to the plaintiff must be direct.
  - When an injury is consequential rather than direct, it is an action on the case.

### **(b) Rule in Williams v Holland**

Where an injury is direct, but the fault element is negligent/careless, the plaintiff may bring an action in either Trespass or Case.

However, where an injury is direct, but the fault element is intentional, the only cause of action available to the plaintiff is Trespass.

### **Williams v Holland (1833)**

**Facts:** Highway accident, where D driving a horse cart recklessly and negligently. D lost control of the cart and collided with another cart, resulting in damage to P's vehicle and injury to P's children. P brought an action on the case against D.

**Issue:** Whether case was an inappropriate form of pleading for these facts, and whether trespass was more appropriate.

**Principle:**

- Where an injury is direct, but the fault element is negligent or careless, the plaintiff may make an election to bring an action in trespass or case.
- However, where the defendant's act is both direct and intentional, the only cause of action available to the plaintiff is trespass.

### **Williams v Milotin (1957) 97 CLR 465**

**Facts:** P riding bicycle along road and was struck by D due to negligent driving. P injured. P commenced action >3 but <6 years after date of occurrence.

- Limitation of Actions Act 1936:
  - s 36: must commence action in trespass within 3 years
  - s 35: must commence action on the case within 6 years
- D argued that as P's action could be brought both as an action in trespass and an action in negligence (action on the case), the shorter of the statute of limitations ought to apply, and because the claim was brought after 3 years (the expiry), the claim is invalid.

**Issue:** Whether a plaintiff could maintain a cause of action, alleging trespass and negligence (case), where the facts disclose that the injury was caused unintentionally.

**Principle:**

- Plain, negligently, inflicted injury to the person can, in at least some circumstances (depending on the facts), be pleaded as trespass to the person.
- But the intentional infliction of harm cannot be pleaded as negligence (case).

### **(c) Fault in Trespass**

In modern tort law, **fault (intent or negligence)** is an **essential ingredient** in **trespass**, as it is in **almost every action on the case**

- **Trespass:** fault is *always* essential
  - **Intentional trespass** (direct injury + intentional fault)
  - **Negligent trespass** (direct injury + negligent fault)
- **Case:** fault is *almost always* essential (exception: strict liability)

### **Weaver v Ward (1617)**

**Facts:** P brought an action of trespass in assault and battery against D, who accidentally discharged a gun and wounded him in military training exercise.

**Issue:** Was D liable to P in trespass for an accidental injury?

**Principle:**

- There is only no liability in trespass where the trespassory act was committed utterly without fault by D.

### **Holmes v Mather (1875)**

**Facts:** A horse drawn carriage become uncontrollable after being startled by a dog, D (the master's servant) tried to gain control over the carriage to guide the horses away from P, but ended up colliding with P, causing injury. P sued D for trespass and negligence.

**Issue:** Was P able to maintain a cause of action in trespass against D?

**Held:**

- Where an act is not wrongful for being either intentional or negligent, no action is maintainable in trespass.
  - If we were to find D ought to be held liable, it would be a nonsensical result:
    - D would be held liable if D tried to avoid harm to P (tried to avoid P)
    - But D would not be held liable if D did nothing

**Principle:**

- Where an act is not wrongful for being either intentional or negligent, no action is maintainable in trespass.

### **Stanley v Powell [1891]**

**Facts:** D was an employee and at a shooting party and fired at a bird. One of the bullets bounced off a tree and accidentally wounded P in the eye.

**Issue:** Could D be held liable in trespass for directly causing harm to P?

**Held:**

- P did not claim that D caused the injury intentionally, as such P claimed D was negligent. Given that the jury found no negligence, Denman J held that D could not be liable in trespass, as there was **no fault (intention or negligence), thus no trespass**
- **Social influences:**
  - D was wealthy landowner, as were most men on the jury
  - It is unlikely that the case would have been decided the same way today

**Principle:**

- Where there is no fault (intention or negligence), there can be no trespass.

### **(d) Onus of Proof in Trespass**

#### **Trespass**

As a first step, the **onus is on the plaintiff to prove that a trespassory act** was performed by the defendant (**Platt v Nutt**). [The act can be assault, battery, false imprisonment...]

Then the **onus passes to the defendant to prove, on the balance of probabilities**, that the trespassory act occurred without the defendant's fault (intention or negligence) (**Blacker v Waters; McHale v Watson**).

Exception: **highway cases**, where the **onus is on the plaintiff to prove the defendant's fault** (**Venning v Chin**).

#### **Action on the Case**

The **onus is on the plaintiff to prove the defendant's fault**.

### **Blacker v Waters (1928) Supreme Court (NSW) (Full Court)**

**Facts:** P visited D on a shooting gallery, a bullet fragment shot by D hit the P in the eye. P sued D for trespass.

**Issue:** Whether the onus of proof of fault in trespass lay with P or D.

**Principle:**

- The onus is on the defendant to prove, on the balance of probabilities, that the trespassory act occurred without the defendant's fault (intention or negligence).

### **McHale v Watson (1964) 111 CLR 384 (High Court)**

**Facts:** D threw a dart at a post, but the dart bounced off the post and hit P in the eye. P sued in trespass and in negligence.

**Issue:** Whether the onus of proof of fault in trespass lay with P or D.

**Principle:**

- The onus is on the defendant to prove, on the balance of probabilities, that the trespassory act occurred without the defendant's fault (intention or negligence).
  - *"As Watson threw the thing which hit the plaintiff in the eye he is liable for the consequences, unless I am satisfied, on the balance of the probabilities, that he did not intend it to hit her and that he was not negligent in throwing it as and when he did"*

### **Venning v Chin (1974) 10 SASR 299**

- **Facts:** P struck by car driven by D while crossing public road, and P suffered injuries. In first instance, the trial judge held D was guilty of contributory negligence - there was no positive evidence of D's negligence but no positive evidence of absence of D's fault. D appealed.
- **Issue:** does the onus of proof of fault in trespass lay with the P or D?
- **Held:**
  - On appeal, the court disagreed as to the facts and law.
  - Found that D was guilty of negligence because D's view of the traffic was unobstructed at the critical time.
  - Found that there was a different onus of proof for highway cases - when you are on a highway, you bare additional responsibility as a P.
    - In **non-highway cases**, D must prove absence of intention and negligence
      - **Blacker v Waters & McHale v Watson** are binding authority for this
    - In **highway cases**, the onus of proof is reversed: P must prove the intention or negligence of D
      - If you are on a highway, you are engaging in risky behaviour, therefore P must bear onus of fault.
- **Principle:**
  - As a general rule, in trespass, the onus is on D to disprove fault
  - However, in trespass for injury caused in highway accident, the onus is on P to prove fault on part of D

### **Platt v Nutt (1988) 12 NSWLR 231**

- **Facts:** D slammed a glass door during the course of a domestic argument with P. P put out her hand to stop the door, and she was injured when her hand smashed through the glass. She would not have been injured if she had not put her hand out to stop the door.
- **Issues:**
  - Were P's injuries the direct consequence of D's conduct? (established whether trespass occurred)
- **Held:**
  - D was not liable for trespass by battery, as P had failed to prove that her injuries were caused by the direct act of D, rather than as a consequence of her own wilful act in putting out her hand - thus no trespass action, thus P had the onus of proof the trespassory act.
- **Principle:**
  - **Onus of proof of the trespassory act is an issue distinct from onus of proof of fault.**
  - **The plaintiff in trespass must prove that the defendant committed the trespassory act of which the plaintiff complains.**