

Week 1 – Intro

Tort Law vs. Criminal Law

Criterion	Tort Law	Criminal Law
Principle of justice	Corrective justice	Retributive justice
Purpose	Compensation	Punish
Issue	Private	Public
Parties to the action	Individuals or corporations	The State
General standard of proof	Balance of probabilities	Beyond reasonable doubt

Functions of Tort Law

Compensatory

- Creates a system of **compensation** for people who have been injured by a wrong
- Goal** = put the injured person in the position he or she would have been in but for the harm
- Damages awarded as compensation**

Deterrence

- Awarding damages deter future actions that cause similar harm
- Does **not** deter some functions (i.e. dangerous driving)

Intentional Torts

- Trespass to the person
- Trespass to land
- Trespass to chattels or goods
- Conversion
- Retinue
- Action on the case for intentional interference with the person
- Malicious prosecution

Elements for Intentional Torts

1. Directness	- Trespass requires a direct, positive act or interference <i>Hutchins v Maughan</i> – Illegally placed baits beside a creek that killed dogs was to not be a direct act. Defendant would be required to throw the baits to the dogs
2. Fault	- Fault = intention or negligence - Defendant needs only to intend the interference (not the harm) Harm is not required - Example (Intentional): e.g. forming an intention to trespass - Example (negligence): failure to exercise reasonable care caused the interference negligently spitting in the face
3. Damage	Trespass is actionable, damage is not required
4. Onus of Proof	- Generally, the defendant has the onus of disproving fault in the action for trespass (as opposed to action on the case) Le proving consent of plaintiff

Battery

Definition	Battery refers to the intentional contact with the body of another person without that person's consent (ie unlawful touching)
Element 1: Unlawful Touching	- This is the element that distinguishes battery from other forms of trespass - GENERAL PRINCIPLE: that every person's body is inviolate, and that any touching of another person, <u>without lawful excuse</u> and however slight, is capable of amounting to a battery and a trespass: <i>In re F (Mental Patient: Sterilisation)</i> [1990] 2 AC 1; <i>Collins v Wilcock</i> [1984] 1 WLR 1172 - NOTE that it is now established that the touching need not be hostile: <i>Brian Rixon v Star City Pty Ltd (formerly Sydney Harbour Casino Pty Ltd)</i> (2001) 53 NSWLR 98 - Eggs of lawful excuse: consent, children subject to reasonable punishment, lawful exercise of power of arrest, reasonable force in self-defence and prevention of crime Exception: 'Exigencies/ordinary incidents of everyday life' – Collins v Wilcock [1984] 1 WLR 1172
Element 2: Positive Act	The plaintiff must establish that the interference occurred because of a positive act of the defendant, as opposed to a failure to act (ie an omission): <i>Fagan v Metropolitan Police Commissioner</i> [1969] 1 QB 439
Element 3: Directness	Plaintiff must show that the injury was immediate upon the act done: <i>Leame v Bray</i> (1803) 102 ER 724 per Le Blane J
Element 4: Fault	- Except in highway cases, the <i>onus is on the defendant</i> to prove act was neither intentional or negligent Intentional conduct: a <i>desire or purpose</i> upon the part of the defendant to cause an interference but also encompasses situations in which the defendant should have had knowledge, to a <i>degree of substantial certainty</i> that the interference would occur as a result of their act Negligent conduct: requires assessment of whether the defendant <i>failed to exercise reasonable care</i> and as a result caused the interference
Element 5: Damage	Battery is a trespass and therefore actionable per se
Defences	- Consent - Necessity - Contributory negligence (where interference involves negligent conduct) - Self-defence – NOTE effect of Civil Liability Act s52 - Provocation (NOT available as a defence but may be relevant to reduction of aggravated or exemplary damages)

Assault

Definition	Assault occurs when the Def by some act creates in the plaintiff a reasonable apprehension of imminent harmful or offensive direct contact
Element 1: Apprehension of Imminent Contact	Reasonable apprehension of imminent contact Reasonableness: 'Whether or not the apprehension is reasonable is determined objectively with regard to all the circumstances which exist at the time of the alleged assault': <i>Barton v Armstrong</i> [1969] 2 NSWLR 451 - For the plaintiff to have a reasonable apprehension, the def must have the present and apparent ability of carrying out the battery: <i>Bradey v Schatz</i> [1911] St R Qd 206; <i>McClelland v Symons</i> [1951] VLR 157 - Ultimately, it is the effect on the victim's mind that is the material factor and not whether the def actually had the intention or the means to follow through: <i>Barton v Armstrong</i> [1969] 2 NSWLR 451 - Re Imminence – how immediate must the threatened physical violence be after the utterance of the threat which creates the fear? Depends on the facts of each case: <i>Barton v Armstrong</i> [1969] 2 NSWLR 451 per Taylor J "If the threat induces the apprehension of physical violence then I am of the opinion that the law is breached, although the plaintiff does not know that physical violence may be effected": <i>Zanker v Vartzokas</i> (1988) 34 A Crim R 11 <i>McIntosh v Brown</i> [1975] SASR 184 (extracted in Zanker)
Element 2: Positive Act	The plaintiff must establish that the interference occurred because of a positive act of the defendant, as opposed to a failure to act (ie an omission): <i>Fagan v Metropolitan Police Commissioner</i> [1969] 1 QB 439
Element 3: Directness	Plaintiff must show that the injury was immediate upon the act done: <i>Leame v Bray</i> (1803) 102 ER 724 per Le Blane J
Element 4: Fault	- Act is usually intentional. The law is not sure whether negligent assault can be found – there is an assumption that there is no action for negligent assault in tort (see [3.75] of text). However, also note that NSWCA in <i>NSW v McMaster</i> at 205-209 says negligent assault is possible: see [3.70] of text - Subjective intention of the assailant (namely, whether or not to actually carry through with the act) is NOT determinative - It is sufficient to constitute a threat if there had been an intention on the part of the assailant to <i>cause apprehension</i> to the person being assaulted - Except in highway cases, the <i>onus is on the defendant</i> to prove fault – see [3.75]
Element 5: Damage	Assault is a trespass and therefore actionable per se

Defences include: Consent, Necessity, Self-defence – NOTE effect of Civil Liability Act s52, Provocation (NOT available as a defence but may be relevant to reduction of aggravated or exemplary damages), Act was justified by law (e.g. police officer acting within statutory powers)

	False Imprisonment
Definition	A direct act by the def that intentionally deprives the plaintiff of their liberty without lawful justification
Element 1: Total Imprisonment	- The F.I. must be total. There must be detention that prevents free movement in all directions NOT merely obstruction of movement in a particular direction <i>Bird v Jones</i> - Whether there is total detention depends on whether there is a <u>reasonable</u> means of escape: <i>Burton v Davies</i> - The means of escape will <u>not</u> be reasonable if a person is justified in believing that they are being lawfully detained or that they will be physically detained if they attempt to leave: - It is possible that the plaintiff is totally imprisoned without physical boundaries, such as where the individual has not consented but is coerced by the relationship of power and submits to the control of the def: <i>Symes v Mahon</i> - Plaintiff's knowledge of imprisonment is not essential: where the plaintiff is drunk, asleep, unconscious, diminished mental capacity) BUT if a person is unaware that he has been falsely imprisoned and has suffered no harm then they can expect to recover no more than nominal damages: <i>Murray v Ministry of Defence</i>
Element 2: Positive Act	- The plaintiff must establish that the interference occurred because of a positive act of the defendant, as opposed to a failure to act (ie an omission): <i>Fagan v Metropolitan Police Commissioner</i> [1969] 1 QB 439 Principle of "Acting under Direction":- - the Def must cause the false imprisonment - Def may cause the F.I. through his/her own actions by actively promoting others to carry out the imprisonment - Where there are several persons who are actively promoting or causing the detention of the plaintiff, each will be jointly responsible for the imprisonment: <i>Myer Stores v Soo</i> [1991] 2 VR 597 <i>Dickenson v Waters Ltd</i> (1931) 34 SR (NSW) 693 <i>Ruddock v Taylor</i> (2005) 79 ALJR 1534
Element 3: Directness	Plaintiff must show that the injury was immediate upon the act: <i>Leame v Bray</i> (1803) 102 ER 724; <i>Le Blanc J</i>
Element 4: Fault	It is not clear whether negligent false imprisonment can be recognized – see [3.120]
Element 5: Damage	False Imprisonment is a trespass and therefore actionable per se
Defences	- Consent - Necessity - Self-defence – NOTE effect of Civil Liability Act s52 - Provocation (NOT available as a defence but may be relevant to reduction of aggravated or exemplary damages)

BATTERY: In the hypothetical scenario, [insert brief description], the issue is whether [defendant's name] committed battery against [plaintiff]. Battery is defined as intentional contact with another person's body without their consent—unlawful touching. To establish battery, the following elements must be satisfied: (1) **Unlawful Touching**—any touching without lawful excuse may constitute battery, and the touching need not be hostile (*Jarvis v Re F*; *Collins v Wilcock*; *Brian Rixon v Star City Pty* [APPLY FACTS]) (2) **Positive Act**—the interference must result from a positive act by the defendant, not an omission (*Fagan v Metropolitan Police Commissioner*) [APPLY FACTS] (3) **Directness**—the injury or contact must be the immediate consequence of the defendant's act (*Leame v Bray* (1803) 102 ER 724); (4) **Fault**—the defendant must prove the act was neither intentional nor negligent; intentional conduct includes situations where the defendant knew with substantial certainty that interference would occur, and negligent conduct involves failing to exercise reasonable care; (5) **Damage**—battery is actionable per se, so the plaintiff need not prove actual damage. Potential defences include consent, necessity, contributory negligence, self-defence (as per *Civil Liability Act* s52), and provocation (not a defence but may reduce damages). Based on this analysis, I would advise [client name] that an action for battery is likely/unlikely to be successful.

ASSAULT: In the given scenario, [insert brief description], the issue is whether [defendants name] committed assault against the plaintiff. Assault occurs when the defendant, by some act, creates in the plaintiff a reasonable apprehension of imminent harmful or offensive direct contact. To establish assault, the following elements must be satisfied: (1) **Apprehension of Imminent Contact**—the plaintiff must have a reasonable apprehension of imminent contact, determined objectively with regard to all circumstances at the time (*Barton v Armstrong*); the defendant must have the present and apparent ability to carry out the battery (*Bradey v Schatzel*; *McClelland v Symons*); it's the effect on the victim's mind that matters, not the defendant's actual intention or means to follow through (*Barton v Armstrong*); the imminence of the threat depends on the facts of each case, and fear of future violence can suffice if it produces apprehension (*Zanker v Vartzokas* (1988) 34 A Crim R 11); (2) **Positive Act**—the interference must result from a positive act by the defendant, not an omission (*Fagan v Metropolitan Police Commissioner*); (3) **Directness**—the injury or apprehension must be the immediate consequence of the defendant's act (*Leame v Bray* (1803) 102 ER 724); (4) **Fault**—the act is usually intentional, and it's sufficient if the defendant intended to cause apprehension; the law isn't entirely clear on negligent assault, but it may be possible (*NSW v McMaster*); the onus is on the defendant to prove lack of fault; (5) **Damage**—assault is actionable per se, so the plaintiff need not prove actual damage. Potential defences include consent, necessity, self-defence (as per *Civil Liability Act* s52), provocation (not a defence but may reduce damages), and actions justified by law (e.g., a police officer acting within statutory powers). Based on this analysis, I would advise [client/s name] that an action for assault is un/likely

FALSE IMPRISONMENT: In the given scenario, [describe], the issue is whether [defendant] falsely imprisoned [plaintiff]. False imprisonment is a direct act by the defendant that intentionally deprives the plaintiff of their liberty without lawful justification. To establish this, the following elements must be satisfied: (1) Total Imprisonment: the detention must be total, preventing free movement in all directions, not merely obstructing movement in a particular direction (per *Bird v Jones* (1845) 7 QB 742; *Burton v Davies* [1953] QSR 26); a means of escape is not reasonable if the plaintiff believes they are being lawfully detained or will be physically prevented from leaving; imprisonment can occur without physical boundaries if the plaintiff is coerced by a relationship of power and submits to the defendant's control (*Symes v Mahon* [1922] SASR 447); the plaintiff's knowledge of the imprisonment is not essential, but if unaware and suffering no harm, only nominal damages may be awarded (*Murray v Ministry of Defence* [1988] 1 WLR 692); (2) Positive Act—the defendant must have caused the imprisonment through a positive act, including actively promoting others to detain the plaintiff; multiple parties involved can be jointly responsible (*Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439; *Myer Stores v Soo* [1991] 2 VR 597); (3) Directness—the detention must be the immediate result of the defendant's act (*Leame v Bray* (1803) 102 ER 724); (4) Fault—it's unclear whether negligent false imprisonment is recognized; intentional conduct is generally required; (5) Damage—false imprisonment is actionable per se, so no proof of actual damage is necessary. Potential defences include consent, necessity, self-defence (as per *Civil Liability Act* s52), provocation (not a defence but may reduce damages), and actions justified by law. Based on this analysis, I would advise [client]

ACTION ON THE CASE – INTENTIONAL INTERFERENCE	
	Malicious Prosecution
Definition	Procuring <i>with malice</i> the prosecution of another person
Element 1: Malicious proceedings (positive element)	The defendant initiated proceedings against the plaintiff maliciously (acting in a non-legitimate purpose)
Element 2: Reasonableness (negative element)	There was no reasonable or probable cause for doing so
Element 3: Plaintiff's Favour	The proceedings terminated in the plaintiff's favour
Element 4: Damages	Moreover, since malicious prosecution is an action on the case, there must be damage to <u>the life, liberty, reputation or property of the victim. Must be proved by the victim</u>
Case	<i>A v New South Wales</i> (2007) 230 CLR 500, where a police investigator initiated prosecution under pressure without proper cause. - The High Court held that the following two elements are distinct: - Malice (positive) – e.g., acting for a non-legitimate purpose - Absence of reasonable and probable cause (negative) – both subjective and objective tests should be met

	Infliction of Personal Injury
Definition	Intentional but indirect infliction of injury, aiming to cause harm
Element 1: Intentional Indirect Act	Intentional act to the plaintiff, indirectly causing them harm <i>Wilkinson v Downton</i>: The court held that the cause of action lies in willfully doing an act calculated to cause physical harm to the plaintiff and actually causing such harm to her <i>Nationwide News v Naidu</i>: court held that actual subjective intention to cause harm is not required. Reckless indifference to a result will suffice. - extreme bullying eventually causing major depressive disorder and PTSD amounted to intentional infliction of personal injury
Element 4: Damages	Moreover, since infliction of personal injury is an action on the case, there must be damage to <u>the life, liberty, reputation or property of the victim. Must be proved by the victim</u>

Relief for Intentional Interference with the Person

Injunctions may be ordered to prevent an anticipated tort, however damages are most common

Types of Damages			
Normal	Compensatory	Aggravated	Exemplary
- Small amount of money ordered by the Court to be paid to the victim Suffered legal wrong but no actual financial loss	- Financial compensation limited to the extent and amount of loss due to the injury Resulting from intentional tort resulting in long term work absence	- Awarded to the plaintiff due to the deliberate conduct of the defendant which resulted in an affront to the plaintiff. See <i>Myer Stores Ltd v Soo</i>	- Awarded for the purposes of retribution and deterrence only in cases of sufficiently egregious/outrageous conduct. RARE AND EXCEPTIONAL

Intentional Interference with Chattels

- Chattels are goods – **TANGIBLE OR MOVABLE GOODS (NOT INTELLECTUAL PROPERTY)**
- Characteristics include
 - Tangible
 - Can be possessed physically
 - Movable
 - Visible
 - Transferrable by delivery

Is not a Chattel	Is a Chattel
• fixtures • buildings • equipment permanently attached to land • dead bodies (per <i>Doodeward v Spence</i>) ◦ (exception: Egyptian Mummy)	• pets • livestock • motor vehicles, books • computers • mobile phones • artwork • sperm • embryos

Trespass to Chattels

Elements	- Direct interference with Chattels ◦ Interference constitutes trespass (stealing, motor vehicle, cattle stealing, moving good to another place without permission, using good without permission) - In the plaintiff's possession at the time of the interference - Fault (as in trespass to persons) - Plaintiff is not required to prove damages ◦ <i>Penfolds Wines Pty Ltd v Elliott, Latham</i> (actual damage is unnecessary for trespass to chattels).
Title to Sue	Title to Sue (Two Necessary Elements) - Intention to control and exclude others - Actual control - Both per <i>Hocking v Director General of the National Archives of Australia</i> <i>National Crime Authority v Flack</i> Sole owner of property has assumed intention to possess all chattels on their premises, even if they have no knowledge of chattel in question
Defences	• Consent • Lawful authority
Remedies	• Amount equal to value of goods • Consequential losses • Exemplary or aggravated damages

Conversion

Definition	• Alternative claim to trespass • a wrongful taking or destruction of goods, of which the plaintiff had possession at the time of the wrong
Title to Sue	- Possession when the wrongful act was done (<i>Penfolds Wines v Elliott</i>); or - The right to immediate possession at that time (<i>Sadcas v Business & Professional Finance</i>) - A contractual right to possession is not enough - The plaintiff must have some form of legal right to the good (proprietary title).
Fault	• Strict liability offence: does not require a defendant to be at fault • is intentional in the sense that it is sufficient that the defendant intends to deal with the chattel in a manner that is an assertion of dominion contrary to the rights of the person entitled to possession. •
Examples	• Sales in which the wrongful owner transfers property. However, where a wrongful sale gives good title to purchaser, the sale amounts to conversion.

Trespass to Land

Conversion

Definition	• Alternative claim to trespass • a wrongful taking or destruction of goods, of which the plaintiff had possession at the time of the wrong
Title to Sue	- Possession when the wrongful act was done (<i>Penfolds Wines v Elliot</i>); or - The right to immediate possession at that time (<i>Sadcas v Business & Professional Finance</i>) - A contractual right to possession is not enough - The plaintiff must have some form of legal right to the good (proprietary title).
Fault	• Strict liability offence: does not require a defendant to be at fault • is intentional in the sense that it is sufficient that the defendant intends to deal with the chattel in a manner that is an assertion of dominion contrary to the rights of the person entitled to possession.
Causation	• Owner can sue later possessor in case of successive conversion.
Dealings	- Sales in which the wrongful owner transfers property. However, where a wrongful sale gives good title to purchaser, the sale amounts to conversion. - A defendant wrongfully takes a chattel out of the plaintiff's with the intention of keeping it, the defendant will have exercised dominion or control over the chattel contrary to the rights of the owner and will be liable for conversion. - Detention of goods: owner with immediate right to possession can sue for conversion to demand return of chattel
Remdies	• Injunction to prevent conversion • Damages (to restore plaintiff's position prior to conversion) • Forced sale to the converted goods + damages for detention + reasonable price increase + consequential loss + aggravated/exemplary damages

Detinue

Definition	• <i>General and Finance Facilities v Cooks Cars (Romford)</i>: The wrongful refusal to tender goods upon demand of plaintiff, who is entitled to possession • It requires a demand coupled with subsequent refusal • Defendant may have legally acquired the goods
Title to Sue	Right to immediate possession (per Sadcas) - Therefore, no actual possession or ownership required - Plaintiff must prove he/she made a demand for the goods; and - The defendant wrongfully refused to return goods
Demand	• The demand for return of the goods – which may be written or oral – should provide specific, clear and unequivocal directions regarding delivery of goods. Also stipulate any existing consent to the goods is revoked. • The refusal should express ◦ defendant may not be liable in case of reasonable delay (i.e checking entitlement of plaintiff to goods) • Failure to take notice of demand also constitutes refusal
Remedies	<i>Per General & Finance Facilities v Cooks Cars</i> Three forms of order - Judgement for value of chattel and damages for its detention - Court order to return the chattel + damages for detention - Damages equivalent to the value of the chattel at date of judgement