

TRESPASS TO THE PERSON

BATTERY

1. DEFINITION

A voluntary and positive act of the defendant which directly and intentionally or negligently results in contact with the plaintiff's person without lawful excuse.

2. ONUS OF PROOF

P bears the burden of proving all elements of the tort of trespass to the person, on the balance of probabilities, except fault *McHale v Watson*

- D bears the burden of disproving fault, by demonstrating something was an inevitable accident *McHale v Watson*
- This still applies to cases of negligent battery *NSW v Ouhammi*

Exception:

- In highway cases (road accidents) fault is not assumed, the burden falls on P to prove fault *Venning v Chin*

3. ACTIONABLE PER SE

This means that there is no need to prove that P suffered any loss or damage

4. POSITIVE AND VOLUNTARY ACT

Positive = A 'mere passivity or omission' will not normally constitute trespass to person *Innes v Wylie*

Voluntary = Undertaken with the D's free will (actions where the D is unconscious or unable to control their bodily movements do not count *Smith v Stone*)

5. DIRECTNESS

The injury or interference must be direct rather than merely consequential without any intervening acts

- Hutchins v Maughan*: An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act

Novus actus interveniens:

Hutchins v Maughan: P moved his dogs onto D's property after D told P there were poison traps.

- An action is consequential when by reason of some obvious and visible intervening cause, it is regarded, not as part of the D's act, but merely as a consequence of it.

Scott v Shepherd: Innocent bystanders acting to avoid harm, reflexively throwing a firework away.

- Acts done reflexively or in self-preservation do not constitute intervening actions

Southport Corporation v Esso Petroleum Company Ltd: unexpected movement of waves meant the vessel was not responsible for dumping oil that damaged property

- Natural forces may interfere with the immediacy of the act and, in some cases, interfere directness.

6. UNLAWFUL CONTACT WITH P'S PERSON

- Very low threshold: The least touching of another can constitute a battery *Cole v Turner*
- Any touching of another person, however slight may amount to battery *Collins v Wilcock*
- D does not need to physically touch P i.e. spitting in *R v Cotesworth*
- Touching outside the scope of what is reasonably acceptable conduct *Collins v Wilcock*
- Can be through use of tool or instrument to make contact *Scott v Shepherd*
- The act does not need to be accompanied by a degree of hostility or anger *Rixon v Star City* Relevant and useful but not necessary *Cole v Turner*

Implied consent:

- People who move about in society impliedly consent to the sorts of **inflictions of force that occur in everyday life**.
- touch that is "generally acceptable in the ordinary conduct of daily life" is **not battery** *Collins v Wilcock*

7. FAULT

The unlawful interference with the person must be undertaken **intentionally, recklessly or negligently**

- **Intention:** Actually **intending to do the act**, usually obvious on the facts. **No need to intend harm, only physical contact**.
- **Recklessness:** D **knew or should have known that the harm was likely** to occur but **disregarded this substantial risk** and committed the act regardless. **Subjective test** *McNamara v Duncan*
- **Carelessness:** D acted with **less care than a reasonable person**. **Objective test** *Williams v Milotin*

N.B Motive is irrelevant, **D does not have to intend the consequence (the injury), just the act**.

ASSAULT

1. DEFINITION

A **voluntary and positive act** by the defendant that **directly, and intentionally or negligently**, causes the plaintiff reasonably to **apprehend imminent physical contact** without lawful excuse.

2. ONUS OF PROOF

P bears the burden of proving all elements of the tort of trespass to the person, on the balance of probabilities, **except fault** *McHale v Watson*

- **D bears the burden of disproving fault**, by demonstrating something was an inevitable accident *McHale v Watson*
- This still applies to cases of negligent battery *NSW v Ouhammi*

Exception:

- **In highway cases** (road accidents) fault is not assumed, the **burden falls on P to prove fault** *Venning v Chin*

3. ACTIONABLE PER SE

This means that there is **no need to prove that P suffered any loss or damage**

4. POSITIVE AND VOLUNTARY ACT

Positive = A **'mere passivity or omission'** will **not** normally constitute trespass to person *Innes v Wylie*

Voluntary = **Undertaken with the D's free will** (actions where the D is unconscious or unable to control their bodily movements do not count *Smith v Stone*)

5. IMMINENT CONTACT

- Apprehension must be of **physical contact that is imminent**, **mere threats of future harm is not sufficient** *Tuberville v Savage*
 - "If we were not in court then I would not take that from you!", **no assault** as no threat of imminent harm
- Does not necessarily mean violence will commence without delay, **sufficient for it to be 'soon'** *Zankar v Vartzoakes*
 - Woman was told by man in vehicle that he would take her to his friend's place and have his way with her, she apprehended harm, jumped out of the moving vehicle. **Found assault, as P did not know whether assault would come immediately or soon**

6. REASONABLE APPREHENSION

- **Subjective aspect:** Did the plaintiff experience apprehension of imminent contact?
- **Objective aspect:** Would a **reasonable person, in the plaintiff's position, have apprehended** physical contact?

Consider:

- Apprehension is unreasonable if it is beyond the present physical capacity of the D to carry out their threat
- However, actual or apparent present ability suffices because the question is asked from P's perspective
- E.g. If D had an unloaded gun: inability to carry out the threat is irrelevant if lack of ability was not apparent to P
- P must have knowledge of the threat in general, otherwise there can be no assault

7. WORDS AND CONDITIONAL THREATS

- Words alone may constitute assault if those words can give rise to a reasonable apprehension of imminent physical harm
Barton v Armstrong; Knight v The Queen

Conditional threats:

- Threat that harm will come unless the person acts or refrains from acting in a certain way
- If the physical contact that is threatened would be illegal (e.g. constitute a battery) if carried out, then the conditional threat will be an assault *Rozsa v Samuels*
- Question 1: Does the threatener have a legal entitlement to demand the thing that they are asking for? If NO, possible assault. If YES, proceed to question 2.
- Question 2: Would the physical conduct that is threatened to be carried out to assert that claim of right be lawful? If NO, possible assault. If YES, no assault.

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Novus actus interveniens:

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Southport Corporation v Esso Petroleum Company Ltd: unexpected movement of waves meant the vessel was not responsible for dumping oil that damaged property

- Natural forces may interfere with the immediacy of the act and, in some cases, interfere with directness.

9. FAULT

The unlawful interference with the person must be undertaken intentionally, recklessly or negligently

- Intention: Actually intending to do the act, usually obvious on the facts. Don't need to intend to cause harm, only to cause apprehension.
- Recklessness: D knew or should have known that the harm was likely to occur but disregarded this substantial risk and committed the act regardless. Subjective test *McNamara v Duncan*
- Carelessness: D acted with less care than a reasonable person. Objective test *Williams v Milotin*

N.B Motive is irrelevant, D does not have to intend the consequence (the injury), just the act.

FALSE IMPRISONMENT

1. DEFINITION

A total restraint on the plaintiff's freedom that is directly, and intentionally or negligently, brought about by the positive and voluntary act of the defendant without lawful justification

2. ONUS OF PROOF

P bears the burden of proving all elements of the tort of trespass to the person, on the balance of probabilities, except fault
McHale v Watson

- D bears the burden of disproving fault, by demonstrating something was an inevitable accident *McHale v Watson*
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Exception:

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Positive = A 'mere passivity or omission' will not normally constitute trespass to person *Innes v Wylie*

Voluntary = Undertaken with the D's free will (actions where the D is unconscious or unable to control their bodily movements do not count *Smith v Stone*)

5. TOTAL RESTRAINT

- There will be no imprisonment if a person "merely obstructs the passage of another in a particular direction", leaving the person obstructed "at liberty to stay where he is or to go in any other direction if he pleases" *Bird v Jones*
- P must prove that there was "a total restraint of liberty on themselves not a partial obstruction of their will" for "however short a time" *Bird v Jones*

Physical restraint:

- Need total restraint in all directions
- P can prove that there is total restraint when there is an unreasonable means of egress available *McFadzean v CFMEU*

Factors that the court will consider in determining whether an escape is unreasonable:

- Danger *Burton v Davies*
- If the alternate route is not obvious or apparent
- Threat of danger to property or the person *McFadzean v CFMEU*
- The route would involve doing something illegal
- Amount of time and distance required to escape, must be more than a mere inconvenience *McFadzean v CFMEU*
- P's physical health & fitness, experience, clothing and footwear compared to terrain *McFadzean v CFMEU*
- *Jones v Bird*: P prevented from crossing the bridge is not FI, could have taken an alternate path
- *McFadzean v CFMEU*: Anti-logging activists prevented from leaving via vehicle access, but could have left via forest track

Contractual cases:

- Agreeing to undertake an activity, a condition of which is being unable to leave an area may preclude P from later claiming FI should they want to breach that agreement *Herd v Weardale Steel Coke and Coal, Balmain New Ferry v Robinson*
- *Balmain New Ferry*: No FI if P has expressly signed away a portion of their liberty until contract is complete (criticised)

Psychological restraint:

- The question is whether the P completely submitted their will to the demands of the D as to their movements to the degree that they were not exercising their own choice *Symes v Mahon*
- Physical restraint not necessary
- *Myer v Soo*: Took to be questioned by police and then released. P did not have a choice, despite no touching or assault.

Factors that the court will consider in determining whether there is psychological restraint (submission v consent):

- Official capacity of D
- Language used by D (order v request)
- Language used by P (indicating reluctant agreement, scared, can tell they feel the need to comply)

6. KNOWLEDGE OF RESTRAINT

- Necessary for psychological restraint, else no 'complete submission' *Symes v Mahon*
- Not necessary for physical restraint *SA v Lampard-Trevorrow*

7. DIRECTNESS

The injury or interference must be direct rather than merely consequential without any intervening acts

- *Hutchins v Maughan*: Follows so immediately upon the act of the defendant that it may be termed part of that act

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N.B Agency

- The fact that the tort is committed by a principal's agent does not disrupt the element of directness in respect of the principal. The relevant issue is whether the principal D caused and procured the wrongful detention *Coles Myer v Webster*
- Was X 'active in promoting and causing the imprisonment'? or did Y exercise 'independent discretion or judgement'?
- What were the specific instructions of the agent? Did they instruct to imprison? Or was it a broader request? Infer?

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- **Carelessness**: D acted with less care than a reasonable person. Objective test *Williams v Milotin*

N.B Motive is irrelevant, D does not have to intend the consequence (the injury), just the act.

N.B Fault for FI:

- Do not need intention or malice to cause harm *Ruddock v Taylor*, but may be relevant for damages *Myer Stores v Soo*
- FI can be found despite D having a reasonable yet mistaken belief in their right to imprison *P R v Governor of Brockhill Prison*

TRESPASS TO THE PERSON – DEFENCES & REMEDIES

DEFENCES (ONUS ON D TO PROVE ON BOP ANY DEFENCE)

1. CONSENT

The D will have a defence against an act which would otherwise constitute as a trespass to the person, if they can prove on the balance of probabilities that the P has consented to the act *Giumelli v Johnston*