

# TORTS

## NOTES

TRIMESTER 3, 2025

### TRESPASS TO THE PERSON

#### BATTERY

The direct, unlawful physical application of force.

- Shining a flashlight into someone's eyes
- Pulling a chair from someone so they're thrown to the floor
- Striking a horse so it throws its rider
- Cutting someone's hair against their will
- Spitting at someone

#### INTRODUCTION

[Plaintiff] may argue that [defendant] has committed the intentional trespass to the person tort of battery through their action of [what physical contact]. Battery is actionable *per se*, and [plaintiff] therefore need not have suffered any actual injury to pursue an action. However, [plaintiff] must prove, on the balance of probabilities, that [defendant's] act was positive and voluntary, it interfered with [plaintiff], was direct, and involved intentional, reckless or negligent fault.

#### BATTERY

Physical contact which is 'generally acceptable in the ordinary conduct of daily life' is an exception to battery and is not legally actionable (*Marion's Case*). E.g.:

- Crowded lift or brushing against another person in a crowd (*Campbell v Samuels*)
- Security officer placing hand on person's shoulder to get their attention and ask them to accompany them to an interview room (*Rixon v Star City*)
- But, policy officer grabbing arm of woman after she tried to walk away was 'not acceptable' and was battery (*Collins v Wilcock*).

#### 1. POSITIVE AND VOLUNTARY ACT

##### POSITIVE:

The act of [what physical contact] is/is not positive as it did/did not involve an overt bodily movement of [what], and was/was not [merely an omission/passive act] (*Innes v Wylie*).

##### *Innes v Wylie:*

Police officer stood 'entirely passive' in a doorway – held to be an omission, no positive act and no battery.

##### VOLUNTARY:

Additionally, [defendant's] act was/was not voluntary as they did/did not consciously bring about the bodily movement/action that resulted in [act].

#### 2. INTERFERENCE WITH PLAINTIFF

[Defendant's] act did/did not interfere with [plaintiff] as there was/was not physical contact, evident [how]. Pursuant to *Cole v Turner*, 'the least touching of another' is sufficient to constitute a battery.

It is not necessary that [defendant] themselves touch [plaintiff's] body (*Scott v Shepherd*).

### 3. DIRECTNESS

[Plaintiff's injury] must follow so immediately from [defendant's act] that it may be termed part of that act in order to satisfy directness (*Hutchins v Maughan*, per Herring CJ).

#### IF NO INTERVENING ACTS:

On the facts, there are no intervening acts from natural forces (*Southport Corporation v Esso Petroleum*) or human actions that sever the directness between [defendant's act] and the interference with [plaintiff]. [Defendant's] act on its own brought about the interference of [what] with [plaintiff], establishing directness of the act.

#### IF INTERVENING NATURAL FORCE:

[Defendant] may argue that there was an intervening natural force of [what] that severed the directness between [act] and [interference]. Directness will not be made out if there is an intervening natural force (*Southport Corporation v Esso Petroleum*).

On the facts, [natural force] is/is not likely to have intervened in the directness of [act] as [why/how].

##### *Southport Corporation v Esso Petroleum:*

**FACTS:** D's ship was stuck in an estuary. To avoid the ship breaking in half, the captain dumped the oil into the sea. The oil washed up on the shore.

**ISSUE:** Were tides (which brought the oil to shore) an intervening force?

**HELD:** Yes, the oil had not been directly caused by D's act, but rather as a consequence of D's act. The oil had not been directly deposited on the shore but rather carried by the tide to the shore. No trespass.

#### IF INTERVENING HUMAN ACT:

[Defendant] may argue that there was an intervening human act of [what] that severed the directness between [act] and [interference]. Directness will not be made out if there is an intervening human act, including actions of the plaintiff (*Hutchins v Maughan*).

On the facts, [human act] is/is not likely to have intervened in the directness of [act] as [why/how].

\*BUT NOTE: was the action taken reflexively and in self-defence? Go below.

##### *Hutchins v Maughan:*

**FACTS:** P was driving a flock of animals and wanted to graze his sheep on D's unfenced land. D had laid poisoned baits on the land and warned P, but P thought he was bluffing and went to the land. Two of his sheep dogs were poisoned.

**ISSUE:** Was this an intervening human act?

**HELD:** No directness. The poisoning has not followed immediately upon D's laying of baits. The poisoning was consequential on the laying of the baits, because P himself had to intervene by coming to the land and bringing his dogs thereon.

#### INTERVENING HUMAN ACT TAKEN REFLEXIVELY OR IN SELF-DEFENCE:

[Defendant] may argue that there was an intervening human act of [what] that severed the directness between [act] and [interference]. However, human actions by a third party taken reflexively and in self-defence will not break the chain of directness from the defendant's act (*Scott v Shepherd*). The act from [intervening person] was made in self-defence and was reflexive, evident as [how], and will thus not break the chain of directness between [defendant's act] and the contact with [plaintiff].

##### ***Scott v Shepherd:***

**FACTS:** D threw a lighted squid into a crowded marketplace, which fell on a stall and was thrown away by owner to another stall, whose owner threw it away again. It then struck P in the face, taking out his eye.

**ISSUE:** Did the owners who threw the squid break the chain of directness?

**HELD:** Directness satisfied. Injury was direct and immediate upon the D's act of throwing the squid. The two stall owner intermediaries acted 'under a compulsive necessity for their own safety and self-preservation'.

#### **4. FAULT**

[Defendant's act] must have been committed through fault, either intentionally, recklessly, or negligently. The onus is on [defendant] to disprove fault (*McHale v Watson; State of NSW v Ouhammi*). [Defendant's] motive is irrelevant (*Murray v McMurchy*), and it does not need to be established that [defendant] intended/be reckless/be negligent about the results of the conduct, namely [what is result], but merely the interference of [what action] itself. It is not necessary that [defendant's] contact be inflicted with hostility or anger (*Rixon v Star City*).

##### **INTENTIONAL:**

On the facts, taking a subjective assessment, [defendant] intended the physical contact with [plaintiff] as [evident how].

→ D deliberately touching P's arm (*Collins v Willcock*).

##### **RECKLESS:**

On the facts, taking a subjective assessment, [defendant] was reckless in making the physical contact with [plaintiff] as [evident how] (*R v Ireland*).

→ D kicking out at a random and happening to connect with P (*R v Venna*).

##### **NEGLIGENT:**

While negligent trespass is no longer recognised in the UK, Australian courts nevertheless still recognise this fault for intentional torts (*Williams v Milotin*). On the facts, taking an objective assessment, [defendant] was negligent in making the physical contact with [plaintiff] as [evident how].

→ NOT where D is a 12-year-old boy who throws a sharpened piece of steel which hits the eye of a 9-year-old girl with whom he is playing (*McHale v Watson*).

**Williams v Milotin:**

FACTS: P was a cyclist hit by D's truck, but D did not intend to hit him – he was driving negligently.  
HELD: Court held that P could choose to pursue either trespass to person or tort of negligence.

**EXCEPTION TO REVERSE ONUS – HIGHWAY CASES**

**\*ONLY CONSIDER IF THE BATTERY HAS TAKEN PLACE ON A ROAD\***

While the onus is usually on the defendant to disprove fault (*McHale v Watson; State of NSW v Ouhammi*), as the battery of [what action] occurred on a road, [plaintiff] must prove [defendant's] fault of intention, recklessness or negligence (*Venning v Chin*). This exception is justified by referring to the fact that when an individual goes onto a road, they accept that they are exposing themselves to a risk of harm, and that entirely accidental road accidents occur often, and it is difficult to disprove fault in these situations.

- Collisions between vehicles
- Collisions between a vehicle and a pedestrian
- A vehicle running off a road and damaging property adjoining the road
- Contact between goods being carried out of adjacent property and people using road

**5. ACTIONABLE *PER SE***

[Plaintiff] does not need to show damage to bring an action in battery. Thus, although they have not suffered any injury as a result of [what action], this will not affect their claim.

**CONCLUSION**

Overall, [plaintiff] will likely be able to/not able to establish that [defendant] has committed battery through their action of [what] as [why].

\*GO TO DEFENCES

**ASSAULT**

The threat/apprehension of physical contact.

**INTRODUCTION**

[Plaintiff] may argue that [defendant] has committed the intentional trespass to the person tort of assault through their action of [what apprehension/threat]. Assault is actionable *per se*, and [plaintiff] therefore need not have suffered any actual injury to pursue an action. However, [plaintiff] must prove, on the balance of probabilities, that [defendant's] act was positive and voluntary, it interfered with [plaintiff], was direct, and involved intentional, reckless or negligent fault.

**1. POSITIVE AND VOLUNTARY ACT**

POSITIVE:

The act of [what physical contact] is/is not positive as it did/did not involve an overt bodily movement of [what], and was/was not [merely an omission/passive act] (*Innes v Wylie*).

#### VOLUNTARY:

Additionally, [defendant's] act was/was not voluntary as they did/did not consciously bring about the threat or apprehension to [plaintiff].

### **2. INTERFERENCE WITH PLAINTIFF**

[Defendant's] act must interfere with [plaintiff]. To constitute an assault, [defendant's] act must interfere with [plaintiff], causing them to have a reasonable apprehension of imminent physical contact.

#### 1. REASONABLE APPREHENSION

From the perspective of a reasonable person in [plaintiff's] position with knowledge of [defendant's] threat, apprehension of imminent physical contact from [defendant] is/is not likely as [why]. Additionally, to [plaintiff] it was/was not reasonable to assume that it was within [defendant's] present physical capacity to carry out the threat as [why – holding a gun that is not loaded, but P doesn't know].

→ **MERE WORDS:** Although [defendant] has merely used words to apprehend [plaintiff] of physical imminent contact, mere words are sufficient to constitute assault (*Barton v Armstrong* [telephone threats in early hours of morning]).

→ **THREATENING SILENCE:** Although [defendant] has apprehended [plaintiff] through their silence, threatening silence is sufficient to constitute assault (*R v Ireland*).

→ **DOES P NEED TO BE AFRAID/FEARFUL?** Although [plaintiff] was not actually afraid or fearful despite their apprehension of imminent physical contact from [defendant], evident [how], fear is not required to constitute assault (*Bradley v Schatzel*).

→ **CONDITIONAL THREAT:** Although [defendant's] threat is conditional upon [what condition], this is no obstacle to the threat constituting assault (*Rozsa v Samuels*).

\***UNLESS LEGAL RIGHT TO THREATEN:** While a conditional threat can constitute an assault (*Rozsa v Samuels*), [defendant] had a legal right to impose a conditional threat upon [plaintiff] as they were attempting to deter [plaintiff] from [illegal act – burglary].

#### ***Rozsa v Samuels:***

**FACTS:** R and S, two taxi drivers, got into an argument after R jumped a taxi queue. S threatened to punch R in the head, to which R pulled out a knife and said, 'if you try it, I'll cut you to bits'.

**HELD:** Conditional threats will only be an assault if the threat, if carried out, would itself be unlawful. If S had tried to punch R in the head (the condition), R then promised to 'cut S to bits' (the threat). The question is whether R 'cutting S to bits' would then be illegal – or whether it would be acting in self-defence. Here, it would not have been self-defence (not reasonable) to respond to a fist fight with a knife. R committed assault.

### **2. OF IMMINENT PHYSICAL CONTACT**

[Plaintiff's] apprehension must be of physical contact that is imminent and will occur soon, without delay. On the facts, [defendant's] threat was in regard to physical contact occurring [when], and [plaintiff] apprehended [immediate/future] physical contact as a result.

→ **MUST APPEAR TO P TO BE WITHIN D'S CAPACITY:** Although [D] threatened [P] of imminent physical contact which could not actually occur due to [what], this is irrelevant considering [P] did not know [what – empty gun], and thus has reason to believe [type of physical contact] was in [D] present capacity (*Rixon v Star City* [example give – if D holds an empty gun up to P, but P does not know it is empty]).

→ **ONGOING/CONTINUING APPREHENSION OF IMMINENT PHYSICAL CONTACT:**

Although [plaintiff's] apprehension is an ongoing/continuing apprehension of imminent physical contact from [defendant] as [why], the court would likely find this apprehension sufficient as there was a continuing fear in [P's] mind of imminent violence due to [what – ongoing car trip] (*Zanker v Vartzokas*).

\***UNLESS NULLIFYING WORDS TO THE CONTRARY:** However, [P's] ongoing apprehension can be said to have been nullified by [D's] words, [words], which are to the contrary of an ongoing imminent threat of physical contact (*Tuberville v Savage*).

#### *Tuberville v Savage:*

**FACTS:** During the course of an argument with D, the P put his hand on the top of his sword and said, 'if it were not assize time, I would not take such language from you'. It was assize time.

**HELD:** No assault. Conditional threats can only be an assault if the condition can be satisfied. It was assize time, so the condition was not possible. Further, while P's placing of his hand on the top of his sword was a threat, his words nullified this.

→ **NOT IMMINENT PHYSICAL CONTACT:** While [D] threatened [P] with physical contact, similar to *Balven v Thurston*, it is likely the court would not find that this was imminent physical contact as [why].

#### *Balven v Thurston:*

**FACTS:** The D sent threatening texts to his former partner: 'I guna get u big tim I want me money u will die ill waiting u were not faithful' and 'u house will be ashes while u asleep for what u did no good'.

**HELD:** No assault. Neither text threatened of 'imminent' physical contact. The first text did not convey any temporal immediacy. The second text implied some future indeterminate time when the P was asleep.

### 3. DIRECTNESS

[Plaintiff's] apprehension must follow so immediately from [defendant's threat] that it may be termed part of that act in order to satisfy directness (*Hutchins v Maughan*, per Herring CJ).

#### IF NO INTERVENING ACTS:

On the facts, there are no intervening acts from natural forces (*Southport Corporation v Esso Petroleum*) or human actions that sever the directness between [defendant's threat] and the interference with [plaintiff] of a reasonable apprehension of imminent physical contact.

[Defendant's] threat on its own brought about the interference of [apprehension] with [plaintiff], establishing directness of the act.

#### IF INTERVENING NATURAL FORCE:

[Defendant] may argue that there was an intervening natural force of [what] that severed the directness between [act] and [interference]. Directness will not be made out if there is an intervening natural force (*Southport Corporation v Esso Petroleum*).

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**ISSUE:** Were tides (which brought the oil to shore) an intervening force?

**HELD:** Yes, the oil had not been directly caused by D's act, but rather as a consequence of D's act. The oil had not been directly deposited on the shore but rather carried by the tide to the shore. No trespass.

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On the facts, [human act] is/is not likely to have intervened in the directness of [act] as [why/how].

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**FACTS:** P was driving a flock of animals and wanted to graze his sheep on D's unfenced land. D had laid poisoned baits on the land and warned P, but P thought he was bluffing and went to the land. Two of his sheep dogs were poisoned.

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**HELD:** Directness satisfied. Injury was direct and immediate upon the D's act of throwing the squid. The two stall owner intermediaries acted 'under a compulsive necessity for their own safety and self-preservation'.

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*Ouhammi*). [Defendant's] motive is irrelevant (*Murray v McMurchy*), and it does not need to be established that [defendant] intended/be reckless/be negligent about the results of the threat, namely [what is result], but merely the interference of [what action] itself.

### **INTENTIONAL:**

On the facts, taking a subjective assessment, [defendant] intended the threat of imminent physical contact to [plaintiff] as [evident how].

### **RECKLESS:**

On the facts, taking a subjective assessment, [defendant] was reckless in making a threat of imminent physical contact to [plaintiff] as [evident how] (*R v Ireland*).

### **NEGLIGENT:**

While negligent trespass is no longer recognised in the UK, Australian courts nevertheless still recognise this fault for intentional torts (*Williams v Milotin*). On the facts, taking an objective assessment, [defendant] was negligent in threatening imminent contract to [plaintiff] as [evident how].

→ NOT where D is a 12-year-old boy who throws a sharpened piece of steel which hits the eye of a 9-year-old girl with whom he is playing (*McHale v Watson*).

#### ***Williams v Milotin:***

FACTS: P was a cyclist hit by D's truck, but D did not intend to hit him – he was driving negligently.  
HELD: Court held that P could choose to pursue either trespass to person or tort of negligence.

### **EXCEPTION TO REVERSE ONUS – HIGHWAY CASES**

#### **\*ONLY CONSIDER IF THE ASSAULT HAS TAKEN PLACE ON A ROAD\***

While the onus is usually on the defendant to disprove fault (*McHale v Watson*; *State of NSW v Ouhammi*), as the battery of [what action] occurred on a road, [plaintiff] must prove [defendant's] fault of intention, recklessness or negligence (*Venning v Chin*). This exception is justified by referring to the fact that when an individual goes onto a road, they accept that they are exposing themselves to a risk of harm, and that entirely accidental road accidents occur often, and it is difficult to disprove fault in these situations.

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### **5. ACTIONABLE *PER SE***