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Trespass to the person

Trespass Family: Common Elements

Trespass to Person	Actionable per se?	Interference to P	Positive and voluntary act by D	Directness	Fault
Battery (protects P's physical integrity)	Yes	physical contact	• What is a 'positive' act?	• What is 'directness'?	Either: • intention; or • negligence
Assault (protects P's mental integrity)	Yes	• a reasonable apprehension of • imminent physical contact	• What is a 'voluntary' act?		• not tort of negligence • acted with less care than a RP would have
False Imprisonment (protects P's personal liberty)	Yes	total restraint			

Definition: A battery is a positive and voluntary act by D, done intentionally or negligently, which directly causes physical contact to P

Definition: An assault is a positive and voluntary act by D, done intentionally or negligently, which directly causes P to reasonably apprehend imminent physical contact

Definition: A false imprisonment is a positive and voluntary act by D, done intentionally or negligently, which directly causes P's total restraint

Intro:

In order for [P] to sue [D] in trespass, [P] need not have suffered any damage.

Battery

Intro:

[D] may be liable for battery. Battery is a voluntary and positive act of the defendant which directly and intentionally or negligently results in **contact** with the plaintiff's person.

Elements:

1. PVA

[D's] act is not a passive conduct or omission (*Innes*) and was done consciously. This element is satisfied.

2. Direct application of Force with P

Any touching of another person, however slight, may amount to a battery. The force need not be out of anger or hostility (*Collins*). Additionally, the force may be applied through a medium (*Fagan*). In order to satisfy the element of directness, [D's] act of [action] alone must be enough to cause harm to [P]. That is, [P's] harm must follow so immediate upon [D's] act that they may be regarded as part of the same act (*Hutchins v Maughan*).

D may argue that the force is that generally acceptable in everyday life and touching which is generally acceptable in everyday life will not constitute a battery (*Collins*). However, what is 'generally acceptable' will depend on the context of the case (*Rixon*). On the facts,

[D] will argue that (--possible intervening act--) broke the chain of causation and rendered [P's] harm a mere consequence of the [D's] act.

(--The harm--) had not followed so immediately upon the defendants' (--tortious act--) that the (--harm--) could be regarded as part of the same act as the (--tortious act--). Rather (--the harm--) was consequential upon the (--tortious act--) because in order for (--plaintiff to be harmed by tortious act--) the plaintiff had to himself intervene by (--intervening act of P--) and (--how intervening act caused harm--). Had there been no (--intervening act--) the plaintiff would've suffered no injury from the defendant's act (--The harm--) had not been caused directly by the defendant's act. Rather (--the harm--) was a mere consequence of D's act. The (--harm--) occurred directly as a result of the (--natural force--)

Therefore, there were no intervening acts means (--plaintiff's harm--) follows so immediately upon (--defendant's act--) that it may be termed part of that act (*Hutchins v Maughan*). On balance, this element is likely/unlikely satisfied.

3. Fault of Defendant

It must be established whether [D] intended to cause contact. On the facts..... IF intention is not made out, [D] may be negligent in causing contact with [P] (*McHale v Watson*).

On the balance, fault is likely made out.

Conclude:

On the balance, [D] maybe liable for battery.

Assault

Intro:

[D] may be liable for assault. Assault is a voluntary act and a **positive act** by the defendant that **directly**, and intentionally or negligently causes the plaintiff to reasonably to **apprehend** imminent physical contact

Elements:

1. PVA

- a. **Word alone sufficient as OVA (*R v Ireland*)**
- b. **Words negated threat (*Tuberville v Savage*)**
- c. **Conditional threat? IF actually carried out, would the threatened contact be unlawful (*Rozsa v Samuels*)?**
 - i. If the threat itself is not unlawful, it is not sufficient for assault.
 - ii. If threat itself is unlawful, it is sufficient for assault even if threat is made to prevent [P] acting unlawfully.

The physical contact must be the consequence of [D] positive and voluntary act; it cannot be a mere omission or 'passive like a door' (*Innes v Wylie*). On the facts [D's action] which is a positive act because...

Moreover, the very fact that (--justify how the act is conscious and willed) proves the [D] acted voluntarily, hence the element of a positive and voluntary act on behalf of [D] is satisfied

2. Threat of imminent harmful or offensive Contact

- a. 'imminent' – it must be considered how soon after the threat would the threatened contact be carried out.

On balance, this element is likely satisfied.

3. Reasonable Apprehension

- a. 'Apprehension' – [P] subjectively perceives/expect the harm, fear is not required.
- b. 'Reasonable' – A RP in [P's] position [would/would not] apprehend the harm, considering D's present ability to inflict contact.

On the balance, this element is likely/unlikely satisfied.

4. Directness

- a. Did P's apprehension follow so immediately upon D's threat (*Hutchins v Maughan*)?
- b. No intervening act/event (*Scott v Shepherd*)?

In order to satisfy the element of directness, [D's] act of (--assault--) alone must be enough to cause the apprehension harm to [P]. That is, [P's] apprehension of harm must follow so immediate upon [D's] act that they may be regarded as part of the same act (*Hutchins v Maughn*). [D] will argue that (--possible intervening act--) broke the chain of causation and rendered [P's] harm a mere consequence of [D's] act.

5. Fault

- a. Intention to create apprehension, not necessarily to actually inflict threatened contact (*Rixon*)
- b. Negligence in causing apprehension (*McHale v Watson*)

In order for the fault element to be made out, D must have intended, or be careless, in regard to the OUTCOME of the action, rather than simply the act itself.

In Australia, trespass can be intentional or negligent (*Williams v Milotin*)

- **Actual intention:** someone actually intends the outcome of their action
- **Implied intention:** The doctrine of substantial certainty: if a defendant acts in a certain way, and a reasonable person in D position would believe that a particular result would follow, he will be deemed to have intended the result. (American authority)
- **Recklessness:** circumstances where a defendant knows that the outcome might ensue from particular actions but undertakes them anyway. (English authority)
- **Negligence:** where D undertakes the relevant action with a level of care that is less than the reasonable person

Onus Of Proof: generally the case that D must show that the trespassers act was neither intentional or negligent (*McHale*)

Exception: highway accidents (*Venning v Chin*)

- It is up to the plaintiff to show that the defendant's action had been intentional or negligent.
- But what constitutes a highway accident? Venning ruled:
 - There's a collision between vehicles on the highway;

- There is a collision between a vehicle and a pedestrian on the highway;
- A vehicle runs off the highway and damages property are joining the highway; or
- There is contact between goods being carried out of a property adjacent to a highway, and people using the highway

On the facts, [D] clearly had an intention to create apprehension, not necessarily inflict contact (*Rixon*) as [reason].

Negligence in causing apprehension (*Williams v Milotin*)

Conclude:

On the balance the court is likely to find [D] [is/is not] liable for assault of [P] through [Action].

False Imprisonment

Intro:

[D] may be liable for false imprisonment of [P]. False imprisonment is a positive and voluntary act by D, done intentionally or negligently, which directly causes [P's] total restraint. It is actionable per se, i.e., P does not need to have been injured/damaged. P bears the burden of proving all elements of the tort of trespass to person except fault. In Australia, fault is assumed for trespass cases (*McHale v Watson*). Burden falls on D to disprove fault on the BOP. This exception does not apply to road accident cases (*Venning v Chin*).

Elements:

1. PVA?

On the facts, [D's] act of [action] is PVA. This element is likely satisfied.

2. Restraint in All direction → 'Total restraint'

[P] will argue that they were under total restraint (*Bird v Jones*). [P] was prevented from passing (--insert boundary--). This satisfy the requirement of *Bird v Jones* that [P] was totally restrained rather than under partial obstruction. Thus, this element is satisfied.

a. Nature of restraint

- i. Physical
- ii. Psychological

b. Degree of restraint

- i. If physical –

Must be total restraint of P's liberty, **No imprisonment** if person "**merely obstructs passage of another in a particular direction**" leaving the person "**at liberty to stay where he is or to go in any other direction he pleases**" (*Bird v Jones*)

There must be no reasonable means of escape (*McFadzean*). Reasonable considers obviousness, safety and practicability. On the facts.... If P has means of escape from the place of imprisonment but that means is not a reasonable one, the imprisonment will be deemed to be total.

There is no claim in false imprisonment if there is a reasonable means of egress, regardless of whether the plaintiff makes use of it or hesitates before using it (*McFadzean v CFMEU*).

If P not actually restrained in specific place and even if not apparent to others that P was being restrained, restraint to P may still be deemed to be total

- ii. If psychological –
 1. [D's] coercive conduct has overcome [P's] will. P totally submits to restraint by [D] (*Symes v Mahon*).
 2. If P consents to what D wants (*Myer Stores*)
 - c. **Knowledge of restraint?**
 - i. If psychological, necessarily involves P knowing (*Symes v Mahon*)
 - ii. If physical, not necessary for P to know (*Meering v Graham-White Av Co*)
 - d. **Duration of Restraint** – However short is sufficient (*Bird v Jones*)
 - e. **Restraint pursuant to contract?** (*Balmain New ferry; Herd v Weardale*)
- 3. Direct Interference**
- a. [P's] total restraint follows so immediately upon [D's] act of [actions] (*Hutchins*). There are no intervening acts (*Scott v Shepherd*). Therefore, this element is likely made out.
 - b. Did D actively promote, procure, or participate? (*Myer Stores; Coles Myer*)
- 4. Defendant at Fault**
- a. Intention to totally restrain P
 - b. Negligence in causing restraint (*Williams v Milotin*)

Conclude

On the balance, the court is likely to find [D] liable for false imprisonment of [P].

Defences

Consent

Intro:

D will have a defence against an act which would constitute a trespass to the person if the plaintiff has *consented* to that act (*Marion's case*). Consent must be given freely by the claimant, without duress, fraud or misrepresentation. The onus on D to establish existence of consent (*Secretary, Department of Health & Community Services*). It must be proved that [P] actually consented, it is not sufficient to establish [D] honestly and reasonably thought [P] consented. For the defence of consent to operate successfully, it is necessary that the trespass that occurs falls within the scope of that which is consented to (*McNamara v Duncan*).

Elements:

1. Consent can be given expressly or impliedly

- Express consent can be written or oral. On the facts, there is/is not express consent as [reason].
- Implied consent can/cannot be inferred by [P]'s conduct in the circumstances as [reason].

2. Consent must be real and be given voluntarily

- Consent must not be vitiated by duress (*Symes*), fraud or [P's] incapacity. On the fact.... Thus this element is/is not satisfied.
- Medical cases →