

# Torts – 70311

---

<b>INTRODUCTION</b>	<b>3</b>
<b>TRESPASS</b>	<b>5</b>
<b>TRESPASS TO THE PERSON</b>	<b>7</b>
<b>TRESPASS TO LAND</b>	<b>15</b>
<b>TRESPASS TO GOODS</b>	<b>21</b>
<b>DEFENCES TO INTENTIONAL TORTS</b>	<b>22</b>
<b>ACTIONS ON THE CASE FOR INDIRECT INJURY</b>	<b>32</b>
<b>INTRODUCTION TO NEGLIGENCE; DUTY OF CARE &amp; PUBLIC POLICY</b>	<b>35</b>
<b>NEGLIGENCE: BREACH OF DUTY OF CARE</b>	<b>43</b>
<b>NEGLIGENCE: PROOF OF BREACH &amp; CAUSATION</b>	<b>53</b>
<b>NEGLIGENCE: REMOTENESS OF DAMAGE</b>	<b>63</b>
<b>DEFENCES TO TORTS INVOLVING NEGLIGENCE</b>	<b>68</b>
<b>CATEGORIES OF DUTIES OF CARE</b>	<b>86</b>
<b>PURE ECONOMIC LOSS; NEGLIGENT MISSTATEMENT</b>	<b>97</b>
<b>STATUTORY AUTHORITIES, DEFECTIVE STRUCTURES AND OMISSIONS</b>	<b>106</b>
<b>VICARIOUS LIABILITY; NON DELEGABLE DUTIES; CONCURRENT &amp; PROPORTIONATE LIABILITY</b>	<b>115</b>
<b>WORKERS COMPENSATION + OTHER</b>	<b>122</b>
<b>DETINUE &amp; CONVERSION</b>	<b>127</b>
<b>NUISANCE</b>	<b>131</b>

**DEATH**

**137**

# Introduction

---

## What is a Tort?

- A civil wrong or injury which the law will redress with damages
- The law of torts is concerned with compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.

## Aims/Concerns' of Torts:

- Compensation – putting the injured party in the same position they would have been, had the wrong not occurred.
- Deterrence – preventing people from acting in harmful ways by deterring them from engaging in wrongful future conduct.
- Loss spreading – shifting the costs that befall on the victim to another party, the tortfeasor. In modern times, many tortfeasors are insured, so the loss spreading falls upon the insurer, who then passes this on to its customers.

## Workers Compensation

- With the introduction of workers compensation legislation, injured workers pursuing common law claims has greatly decreased, and the common law doctrine of negligence is on the verge of legislative extinction

## Motor Accident Compensation

- NSW does not have 'no fault' compensation, but does have some special provisions under the *Motor Vehicle (Compensation) Act 1979* for victims of 'blameless accidents', including specific provisions for children.
- For those in NSW who aren't injured in 'blameless accidents' or who are 16 years or older and don't satisfy requirements for Lifetime Care and Support Scheme, the common law is their only remedy → but for non-economic and economic loss claims, there are restrictions.

## Criminal Injuries Compensation

- Criminal compensation schemes have been widely enacted to ensure that victims are somewhat compensated → it is unlikely that the criminal would have finances to repay the claim

## Tort Reform Legislation

- Great fear of being sued led to detrimental effects on community activities, the Ipp Report found → legislation and courts have reflected this by placing greater weight on the proposition that people will take reasonable care for their own safety, swinging pendulum towards defendant → Former Justice Ipp does believe the changes have made it overly difficult for plaintiffs.

- With different statutes around Australia, different classes of accidents and plaintiffs will be governed by different statutory schemes, resulting in different liability rules and rates of comparison.
- Reasons for reform:
  - = Insurance Crisis
  - = Unaffordability of 'generous' awards of damages
  - = Bias of common law of tort toward plaintiffs
  - = Need for more 'personal responsibility'

### **Case v Trespass**

- **Case:** Case protects a plaintiff from indirect interference (i.e. D leaving throwing a log on the road, and P coming along and tripping over it and receives injury)
- **Trespass:** Trespass protects a plaintiff from a direct interference (i.e. D throwing a log at P, injuring them)

### **What interests does Tort Law protect?**

- Personal safety and security
- Safety of property
- Reputation
- Psychiatric/Emotional damage
- Economic losses

# Trespass

---

**Proof of Damage** → actionable per se – it is not necessary to prove damage

**Nature of interference** → writ based on direct interference

## Onus of Proof

- Plaintiff must establish that the defendant caused the act.
- On the defendant to prove a lack of fault/negligence, except in highway cases: *McHale v Watson (1964)*

## Elements:

### A positive voluntary act – intentional or negligent act: fault

- Intentional deliberate act or a negligent act (*Williams v Miltonin*) directly causing interference – a wilful act
- No trespass without fault: *Holmes v Mather, Stanley v Powell, McHale v Watson*

#### *Holmes v Mather*

= Defendant alleged to have trespassed when horses which were drawing defendant's carriage went out of control and hit plaintiff  
 = COURT HELD: Not intentional or with fault as servant did his best to avoid injury but was unable – it was not the act of guiding the horses away from the plaintiff which had brought the horses to the place where the accident happened

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

= D in shooting party, shot at pheasant which glanced off a tree and hit plaintiff in the eye, causing blindness + other injuries  
 = COURT HELD: It was an accident, and cannot be a trespass as there was no negligence or lack of caution.

#### *Williams v Milotin (1957)*

= P was struck by D while riding his bike – with D claiming that P couldn't sue for trespass as it was outside statute of limitations  
 = COURT HELD:

#### *McHale v Watson*

= COURT HELD: "Is it for the defendant who threw it to prove an absence of intent and negligence on his part?" → YES

- In determining negligence, reasonable person test applies.

### Directness/Interferes with the plaintiff

- The interference in trespass must be direct, not merely a consequence of it: *Reynolds v Clark + Scott v Shepherd*

- *Hutchins v Maughan [1947]*: a trespass will lie when the injury “follows so immediately upon the act”
- “Did the impact follow so closely on the D’s act that it might be considered part of that act”: *Sir John Salmond (1945)*
- Directness does not require physical contact between the plaintiff and the defendant: *Scott v Shepherd (1773)*

### *Scott v Shepherd (1773)*

= Firework thrown in crowded marketplace, fell on Yate’s stall and Will picked it up and threw it on, landing on Ryal’s stall, who threw it on, later exploding and injuring plaintiff

= COURT HELD: Intermediate acts of Willis and Yates do not purge original tort in the defendant – they were acting in the agony of the moment in self-preservation, as if part of an unbroken chain

= DISSENT: Blackstone J dissented saying that trespass was only committed against Yates/

### *Hutchins v Maughan [1947]* Lack of intervening act:

= Defendant laid on unfenced land where D grazed his horses, with P’s dogs coming along and eating the bait, dying → this was after D had told P about the bait

= QUESTION TO BE ANSWERED: Injury to dogs was immediate or consequential – direct occasioned by D’s actions, or merely consequential upon that act.

= COURT HELD: No trespass as the act of laying the baits by itself did not intervene with P’s property → “the injury suffered cannot be said to have follow so immediately in point of causation upon the act of the defendant as to be termed part of that act.”

### Is actionable per se

- No requirement to show damages, just need to establish trespass.
- May be awarded where there is injury or damage to bodily integrity or person’s dignity, rather than physical injury.
- Damages may be awarded by the way of punishment (exemplary damages) OR for injured feelings (aggravated damages)
- Exemplary damages may be mitigated by plaintiff’s conduct (eg, provocative: *Fontin v Katapodis (1962)*)

# Trespass to the person

---

Forms of Trespass to the person include:

- Battery
- Assault
- False Imprisonment

## Battery

- The direct and intention act by a person which causes contact with body of another.

### Elements of Battery:

1. An intention voluntary act by a person
2. Which directly
3. Causes contact with the body of another

### Direct and intentional act

- Must be willed/voluntary act

### Contact with the body

- Positive, affirmative contact that is outside accepted usages/accidental contacts of daily life – spitting in someone’s face, unwelcome kiss, taking something from P’s hand, throwing boiling water at plaintiff
- “Any touching of another person, however slight might amount to battery”: *Collins v Wilcock [1984]*
- Concept historically was referred to as “touching in anger”: *Cole v Turner (1704)*. It is unsure what “in anger” means,

= Hostility means unwanted contact: *Collins v Wilcock [1984]* where the police officer gave more contact than was generally accepted in getting someone’s attention.

### *Rixon v Star City [2001]*

= Rixon was approached at casino by security guard, who grabbed him on the shoulder, turned him around and asked him if he was Brian Rixon

= COURT HELD: No battery as the contact was for the purposes of engaging Mr Rixon and not in excess of what is accepted in everyday life.

- Mere omission cannot amount to battery, as it must be a positive act. However, an omission can turn into a positive act, as seen in *Fagan v Metropolitan Police Commander*

## Assault

- Any direct threat by a person which intentionally or negligently creates in another an apprehension of imminent, harmful or offensive contact.

### Elements of Assault

1. An intentional voluntary act or threat by the defendant
2. Which directly creates in another person (the plaintiff)
3. A reasonable apprehension of imminent contact with that person's body

### Intention

- The threat must be intentional

#### *Cranston v Consolidated Meat Group Pty Ltd [2008]*

= Incident arose amongst two employees working at the meat factory, where D told P to go away, gesturing with his hand that also carried a knife. P sued for assault, saying she was apprehended imminent contact

= COURT HELD: Use of knife was unconscious, resulting solely from the fact that D used the knife in his course of work and was by no means intended to create fear in the mind of P.

### Act or threat

- Can be threatening acts, words or both.

#### *NSW v Ibbett (2006)*

= Police followed D's son into garage at night, causing a commotion that D heard and went into investigate, lifting up the garage finding a police officer pointing a gun at her son, and then at D herself, demanding that D let in "his mate."

= COURT HELD: Confrontation was more than enough to satisfy requirements of assault.

### Do words alone constitute a threat?

- No clear authority but words alone may constitute assault if the oral threat causes apprehension of imminent bodily contact

#### *Barton v Armstrong [1969]*

= COURT HELD: "It is a matter of the circumstances" as to whether words alone will constitute assault BUT the telephoning of somebody during the middle of the night, in a threatening tone to instil fear in one's mind, is more than just mere words → mere words becoming conduct?

- Silence on the phone may constitute assault: *R v Burstow; R v Ireland [1998]*

### Apprehension

- It is necessary to establish an intention to cause apprehension in the plaintiff that a battery is about to occur.
- OBJECTIVE TEST: Would a reasonable person in the plaintiff's position have been apprehensive of imminent contact → not the individual themselves

- Exception to this rule where D knows P to be timid and plays on that fact:  
*MacPherson v Beath (1975)*

### Apprehension must be of imminent harmful contact

- The apprehension must be of imminent harmful contact, but does not necessarily related to immediacy in terms of time.

#### *Zanker v Vartzokas (1988)*

= Woman got into man's van for a lift, he started to ask for sexual favours, she wanted to get out what he accelerated and said that the was taking her to his mate's house, who would "fix her up". She jumped out of the car, suffering some bodily injuries.

= COURT HELD: Still imminent violence, as it was future violence that was going to come to fruition as soon as she left the car.

= "A present fear of relatively immediate, imminent violence was instilled in her mind ...and that fear was kept alive ... by continuing progress with her a prisoner."

#### *MacPherson v Brown (1975)*

= Professor Gibbs was surrounded by a group of 20 students, who were demanding answers. Gibbs said he feared for his safety if he tried to get away and that his progress to get away would

= ZELLING J (minority): The defendant kept the crowd surrounding Gibbs to make him feel as if he couldn't/scared to attempt to leave.

### Conditional Threats

= If the conditional threat instils a reasonable apprehension in the mind of the plaintiff, it is assault.

#### *Tuberville v Savage (1669)*

= D said to another "if it weren't assize time, I would not take such language from you" while putting his hand on his sword

= COURT HELD: Not assault – D was saying he would not fight P because the judges were in town.

#### *Rozsa v Samuels [1969]*

= Passenger threatened to punch taxi driver, whereon taxi driver raised a knife saying, "I will cut you to bits if you try it." And moved out of the taxi

= COURT HELD: Assault, defendant had other options to respond to the threat → it was inproportionate to the initial threat

- Reasonable means of self defence: A went beyond the this test, as his means of self defence were not reasonable and in proportionate to the original threat.

- It can still be assault in conditional threats if the individual complies:  
*Police v Greaves*

#### *Police v Greaves [1964]*

= Robber told police officer that if he moved any forward, he would put a knife through his guts – police officer withdrew

= COURT HELD: Still assault as though the threat was conditional, "the menacing attitude of the respondent caused the police officers to retire."

## False Imprisonment

- A tort for an individual who has been unlawfully restrained/detained

### Elements of False Imprisonment

1. A positive voluntary act of the defendant
2. Directly causing
3. The *total deprivation* of the liberty of the plaintiff
4. Without lawful justification

### Directness and intention

- No authority for negligently committed false imprisonment
- D must have an intention to imprison – no malicious intent is required.

#### *Ruddock v Taylor (2005)*

= Taylor says he was falsely imprisoned after he was detained following the cancellation of his VISA

= COURT HELD: High Court was lawful imprisonment as the cancellation of the VISA was lawful, as was the subsequent imprisonment because it was based on 'reasonable suspicion' that he was an unlawful non-citizen because of the minister's cancellation of the VISA

= Spiegelman CJ in NSW Court of Appeal applied *Scott v Shepherd* to the fact

- *Cowell v Correct Services Commission (1988)*

= A case of a failure to release a prisoner on the correct date at the conclusion of his sentence, because of mis-calculation of remissions.

- Must prove that D had directly participated in the false imprisonment:

*Watson v Marshall*

#### *Coles Myer Ltd v Webster (2009)*

= Two P's were accused of using false credit cards, with D saying that this was the case – two cops found Ps in part of mall, prevailing on two Ps to go with them to part of mall where manager in D's company, identified them – Ps were questioned and strip searched. Ps then sued for false imprisonment, but it was found that the police were acting independently. The case was heard on appeal.

= COURT HELD: Ps were successful in suing for false imprisonment – as D(manager) had deliberately and falsely invented accusations to cops, which led to false arrest → for a person to be liable for false imprisonment as a result of another party arresting/imprisoning, D must have 'actively sought' + 'manifested an intention that there be an imprisonment'

- Refers to *Scott v Shepherd* 'mischievous element'

### Total deprivation of Liberty

- There must be a total deprivation of liberty – does not have to be a prison: can be a car, a room, even a circle of people surrounding another individual.
- *Bird v Jones (1845)*: "by that boundary the party imprisoned must be prevented from passing ... imprisonment includes the notion of restraint within some limits defined by a will or power exterior to our own."