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Torts

Distinction between trespass and action on the case

Trespass vi et armis (trespass) and trespass on the case (case) can be distinguished in five respects:

1. Directness of injury
2. Need to prove damage
3. Fault
4. Onus of proof
5. Limitation period for cause of action

1. Directness of injury

- *Reynolds v Clarke*
 - The defendant fixed a spout causing rainwater to be drained onto the plaintiff's land, causing damage to the plaintiff's house
 - Fortescue J *held*: the flowing of water was 'consequence of another act' (that is, defendant fixing spout), not 'immediate wrong' → action on case
 - If a person throws a log and it hits someone → trespass
 - If a person throws a log, and someone tumbles over it → case
- *Scott v Shepherd*
 - The defendant lit a squib and threw it into a crowded market. It landed in Yates' stand and Yates threw it over the marketplace. It landed in Ryal's stand and Ryal threw it over the marketplace. The squib exploded in the plaintiff's face, who lost an eye.
 - Blackstone J *held*: "The settled distinction is that, where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case"
 - Trespass = "direct or immediate". Case = "mediate or consequential".
 - De Grey J *held*: Willis and Ryal were under a compulsive necessity for their own safety and self-preservation, and did not intend to harm the plaintiff. The original throwing caused the injury → trespass against defendant
 - Blackstone J (dissenting): Yates and Ryal exceeded self-defence. It should be trespass against Ryal.
- *Hutchins v Maughan*
 - The defendant laid baits along a river days before the plaintiff arrived. The plaintiff's dogs picked up baits and died.
 - *Held*: An injury is direct "when it **follows so immediately upon the act of the defendant** that it may be termed part of that act"
 - It is consequential if there is some "obvious and intervening cause" that is "not part of the defendant's act" but a "consequence of it"
 - If the bait was thrown to the dogs → trespass
 - However, the plaintiff brought the dogs to the river, which caused the injury. It was "consequential" on the defendant laying the bait and "not immediately or directly occasioned thereby".

- *Southport Corp v Esso Petroleum Co*
 - The captain released oil to prevent the ship from sinking. The currents, tides and waves caused the oil to flow to the plaintiff's land, which caused damage.
 - *Held*: Since the oil was moved by intervening event of currents, tides and waves → action should be on case, not trespass
 - Even if trespassory act of captain, action should be on case because the employer is vicariously liable

2. Need to prove damage

- Trespass is actionable per se, that is, no requirement to prove damage
- Case requires proof of material loss or damage. It is an essential element of case.

Rule of *Williams v Holland*

- *Williams v Holland*
 - *Held*: Added flexibility for direct acts to be brought on either trespass or case depending on fault
 - If action involves "carelessness and negligence", the Plaintiff is "at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act"
 - Therefore:
 - direct act and intentional → trespass only
 - indirect act → case only
 - direct act and negligent → choose between case or trespass
- *Williams v Milotin*
 - The plaintiff was injured whilst riding a bike by a negligent truck driver. The injuries were sustained directly by the impact of the truck but negligence of the driver. The matter started 3.5 years after tortious act took place.
 - SA law mandated limitations of 3 years (trespass) and 6 years (case)
 - HCA *held*: adopted *Williams v Holland* into Australian law. Without intention, the plaintiff can choose to bring trespass or case for direct injuries.
 - It is irrelevant that the facts can be brought on trespass or case. Since the matter was brought on case, the 6 year limitation applies.

3. Fault – intention or negligence is an essential ingredient of trespass

- *Weaver v Ward*
 - The defendant shot and wounded the plaintiff in a military training exercise
 - *Held*: Everyone is "answerable to trespass" and "no man shall be excused of a trespass...except it may be judged utterly without his fault"
 - Example: taking a hand and using it to strike someone; if someone ran in front of a discharged bullet
- *Holmes v Mather*
 - The defendant's horses lost control of the carriage after seeing a dog, which caused injury to the plaintiff.
 - Question: is whether there is liability where there is no fault.
 - *Held*: Fault is an essential element of **trespass**

- *Stanley v Powell*
 - The defendant's bullet bounced from a tree and hit the plaintiff's eye
 - *Held*: The defendant was found to not have acted negligently or intentionally and the injuries were utterly without his fault → no liability

4. Onus of proof of fault

In trespass, the plaintiff has onus to prove the trespassory act but the defendant has onus to disprove fault. In case, the plaintiff must prove all elements and the defendant has no onus:
CLA s 5E (for negligence)

- *Blacker v Waters*
 - The defendant's bullet ricocheted and hit the plaintiff's eye. The defendant contends that he did not intend and was not negligent
 - *Held*: Defendant has onus to disprove fault but failed to show that he had taken all reasonable care.
- *McHale v Watson*
 - The 12 year old defendant created a metal dart and struck the plaintiff's eye. The plaintiff brought trespass.
 - *Held*: In trespass, the defendant must disprove intention or negligence
 - In negligence, the standard of care is that of a reasonable person in the defendant's position. For children, the standard is modified to take into account their age
 - The HCA (at first instance) found that the defendant was utterly without fault and dismissed the action
- *Venning v Chin* (Highway rule)
 - The plaintiff was a pedestrian who was hit by the defendant's car
 - The plaintiff brought the matter in trespass. The primary judge determined that the defendant had failed to disprove fault.
 - On appeal, the Full Court found the primary judge erred in finding that the defendant needed to disprove fault in trespass for injury caused in a highway accident.
 - Bray CJ:
 - Rejected Lord Denning MR in *Letang v Cooper* that distinction should be divided to trespass = intentional; case = negligence. Reasons: contrary to *Williams v Milotin*; it was "judicial legislation" that would "deprive plaintiffs of a remedy which they have enjoyed for over a century and a half"
 - Rejected Diplock J in *Fowler v Lanning* that plaintiff needed to prove intention or negligence in all trespass matters. Reasons: contrary to *McHale v Watson*; "exception [for highway cases] cannot eat up the rule"; doubt that there was any implied acceptance of the risk of being shot
 - *Held*: Whilst trespass generally requires the onus on the defendant to disprove negligence, "weight of authority" favours legal proposition that "highway accidents are an exception to this rule and that in trespass for injury on the highway the onus is on the plaintiff to prove either intention or negligence on the part of the defendant."

- *Platt v Nutt*
 - The defendant (appellant) slammed an interior glass door on the plaintiff (respondent) who was holding the flyscreen door for the plaintiff's daughter to take out belongings. The shattering of the glass caused injury the plaintiff.
 - The case was about whether a trespassory act was committed.
 - (1) *Clarke and Hope JJA held*:
 - (2) *Kirby P held*: Australia should adopt *Fowler v Lanning* that plaintiff must prove intention or negligence in trespass in all cases. Reasons: conformity with UK (post *Fowler*), NZ and Canada; the distinction between highway and non-highway cases is "unprincipled"
 - *Clarke and Hope JJA* did not comment on whether the court should follow *Blackler* or adopt *Fowler*
 - Left question open in NSW to follow either
- *Croucher v Cachia*
 - The plaintiff (respondent) sued the defendant (appellant) for battery after the defendant used gardening shears to attack the plaintiff, causing injuries.
 - *Leeming JA held*: It is "clear law" that trespass does not require the plaintiff to prove intention.

Trespass to the person

Trespass involves three torts: battery, assault and false imprisonment.

Battery = direct application of force to the plaintiff's body without consent or lawful justification

1. Direct/forcible interference (includes slightest application of force)
2. Can also involve an object in the person's control (eg spitting or pouring water)
3. Based on the fundamental principle of person inviolability, self-autonomy, protect interest in bodily security from unwanted physical interference
4. Traditionally required anger or hostility but no longer part of the law
5. An exception is contact generally acceptable in the ordinary conduct of daily life
6. In *Croucher v Cachia*, *Leeming JA* found that there can be a negligent battery

- *In Re F*
 - F suffers from a high level of mental disability and her family/close friend proposed for her to be sterilised. The issue is that her mental disability prevented her giving consent.
 - *Held*, fundamental principle that every person's body is inviolate → everybody is protected against personal injury and physical molestation → every form of touching can be a battery without consent or lawful justification
 - General rule that physical interference with consent is not unlawful
 - Also, chastisement of children, lawful arrest, self-defence (reasonable and proportionate use of force) and the prevention of crime
 - Broader exception has been created to allow for the exigencies of everyday life – including jostling on the street, crowded places, parties, tap on shoulder, shaking hands – such forms of contact are *not actionable* on battery as they fall into a broad exemption embraces all physical contact which is generally acceptable in the ordinary conduct of everyday life (this exception is separate to consent)

- Traditionally thought it must be in anger or hostile. But it is difficult to reconcile with belief that all forms of unwanted touching is battery. A surgeon who performs unconsented surgery is not in anger or being hostile.
- *Rixon v Star City*
 - Plaintiff was professional gambler who had an exclusion order that prohibited him from entering a casino. He was spotted one day and one of the casino's employees went up to him and put his hand on the Plaintiff's shoulder and asked if he was the Plaintiff.
 - *Held*, touching does not have to be in anger to constitute a battery
 - The conduct fell within exception made for physical contact that is generally acceptable in the ordinary conduct of everyday life as long as the degree of force is greater than is reasonably necessary in the circumstances

Assault = defendant's intentional act that creates in the mind of the plaintiff the apprehension of immediate contact with the plaintiff's person

1. Threat must be immediate or imminent violence (relatively short period of time)
 2. Defendant has the ability or apparent ability to carry out the threat
 3. The defendant must intend to create in the plaintiff's mind an apprehension of immediate contact (does not need to intend to make contact, just apprehension)
 4. The apprehension must be objective reasonable – would a reasonable person in the plaintiff's position apprehend unlawful contact
 5. Words alone and conditional threats can constitute an assault
 6. Different to criminal definition of assault
- *Stephens v Myers*
 - Plaintiff was a chairman at a meeting where a motion was passed to throw out the defendant. The defendant advanced towards the plaintiff with a clinched fist but was stopped before he hit the plaintiff.
 - Could there be an assault since the defendant was restrained?
 - *Held*, it is possible to find an assault if the defendant would have reached the plaintiff almost immediately if he was not restrained
 - An assault occurs if there is a reasonable apprehension in the plaintiff's mind that the defendant would have made immediate contact if the defendant was not restrained
 - *Hall v Fonceca*
 - There was a dispute in a hockey club and the defendant raised both fists and told the plaintiff to 'get away'
 - The plaintiff then attempted to punch the defendant but the plaintiff fell to the floor and was injured.
 - The defendant then tried to establish that he had self-defence.
 - *Held*, self-defence relies on defendant responding to a threat of harm by the plaintiff
 - Defence was able to show that plaintiff created an apprehension of contact and, therefore, defence made out.
 - *Chetcuti*
 - The plaintiff was highly confrontational towards two Transport Officers. The Officers chased him and he broke his wrist.
 - His basis is that he was scared that the Transport Officers would chase and bat him.
 - Trial judge found in favour of Mr Chetcuti.
 - *Held* in appeal, the trial judge erred in considering the elements of assault