LPAB03 Torts Notes

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Trespass to the Person

- Any type of unwanted or unjustified interference with a person's body/liberty, or a creation of fear of such interference, is actionable at law
- Actionable per se - no proof of damages needed, injury to P need not be proven as damages not part of the cause of action (only needs some unlawful interference) i.e. infringement of civil liberty
- - i.e. damages may be awarded not only in respect of physical injury, but also injury in the form of insult, hurt feelings, indignity, disgrace, any mental suffering: Fogg v McKnight (1967)

Battery

(actual physical contact)

Rule: Battery comprises a **direct** and **intentional [or negligent/reckless]** act of the defendant which causes **some physical contact** with the person of the plaintiff **without the plaintiff's consent**. *Collins v Wilcock* [1984] 1 WLR 1172

A defendant who directly causes physical contact with a plaintiff (including by using an instrument) will commit a battery unless the defendant proves the absence of intent and negligence on their part, that is, that the defendant was "utterly without fault": *Croucher v Cachia (2016) 95 NSWLR 117.*

ONUS OF PROOF

- Lies with the Plaintiff to prove the direct act
- Lies with the Defendant to prove lack of fault (not intentional or negligent; any defences)

Elements:

1. Direct act of the defendant which either intentionally or negligently,
2. Causes some physical contact with the plaintiff,
3. Without the plaintiff's consent or any other lawful justification

    - As with all forms of trespass, it is *actionable per se* i.e. the plaintiff need not prove actual damage (nominal damages may be awarded where tort was trivial and no damage was suffered)

Case	Facts	Ruling
Element 1: direct act of the Defendant (either intentionally or negligently)		
- No battery unless there is a voluntary act by the defendant. No battery if the incident is one over which the defendant has no control - Direct' means whether the impact followed so closely on the defendant's act that it could be considered part of the act (Hutchins v Maughan (1947)		

- An act will also be considered direct if it sets in motion an unbroken series of consequences, the last of which causes contact with the plaintiff. Scott v Shepherd (1773) 96 ER 525 (squib). However in *Stanley v Powell(1891),* where a bullet accidentally ricocheted off a tree, the defendant was not held liable (new intervening act?).
- There must be an act by the defendant - can't just be blocking a door or something. In *Platt v Nutt (1988)*, an action in trespass failed because the plaintiff did not establish she was injured as a result of the forceful conduct of the defendant and not as a result of her own independent actions.
- Holmes v Mather (1875): defendant not liable for damage done by horses pulling his carriage as they had bolted; no agency
- *Stokes v Carlson* (1951) 240 SW: 'A contraction of muscles that is purely a reaction to some outside force, convulsive movements of an epileptic, movements of the body during sleep when the will is in abeyance, and movements during periods of unconsciousness are not 'acts' of the person, and the person will not be responsible for injuries inflicted thereby, since such movements are without volition.'

Intentional acts

- Most suits for battery are based on intentional acts - not a requirement that the defendant intended to injure or harm the plaintiff, it is **enough that the defendant intended to perform the act, which caused the offensive contact with the plaintiff**.
- Of course, defendant may have not intended to perform the act causing the offensive contact e.g. in *Bunyan v Jordan (1937),* Latham CJ dismissed a charge of battery because, taken as a whole, the defendant's actions could not be said to be calculated or likely to cause harm
- The D must have either intended, had reckless disregard for or been negligent with respect to the consequences of his or her actions. *McNamara v Duncan (1979) 26 ALR 584*
- Hostile intent is not necessary because battery is an unwanted touching – seen from the plaintiff's point of view not the defendant's. *Rixon v Star City Pty Ltd (2001) 53 NSWLR 98*
- D must have intended, or had reckless disregard as to, or been negligent as to consequences of their actions – no trespass to person if caused directly, but unintentionally and without negligence: *Fowler v Lanning (1959)*
- NOT omission (but consider *Fagan v Metropolitan Police Commissioner [1968],* failure to move car not omission but continuing act)

Negligent acts

- If the act is negligence, the claim is usually in negligence, but in Australia there appears to be no legal impediment to a negligent action from being the basis of a suit for battery, provided the other criteria are satisfied

Element 2: Physical contact

- Involves immediate contact with the plaintiff, however it is not necessary that D physically touches P.
- Least touching of another sufficient to constitute battery: *Cole v Turner (1704),* hostility NOT necessary. *Boughey v R (1986)* (obiter by judges in the case)
- "The fundamental principle plain and incontestable is that every person's body is inviolate, and that any touching of another person, however slight may amount to a battery" (*Collins v Wilcock* [1984] 1 WLR 1172, Lord Goff)
- The P need not be aware of the unlawful contact at the time of the incident. (Eg. the P was asleep or unconscious) *Chatterton v Gerson* (1981)
- Must exceed the accepted usages and accidental contacts of daily life: *Wilson v Pringle (1987)*
- Exceptions:
    - Children – reasonable punishment (but what is 'reasonable'?)
    - Self defence
    - Reasonable force in an arrest

- Prevention of a crime
- Physical contact during ordinary course of life

Element 4: Without the plaintiff's consent (or other lawful justification)

- Consent to the alleged battery is a total defence
- Consent may be given expressly by words or be implied from conduct
- A person is deemed to consent to a reasonable degree of physical contact as a result of social interaction (see *Collins v Wilcock 1984)*
- In Australia, judicial authority in *Marion's case* supports the view that the onus is on the defendant to prove consent to the alleged trespass.
- In *Cole v Turner (1704),* Lord Goff notes how nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street - such cases are common examples of implied consent cases

Note some of the main instances in which battery may occur:

- Fights (*Horkin v North Melbourne Football Club Social Club [1983] 1 VR 153)*
- Motor vehicle accidents, such as pedestrian accidents (*Williams v Milotin (1957) 97 CLR 465*)
- Medical treatment (*Re Marion's case (1992)*)
- Injuries sustained on the sporting field (*Canterbury Bankstown Rugby League Football Club and Bugden v Rogers*)
- Civil actions for sexual assault (*Stingel v Clark 2006)*
- Unlawful arrests/searches by police (*Schmidt v Argent [2003] QCA 507; Walker v Hamm [2008] VSC 596*)

Collins v Wilcock [1984] 1 WLR 1172 **Definition of battery, unlawful touching when beyond scope of police authority**	A police officer wished to question a woman in relation to her alleged activity as a prostitute. The woman decided to walk away, but the police officer was intent on stopping her and in order to do so, grabbed her arm in order to prevent her from walking away. Under the Street Offences Act 1959 c.57, the police officer had no power to detain the woman. The woman struggled with the police officer and scratched him. She was charged with assaulting a police office in the course of his duty	"**Battery comprises a direct and intentional [or negligent/reckless] act of the defendant which causes some physical contact with the person of the plaintiff without the plaintiff's consent"** A person is deemed to consent to a reasonable degree of physical contact as a result of social interaction "The fundamental principle plain and incontestable is that every person's body is inviolate, and that any touching of another person, however slight may amount to a battery" Lord Goff.
Cole v Turner (1704) 6 Mod Rep 149 - **what contact constitutes battery?** **battery= The least touching in anger, struggle etc** **Not battery = incidental touching is ok** **Exceptions:** - **Children (reasonable punishment)**	The case concerned an action brought before the court for trespass and battery. The Claimants were a husband and wife, both of who had allegedly suffered battery by the Defendant.	It was held that anger was a relevant element to the tort of battery and that accidental touching would not amount to battery. At the same time even a light touch could be converted to battery through the existence of anger. Chief Justice Holt found that **the least touching of another in anger is a battery** **principle of personal inviolability must inevitably be subject to exceptions due to its broadness**

Defences to Intentional Torts

DEFENCES to intentional torts

- It is up to the Defendant to prove they were not at fault. This includes proving that the act was not intentional (or negligent).
- It also includes raising and proving any defences.
- Contributory negligence is not available as a defence to an intentional tort. Fontin v Katapodis (1962)
- Mistake is not ordinarily accepted as a defence in civil actions. Where the defendant intended the act of trespass, it will not be a defence to show that she erroneously believed she was acting lawfully. *Symes v Mahon (1922)*

CONSENT

Case	Facts	Ruling
CONSENT • The plaintiff's consent to the act will prevent an action for trespass to the person, goods or land *McNamara v Duncan (1971) 45 FLR 152* • Consent must be freely and validly given - consent obtained by duress or fraud is not a defence to trespass *Symes v Mahon (1922)* • However, in the absence of contractual consent, remember that it is no defence that the plaintiff has 'come to' the nuisance *Sturges v Bridgman (1897)* • Onus of proof is mostly on the defendant *(Marion's Case)* Elements - Consent must be: 1. Voluntary (not obtained through duress/fraud) 2. Given with knowledge 3. Come from competent person 4. In relation to specific complained act (can't have consented to something that doesn't cover the act complained of…see sporting cases about consenting to rules of the game and a bit more, but not intentional malicious violence)		
Collins v Wilcock (1984) **Implied consent**		"in respect of physical contact arising from the exigencies of everyday life — **jostling in a street, social contact at parties and the like — there is an implied consent** "by all who move in society and so expose themselves to the risk of bodily contact", or ...such encounters fall "within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life".
Aldridge v Booth (1988) 80 ALR 1 **Duress**		**Consent procured by duress will not constitute a bar to the action.**
R v Williams [1923] 1 KB 340 **Fraud**		Nor will consent induced by fraud operate as a defence, provided the fraud goes to the quality or nature of the act consented to.
Cowell v Rosehill Racecourse (1937) **Must not have been revoked or expired**		If the P revokes consent the D will have a reasonable amount of time to cease the interference. 'If permission is terminated, further continuance of the acts it authorised become unlawful. D does not become a trespasser until he has received notice and a reasonable time has elapsed'

Marion's Case (1992) 175 CLR 218 **medical treatment**		Competent adults are presumed to have a right to voluntarily choose whether or not to consent to any medical intervention, including life-saving or life-sustaining treatment. Citing Cardoza J (US Justice): **Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault.**
Airedale NHS Trust v Bland [1993] **medical treatment**		**If such a patient refuses treatment, that choice must be obeyed, even if, objectively, it is against the patient's best interests**
Body contact sport/activity		• Consent in such cases is rarely given expressly but is usually implied from conduct *Blake v Galloway* [2004] • because sports differ from one another in their objectives and in what is expected of the actor, each situation must be looked at individually *McNamara v Duncan* (1979) • A player who deliberately and against the rules of the game injuries another may be liable for trespass to the person *Baird v Police* (2017)

SELF-DEFENCE

SELF-DEFENCE

- It will be a good defence that the defendant used reasonable force, proportionate to the threatened harm, in order to protect himself or herself *Palmer v R [1971].*
  Thus, to succeed with this defence, the defendant must prove that
  - use such force as reasonably necessary
  - have no other option open to them
  - reasonably believe their life is in danger or that attack will cause serious bodily harm

- Onus on D to prove reasonableness
- What is reasonable force is a question of fact (demonstrated in all below cases)
- Proper weight should be given to defendant's predicament
- Force used in self-defence might be justified even where it is disproportionate to the nature of the evil sought to be avoided (upheld in Cook v Beal (1967); Cockcroft v Smith (1705); Dale v Wood (1822). Each case, force used was unnecessarily disproportionate for self- defence and reflects the relation between the harm threatened and the means of defence is only one factual element to be considered in deciding the general question of reasonableness

  It will be material to consider whether:
  - The defendant could have escaped
  - Whether the defendant resisted with the most reasonable means available
  - Whether the defendant's act went beyond the limits of defence into the realm of pure revenge
  - Whether the defendant continued to use violence after the danger had passed
  - Whether the attack was, or was reasonably expected to be, violent

Civil Liability Act 2002 (NSW)

Section 51 applies to civil liability for death, injury or property damage

(1) This Part applies to civil liability of any kind for personal injury damages (as defined in Part 2) or damage to property.

Negligence

Overview

Negligence is a cause of action where a person's 'unintentional' or 'consequential' wrong has caused harm to another.

ELEMENTS

The cause of action involves:

- a relevant **duty owed** by the D to the P to take reasonable care
- **a breach of that duty** of care in that the doing of the act (or the manner in which it was done) was inconsistent with what a reasonable man would do by way of response to the foreseeable risk…;
- **injury/damage**
- **caused by** the D's carelessness and which was **within the limits of reasonable foreseeability**.

ALL elements (Duty, Breach, Causation and Damage) must be established to prove negligence.

NB: ***Limitations Act 1969 (NSW)***

- s14 (general not specific to neg) An action for negligence also has a limitation period of six years (except in respect of personal injury or death claims, where the limitation period is three years (s 18A). However, the limitation period for a negligence claim begins once loss is suffered or damage occurs.

Can a limitation period be extended?

- The courts have discretion to extend a limitation period. For example:
  - Where the claimant is under a disability, the court can order an extension of the relevant time limit to six years after a person ceased being under a disability (or died, whichever is earlier).
  - In personal injury matters, the court may extend the limitation period by one year where there is a "material fact of a decisive character" that is unknown to the claimant until at least a year before expiry of the limitation period (or afterwards).

Element 1: Duty of care

- **A defendant can only be found liable in negligence if they owed a duty of care to the plaintiff** ***Donoghue v Stevenson (1932)***
- **There are established categories of duty of care.**
- **If a case falls outside an established category, the courts will look at reasonable foreseeability and salient features of the relationship to determine if a duty is owed** ***Sullivan v Moody (2001)*****.**

- There needs to be reasonable foreseeability of the potential risk *Heaven v Pender (1883)* and affirmed many times over.
- Lord Atkin in *Donoghue v Stevenson (1932)* *The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions, which you can reasonably foresee, would be*

likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

- Further proximity is not restricted to physical distance *Donoghue v Stevenson (1932)*
- However, proximity is no longer seen as the overarching test of determining whether a duty of care exists.

The courts have struggled, particularly in the last 30 years, to devise a general test that can be applied in all of the very varied circumstances that can give rise to an action in negligence.

'Proximity' test (revoked): A test advanced by Deane J in *Jaensch v Coffey (1984)* for the existence of a duty of care in negligence cases. It was adopted by the High Court for six years in the 1990s. It was eventually overturned in *Hill v Van Erp* (1997). No clear agreement on what test should replace the test of proximity was made.

'Caparo' test (revoked) A three-stage test used in England that was advanced by Kirby J in 1998 in the case of *Pyrenees Shire Council v Day (1998*). It was overturned in *Sullivan v Moody (2001)* for being too subjective and discretionary. It was then described by Kirby in *Graham Barclay Oysters Pty Ltd v Ryan, Ryan v Great Lakes Council, New South Wales v Ryan (2002)* that '*a duty of care will be imposed when it is reasonable in all the circumstances to do so*'. In this sense, it is as if the 'judicial wheel has come full circle' back to the original conception of duty of care following the case of *Donoghue v Stevenson*; that is that the courts make decisions by first asking the question 'is the relationship between plaintiff and defendant in the instant case so close that a duty arose?' and then answering yes or no in light of the court's own experience-based judgement.

Further, as Kirby J observed *in Harriton v Stephens (2006):*
'Most tort actions fall within a recognised duty of care category… [I]n so far as physical injuries arising from a positive act are concerned, it is accepted that if the reasonable foreseeability test is satisfied, the elusive additional component of a duty of care will generally exist.'

Salient features test (currently in practice)
Australian law is not settled regarding test for duty of care. However current approach of High Court, which has developed since rejection of 'proximity' as an overarching test for duty called a 'salient features' of the relationship between approach (*Sullivan v Moody 2001*) and may include (many set out in by Alsop in *Caltex Refineries (Qld) Pty Ltd v Stavar (2009)*:

a) the degree and nature of control able to be exercised by the defendant to avoid harm (autonomy);
b) the degree of vulnerability of the plaintiff to harm from the defendant's conduct;
c) the degree of reliance of the plaintiff upon the defendant;
d) any assumption of responsibility by the defendant (Nagle);
e) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant (still a factor just not overriding like in Deane J in *Jaensch v Coffey (1984)*
f) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
g) the nature of the activity undertaken by the defendant;
h) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
i) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
j) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
k) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
l) the existence of conflicting duties arising from other principles of law or statute;
m) consistency with the terms, scope and purpose of nay statute relevant to the existence of a duty; and