

## INTENTIONAL TORTS

**Onus of Proof:** P proves elements of trespass → burden shifts to D, to prove lack of fault/defence on balance of probabilities (exception of highway accidents where P must prove fault: *Venning v Chin* (1974))

### TRESPASS TO 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) → 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)

**Positive voluntary act** - which interferes with a protected interest of P, must be intentional, reckless (as to possibility of harm), or negligent (as to a reasonable foreseeable risk): *Williams v Milotin* (1957)

- judged by act and its consequences, i.e. trespass to person may operate as a form of strict liability
- intention to do tortious act, not necs. to cause harm, no hostility necessary: *Sibley v Milutinovic* (1990)

**Directness** - interference to P must be a direct result of D's action, NOT consequential: *Hutchins v Maughan* [1947]

- \* Immediate action: *Reynolds v Clark* [1725] where log thrown and hits someone = immediate, not immediate = someone trips over log thrown onto path
- \* Natural and probable consequence of D's act: *Scott v Shepard* (1773) firework thrown in a marketplace, tossed by person to other, then again, exploded → injured P.
- \* Lack of intervening act: intervening act disperses directness, *Hutchins v Maughan* [1947] where D placed poison on unfenced land, warned P who went onto land nonetheless, P's dog consumed and died, **HELD**: consequential act, no trespass, laying bait, didn't interfere with P's property

**Damages:** aggravated = compensation for injury to plaintiff resulting from the circumstances and manner of D's wrongdoing, exemplary = punishment and deterrent, damages claimable even where no physical injury

### ➤ Assault

Any direct threat by D, which intentionally or negligently creates in P an apprehension of imminent harmful contact

- Apprehension → P must have knowledge of the threat/imminent contact (not necessarily fear)
- OBJECTIVE test of whether a reasonable person in the same situation would have been apprehensive of harmful contact (but person of unusual timidity can recover where D knows of this disposition)
- Look at effect on victim's mind, NOT whether D had intention or means to carry out threat

#### a) Direct,

Assault must be caused by a direct act of D: *Stephens v Myers* (1830), including the continuation (natural and probable consequences) of an act: *Scott v Shepherd* (1773)

#### b) Threat by D,

Threats may be conduct, words, or both

- *Barton v Armstrong* (1969): threat by words over phone may constitute assault if it creates an apprehension of imminent bodily contact, consider circumstances
- Look at whole of circumstances of D's conduct; words may contradict action, e.g. *Tuberville v Savage* (1669) where D drew sword but stated 'if it were not assize time, I would not take such language' → no assault
- Mere silence may constitute assault: *R v Ireland* [1997]
- Violent gestures, e.g. clenched fists: *Stephens v Myers* (1830)

#### c) Intentionally or recklessly, (voluntary)

D must intend consequences of their act, intention to cause in P apprehension of imminent bodily contact

- *Brady v Schatzel* (1911): P pointed unloaded pistol at D, **HELD**: assault (not relevant that D is incapable of carrying out threat, look only at effect on P's apprehension of any physical interference)
- But no assault where it is obvious that D has no ability to carry out threat, e.g. D from behind locked door
- D's act is accidental or without fault = no assault, e.g. *Stanley v Powell* (1891) where D member of shooting party fired at pheasant, bullet ricocheted off tree and wounded P → D not liable for assault
- Recklessness may constitute intention – where consequences of D's acts uncertain but D indifferent as to such consequences even where result must have or should have been foreseen: *Morris v Marsden* (1952)

## INTENTIONAL TORTS

### d) Apprehension of imminent harmful contact

OBJECTIVE test of whether a reasonable person in P's position would have been apprehensive of imminent harmful contact – cannot consider P's subjective bravery/cowardness

- Exception where D knows of P's unusual timidity and plays on that fact: *Macpherson v Beath* (1975)
- Imminence of harm relevant: *Zanker v Vartzokas* (1988) where P offered lift by D, while driving D offered money for sexual favours, P requested to be let out, D refused and accelerated, saying he would 'take you to my mate's house. He will really fix you up' → HELD: assault, imminent threat even though of future violence as violence threatened would occur immediately at end of imprisonment – present fear can be immediate and continuing + threats must be unavoidable (P had no option to escape)
- Possibility of imminent harm: *Barton v Armstrong* (1969) where threats by phone did not specify when they would be carried out, by possibly could be immediate/impending

### Conditional threats:

*Rozsa v Samuels* (1969): P taxi driver threatened to punch D for cutting in line, D responded by pulling knife from dash, saying 'I will cut you to bits if you try', and moved to get out of own vehicle, HELD: assault, conditional threat (assault dependent on P punching) BUT response was unreasonable/excessive to P's threat

### ➤ Battery

Direct and intentional act of D which causes actual bodily contact with P, without P's consent, may be intentional, reckless, or careless → where physical force used to bring about unwanted contact with another person

- No requirement of actual physical harm; contact alone is sufficient: *Cole v Turner* (1704), 'the least touching of another in anger is a battery' (N.B. anger/hostility not required)
- Non-highway cases = onus of proof on D, once P has proven direct contact, burden of proof shifts to D to show that the act was involuntary or that they were otherwise not at fault: *McHale v Watson* (1964)
- Highway cases = onus of proof on P, to prove fault (intention or recklessness) by D: *Venning v Chin* (1974)

#### a) Direct act,

Includes continuation of an act:

- *Scott v Shepherd* (1773) where D threw lighted squib of gunpowder, landed on stall, owner picked up and threw + again, eventually exploded injuring P, HELD: D liable for battery, acts of stall-owners did not break chain of directness (acted under compulsion, not as free agents, inevitable consequence of D's act)

#### b) Intentional/reckless/negligent act, (voluntary)

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)

#### c) Bodily contact with P,

Least touching of another sufficient to constitute battery: *Cole v Turner* (1704), hostility NOT necessary

- Includes spitting: *R v Cotesworth* (1704); use of weapon or missile, taking something from hand of another: *Fisher v Carousel Motor Hotel Inc* (1967), throwing water: *Pursell v Horn* (1838), shining light in eyes of another: *Kaye v Robertson* (1991)
- P does not have to be aware of contact at time it is made: *Chatterton v Gerson* (1981) where P under anaesthetic for operation
- Must exceed the accepted usages and accidental contacts of daily life: *Wilson v Pringle* (1987)
- Hostility not a requirement but may affect amount of damages awarded to P

*Collins v Wilcock* (1984): D police officer took arm of P to restrain, not carrying out an arrest, HELD: battery D went beyond generally acceptable conduct of touching to gain attention

*Rixon v Star City Casino* (2001): P subject to exclusion order from casino, on premises, employee approached, placed hand on P's shoulder and asked to identify, HELD: no assault or battery, no intention to create apprehension of imminent bodily harm, physical contact purpose of engaging P's attention, not in excess of that used in everyday life

- any touching of a person, no matter how slight, is a battery, EXCEPTIONS of reasonable punishment for children, people subjected to lawful arrest, reasonable force for self-defence or prevention of a crime, consent, physical contacts of ordinary life by implied consent

## INTENTIONAL TORTS

### ➤ False Imprisonment

Wrongful total restraint on the liberty of P, directly brought about by D, may be intentional, reckless, or negligent

#### a) Wrongful,

Must be against P's will, divided authority as to requirement that P knows of their false imprisonment

- *Meering v Grahame-White Aviation Co (1919)*: P went to employer's office to answer questions re stolen items, unaware that detectives stationed outside, **HELD**: false imprisonment
- *Herring v Boyle (1834)*: P mother went to pick up son from boarding school for holidays, headmaster refused to allow until fees paid, **HELD**: no false imprisonment
- Knowledge of imprisonment/lack of may affect amount of damages awarded: *Myer Stores Ltd v Soo (1991)*

#### b) Total restraint,

Any form of total deprivation of liberty, even if for a short period, total restriction of freedom of movement

- *Bird v Jones (1845)* per Coleridge J: 'A prison may have its boundary large or narrow, visible and tangible... may itself be moveable or fixed', more than 'mere loss of freedom of movement'
- *Symes v Mahon (1922)*: P told by officer there was warrant for his arrest, accompanied officer to town on train, paying own fare and sitting in separate compartment, **HELD**: false imprisonment, submitted to D's power under reasonable belief that P had no means of reasonable escape
- **No reasonable alternative path/escape available**: *Bird v Jones (1845)* where P on path by police, → no false imprisonment as other directions available, *Burton v Davies [1953]* where car driving at high speed → no reasonable means of safely exiting
- **Knowledge of P**: *Robinson v Balmain New Ferry Co Ltd (1910)* where P regular user of wharf, decided not to board, refused to pay exit fee → no false imprisonment, P knew conditions of entry
- **Voluntary submission**: *Herd v Weardale Steel [1915]* where P miner preventing from leaving mineshaft, D claiming he had not completed contractual obligations to complete shift → no false imprisonment
- **Duration** can be for any period of time, even a short period, per *Murray v Ministry of Defence [1988]* where imprisonment lasted 30 minutes → false imprisonment
- *Trevorrow v State of South Australia (No 5) (2007)*: child of Stolen Generations placed with foster family → no false imprisonment, no total restraint on liberty

#### c) Directly caused by D,

Need not involve force or contact, e.g. turning and locking key

- *Watson v Marshall (1971)* where D police officer asked P to accompany to psychiatric hospital, P believed he would be forced to do so if refused, → false imprisonment
- Omission, e.g. failure to release prisoner at end of sentence: *Cowell v Corrective Services Commission (1988)*

**S 3B** excludes intentional acts done with intent to cause injury or death, or sexual assault/other sexual misconduct

Preferable to claim intentional tort from P's perspective to avoid damage restrictions + difficulties of proof under CLA

## ACTIONS ON THE CASE

Development of tort to protect from indirect interference (where trespass protects only against direct interference)

### Differences between trespass and action on the case

- **DAMAGE**: actions on case require proof of injury, aim to provide compensation for actual injury suffered rather than interferences with rights (whereas trespasses are actionable *per se*, no requirement of damage)
- **DIRECTNESS**: actions on case indirect, consequential causal connection between D's conduct and P's injury, (whereas trespasses require direct causal connection between D's conduct and P's injury, sense of immediacy/voluntariness)
- **BURDEN OF PROOF**: actions on case require P to prove D's lack of care and causation of P's injury by D's acts (whereas in trespass P only proves D's direct contact, except for highway cases)

### ➤ Physical injury inflicted by indirect intentional acts

D's deliberate act (not merely negligent) + intention to do injury + P suffered injury

Compensation for physical injury caused by indirect acts: *Bird v Holbrook (1828)* where D placed spring gun in garden following theft of plants, no warning or notices, P entered garden to retrieve peafowl which had strayed, injured by gun, **HELD**: D liable, intention to injure and not deter evidenced by failure to warn