

# **DEFENCES**

## **Defences - Consent**

Scope of consent? Consent must cover the act in question (McNamara v Duncan – i.e. trespass must fall within the scope of that consented to).

Duress – Emotional / Economic duress? – Latter v Braddell, Aldridge v Booth;

## **Consent and Sporting Contests**

### **McNamara v Duncan**

Held (Fox J):

What P did can hardly be understood as an act in the ordinary, legitimate course of a game of football.

- I do not think it can reasonably be held that the P consented to receiving a blow such as he received in the present case. It was contrary to the rules and only sensible hurt within the rules of the game is consented to.
- Deliberate injury with the sole purpose of causing hurt is not justified by the rules.

### **Giumelli v Johnston (1991)**

- King CJ, in the Full Court, held that a player's consent to the application of force extends not only to the application of force within the rules of the game but also to some commonly encountered infringement of the rules; but such consent cannot be taken to extend to violence in contravention of the rules by a player who intends to cause bodily harm and ought to know that such harm is the likely result.

**Latter v Braddell:** Duress vitiates consent. In Latter v Braddell, a servant who complied, crying and under protest, with an order of her employer that she be medically examined to check if she was pregnant, was held to have consented.

## **Medical Procedures (informed consent)**

For the purpose of trespass to person → Chatterton v Gerson;

- It is not necessary, in this context, that Dr have outlined the risks involved;
- It is the principle of CL that medical treatment involving a direct touching of the patient which is performed without the patient's consent is a battery.

## **Confirmed in Rogers v Whitaker.**

Some exceptions:

Emergencies (consider the Defence of Necessity);

If patient incapable of providing consent e.g. intellectually disabled, minors.

## **Minors**

Secretary, Department of Health and Community Services v JWB (Marian's Case)

A minor is capable of giving informed consent when he/she has “achieved a sufficient understanding, and intelligence to enable him or her to understand fully what is proposed”.

With regard to non-therapeutic procedures before the child has achieved capacity, the

court will determine (not the parents) such consent, in accordance with the best interests of the child.

### **Revocation of Consent**

To be valid revocation of consent, the withdrawal of consent must be unambiguous and communicated to D (Cowell v Rosehill Racecourse Co);

### **Defences – Self Defence**

D is entitled to act in self defence where:

There is an unlawful infliction of force to her person;

OR

She is under a reasonable apprehension that force is about to be unlawfully inflicted to her person.

Burden on D to show force used was NOT excessive.

In Zecevic v DPP (Vic), the HCA outlined the test to apply in determining SD:

### **Ask whether D believed on reasonable grounds that it was necessary to do what she did?**

What is reasonable and necessary depends on the circumstances.

In determining reasonableness, consider:

- Whether D could have avoided the threat without using force.
- Proportionality of degree of force relative to the threat offered.

### **Fontin v Katapodis:**

Held:

In rejecting, the defence of self-defence, the HC observed that the D could easily have moved away to avoid further blows, and to throw a piece of glass was out of all reasonable proportion to the emergency.

Rosza v Samuels- self-defence was rejected as threat was unlawful and out of proportion. Taxi driver could have moved to a different seat and taken a step back.

### **Self Defence and Provocation**

Two kinds of situations:

(1) Where D was the provocateur (eg Zecevic):

Relevant issue here is whether original aggression had ceased;

(2) Where P was the provocateur (eg Fontin):

May warrant reduction to exemplary damages;

### **Mistaken Belief**

#### **Ashley v Chief Constable of Sussex Police:**

Assailant must prove that the mistaken belief was honestly held AND reasonable;

Based on that honest and reasonable belief, Court must be satisfied that the action taken by D in response was reasonable.

### **Related Defences**

Defence of another (which may also include a stranger e.g. Goss v Nicholas);

Defence of property (e.g. Hackshaw v Shaw);

## **Defences – Necessity**

There must be an urgent situation of imminent peril (Southwark London Borough Council v Williams).

### **Reasonably Necessary?**

Assessed by reference to what was known at the time.

Consider if the harm likely to be caused by defensive action is greater/less than the harm that would have been caused if no defensive action taken.

Only limited weight on this last consideration, particularly if D acted on spur of the moment (Proudman v Allen).

The peril sought to be defended against must not have been caused by D's own conduct (Southport Corporation v Esso Petroleum Co):

### **Southwark**

Lord Denning MR said: "if homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open the door which no man could shut. So the courts must, for the sake of the law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good."

**Scott v Shepherd**- defence of necessity- did the act to preserve their own stall. Acted in self-preservation.

### **Proudman v Allen**

Hannan AJ said:

CL should not impose liability to pay damages for trespass to goods of 'volunteers' or strangers who try to save property from damage and take reasonable steps in a situation of urgent necessity to remove that property out of the way of danger or safeguard it by some other means.

He acted in the reasonable belief that his interference was justified by the necessity of the situation and was intended to benefit the owner.

### **Necessity and Medical Procedures**

Necessity commonly raised where P needs medical assistance, but P's consent unable to be obtained:

- P unconscious / unable to consent (eg In re F).
- P temporarily unconscious (eg Murray v McMurchy).

In re F: For defence of necessity in medical contexts, D must show:

- it was impracticable to communicate with the P; and
- actions taken by D were consistent with those of a reasonable person in the circumstances, acting in P's best interests.

Murray v McMurchy: only medical treatment necessary to protect a person's life or health may be justified.

### **'In Re F'**

Lord Goff said:

Doubtless, in the case of a person of sound mind, there must be an emergency before such action taken without consent can be lawful.

Not only (1) must there be a necessity to act when it is practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person. (performing an amputation to cut a leg off to free an unconscious man from a car accident so he lives)

### **Murray v McMurchy**

#### **Held:**

McFarlane J held that if the tying of the tubes had been necessary as opposed to being convenient, for the protection of the patient's life or even the preservation of her health, the defence of necessity would have applied.

A test was whether the extended procedure was necessary.

Here there was no emergency to justify depriving the P of her reproductive capacity without her consent.