

## **TRESPASS**

**1. Actionable per se** – no need to prove loss or damage but may impact level of damages.

### **2. Direct Interference**

#### **Onus on plaintiff to prove on the balance of probabilities**

Hutchins v Maughan - Whether the interference followed so closely it could be considered part of that act

- Scott v Shephard – D's act initiated an unbroken series of events in which the storeowner acted out of necessity.
- Reynolds v Clarke – if a man throws a log on a highway and it hits me, it is direct.
- Hutchins v Maughan [1947] – D warned P of the bait – P brought his dogs and they ate the bait, which had lay there for a while – therefore consequential.

### **3. Fault element - Intentional Act or Negligent Act**

#### **Onus shifts to defendant to prove that the act was not intention/no fault (McHale v Watson)**

'There is no liability unless the interference was voluntary and the defendant intended the impact or caused it negligently' - Cole v Turner

Must be a 'deliberate, wilful act with intention or knowledge that the consequence was certain or substantially certain to happen' – Carter v Walker

#### **Carter v Walker - courts will ask:**

- Whether contact with plaintiff was intended
- The contact was the substantially certain result of the defendants act or
- The contact was the result of the defendant's reckless disregard or lack of care.

#### **Intention**

- Stanley v Powell – D aimed for bird and wounded Plaintiff - No actual intention.
- Mchale v Watson - Child threw dart and blinded young girl – using Stanley v Powell – had no intention.
- McNamara v Duncan - unnecessary to prove the defendant actually intended to cause contract with the plaintiff.
- Hogan v Gill – although D voluntarily pulled trigger, child was probably unaware gun was loaded – no intention

#### **Involuntary**

- Smith v Stone - If the D can prove that the interference was involuntary there can be no trespass.
- Public Transport Commission v Perry - "If a person in a condition of complete automatism inflicted injury it would not be actionable".

#### **Lack of Care**

- In trespass, a defendant who commits a direct interference may be liable despite not doing the action deliberately (Williams v Milotin)
- Carter v Walker - Motive is irrelevant. It is enough if D knew the consequences of the act were certain or substantially certain to happen.

## **BATTERY – Page 32**

"A direct act by the defendant causing bodily contact with the plaintiff without his or her consent or without legal justification".

Aim: protect against unwanted contact

### **Elements:**

1. Direct application of force
2. Causes a physical interference with the body of the plaintiff
3. Without consent or legal justification
4. Intentional or negligent act

### **Examples of battery**

- Spitting in someone's face (R v Cotesworth)
- Cutting someone's hair without their consent (Forde v Skinner)
- Striking a horse so it throws the rider (Dodwell v Burford)
- Pulling a chair out from underneath someone (Hopper v Reid)
- Throwing fireworks (Scott v Shepherd)
- Throwing boiling water (Pursell v Horn)

### **1. Direct Application of Force**

#### **Onus on plaintiff to prove on the balance of probabilities**

Hutchins v Maughan - Whether the interference followed so closely it could be considered part of that act

- Must be a positive action – not a passive one – Innes v Wylie (standing in doorway)
- Scott v Shephard – D's act initiated an unbroken series of events in which the storeowner acted out of necessity
- Reynolds v Clarke – if a man throws a log on a highway and it hits me, it is direct.
- Hutchins v Maughan [1947] – D warned P of the bait – P brought his dogs and they ate the bait, which had lay there for a while – therefore consequential.

### **2. Physical Interference / Offensive Contact**

- Slaveski v Victoria - The aim of battery is to protect against unwanted contact and thus, the alleged interference must be offensive contact with plaintiffs person.
- "at least touching of another in anger is battery" Cole v Turner
- however, hostility is not an element (R v Boughie – Husband accidentally killed wife in bed)
- Rixon v Star city - the mere touching of a plaintiff to gain their attention does not amount to battery.
- Normal/everyday touch is subject to implied consent – Collins v Wilcock

*Fagan v Metropolitan Commissioner of Policeman* - Intentional act of not getting off the policeman's foot and purposely delaying removing the car was battery.

### **3. Without Consent/Lawful Justification**

- McNamara v Duncan - If contact is lawful and consented to, there is no battery.
  - Consent is express or implied
  - When consent cannot be implied from the circumstances then express consent will be required for the consent to be valid
1. Consent must be real and freely given with respect to the act itself.
  2. Any consent given must not be exceeded.
  3. Medical procedures – must be "informed consent".

### **Consent in Sporting Activities**

- Giumelli v Johnston - Plaintiff was carrying the ball and was injured by D deliberately elbowing his face. D argued P consented to the nature of the game.
- Consent is lawful justification and thus did not stand.

### **Battery in Medical context – Marion's case**

- HCA concluded court authority is needed for sterilization.
- Mchugh said "at common law every surgical procedure is an assault (battery) unless it is authorized justified or excused by law"

### **Consent can be invalidated**

1. D had sex with P under the false pretence that it was necessary for her voice  
R v William [1923] If D fraudulently informs P of the need for or type of contact then consent has been given freely in eyes of court.
2. A teen got a job at a cake shop and her boss pressured her into sex.  
Aldridge v Booth [1988] - if P consents under duress then consent is invalid.
3. Surgeon conducted Emergency caesarean – detected further tumours and tied off tubes. Court found second pregnancy would not have exposed extra hazard.  
Murray v McMurchy [1949] – where intrusion greater than consented.

### **Knowledge**

Knowledge is not essential to battery on the part of either party

- Patient not knowing about caesarean (Murray v McMurchy)
- Driver hitting person thinking to be an object –Law v Visser

### **4. Fault element - Intentional or Negligent Act**

'There is no liability unless the interference was voluntary and the defendant intended the impact or caused it negligently' - Cole v Turner

Must be a 'deliberate, wilful act with intention or knowledge that the consequence was certain or substantially certain to happen' – Carter v Walker

### **Carter v Walker - courts will ask:**

- Whether contact with plaintiff was intended
- The contact was the substantially certain result of the defendants act or
- The contact was the result of the defendant's reckless disregard or lack of care.

### **Intention**

- 'Directed by the Defendants conscious mind' – Morris v Marsden
- Stanley v Powell – D aimed for bird and wounded Plaintiff - No actual intention.
- McHale v Watson - Child threw dart and blinded young girl using Stanley v Powell had no intention.
- McNamara v Duncan - unnecessary to prove the defendant actually intended to cause contract with the plaintiff.
- Hogan v Gill – although D voluntarily pulled trigger, child was probably unaware gun was loaded – no intention
- Livingstone v Minister for Defence – if D intends to hit one person and hits P, they are still liable.

### **Involuntary**

- 'Directed by the Defendants conscious mind' – Morris v Marsden
- Smith v Stone - If the D can prove that the interference was involuntary there can be no trespass.
- Public Transport Commission v Perry - "If a person in a condition of complete automatism inflicted injury it would not be actionable".

### **Lack of Care**

## **ASSAULT - Page 36**

"A threat of harm to one's person" and includes...

### **Elements**

1. A threat of imminent harmful or offensive contact;
2. A reasonable belief on the part of the plaintiff that the defendant has the ability to carry out the threat; and
3. Intention on the part of the defendant.

## **1. A Threat of Imminent Harmful or Offensive Contact;**

### **Threat**

- Must be a positive action of the defendant; may include threatening gesture or act, alone or accompanied by a verbal threat.

### **Imminent**

- Imminent does not necessarily equate with "without delay" but neither does it encompass future remote time.
- All circumstances are taken into account - in *Zanker v Vartzokis* as there was no indication of where the mates house was and thus, imminent fear was instilled
- Receiving a phone call with the threat of a punch does not meet 'imminent' - *R v Gabriel*

### **Conditional threat**

- If the words of the threat make it clear that the P is in no danger there is no assault - eg. *Tuberville v Savage* "if it were not assize time..." as it was assize time, there was no threat or apprehension.
- However, a conditional threat of application of force unless something is done (eg. "your money or your life" may be assault if the alternative is obedience to an unacceptable command.
- In *Police v Greaves* - D threatened police saying "you come one step close and youll get this through your guy" it was assault as it was imminent direct force UNLESS the constable ceased the lawful acts that were within the course of his duties.
- *Rosza v Samuals* – 'it is an assault if the threat involves compliance with an unlawful command' Hogarth J.

### **Mere words & Telephone Calls**

- Mere words were once not enough to amount to assault (*Tuberville v Savage*)
- However, now if words constitute a real threat of imminent danger, it may be assault. *Barton v Armstrong* - Defendant was a high-profile politician threatened P over the phone with violence to get him to sign a deed i.e telephone calls can constitute assault -was cemented in *Slaveski v Victoria*.
- Someone making silent phone calls can be guilty of Assault (*R v Ireland*) – this had caused psychological damage to the women  
"He was using his silence as a means of conveying a message to his victims"

## **2. Reasonable Belief of D's Ability to Carry Out the Threat**

### **Knowledge of the threat**

- Plaintiff must be aware of the threat (*Police v Greaves* - D threatened a police constable with a carving knife, however was accompanied by words)
- *R v Phillips* - Threatening a sleeping or unconscious person cannot be an assault even if the person later is made aware of the threat. D pushed girl to ground making her unconscious, he dragged her to the river bank and she drowned, this did not amount to assault as there was no instillation of fear.

#### **Actual ability**

- Plaintiff must perceive the defendant has the ability to carry out the threat (Zanker v Vartzokis)
- Stephens v Myers - Defendant made violent gesture and was stopped by a third party - there was a means of carrying it out and it was therefore, assault.

#### **Apparent ability**

- Even if the D does not have actual ability, if the P has reasonable belief that they do, then this may be enough (R v St. George - pointing any pistol whether loaded or not is assault)
- Brady v Schatzel - D pretended to load gun and was found guilty of assault

#### **Apprehension not fear**

- Based on a reasonable person
- Apprehension does not refer to P being in fear but having the belief or expectation that force is about to be applied to their person (Brady v Schatzel)
- No fear is needed just the understanding that the threat will be carried out without his or her consent  
Reread 3.29

### **3. Intention to instill fear**

- Stickley at 3.32 observes “Although fault in trespass is intention or carelessness, to be an assault there must **be a subjective intention** on the part of the defendant **that the threat will create in the mind of the plaintiff an apprehension that the threat will be carried out** forthwith.”
- However, an intention to actually carry out the threat is not necessary (Rixon v Star City Pty Ltd)  
Reread 3.33