

TORT LAW NOTES

TRESPASS TO PERSON

Traditionally, there were two types of actions that were concerned with the plaintiff's person. They were 'trespass' and 'action on the case'. The distinction between these two is the distinction between directly caused and indirectly caused damage.

'If a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury I must bring an action upon the case'.

Although it is necessary for direct damage to be caused for the plaintiff to succeed in trespass, there is a fairly broad approach to the question of 'direct'.

Key Case: *Scott v Shepherd (1773)* – the defendant threw a gun powdered squib onto a stall owned by Yates. In order to protect himself, Yates threw it to Willis who threw it to Ryal and finally in the plaintiff's face. It was ruled that the plaintiff's injury was a direct result of the defendant's actions.

Trespass is actionable per se which means that the plaintiff does not need to prove that he/she has suffered damage or loss as a result of the defendant's actions. If the plaintiff can prove the elements of trespass but cannot prove any damage or loss, the plaintiff will probably be awarded nominal damages. In contrast, in the 'action on the case' (modern tort of negligence) damage is the core of the action. Therefore, in order to succeed in an action on the case the plaintiff must prove that the defendant's act had indirectly caused some loss or damage.

The case below demonstrates that fault is an essential element of liability in trespass to person.

Key Case: *Stanley v Powell (1891)* – the defendant fired at a pheasant however one of his pellets glanced off a tree and accidentally wounded the plaintiff. The jury held that the defendant had not been negligent.

Thus, an action in trespass to the person 'lies only for injury directly and intentionally caused, or directly and negligently caused, by the defendant'. Most modern actions of trespass to the person involve intentional acts.

There are 3 types of trespass to the person: assault, battery and false imprisonment. There is also a possible fourth type of intentional infliction of emotional distress.

1. Battery – a direct act by the defendant causing bodily contact with the plaintiff without his/her consent. Any form of touching constitutes as battery and as trespass to the person is actionable per se, the plaintiff does not need to have suffered an injury in order to bring an action.

E.g. *Cole v Turner (1704)* – this case highlights how the cutting of someone's hair without his/her consent may constitute as battery.

The question of hostility is a major issue in trespass to the person. However there is a general acceptance that hostility does not need to be present and that battery is touching without consent.

E.g. *Collins v Wilcock (1984)* – this case demonstrates that all physical contact without consent is seen as battery but there are exceptions for physical contact which is 'generally acceptable in the ordinary conduct of everyday life'.

Key Case: *Rixon v Star City Pty Ltd (2001)* – the plaintiff was playing roulette at the Sydney Harbour Casino even though an exclusion order was made against him. Various casino employees approached him and the plaintiff alleged battery as one of the employees placed his hand on the plaintiff's shoulder. The court held that the touch did not constitute as battery as it lacked 'the requisite anger or hostile attitude'.

Although the contact must be a direct result of the defendant's actions, it is not necessary for the defendant to physically touch the plaintiff – see *Scott v Shepherd*. However, the contact by the defendant must be active, rather than passive.

E.g. *Innes v Wylie (1844)* – the defendant, a policeman, prevented the plaintiff from entering a room by standing in the doorway. The court ruled that no battery was constituted as the defendant was standing passively like a door or wall.

As said above, it is not necessary for the defendant to make personal contact with the plaintiff but it is essential there be some physical contact with the plaintiff's person for the tort of battery to be established.

E.g. *Carter v Walker (2010)* – the defendants was 2 policemen who responded to a domestic dispute. A physical altercation found the first plaintiff and the second plaintiff (mother) both physically injured. The third plaintiff (Brother) alleged battery for nervous shock from seeing what happened. The court ruled that the third plaintiff had not been directly harmed by the actions of the defendants nor did he have any physical contact with the defendants.

As mentioned before, in order for contact to be constituted as battery it must occur with consent. But sometime consent can be expressed from the surrounding circumstances such as the touching that occurs on a crowded bus or train.

However there are limits to implied consent as seen in the next case.

Key Case: *Giumelli v Johnston (1991)* – the plaintiff and defendant were football players on opposing teams. The defendant collided into the plaintiff, while he was

holding the ball, with an illegal elbow tackle. The defendant claimed that the plaintiff had consented to injury by participating in the game. The court held that battery was constituted because the physical violence was in the contravention of the rules of the game by causing bodily harm.

In contrast to England, Australia courts take the view that consents is a form of defence, this means the onus lies on the defendant to prove that the plaintiff did consent to physical contact.

2. Assault – in ordinary use and criminal law, the term assault is used to describe what the law of torts would call a battery: 'namely the defendant hitting or touching the plaintiff'. However in the law of torts, 'an assault is a direct threat by the defendant that causes the plaintiff to reasonably apprehend some imminent unwanted contact with his/her person'. As a distinction, assault is the threat of unwanted contact while battery is the fact of unwanted contact.

Hargrave AJA gave the following 5 elements of the tort of assault in the case *ACN 087 528 774 Pty Ltd v Chetcuti (2008)*:

- A threat by the defendant, words or contact, to inflict harmful or offensive contact upon the plaintiff. It is enough if the threat to contact to the body of the plaintiff is made without consent or legal justification.
- A subjective intention by the defendant that the threat will create in the mind of the plaintiff an apprehension that the threat will be carried forthwith. It does not need to be proved that the defendant will carry out the threat.
- The threat must create an immediate apprehension in the mind of the plaintiff that the threat will be carried out forthwith. It is not enough that the plaintiff is just frightened by the threat.
- The apprehension in the mind of the plaintiff must be reasonable.
- The plaintiff's reasonable apprehension caused injury, loss or damage to the plaintiff.

Although physical contact is not an element of assault, there must be at least the chance of physical contact for the threat to constitute as assault. Therefore, if the threat cannot culminate in a battery, there is no assault.

E.g. *Stephens v Myers (1830)* – the defendant attended a parish meeting with the plaintiff. The meeting ended with the a ruling that the defendant be ejected out the meeting but the defendant said that he would rather pull the plaintiff out of his chair then leave the meeting. When the defendant paced towards the plaintiff, he was stopped. The court said that there must 'the means of carrying the threat into effect'.

Although there must be the means of carrying out the threat, the defendant does need to intend to carry out the threat for there to be assault. However, the defendant must intend for the plaintiff to believe that the threat will be carried out.

Key Case: *ACN 087 528 774 Pty Ltd v Chetcuti (2008)* – the plaintiff started an argument with two ticket inspectors and spat on the face of one before fleeing. The inspectors chased the plaintiff, causing him to fall and suffer a permanent wrist fracture. The court ruled that

assault was constituted as 'the ticket inspectors had engaged in an intentional act that created in the mind of the plaintiff an apprehension of imminent physical attack or harm'.

Seen in most cases of assault, there is verbal abuse accompanied with some physically threatening action. Therefore it sometimes said that mere words cannot constitute as assault. This is not correct as the question is whether the threat causes the plaintiff to fear immediate physical contact, rather than then contact in the future.

E.g. *Barton v Armstrong (1969)* – the defendant threatened the plaintiff with violence to sign a number of deeds for commercial deals. The plaintiff signed the deed as a result of the threat, some which were made over the phone. The defendant argued that the threats did not constitute assault as they were made over the phone. Taylor J held that this could constitute as assault as it is a matter of the certain circumstances.

Whether or not purely verbal threats constitute as an assault, however it is clear that words can render a threat, which would otherwise constitute as assault, useless as demonstrated in the next case.

Key Case: *Tuberville v Savage (1669)* – the defendant laid his hand upon his sword and said to the plaintiff, 'if it were not assize time, I would not take such language from you'. It was held that this did not constitute as assault because it was 'assize time' which meant that the defendant did not actually intend to harm the plaintiff.

3. False Imprisonment – a direct act by the defendant that totally deprives the plaintiff of his/ her liberty without lawful justification. The deprivation of the plaintiff's liberty must be total.

Key Case: *Bird v Jones (1845)* – the plaintiff was prevented from crossing the Hammersmith Bridge because the defendant had placed seats there to watch the boat race. This did not constitute as false imprisonment as the plaintiff had other means of crossing the bridge or retreating.

E.g. *McFadzean v CFMEU (2004)* – the plaintiffs, who were environmental protestors, confronted the defendants, who were forest workers, with a variety of protest techniques. The defendants set up a picket line outside the plaintiff's camp. The plaintiffs claimed false imprisonment as they feared violence if they crossed the picket line. It was held that false imprisonment was not constituted as they had other means of escaping (through the bush).

The deprivation of the plaintiff's liberty must be total and absolute; however it is not necessary the plaintiff be imprisoned in the strict sense of the word. A plaintiff may be falsely imprisoned without actually being physically kept in one place by the defendant, if he/she is deprived of liberty through the submission of the defendant's powers.

E.g. *Symes v Mahon (1992)* – the defendant, a police officer, approached the plaintiff with an arrest warrant and requested the plaintiff accompany him to Adelaide. After a journey to the police court in Adelaide, it was discovered that the plaintiff was not whom the warrant had been issued. This was seen as false imprisonment ('reasonably thinking that he had no way of escape which could reasonably be taken by him').

In contrast, if the plaintiff accompanies the defendant voluntarily, without completely submitting to the defendant's authority in the sense in the case above, then it is not false imprisonment. This can be seen in the case *Myer Stores Ltd v Soo (1991)*, when the plaintiff was seen as being falsely imprisoned when he was interrogated for shoplifting but it is not false imprisonment when he went to the police station in the future.

For a total deprivation of liberty to constitute as false imprisonment, it must be without lawfully justification thus it being false. For example, it is lawful justification to imprison a criminal.

E.g. *White v South Australia (2010)* – a group of protestors including the plaintiffs crossed into a uranium mining site. They were detained by police in a makeshift cell (old ship container), a wire cage was also welded to the outside of the cell while the plaintiffs were inside. The court ruled that there was false imprisonment as the arrests were unlawful as the protestors had not been asked to leave before arrest.

Traditionally, there has been debate over the issue about whether the plaintiff had to know that his/her liberty was being deprived in order to constitute as false imprisonment. The *Murray and Ministry of Defence (1988)* finally resolved the conflict by agreeing with the latter view.