

TORTS INTRODUCTION

(A) WHAT IS A TORT?

A civil wrong that is based on a breach of a duty imposed by law which gives rise to a civil (personal) right of action for a remedy not exclusive to another area of law.

Standard of proof → On the balance of probabilities.

(B) AIMS

- Loss distribution/adjustment (shifting loss from victim to perpetrator).
- Compensation (through the award of pecuniary damages)
 - The object of compensation is to place the victim in the position they were before the tort.
- Punishment (through exemplary/punitive damages – secondary aim)

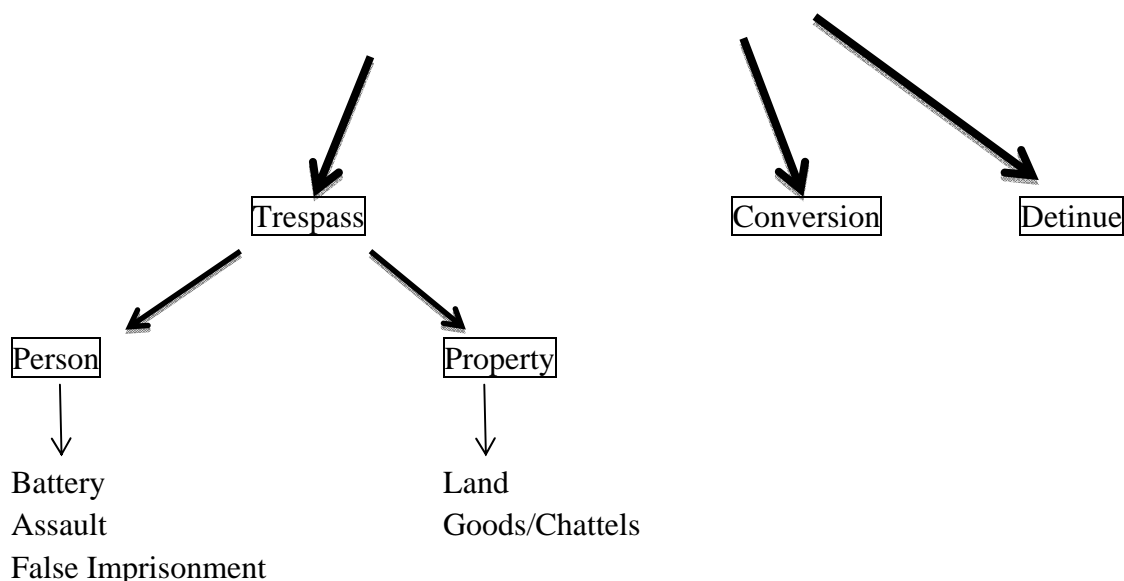
(C) INTEREST PROTECTED IN TORT LAW

- Personal security (trespass / negligence)
- Reputation (defamation)
- Property (trespass / conversion)
- Economic and financial interests

(D) ONUS OF PROOF

- In CL, he who asserts, proves.
- Traditionally in trespass D was required to disprove fault once P proved injury. Depending on whether the injury occurred on or off highway: **McHale v Watson** → boy threw sharp piece of metal at girl's eye.
 - On highway: P proves all elements.
 - Off highway: D proves injury only.
- Current Australian position is contentious but seems to support view that in off highway cases D is required to dis-prove all the elements of the tort once P proves injury.
 - **Hackshaw v Shaw**: (negligence) D landowner of semi-rural property, sick of petrol being stolen so hides with rifle. P young girl lying in backseat of car who gets shot.
 - **Platt v Nutt**: depends on location; on or off.
 - **Secretary DHCS v JWB & SMB (Marions case)**: Marion young intellectually disabled woman. What consent is valid, by parents, to sterilise her. Valid consent if Marion unable to understand, or if she has capacity to understand what contraception is and how to use.

INTENTIONAL TORTS



WHAT IS TRESPASS?

- Intentional/Negligent act of Defendant which directly causes an injury to the Plaintiff or his property without lawful justification.

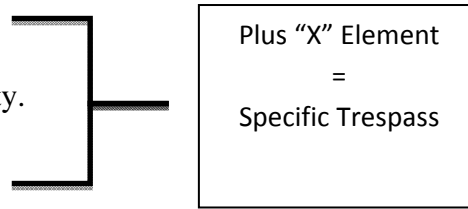
ELEMENTS:

- Intentional / Negligent act.
 - No liability without intention.
 - Basic wilful act → D consciously brings about the contact.
 - Capacity to form the intent: Defendant is deemed capable of forming intent if they understand the nature of their act.
 - E.g. Infants, Lunatics
 - *Morris v Marsden*
 - *Hart v AG Tasmania* – infant cutting another infant with razor.
- Direct interference with person/property.
 - “*So immediately upon the act of the defendant that it may be termed part of that act*”
Salmund & Heuston, Law of Torts.
 - Injury must be immediately caused by act of D and not consequential to it: **Hutchins v Maughan**.
 - **Scott v Shepherd**: firecracker into crowd.
- No lawful justification.
 - Comes down to issue of consent.
 - Consent must be given freely by a P who understands nature of the act: **In re F (Mental Patient: Sterilisation)**.
 - Onus of proving consent is on the D.
 - Lawful justification includes the lawful act of law enforcement officers.

Injury: a breach of right, not necessarily actual damage.
Trespass: requires only proof of injury, not actual damage.

GENERAL ELEMENTS OF TRESPASS

- Intentional / Negligent act.
- Direct interference with person or property.
- Absence of lawful justification.



Intentional acts are excluded from the operation of the Civil Liability Act: s3B(1)(a) except Pt 7 (Self defence).

3B Civil liability excluded from Act

(1) The provisions of this Act do not apply to or in respect of civil liability (and [awards](#) of damages in those proceedings) as follows:

(a) **civil liability of a person in respect of an intentional act that is done by the person with intent to cause [injury](#) or death or that is sexual assault or other sexual misconduct committed by the person-the whole Act except:**

(i) section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)), and

(ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause [injury](#) or death, and

(iii) Part 2A (Special provisions for [offenders](#) in custody),

(b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the [Dust Diseases Tribunal Act 1989](#) -the whole Act except sections 15A and 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),

(c) civil liability relating to an [award](#) of [personal injury damages](#) (within the meaning of Part 2) where the [injury](#) or death concerned resulted from smoking or other use of tobacco products-the whole Act except section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),

(d) civil liability relating to an [award](#) to which Part 6 of the [Motor Accidents Act 1988](#) applies-the whole Act except the provisions that subsection (2) provides apply to motor accidents,

(e) civil liability relating to an [award](#) to which Chapter 5 of the [Motor Accidents Compensation Act 1999](#) applies (including an [award](#) to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the [Transport Administration Act 1988](#))-the whole Act except the provisions that subsection (2) provides apply to motor accidents,

(f) civil liability relating to an [award](#) to which Division 3 of Part 5 of the [Workers Compensation Act 1987](#) applies-the whole Act,

(g) civil liability for compensation under the [Workers Compensation Act 1987](#) , the [Workers Compensation \(Bush Fire, Emergency and Rescue Services\) Act 1987](#) , the [Workers' Compensation \(Dust Diseases\) Act 1942](#) , the Victims Support and Rehabilitation Act 1996 or the [Anti-Discrimination Act 1977](#) or a benefit payable under the [Sporting Injuries Insurance Act 1978](#) -the whole Act.

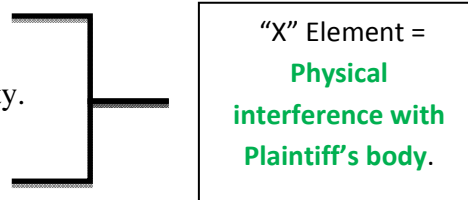
INTENTIONAL TORTS → TRESPASS → PERSON → BATTERY

WHAT IS BATTERY?

- Intentional/Negligent act of Defendant which causes direct physical interference with the Plaintiff's body without lawful justification.
- The essence of the tort is the protection of the Plaintiff's person. No physical contact means no battery has occurred.
- Actionable per se. (does not need to prove damage/injury to get damages)

ELEMENTS

- Intentional / Negligent act.
- Direct interference with person or property.
- Absence of lawful justification.



NATURE OF THE PHYSICAL INTERFERENCE

- **Rixon v Star City Casino:** D places hand on P's Shoulder to attract his attention – no battery.
- **Collins v Wilcock:** Police holds D's arm with a view to restraining her. Touching has to be intentional and hostile. "*Fundamental principle is that every person's body is inviolate*" – battery.
- **Cole v Turner:** The least of touching could be a battery
- Where there is battery there is usually assault.

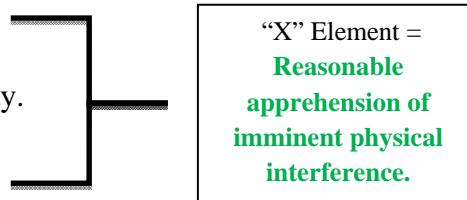
INTENTIONAL TORTS → TRESPASS → PERSON → ASSAULT

WHAT IS ASSAULT?

- Intentional/Negligent act/threat of Defendant which directly places P in reasonable apprehension of an imminent physical interference with P's body (or someone under their control), without lawful justification.
- No physical contact needs to occur.
- Actionable per se. (does not need to prove damage/injury to get damages)

ELEMENTS

- Intentional / Negligent act.
- Direct interference with person or property.
- Absence of lawful justification.



NATURE OF THE REASONABLE APPREHENSION OF IMMINENT PHYSICAL INTERFERENCE

- **Hall v Fonceca**: There must be a direct threat: P shook hand in D's face in an argument.
- **Barton v Armstrong**: mere words are not actionable but when there is more involved that may constitute an assault.
- In general, conditional threats are not actionable.
 - The unsatisfied condition cancels out the threat: **Tuberville v Savage**.
 - Assault occurs if condition relates to P's future conduct and D has no right to impose that condition: **Police v Greaves**.
- Apprehension must be reasonable, objective test (**Zanker v Vartzokas**; P jumps out of moving van to escape D's unwanted lift – no reasonable chance of escape).
- Where there is battery there is usually assault, unless hit from behind then they cannot anticipate/apprehend the physical interference: **Gambrielli v Caparelli**.
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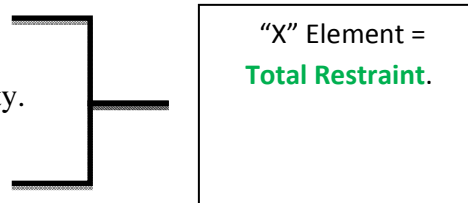
INTENTIONAL TORTS → TRESPASS → PERSON → FALSE IMPRISONMENT

WHAT IS FALSE IMPRISONMENT?

- Intentional/Negligent act of Defendant which directly causes the total restraint of P and thereby confines them to a delimited area without lawful justification.
- Actionable per se. (does not need to prove damage/injury to get damages)

ELEMENTS

- Intentional / Negligent act.
- Direct interference with person or property.
- Absence of lawful justification.



NATURE OF THE TOTAL RESTRAINT

- Restraint must be total:
 - **Bird v Jones** (passage over bridge: partial restraint only)
 - **Balmain New Ferry Co v Robertson** (could swim to escape)
- Absence of a reasonable means of escape (**Burton v Davies**-not reasonable to expect her to jump from car (can escape but only at risk to personal injury))
- Restraint may be total where D subjects P to their authority with no option to leave:
 - **Symes v Mahon**: police arrests P by mistake, compelled him to submit to authority.
 - **Myer Stores Ltd v Soo**: D to prove arrest was without lawful justification.
- No FI where one voluntarily submits to form of restraint.
 - **Balmain New Ferry Co v Robertson** (P voluntarily submitted to imprisonment)
 - **Herd v Weardale** (restraint accepted as workers chose to go into mine shaft)
- Words can constitute FI: “*mere threat of force which intimidates a person into compliance without laying on of hands*” Balkin & Davis (96 ed) pp55. Confirmed in **Symes v Mahon**.
- P does not need to know at the time that they are FI: **Meering v Graham White Aviation**.

LIABILITY WHEN ACTING AS AGENTS

- Issue: do police in making arrest act independently or as the agents of the citizen who promoted and caused the arrest?
- Person who restrains is liable.
 - **Dickinson v Waters Ltd**: Waters is a grocery store, D steals. Police act as agent for the store; not their enquiry.
 - **Bahner v Marwest Hotels Co**: Police hold B because intoxicated, and at that point, police responsible.

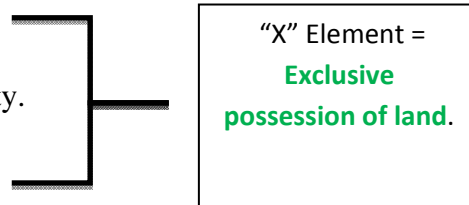
INTENTIONAL TORTS → TRESPASS → PROPERTY → LAND

WHAT IS TRESPASS TO LAND?

- Intentional/Negligent act of Defendant which directly interferes with the Plaintiff's exclusive possession of land.
- Actionable per se. (does not need to prove damage/injury to get damages)

ELEMENTS

- Intentional / Negligent act.
- Direct interference with person or property.
- Absence of lawful justification.



NATURE OF TRESPASS TO LAND

- Land includes actual soil/dirt, the structures/plants on it and the airspace above it.
 - Airspace: only the height that is necessary for ordinary use and enjoyment of land: **Bernstein of Leigh v Skyways & General Ltd.**
 - Protruding sign can be trespass: **Kelson v Imperial Tobacco.**

STATUTORY EASEMENTS

Easement: The right to enter someone else's property. A means of access. Lawfully created by s88K of the Conveyancing Act.

88K Power of Court to create easements

(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

(2) Such an order may be made only if the Court is satisfied that:

(a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900 can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and

(c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

RESTRICTIONS TO EASEMENTS

- “Property rights are valuable rights and the Court should not lightly interfere with property rights... the section does not exist for people to build right up to the boundary of their property or build without adequate access and then expect others to make their land available for access”: **Hanny v Lewis**.
- “Developers have a responsibility to act reasonably as do the proprietors of adjoining land and the developers should not just proceed as if they would automatically get what they seek without negotiations”: **Goodwin v Yee Holdings PL**.
- Note s88K(1): “**Court may... if reasonably necessary**” → what is reasonably necessary and what constitutes effective use or developments, is a question of fact and depends on the circumstances of each case.
- An applicant need not prove absolute necessity, but the easement must be more than “*merely desirable*”.
 - **117 York St PL v SP16123**: crane was reasonable.
 - **Hanny v Lewis**: Seaforth property. P lightly disabled, mobility issues. Easement not reasonably necessary as alternate access to steep hill path.
- An applicant must have made all reasonable attempts to obtain the easement (right to sunlight): **Coles Myer Ltd v Dymocks Book Arcade Ltd**.

COMPENSATION FOR EASEMENTS

- s88K(2): “*adequately compensated*”: Stated in **Wengarin PL v Byron Shire Council**:
 - the diminished market value of the servient land.
 - Associated costs that would be caused to the owner.
 - Loss of amenities such as peace and quiet,
 - Where assessment proves difficult, the court may assess compensation on a percentage of the profits that would be made from the use of the easement.

NEIGHBOURING LAND ACCESS AND UTILITY SERVICE ORDERS

(Access to Neighbouring Land Act 2000 ss11 & ss13)

11 Jurisdiction to make neighbouring land access orders

(1) The Local Court may make a neighbouring land access order if it is satisfied that, for the purpose of carrying out work on land, access to adjoining or adjacent land is required and it is satisfied that it is appropriate to make the order in the circumstances of the case.

(2) The Local Court must not make a neighbouring land access order unless it is satisfied:
(a) that the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work, and
(b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 10 and section 34 (if applicable).

13 Jurisdiction to make utility service access orders

(1) The Local Court may make a utility service access order if it is satisfied that access to land is required for the purpose of carrying out work on or in connection with a utility service situated on the land and it is satisfied that it is appropriate to make the order in the circumstances of the case.