

**Lecture 1: The scope of section 317 in relation to torts****Lecture 2/3: The philosophy behind section 317****I The statutory bar – s 317, Accident Compensation Act 2001**

s 317 Proceedings for personal injury

(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in NZ, for damages arising directly or indirectly out of -

- a. Personal injury covered by this Act; or
- b. Personal injury covered by the former Acts.

= Section 317 bars any right to sue for damages arising directly or indirectly out of personal injury covered by the Act. Thus, a claimant may not rely on the law of torts – and most relevantly, the tort of negligence – to seek damages for personal injury that is covered by the Act. Whether or not the law of torts continues to be available comes down to whether the claimant has cover for the personal injury, and whether the proceedings are for damages arising out of the personal injury.

**II “Personal injury covered by this Act”**

Under s 20 (“Principles”), the personal **injury** must be of a kind described in s 26(1)(a), (b), (c) or (e), and it must have been sustained in the circumstances described in s 20(2).

For the purposes of s 20, s 26(1): includes death, physical injuries (including, eg, a strain or a sprain), mental injury suffered by a person because of physical injuries, damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

There is cover provided the personal injury was (s 20(2)):

- caused by an **accident\*** to the person (see s 25 on the meaning of “accident”),
- treatment injury suffered by the person,
- consequence of treatment for personal injury, or
- caused by a work-related gradual process, disease, or infection suffered by the person.

NOTE: Under ss 21 and 21B, personal injury includes mental injury caused by certain criminal acts (s 26(1)(d)) and work-related mental injury (s 26(1)(da)).

**III “[P]roceedings ... for damages arising ... out of personal injury”**

Section 317 applies *only* to proceedings for damages arising out of personal injury. This may raise the question whether a particular claim relating to personal injury falls within the scope of s 317.

Compensatory damages for personal injury: **barred**

- Putting the person in the position would have been in had the loss not occurred
- "making up for" - often easy to calculate, i.e. simply the value of the loss, time off work, cost to fix something
- A claim seeking compensatory damages for personal injury is necessarily barred by s 317 (e.g. a claim in negligence that the D compensate the P for loss of income arising out of personal injury).

Exemplary damages: **not barred**, even where claim is founded on personal injury

The purpose of exemplary damages is to punish and deter, rather than to compensate. Exemplary damages are only available in cases of intentional or reckless wrongdoing.

**Couch**

- Negligence claim brought by a woman who suffered injury from DOC
- They didn't really consider the issue... but sort of hints that they disagree with the COA and that maybe exemplary damages should be included in the scope of s317 (could be a good argument for Max)
- Interpreted quite wide, and 'implicit criticism' of the COA judgement

- Actions for exemplary damages are not barred by s 317, which was aimed at actions for compensation. Exemplary damages “did not arise out of the plaintiff’s injury”. It was immaterial that personal injury was a necessary ingredient of the action (Couch).

#### **Donselaar**

- One brother assaulted the other brother by hitting him on the head with a hammer
  - Brother brought a claim in exemplary damages for the tort of assault and battery
  - Usually this is not the role of tort law but sometimes actions are so outrageous it requires a punitive response
- Judgement....
- [50] "this is no time for the law to be withholding constitutional remedies for high-handed and illegal conduct, public or private, where it is reasonably possible to provide them."
  - Exemplary D’s are a useful legal tool to punish and we should not use it unless good reason to do so (Cooke J)

= Exemplary damages failed on this case because they are outside of s317

#### **Reparation: not barred**

In **Davies**, the Supreme Court held that s 317 barred the making of a reparation order in criminal proceedings. This decision was reversed by the Sentencing Amendment Act 2014.

#### **Nominal damages: not barred**

Nominal or compensatory damages to vindicate a claimant’s interest in physical safety/integrity? Nominal damages may be available where a tort is actionable per se (ie the claimant need not show that they have suffered actual damage/loss). Their purpose is to recognise the infringement of the claimant’s rights. They cannot be awarded where actual damage is an essential ingredient of the tort, as is the case in a claim of negligence. (i.e. so battery could be claimed but not negligence). Interpret the meaning of s 317 in light of the purpose.

#### **IV Purpose of the Act**

Section 3 = Enhance the public good and reinforce “the social contract”, through a “fair and sustainable scheme for managing personal injury” Overriding goals of the scheme: minimising the incidence of injury (prevention) and the impact of injury on the community

#### **THE ACC SYSTEM... REASON FOR INTRODUCTION ETC.**

#### **The Woodhouse report led to the introduction of the ACC system.**

**Woodhouse J** (author of report) was very critical of the current system for personal injury compensation at the time:

- Under this system, the onus was on the injured party to bring the claim to get compensation for personal injury
- The system was based on a principle of fault (V can only get compensation if they can point to another person being at fault/ negligent, objective fault)

This system was...

- Uncertain/ unpredictable
- Bringing a claim was costly
- Was a waste of money to spend the money on court fees instead of spending the money on rectifying the situation
- Large delays, wasted time
- Few plaintiffs ever succeeded in a claim under this system

[86] "the innocent injured is still more innocent than the innocent injurer"

Compulsory insurance (back before ACC, NZ had compulsory 'highway insurance'), thus by making sure people had insurance, the costs of injury was spread across society (i.e. everyone paid into the insurance and then the insurers paid out)

#### **OPPONENTS TO THE INTRODUCTION OF 317...**

- Fault-based liability acts as a deterrent (But Woodhouse said that this argument is shitty because the current system itself does not work as a deterrent anyway, and there is no financial incentive because insurance is compulsory anyway)

### = COMMUNITY RESPONSIBILITY SYSTEM (BASIS OF ACC)

BASIS OF COMMUNITY RESPONSIBILITY - "if the well-being of the work force is neglected, the economy must suffer injury. For this reason the nation has not merely a clear duty but also a vested interest in urging forward the physical and economic rehabilitation of every adult citizen whose activities bear upon the general welfare."

[56] PRINCIPLE OF COMMUNITY RESPONSIBILITY - THE INHERENT COST OF THESE COMMUNITY PURPOSES SHOULD BE BORNE ON A BASIS OF EQUITY BY THE COMMUNITY (I.E. WE ALL PARTAKE IN CERTAIN ACTIVITIES AND THESE ACTIVITIES ALSO HAVE A BUILT IN RISK OF INJURY, SO WE AS A COMMUNITY HAVE A RESPONSIBILITY TO BEAR THE COST OF THESE 'STATISTICALLY NECESSARY VICTIMS')

**ACC as a 'Social Contract'** = Community responsibility is provided in exchange for giving up the ability to sue.

### McGougan

- Group of P's suffered hip injuries and received faulty hip replacements. The manufacturer of the hip replacements were located in the UK, and the P's wanted to bring a claim of personal injury against them.
- Note, they were covered under ACC, and got compensation (but it was low, 'fair' under the scheme)
- The manufacturers argued that the P's right to sue was barred by s317
- NOTE: Foreign problem questions, does NZ have jurisdiction? (private international law... covers this shit)
- To answer this, the court had to engage with the purpose of s317
- HC clarified that when we are referring to a social contract, we are referring to a socio-political bargain, rather than commercial
- Therefore the court said that s317 does cover it... because people have given up their right to sue under this social contract, therefore there is no room to allow the P's claim to go ahead.
- [35] COA agreed.

### Considerations surrounding ACC..

1. A psychological need for restitution/attribution of blame?
2. Basis for individual responsibility (cause or fault?)
3. The idea of community responsibility
4. "Just" compensation = right to indemnity?
5. Social and economic consequences

### False imprisonment

Another form of trespass to the person is false imprisonment, which is the unlawful imposition of constraint upon another's freedom of movement from a particular place.

*Collins v Wilcock* [1984] 1 WLR 1172 at 1177 per Robert Goff LJ

Total restraint of the P against the P's will = False imprisonment (so long as it is not unlawful)

Police when arresting is lawful to restrain, but otherwise not lawful

Not concerned with personal injury... (unless there is a battery also occurring during the false imprisonment)

The restraint of the *liberty* of the person

False imprisonment is the unlawful total restraint of the liberty of a person. It may be but is not necessarily brought about by force or the threat of force... Force or the threat of force is not the gist of the cause of action... Applying again the tests of the purposes of the Accident Compensation legislation and the natural and ordinary use of language, we have come to the conclusion that false imprisonment as such is outside the purview of the Act. In ordinary speech we do not think that it would be said of anyone who had been detained as the plaintiffs claim to have been that he or she had suffered personal injury by accident.

*Willis v Attorney-General* [1989] 3 NZLR 574; [1990] NZAR 60

### *Bird v Jones* (1845)

A simple obstruction will not suffice if liberty is still available

PL gate crashes the private area at a boat race, he is obstructed by security and told he cannot come that way, although he is still able to move in another direction.

- Majority said, if there is some means of exit, then there cannot be imprisonment

	<p>If the person has freedom to leave... we do not have sufficient restraint to satisfy the tort</p> <p>= The restraint has to be <b>total</b>, but can be for a very short period of time though</p>	<ul style="list-style-type: none"> <li>Patterson J: Imprisonment is a total restraint of liberty, not just an obstruction in a particular direction, even if it is not the direction the P wants to go.</li> </ul> <p>If someone obstructs the passage of a person, with threats or otherwise, if it is not obstructing movement then it is not false imprisonment (could be assault though).</p>
<b>Robinson v Balmain New Ferry Co [1910] AC 295</b>	<p>If you are <i>able</i> to leave = not falsely imprisoned</p>	<ul style="list-style-type: none"> <li>P pays a penny to take the ferry across</li> <li>Once he passes the turn style he changes his mind and wants to go back</li> <li>The ferry says that he has to pay a penny to get back across</li> <li>He claims he was then falsely imprisoned</li> <li>The court said he was not, because he could have taken the ferry or could have paid the penny to go back</li> </ul>
<b>Collins v Wilcock [1984] per Goff LJ</b>	<p>Must be a <i>realistic</i> opportunity to leave...</p> <ul style="list-style-type: none"> <li>A line must be crossed in order for false imprisonment to be satisfied.</li> <li>Is the person staying because they want to, or because they can't leave?</li> </ul>	<p>Police women grabbed the arm of a prostitute on the street (she was not arresting so no real power).</p> <ul style="list-style-type: none"> <li>Walking along the street, anyone can request you to stop and answer questions etc. <ul style="list-style-type: none"> <li>If someone agrees to stop then there is no imprisonment</li> <li>If the request is reinforced by various threats, this can evolve into 'restraint'</li> </ul> </li> </ul> <p>*[22] of <i>Walker</i> quotes this case</p>
<b>Walker v Commissioner of Police of the Metropolis [2015]</b>	<p>Restraint is unlawful, any interference with liberty.</p> <p>Police must be arresting/ have the intention to arrest in order to legally restrain</p> <p>Force is not required</p>	<ul style="list-style-type: none"> <li>Domestic to which police were called and restrained PL in a doorway</li> <li>2 minutes between the restraint and the decision to arrest = 2 minutes of unlawful restraint</li> <li>COA proceeds on the basis that the facts are unclear because the facts differ between police and P's POV</li> <li>Because interference with liberty is a big deal, must be taken seriously.</li> </ul> <p>[28] at the time the police restrained him, they did not have the intention of arresting him. COA affirms that the time doesn't matter and that it was a relatively trivial detention</p>
<b>Willms v Kaluza [2011]</b>	<p>Unable to move = Imprisoned</p>	<p>Debt collection gone wrong</p> <ul style="list-style-type: none"> <li>Ended up tied in a corner with wrists bound, under a blanket, guarded by 3 large men and threatened not to move = He was imprisoned</li> </ul>
<b>Meering v Graham-White Aviation</b>	<p>The PL does not need to be aware they are imprisoned for it to be false imprisonment. I.e. someone can be imprisoned while asleep, drunk or completely unaware.</p> <p>Facts...</p>	<p>I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic. Those are cases where it seems to me that the person might properly complain if he were imprisoned, though the imprisonment began and ceased while he was in that state. Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not. So a man might in fact, to my mind, be imprisoned by having the key of a door turned against him so that he is imprisoned in a room in fact although he does not know that the key has been turned. It may be that he is being detained in that room by persons who are anxious to make him believe that he is not in fact being imprisoned, and at the same time his captors outside that room may be boasting to persons that he is imprisoned, and it seems to me that if we were to take this case as an instance supposing it could be proved that Prudence had said while the plaintiff was</p>

	<ul style="list-style-type: none"> <li>- <i>Drunk in a room, the doors were not locked and he was told he was free to leave</i></li> <li>- <i>Outside the room, person was boasting that they had him under lock and key</i></li> <li>- <i>This representation amounted to false imprisonment</i></li> </ul>	<p>waiting: 'I have got him detained there waiting for the detective to come in and take him to prison' – it appears to me that that would be evidence of imprisonment. It is quite unnecessary to go on to show that in fact the man knew that he was imprisoned. If a man can be imprisoned by having the key turned upon him without his knowledge, so he can be imprisoned if, instead of a lock and key or bolts and bars, he is prevented from, in fact, exercising his liberty by guards and warders or policemen. They serve the same purpose."</p> <p><i>Meering v Graham-White Aviation Co Ltd</i> (1919) 122 LTR 44, 53 – 54 (approved by HL in <i>Murray v Ministry of Defence</i> [1988] 2 All ER 521)</p>
<b>R v Governor of Brockhill Prison</b>	<p><b>Intention</b> is required for this tort</p> <p>Simply the intention to restrain is required, <b>irrelevant of whether it is based on a reasonable or honest belief</b></p> <p>The decision to restrain is enough</p>	<p>The tort of false imprisonment is a tort of strict liability. But the strict theory of civil liability is not inconsistent with the fact that in certain circumstances the harm complained of may have been inflicted justifiably. This is because it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification.</p> <p><i>R v Governor of Brockhill Prison, Ex p Evans</i> [2001] 2 AC 19 at 32 per Lord Hope</p> <p>(Error by prison, false imprisonment because they had no reason to hold the person but had the <i>intention</i> to hold them)</p>

### -----Unlawful restraint-----

s27 gives the grounds for arrest, It says when a restraint is lawful

If a sentence is passed or a process is issued by a court having jurisdiction under any circumstances to pass such a sentence or issue such a process, or if a warrant is issued by a court or person having jurisdiction under any circumstances to issue such a warrant, the sentence passed or process or warrant issued shall be sufficient to justify the execution of it by every officer, prison manager, or other person authorised to execute it, and by every person lawfully assisting him or her, notwithstanding that—

- (a) the court passing the sentence or issuing the process had no authority to pass that sentence or issue that process in the particular case; or
- (b) the court or other person issuing the warrant had no jurisdiction to issue it, or exceeded its or his or her jurisdiction in issuing it, in the particular case.

Crimes Act 1961, s 27

#### **Blundell v Attorney-General [1968] NZLR 341 M page 7**

- Blundell was walking with Barbara Cole (young girl), he was detained walking down the street in Auckland and taken to the police station. If the police are not exercising the power of arrest under these sections, the common law rights apply
- McCarthy J:
  - The principle is that any restraint of a person against his will that is not warranted by law will be a false imprisonment...There was nothing in this case to give the police the power to restrain
  - If we were to accept something short of arrest was permissible, could be distorted into weapons of oppression and injustice, i.e. restraints could be misused.

If someone is exercising restraint against someone else and can find no lawful justification

= Blundell = common law upholds the right of people not to be restrained

#### **Thompson v Attorney-General [2014] NZAR 1282 M page 9**

- PL's court date was cancelled but the court staff failed to note this. When the PL didn't turn up on the 23rd the police were ordered to go and arrest him.
- Police could not be liable because they were exercising the power of arrest – he went after the court staff
- [24] did the court staff have the appropriate intention? "did the court staff intend their omission?"
- Court accepted that this was as a result of a mistake or lack of awareness/ carelessness
- Carelessness that leads to imprisonment does not amount to intention

<<<NOTE>>>

Once the consent has been given, that consent governs the whole restraint. They cannot change their mind  
E.g. Ferry case

- By giving his penny, he consented to being restrained to go on the ferry