What is a Tort?

Tort law is concerned with the interests which a person has in bodily security or the protection of tangible property, financial resources or reputation which are protected by law and which are not exclusively within the fields of the law of contract, the law of restitution or the criminal law.

- Civil wrong committed by one person against another
  - Law provides a remedy for this civil wrong, usually in the form of an action for damages by way of compensation for loss suffered
    - Loss is usually personal injury or property damage

What Interests does Tort Law Protect?

- Physical integrity (person) = Trespass to the Person
- Property or goods = Trespass to goods
- Reputation = Defamation
- Land = Trespass to land

Key Aims of the Law of Torts

- Deterrence
  - Today the rules of the law of torts can have little deterrent effect on activities of most people, except, perhaps, in so far as the remedy of the injunction remains available, because of the well-nigh universal availability and use of third party (liability) insurance
    - One area in which tort law can still exercise some function of deterrence is in capacity to award exemplary damages, to punish defendant for his/her outrageous behaviour
- Compensation (damages as a remedy) – Principle aim
  - This will scarcely ever be effective unless the defendant is insured against liability
- Justice: Expression of a moral principle (corrective justice)
- Loss distribution and insurance
  - Shift a loss which the plaintiff has suffered onto the defendant: but usually, loss is spread through large cross-section of population i.e. this is achieved through insurance
- Appeasement – victims vengeance bought off by compensation, which gives him satisfaction in two ways: he is comforted to receive money himself and pleased that the aggressor is discomfited by being made to pay
- Economic efficiency/risk allocation: ensure that losses are spread and distributed in a way most apposite to maximize economic efficiency
Contexts and Ideologies of Tort Law

- Most claims are for negligence
- Defendants are often insurance companies
  - Little point in seeking to exercise even an undoubted legal right unless the wrongdoer has liability insurance
    - Few people have financial resources to meet even a modest award of damages made against them together with costs
    - Useless for plaintiff to bankrupt a defendant in course of asserting legal rights as former will never receive compensation adjudged due and payable by latter
- Prevailing ideology since 1970s
  - Accident victims undeserving of damages
  - Claims are excessive
  - Allowing a claim opens litigation floodgates
- Modern influences
  - Insurance
  - Human rights e.g. HRA 1998
- “Compensation Culture?”

Definitions

Cause of Action: The factual circumstances giving rise of a legal claim, i.e. a claim that can be pursued by an action or suit by one person against another. For example, one’s being carelessly injured by another is the cause of action giving rise to a legal action for damages and negligence. All elements of tort action need to be there and recognized and there can be multiple causes of action.

Strict Liability: Liability without fault; liability that does not depend on actual negligence or intent to harm e.g. Aircraft Act 1952 (if something drops during flight).

Fault: Liable in Tort, guilty of a crime. Liable for trespass/assault/negligence. If you are at fault do you bear the loss? 1. INTENT to do the act which amounts to the Tort or 2. NEGLIGENCE at the time (carelessness, negligence).

Negligence: 1. Either a way of behaving (Drove negligently, drafted a will negligently) OR 2. Negligence is looking at the tort of negligence as a whole.

Concurrent and Vicarious Liability

- Many situations where more than one person may be liable to injured
  - Could have committed separate tort (so severally/separately liable to the plaintiff) or because they committed a tort together (e.g. jointly assaulted someone, or breached duty which they owed to plaintiff) or because the person who committed tort was employed as employee at the time and tort committed in course of that employment
- Employer’s vicarious liability = STRICT LIABILITY as it does not depend on the fault on the part of the employer
Employer not generally liable for a tort committed by independent contractor

Vicarious liability of an employer does not affect the personal responsibility of the employee who committed the tort as between employee and tort victim

More than one person can be liable to plaintiff for the same damage: it is “joint and several” in cases for personal injury [joint tort feasors or concurrent/several tort feasors who commit separate acts with same damage]
  o Plaintiff can recover his/her whole loss (but not more) from any of the parties, defendants can seek contribution from each other

If loss is property damage/eco loss caused by negligence: liability now “proportionate” so generally each potential defendant only primarily liable to the plaintiff for his/her proportion of plaintiff’s loss

Scope of Tort Law: Case Summaries

Ollier v Magnetic island Country Club [2004] QCA (QLD Court of Appeal) 137

Facts
  • 28 August 1994 Ollier and Shanahan participants in amateur charity golf comp
  • Held on first defendant’s golf course, Magnetic Island
  • Plaintiff struck in head by a ball driven by Shanahan

Issues
  • Was Mr Shanahan negligent?
  • Was Magnetic Island Country Club negligent?
  • Did Mr Ollier voluntarily assume the risk of being hit by a golf ball as an inherent risk of participating in the competition?

Held
  • Trial judge in Supreme Court of QLD (approx 10 years before) found that second defendant had been negligent in failing to look ahead properly before playing the shot which struck the plaintiff
  • Trial judge awarded damages for $2,610,795.72 to plaintiff and dismissed plaintiff’s claim in negligence against the first defendant
  • Trial rejected second defendant’s contention that plaintiff had voluntarily assumed risk of being hit by a golf ball as an inherent risk of participating in the competition
  • Queensland Court of Appeal dismissed the appeal
  • Application by second defendant for special leave to appeal refused by HCA: Shanahan v Ollier [2005] HCATrans 169 (21 March 2005)

This case demonstrates that:
  • Liability requires the plaintiff to prove a negligent act on the part of the defendant which was cause of plaintiff’s injury
  • No relevant ground of defence, such as plaintiff’s voluntary assumption of risk
  • Effectiveness of tort law as compensation mechanism depends on defendant having or having access to sufficient personal assets/liability insurance to pay damages awarded to plaintiff
    o SMH 2004 article claimed that Shanahan did not have many personal assets and he was uninsured
• Therefore: left with a seriously injured accident victim required to rely on social security/health care systems, charity and assistance of family/friends

• Substantial time between date of accident and final disposition of litigation (maybe as waiting for plaintiff’s level of permanent disability to stabilize)

• Could this not have been framed as “trespass to the person?”
TORTS EXAM NOTES

Historical Background, Trespass and Case

**Trespass and the action on the case: the historical distinction**

- Trespass first tort to be recognized by the courts
- In early cases, trespass and action on the case were distinguished through the *form* of the act i.e. direct (immediate) injury and indirect (consequential) injury

**Trespass [DIRECT + INTENTIONAL]**

- Trespass *vi et armis* [with violence and arms] ("trespass"): direct, forcible, unauthorised and immediate interference with persons, goods or land without lawful justification
- Fault in some form is required
- Need intentional or negligent contact – not tort of strict liability
  - In the absence of negligence, a suit alleging trespass based on an unintentional act will not now succeed i.e. McHale v Watson
  - In cases of personal injury directly caused by negligent conduct – can bring suit in trespass or negligence
- ‘Actionable per se’ (of itself)– does not require proof of damage
  - All one needs to prove is that there was a basic interference
- Action of trespass complete when trespass occurred because from that moment you had an action, and you have a certain amount of time to sue in a 'limitation period' defined by Limitation Act 1969
  - 3 years to bring action for trespass to the person cases
  - 6 years for all other cases

“Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant’s part.” [Diplock J in Fowler v Lanning]

- Law initially inflexible: if started and brought wrong action could not start again

**Action on the case [INDIRECT + NEGLIGENT]**

- Indirect interference/injury
- Indirect damage
- Not a part of the defendant’s act but a consequence of it
- Developed into modern actions of negligence, nuisance or conversion (the action of wrongfully dealing with goods in a manner inconsistent with the owner's rights)
- Damage is said to be the “gist” of action on the case

“The old action of trespass was confined to instances of the direct application of force. An indirect application of force would support only an action of trespass
on the case” [Darling Island Stevedoring and Lighterage Co v Long (1957) 97 CLR 36 per Kitto J]

**Direct/indirect injury**

*Reynolds v Clarke* (1725) 92 ER 410 (Fortescue J): consequential act is not direct.

- Two neighbours – one neighbour (Defendant) constructed caves on house's rood, rain collected in caves and flowed down spout onto plaintiff’s property, stable and brew house overflowed, upon which neighbour’s property rotted by the water
- Is the defendant liable by trespass for damage of plaintiff’s property?

Held:
- Plaintiff received no damage from fixing of spout on d’s property: p received damages from consequence of it, therefore trespass cannot lie
- Flowing of water not direct act of defendant; rather consequence of d’s action of fixing spout \( \rightarrow \) consequential act will not be a trespass, but an act upon where the case may lie (so should have been action on the case)

**Fortescue J:** “The difference between trespass and case is that in trespass the plaintiff complains of an immediate wrong, and in case of a wrong is the consequence of another act ... 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 it lies there, I tumble over it and receive an injury, I must bring action upon the case, because it is only prejudicial in consequence, for which originally I could have no action at all ...”

*Scott v Shepherd* (1773) 96 ER 525 (Blackstone J) “Squib” case: established that a continuing act may be direct.

- Shepherd threw a lighted squib into a crowded market-house
- Fell onto the stand of Yates. Willis (of Yates) picked it up and threw it in order to prevent injury to himself and Yates onto another stand, that of Ryal. In self-defence, he threw the squib
- Ended up exploding in Scott’s face, causing him to lose sight in one eye

*Is the injury to Scott direct?*
- Plaintiff was awarded 100 pounds in damages
- Yates/Willis/Ryal acting under necessity \( \rightarrow \) continuation of Shepherd’s act \( = \) not free agents

**De Gray CJ:** “…the question here is whether the injury received by the plaintiff arises from the force of the original act of the defendant or from a new force by a third person... *everyone who does an unlawful act is considered as the doer of all that follows.*”

**Blackstone J [dissenting]:** “…the settled distinction is that, where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the Case...the original act was against Yates as a trespass...”
• Claimed to be no liability for indirect consequences

Directness $\leftrightarrow$ Indirectness
Immediate $\leftrightarrow$ “Consequential”

*Hutchins v Maughan* [1947] VLR 131 (Supreme Court of Victoria): Trespass is the remedy for the direct (or immediate) application of force by the defendant to the plaintiff’s person, land or goods. An action on the case is the remedy for indirect (or consequential) injury caused by the defendant to the plaintiff.

**Facts**
- Complainant is a drover: Easter Sunday 1944 he was droving in vicinity 2000 ewes
- On way to unfenced land he met the defendant and was told by him that the paddock north of the Sanctuary in the vicinity was poisoned, and that there were baits along the creek
- Complainant apparently thought defendant was bluffing about the poison along the creek and rode down to creek with dogs a day or so later – saw no sign of baits: but shortly after dogs picked up baits and died

**Issues**
- Was the injury suffered by the plaintiff consequential or immediate?

**Held (per Herring CJ)**
- Police magistrate originally gave judgement for the complainant for his trespass claim and awarded him with 50 pounds
  - Upheld the defenses taken so far as negligence/nuisance
- Doing of the act caused the complainant no mischief
  - Baits were laid by the defendant before the complainant took his dogs on to the land in question
  - Before he could suffer an injury, he had himself to intervene by coming to the land and bringing his dogs thereon – therefore no trespass can be maintained
- Injury suffered cannot be said to have followed so immediately in point of causation upon the act of the defendant as to be termed part of that act should be regarded as consequential and not as directly or immediately occasioned by it
- Negligence was not maintained as the defendant told plaintiff baits were spread over the land, hence he fulfilled his own duty of care

*Southport Corp v Esso Petroleum Co* [1954] 2 QB 182 (Denning LJ)
- Esso tanker which was carrying oil was stranded on an estuary off Southport shore – to refloat itself, it discharged some oil into the estuary and some of this oil later washed up into the foreshore
  - Southport corp had clean-up on the foreshore
- Southport Corp sued in negligence, nuisance and trespass
  - Was negligence and nuisance – interference with use/occupation of foreshore
• Was it a trespass? → Court held it was not as oil was discharged by the ship onto the shore and washed by tide onto foreshore, not discharged directly onto the foreshore by the sinker

Rule in *Williams v Holland (1833) 131 ER 848 (Tindal CJ)* (Court of Common Pleas)

“After Williams v Holland in 1933, it was no longer necessary for a plaintiff alleging injury from the immediate act of the defendant to bring his action in trespass. From that date, he could “waive” the trespass and bring case instead.” *Scott v Davis* (2000) 204 CLR 333 per Gummow J

• Trespass or action on the case can be brought for direct injury caused negligently
• Directness no longer key consideration, primary issue turned to fault
  o Establishment of negligent trespass
  o SO → Action on case took over from trespass when fault involved was negligent, even though injury direct

Principle of law: Where the plaintiff is injured by the defendant’s direct (or immediate) act, the plaintiff may elect to bring an action on the case (rather than trespass) provided that the defendant’s act is negligent. However, where the defendant’s act is both direct and intentional, the only cause of action available to the plaintiff is trespass.

Facts
• Defendant’s gig and horse ran and struck with great violence upon and against the horse and cart of the Plaintiff and thereby broke to pieces the plaintiff’s cart and greatly hurt the son and daughter of the plaintiff
• Procedural history (trial): the injury occasioned by the negligence and carelessness of the defendant was affirmed and p awarded 12 pounds
• Defendant’s objection upon appeal → action should have been trespass, and the case was not maintainable

Issues
• Was the injury occasioned by the carelessness and negligence of the Defendant in driving his own gig?

Held (per Tindal CJ)
• *Leame v Bray*: the only rule established is that an action of trespass might be maintained, not that an action on the case could not
• *Moreton v Hardern*: full length of deciding that where the injury is occasioned by the carelessness and negligence of the defendant, although it be occasioned by his immediate act, the plaintiff may, if he thinks proper, make the negligence of the defendant the ground of his action, and declare in case
• Where the injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a willful act
• Rule nisi discharged
**Fault in trespass**

- In modern tort law, whatever the position may have been in medieval times, fault (intent or negligence) is an essential ingredient in trespass, as it is in almost every action on the case
  - Vast majority of fault cases are INTENT cases

**RULE 1: INTENTIONAL + DIRECT = TRESPASS.**

- 13th century → strict liability was established (i.e. no fault) – trespass was for direct acts and action on case for indirect (consequential) acts

Rejection of this liability came with *Weaver v Ward* (1617) 80 ER 284: no man shall be excused of trespass except it to be adjudged utterly without his fault.

- Defendant shot the plaintiff in a practice brigade
- Defendant shot by chance
  - Bray J: no man is excused from trespass unless no fault is established
    - Rule 1: A lack of fault will excuse a person from trespass
    - Rule 2: Lack of fault is a matter of defence for a defendant to prove, not the plaintiff proving the fault
      - Key benefit of a trespass case – not that fault is a defence that it is the defendant to disprove fault – p advantage

Now, proof of fault is required for all trespassory acts:

- *Holmes v Mather* (1875) LR 10 Exch 261 – lose control of carriage and servant takes over and crashes into plaintiff’s carriage
- *Stanley v Powell* [1891] 1 QB 86 – shooting birds, bullet ricochets off oak tree and hits servant

Without fault there is no tort. Qns we need to answer in order to establish fault:

1. Was the act intentional?
2. Was the act negligent?
3. Is there a statutory scheme of strict liability? i.e. work place accidents
4. If there is none of the above, act was accidental, no legal claim.

**NB:** All indirect acts are framed in negligence, but not all negligent acts indirect. **NB:** All trespassory acts are direct, but not all direct acts are trespassory.

**Onus of proof of fault**

**RULE 2: NEGLIGENT + DIRECT = NEGLIGENT TRESPASS (done with fault).**

Trespass/negligent trespass: (1) The plaintiff must prove causation on behalf of the defendant (i.e. trespassory act) [so onus on defendant to prove, on balance of probabilities, that trespassory act occurred without defendant’s fault] and (2) the burden of proof shifted to the defendant to disprove fault (negligent/intentional actions).
**Negligence:** Plaintiff must prove causation AND fault on behalf of the defendant, i.e. onus is always on the plaintiff.

**Balance of Probabilities:** Onus of proof showing evidence is equal does not prove the case. Working out who has the onus of proof can be vital, and on trespass, as soon as find out trespass has occurred, onus goes to defendant to prove not at fault.

- Trespass on the highway: plaintiff must prove causation + fault
  - Burden of proving intentional/negligent injury on highway on plaintiff
  - Persons who use highways or occupy adjoining property must therefore be taken to assume risk of injury from inevitable dangers arising from flow of traffic [i.e. dangers incidental to ordinary exercise of right of user], but not the risk of intentionally or negligently inflicted harm
- In England, in all cases of trespass to the person, the burden of proving negligence rests with the plaintiff – plaintiff must allege either intention on the part of the defendant or, where negligence is relied upon, the plaintiff must state the facts alleged to constitute negligence

*Blacker v Waters* (1928) 28 SR (NSW) 406: *A prima facie cause of trespass had been established by the plaintiff of the fact that the lead which injured him had come from a bullet fired by the defendant, and that the burden of proving the act complained of was neither intentional nor negligent lay upon the defendant.*

**GENERAL RULE** Onus of proof of fault shifts to defendant once the plaintiff has proved a direct impact caused by the defendant i.e. lack of fault – *McHale v Watson, Platt v Nutt* (obiter) (note: not argued in *Ollier, Fallas, Gray*).

*McHale v Watson* (1964) 111 CLR 384 (High Court of Australia): *It is established that it was up to the defendant to discharge fault. That is, to prove he was acting neither intentionally nor negligently.*

- Defendant child Barry Watson (12 years old) struck plaintiff in the eye with a sharpened piece of metal, described as a dart, with serious consequences for her (9 years old)
- Claim against Watson → trespass to the person and negligence

*Ollier v Magnetic Island Country Club* [2004] QCA 137

*Venning v Chin* (1974) 10 SASR 299 (Supreme Court of South Australia) – *Trespass on the highway*

- Onus of proof on plaintiff even if plaintiff sues in trespass/negligence

**Principle of Law:** As a general rule, in trespass the onus is on the defendant to disprove fault. However, in trespass for injury caused in a highway accident, the onus is on the plaintiff to prove fault on part of the defendant.

**Facts:**

- Plaintiff (appellant) suffered personal injuries when struck by a car, driven by the defendant (Respondent) while crossing a public road
• In plaintiff’s action for damages trial judge found plaintiff guilty of contributory negligence in crossing road without due regard for own safety
  o Trial judge could not find that defendant was guilty of negligence but could also not find that defendant was not guilty of negligence
  o Plaintiff entitled to recover damages for trespass to the person
  o Damages should be reduced by 60% \( \rightarrow \) contrib. negligence
• Plaintiff appealed and defendant cross-appealed

Issues:
• Whether there is an exception to the general rule with regard to highway accidents i.e. should onus of proof of fault be on the defendant?
• Is trespass still available for injuries caused by negligence?

Held:
• Supreme Court held that defendant was guilty in causing the plaintiff’s injuries and that correct apportionment of responsibility for plaintiff’s injuries was 40% plaintiff
• Trespass is still available for injuries caused by negligence (Bray CJ)
• There is no liability in trespass for the use of force against the person which is neither intentional nor negligent
• Australian National Airways Ltd v Phillips [1953] SASR 278, Ligertwood J made it clear that ‘the overall onus was on the plaintiff to prove negligence on the part of the defendant…’
• Appeal allowed, cross-appeal dismissed

Bray CJ: “In summary, I think that I am bound by McHale v Watson ... that in trespass generally the onus lies on the defendant to disprove negligence, but also I think that the weight of authority favours the proposition that highway accidents are an exception to this rule and that in trespass for injury on the highway the onus is on the plaintiff to prove either intention or negligence on the part of the defendant…”

**Platt v Nutt (1988) 12 NSWLR 231** – Supreme Court of NSW, Court of Appeal

Principle of Law: Onus of proof of the trespassory act is an issue distinct from onus of proof of fault. The plaintiff in trespass must prove that the defendant caused the trespassory act of which the plaintiff complains.

Facts:
• In the course of an emotional domestic upheaval the respondent (plaintiff) was injured when her hand penetrated a glass panel in the front door of a house which until that day had been the family home of her daughter and son-in-law who is the appellant [defendant]
• She sued the appellant for trespass to the person upon the basis that he had caused the injury by slamming the door on her
  o Respondent had been standing on porch outside front door of house with her back to an external wire gauze door holding it open to enable her daughter to pass through the doorway while she carried luggage
  o Respondent had been standing there for \( \frac{1}{2} - \frac{3}{4} \) of an hour: appellant’s wife left house followed by their daughter Kylie and appellant slammed front door shut – when did this the respondent, who was
still holding the wire gauze door open, put out her right hand which
hit and broke the glass in a panel of the door
o Respondent claimed in evidence that she put out her hand to prevent
door striking her in face and to prevent it striking kylie
• Trial judge – accepted respondent’s case that appellant had slammed door
but rejected the contention that he had done so with intention of injuring the
respondent and accordingly concluded that respondent could only succeed if
her injury resulted from negligent conduct on part of appellant

Issue:
• Does the plaintiff bear the onus of establishing negligence on part of the
alleged trespasser?
• Did the appellant intend to strike the respondent with the door?
• Did the learned judge err in concluding the appellant was liable in trespass?

Held (CLARKE JA)
• The respondent would not have suffered injury unless she had put her hand
out to impede the passage of the closing door
• Injuries resulted from own independent actions and not conduct of appellant
• Trial judge was unable to determine on evidence whether the respondent in
thrusting out her arm did so as a reflex action to a threatening situation or in
order to thwart the appellant
  o Consequence is that the respondent failed to establish that her injury
  resulted from, or was caused by, the act of the appellant
• She failed to establish on the balance of probabilities that injuries caused by
the appellant’s use of force rather than a consequence of her own willful act
• It is established that if injury to a person is the direct result of a defendant’s
act, the plaintiff will be entitled in trespass although the injury was not
intended by the defendant if it resulted from his negligence
• Appeal allowed

99% → you need to prove your case – Kirby in Platt v Nutt said the onus of proof
should be on proof, on every element, on balance of probabilities.
• Kirby’s major concern – need to restore ‘a satisfactory conceptual
approach and consistency in the assignment of the burden of proof’ in
cases of trespass to the person by bringing other such cases ‘into line with
the law now clearly established as applicable in respect of trespass to the
person by use of a motor vehicle’
  o Shift – would have further advantage of bringing law in line with
general rule which obtains in the courts – who asserts must prove
  o Also remove tactical advantage – when plaintiff is free to choose
whether to characterise/plead case as trespass or negligence
• Such a step might encourage reassessment of the respective functions of
trespass and negligence in law of torts, reconciling ancient cause of action
in trespass to more modern tort of negligence

Fallas v Mourlas (2006) 65 NSWLR 418
• Plaintiff and defendant kangaroo squatting
• Plaintiff didn’t want to shoot, stayed in truck and directed light as
kangaroos went through the bush
• Plaintiff told others do not get in ute/truck with gun
• After shooting over, one got in truck with gun, said it was unloaded, accidently shot the plaintiff
• **Plaintiff sued in negligence**
  o Should have sued in negligent trespass → everyone forgets about it: modern focus is on negligence only

**Trespass for negligent injury?**

• Tendency to associate trespass exclusively with intentional wrongdoing
• In modern tort law (in Aus), trespass is maintainable where the defendant’s fault comprises negligence → so the plaintiff can plead trespass/negligence for an injury which was direct and unintentional and negligent (negligent trespass)
  o Trespass maintainable where d’s fault comprises negligence
  o Trespass not confined to intentional interference

In respect of direct injury caused negligently, the plaintiff may frame the claim in trespass or as an action on the case.

**Williams v Milotin (1957) 97 CLR 465** – High Court of Australia

**Principle of law:** The principle of Williams v Holland is part of Australian law.

**Facts:**

• Action was brought by an infant by his friend to recover damages for personal injuries sustained by the plaintiff in consequence, as he alleged, of being struck while riding a bicycle in the street by a motor truck which was driven by the defendant in a negligent manner
• Date assigned to occurrence was 7th May 1952, writ of summons issued 19th July 1955 – more than three years after alleged cause of action arose but less than 6 years: defendant pleaded action barred by s36, Full Court decided that it was not barred
  o S36 of Limitation of Actions Act 1936-1948 SA: all actions for assault trespass to person menace battery wounding or imprisonment shall be commenced within three ears next after cause of such action accrued but not after
  o S35 enumerates number of actions which must be commenced within 6 years – includes action on the case
• Defendant's starting point: action the plaintiff brought could formerly have been properly framed as action of trespass to the person

**Issues**

• Does the plaintiff's cause of action fall within s35 as one which might have been brought in the form of action / trespass of the case?

**Held (Dixon CJ, McTiernan, Williams, Webb, Kitto JJ)**

• While the cause of action might have been laid as trespass to the person, the action might have also been brought as an action on the case to recover special or particular damage caused by defendant's negligence
Essential ingredients in action of negligence for personal injuries include special/particular damage – gist of the action – and want of due care
  o Trespass to the person includes either
• It is true that in the absence of intention of some kind of want or due care, a violation occurring in the course of traffic in a thoroughfare is not actionable as a trespass
• Appeal dismissed

*Parsons v Partridge (1992) 111 ALR 257* – Supreme Court of Norfolk Island

**Principle of law:** Applying the reasoning in *Williams v Milotin*, an action on the case is maintainable for the negligent driving of a motor vehicle causing personal injury even though this injury caused by the defendant’s direct act.

**Facts:**
• Plaintiffs were injured in a motor car accident on 22 July 1986
• 24 July 1990 they commenced proceedings in this court against defendant
• Alleged that accident in which they received their injuries was occasioned by the negligent manner in which the defendant drove motor vehicle owned by him and that the defendant’s vehicle collided with vehicle in which the plaintiffs were travelling
• Counsel for defendant contends relevant limitation period is 4 years from date of accrual of cause of action, counsel for plaintiff contends 6 years
• Imperial Statute 21 Jac I c 16 s 111 statute which governs limitation of actions in Norfolk Island s111 provides inter alia that actions upon the case are to be commenced within 6 years of accrual of cause of action and actions of trespass are to be commenced within 4 years of such accrual

**Issues:**
• Is the limitation period that should apply to the present case one of four or six years?

**Held (MORLING CJ)**
• Follows from *Williams v Milotin* on the facts alleged in the present case the action might formerly have been correctly brought in the form of an action called trespass on the case, and also in the form of action for trespass to the person
• Plaintiffs in present proceedings have elected to rely upon a cause of action falling within part s111 of Limitation Act 1623 which refers to causes of action in respect of which limitation period is 6 years
  o Having so elected limitation period applicable is 6 years, not four years as contended on behalf of the defendant
• Appeal dismissed with costs

*Letang v Cooper* [1965] 1 QB 232
• Plaintiff was sunbathing in grass carpark of hotel when defendant, negligently ran over her legs
• By time plaintiff brought action more than 3 years elapsed – couldn’t bring in negligence – so brought in damages for personal injury, claiming not only in negligence but in alternative for trespass to the person
• Lord Denning MR held that the distinction between trespass and case is obsolete, instead of dving actions for personal injuries into trespass or case we now inquire whether defendant acted intentionally/unintentionally:
  o Intentionally = trespass, unintentionally = negligence
• Diplock LJ accepted that trespass could still be committed negligently but preferred to refrain from considering whether any substantive differences between negligent trespass and negligence:
  o Although same factual situation revealed acts which could be described either in terms of trespass to the person or negligence, this did not imply two separate causes of action – two apt descriptions of the same cause of action
• Said no such thing as negligent trespass anymore but in Australia we don’t agree with that anymore i.e. *Venning v Chin*

**Negligence for Intentional Trespass**

“As Williams v Milotin makes plain, negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.” (New South Wales v Lepore (2003) 212 CLR 511 per Gummow and Hayne JJ)

• Williams v Holland, Tindal CJ said that an action on the case is maintainable for a direct act “so long as it is not a willful act”
  o So direct injury caused negligently can be framed as trespass/action on the case by the plaintiff
• Williams v Milotin, Dixon CJ, McTiernan, Williams, Webb and Kitto JJ said that, where the defendant intended to strike the plaintiff, “the action could have been brought in trespass and not otherwise”
• In modern tort law, may a claim for some of the consequences (e.g. psychiatric injury) or an intentional trespass (Sexual assault) be framed as a claim in negligence?

**Wilson v Horne (1999) 8 Tas R 363** – Supreme Court of Tasmania, Full Court

**Principle of Law:** Query, whether, in respect of a direct and intentional act (e.g. sexual assault), negligence is maintainable as a cause of action in respect of damage which is a consequence of that act (e.g. psychiatric injury).

**Facts:**

• During 1973-1980, the respondent (plaintiff) aged between 5-12, was repeatedly sexually abused by the appellant, her uncle and 25 years older
  o Abuse = no penetration and not accompanied by physical injury
• 1994, following revelations to the respondent by one of her sisters that she had also been sexually abused by the appellant, the respondent’s memory of her own sexual abuse revived and she developed chronic post-traumatic stress disorder
In respect for this psychiatric illness, the respondent commenced proceedings against the appellant in 1996 in which she claimed damages for negligence (not trespass)

- Trial judge rejected appellant’s submission that where there is a direct and intentional act, trespass is only available cause of action: Limitation Act 1974 (Tas) provided 3-year limitation period for actions founded on negligence to recover damages for personal injuries (including psychiatric illness) and six-year limitation period for all other actions founded on tort, including trespass

**Issue:** In respect to a direct and intentional act, is negligence maintainable as a cause of action in respect to damage which is a consequence of that act?

**Held (Evans J)**

- The decision in *Donoghue v Stevenson* [1932] AC 562 placed no restriction on the nature of conduct which may be relied upon to establish a negligent breach of duty
  
  - Modern legal authorities and texts dealing with torts founded on negligence make no reference to a restriction as asserted on behalf of the appellant

- Respondent could not rely on acts of the appellant which amounted to an intentional trespass to found a cause of action in negligence

- Cox CJ and Wright J, in separate judgements agreed with Evans J that the respondent was entitled to proceed in negligence in respect of the appellant’s intentional trespass

- Appeal dismissed

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Trespass limitation begins after trespass committed, negligence action limitation begins after the damage has occurred.

- High Court – trespass and negligent are distinct.

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**RULE 1:** INTENTIONAL + DIRECT = TRESPASS.

**RULE 2:** NEGLIGENT + DIRECT = NEGLIGENT TRESPASS (done with fault).

**RULE 3:** NEGLIGENT + INDIRECT = Negligence with all requirements of tort of negligence (duty, breach and damage).

**RULE 4:** INTENTIONAL + INDIRECT = ACTION ON THE CASE FOR WILFUL (INTENT INVOLVED) INJURY.

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**(***) IMPORTANT ADDITIONS:**

**Negligent trespass or negligence: advantages and disadvantages:**

In practise, even in Australia the separate tort of negligence is almost always relied upon if the conduct of the defendant is negligent but not intentional, trespass being reversed for situations where the injury is intentionally inflicted.

**Advantages:**

- The position remains in the HC that in cases of trespass occurring OFF the highway, once the plaintiff proves direct injury by the defendant, the burden of disproving negligence shifts to the defendant (*Platt v. Nutt*);
McHale v. Watson; Blacker v. Waters); whereas in the tort of negligence plaintiff would be obliged to prove not only that the defendant had acted in the manner complained but that the defendant had done so negligently.

- Plaintiff thus at a procedural advantage

- A feature of the tort of trespass is that it is actionable per se; where as the gist of the tort of negligence is damage. “Actual damage is a necessary ingredient in unintentional as distinct from intentional trespass to the person”. (Letang v. Cooper per Diplock LJ)

- Trespass may also offer an advantage over negligence to plaintiffs unable to prove that the defendant owed them, personally or as members of a class, a duty of care.

- Remoteness of damage – in negligence defendant is liable only for harm which materializes in a foreseeable way, if the defendant foresees or should have foreseen that damage to the plaintiff’s goods by, for example, impact the defendant will not be liable when carelessly, the defendant sets fire to those goods

- Contributory negligence not a defence to action in trespass

- Limitation of actions. Limitation Act 1969 (NSW): can bring a suit under either head of trespass or negligence

Disadvantages:

- Claim based on negligence is not affected by any doubts concerning the direct nature of the injury. (Williams v. Holland; Williams v. Milton; Parsons v. Partridge)

Letang v. Cooper VS Williams v. Milton:

- Letang v. Cooper: Position in England → Instead of dividing actions for personal injuries into trespass (direct damages) or case (consequential damages), we now inquire whether defendant acted intentionally/unintentionally. If the injury is intentionally inflicted the plaintiff has cause of action in trespass; if the defendant inflicted the injury unintentionally but negligently, the plaintiff’s ONLY cause of action is negligence.

- Williams v. Milotin: Position in Australia → if the defendant inflicted a DIRECT injury UNINTENTIONALLY, the plaintiff is free to choose between actions in trespass or negligence.
TORTS EXAM NOTES
Trespass to the Person (Battery, Assault, False Imprisonment)

Battery

- Any act of the defendant which directly and either intentionally or negligently causes some physical contact with the person of the plaintiff
  - Direct/forcible interference (so closely linked to defender’s act has to be part of act and no intervening force/person of free will to break the directness) – include slightest app of force
  - Personal inviolability, unauthorized
- No act unless there is a voluntary positive/affirmative act by defendant
- Onus on the defendant to prove consent to alleged trespass
- Exceptions: self-defence, consent/authorization or implied consent by conduct, contact generally acceptable in ordinary conduct of daily life (Rixon v Star City Casino), necessity (In Re F), lawful police arrest (Collins v Wilcock), reasonable punishment of children, sport
  - Crowded lift or beyond that. Collins v Wilcock “...general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life....”. Activities with express/implied consent or given by law

State of mind of the defendant

- It is not a requirement of the tort of battery that the defendant’s intention extended to injuring or harming the plaintiff; it is enough that the defendant intended to perform the act which caused the offensive conduct with the plaintiff
- Motive and malice (unlike intention) are irrelevant in determining liability for battery, although presence of either – affect damages awarded to the successful plaintiff
- Intention on the defendant’s part presupposes that the act is voluntary ... it is directed by the defendant’s conscious mind
- Acts done in a state of automatism will not be regarded as intentional but, in general, mental illness is not to be regarded as negating volition

No consent by the plaintiff

- Onus of proof is on defendant to prove alleged trespass

Character of the act of the defendant

- There is no battery unless there is an act by the defendant
- There can be no battery unless there is contact with the plaintiff
- Cole v Turner –Holt CJ: “the least touching of another in anger is a battery”
• Blackstone \(\rightarrow\) “The law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in the slightest manner”
  o Consistently with this – rational to say that this tort protects not merely the interest in freedom from bodily harm but also that in freedom from insult
• Courts cannot and should not be expected to give protection against contacts which ought to be regarded as “permitted” contacts
  o \textit{Collins v Wilcock} [1984]: whether the contact went beyond the ‘generally acceptable standards of conduct’ of everyday life
• Battery – protects a person against all unpermitted/unwelcome contacts, irrespective of whether these result in actual physical harm or insult
• Where contact is with an item of the plaintiff’s clothing rather than directly to the body, battery may be committed, at least where the contact involves some element of force
• Automatism – not voluntary and no control therefore not battery
• Is hostility necessary? – Aus common law view: not a criterion, UK law: hostility is necessary to establish battery \([\textit{Wilson v Pringle}]\)

\textbf{Direct/forcible interference; the fundamental principle of personal inviolability; exceptions to this principle e.g. self-defence, consent, contact generally acceptable. Hostility? What is the nature of the requisite intent?}

\textit{Cole v Turner} (1704) 90 ER 958 per Holt CJ– “The least touching of another in anger is a battery” \(\rightarrow\) Indicates used to be hostility (person being angry). But anger/hostility is \textbf{not a necessary component}.

\textbf{In Re F [1990] 2 AC 1 (Lord Goff of Chieveley)} – House of Lords

\textbf{Principle of law:} The principle of necessity may justify medical or surgical treatment, which otherwise would constitute trespass to the person, when the patient is incapable of giving his or her consent by reason of lack of consciousness in an emergency situation or mental disability. However, application of this principle is accompanied by stringent safeguards requiring that the proposed treatment be in the best interests of the patient in order to preserve his or her life, health or well-being.

\textbf{Facts}
• F – woman, 36 – serious mental disability, patient at a mental hospital and formed voluntary relationship of sexual nature with male patient
• From psychiatric point of view – disastrous for her to conceive and give birth – but she could not give consent to sterilization operation
• F by mother and friend applied for operation and would not amount to an unlawful act by reason on absence of F’s consent

\textbf{Issue:} Is the performance of a medical or surgical treatment upon a person with a permanent medical disability for the purpose of the preservation of their life, health or well-being unlawful due to the absence of consent?
Held per Lord Brandon of Oakbrook, Lord Goff of Chievely, Lord Bridge of Harwich, Lord Griffiths and Lord Jauncey of Tulichette

- Lord Goff of Chievely at [72]: Every person’s body is inviolate
- At [74]: In the case of a person of sound mind, there will ordinarily have to be an emergency before such action taken without consent can be lawful; for otherwise there would be an opportunity to communicate with the assisted person and to seek his consent
- In truth, the relevance of an emergency is that it may give rise to a necessity to act in the interests of the assisted person
- In these cases of necessity ... not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person but also (2) the action taken must be such as a reasonable person could in all the circumstances take, acting in the best interests of the assisted person
- Two examples: one case, an emergency, and in the other, a permanent or semi-permanent state of affairs ... the permanent state of affairs calls for a wider range of care than may be requisite in an emergency which arises from accidental injury. When the state of affairs is permanent, action properly taken to preserve the life, health or wellbeing of the assisted person may well transcend such measures as surgical operation or substantial medical treatment and may extend to include such humdrum matters as routine medical dental treatment, even simple care …
- When a state of affairs is permanent or semi-permanent ... there is no point in waiting to obtain the patient’s consent. The need to care for him is obvious and the doctor must then act in the best interests of his patient
- Appeal dismissed

*Rixon v Star City (2001) 53 NSWLR 98* – Supreme Court of NSW Court of Appeal, Sheller JA (cited) and Priestley and Heydon JJA

**Principle:** Physical contact which is generally acceptable in the ordinary conduct of daily life does not constitute battery. Assault requires an intention to create in another person an apprehension of imminent harmful or offensive contact.

**Facts:**

- Plaintiff, Mr Brian Rixon, was the subject of an exclusion order issued by the defendant, Star City Pty Ltd, a casino operator, pursuant to the Casino Control Act 1992 (NSW) which authorized casino operator to prohibit a person from entering/remaining in a casino
- Plaintiff identified and approached by one of defendant’s employees who placed hand on plaintiff’s shoulder without using any degree of force or causing injury and asked plaintiff if he was Brian Rixon
- District Court of NSW and trial judge Balla ADCJ – rejected plaintiff’s claims for assault/battery in respect of conduct of employee – found that lacked “the requisite intention in relation to assault and the requisite anger or hostile attitude in relation to battery” – Plaintiff appealed

**Issue**

- Does the placing of hand on someone’s shoulder without consent constitute a battery?
Held per Sheller JA

- In Re F: hostility is not needed to transcend bounds of lawfulness
- Collins v Wilcock [1984] 1 WLR 1172 – Lord Goff referred to fundamental principle that every person’s body is inviolate and touching of another person, however slight, may amount to a battery →
  o Blackstone’s Commentaries 17th ed (1830) Vol 3 120 “the law cannot draw the line between different degrees of violence and therefore totally prohibits the first and lowest stage of it, every man’s person being sacred and no other having a right to meddle with it, in any the slightest manner”
- Question: whether the physical contact imposed on plaintiff in excess of what is generally acceptable in everyday life
- Could not be said that the conduct of [the defendant’s employee] in the circumstances found [by the trial judge] and clearly for the purpose of engaging Mr Rixon’s attention was not generally acceptable in the ordinary conduct of daily life
- Proof of assault requires proof of an intention to create in another person an apprehension of imminent harmful or offensive contact
  o Actions of defendant’s employee lacked requisite intention in relation to assault
- Appeal dismissed
  o Also rejected plaintiff’s claim for false imprisonment in respect of 1.5 hours he was detained by defendant in an interview room at casino until police arrived

Nominal Damages: Small damages awarded to show that the loss or harm suffered was technical rather than actual. Rights have been infringed but no long term harm i.e. violations of constitutional rights such as freedom of speech.

Compensatory Damages

- Battery is ‘actionable per se’
- Compensatory damages are a right (Fontin v Katapodis), available to return the plaintiff to the position before the tort
  o Livingstone v Rawyards Coal Group (1880) – Lord Blackburn
    • “...where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”
- Before picture also holds what future held for plaintiff before tort, now what future holds after tort = guesswork

<table>
<thead>
<tr>
<th>Monetary $$</th>
<th>Other damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical expenses</td>
<td>Pain and suffering – cant put figure on,</td>
</tr>
<tr>
<td>Loss earning</td>
<td>court has to broadly assess often by</td>
</tr>
</tbody>
</table>
Loss of ability to pursue leisure | reference to other things

Civil Liability Act 2002 (NSW) ss3B(1)(a), 21

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:

- 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:
  - 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)

21 Limitation on exemplary, punitive and aggravated damages

In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary damages or punitive damages or damages in the nature of aggravated damages.

Aggravated Damages

- Compensatory in nature, directed at special humiliation of plaintiff
  - Additional damages on account of insult/injury or injury to feelings, distress, embarrassment or humiliation for a battery which has also caused physical harm
- Poss of overlap between contumelious conduct – involve special humiliation
- Injury can arise from racial slurs (Henry)
- Principle inquiry is reaction of party wronged (Gray)
- Now a cap on amount can recover for loss of earnings and pain/suffering
- Provocation does not reduce compensatory damages but may reduce exemplary/aggravated damages as court takes into account conduct and motive of both parties i.e. Fontin v Katapodis
- Fixing of damages for non-economic loss
  - Civil liability Act 2002 Part 2 Division 3 s 16 p64
    - (1) No damages may be awarded for non-eco loss unless the severity of the non-eco loss is at least 15% of a most extreme case
    - (2) The maximum amount of damages that may be awarded for non-eco loss is $350,000 but the maximum amount to be awarded only in a most extreme case
    - (3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-eco loss are to be determined in according with following table

Exemplary/Punitive Damages