

Battery: Plaintiff's person

Assault: Plaintiff's peace of mind

False Imprisonment: Plaintiff's liberty

Intention: Subjective state of mind, if consequences of act are desired or substantially certain to follow the common law concludes they were intended. There is no need to intend harm.

Voluntary: 'Willed muscular movement' (excludes sneezing, coughing etc.)

Battery

- Three elements
 - Direct physical act
 - Interfering with the person of the plaintiff
 - Accompanied by fault (does not equal moral culpability)
- Actionable per se
- Direct Contact
 - *Scott v Shepherd* (1773) 2 W Blackstone
 - Threw squib into market- took out eye of plaintiff
 - Injury arose from the force of the original act
 - Each of the players (people rethrowing firework) were a continuance of the original act (Acting under compulsive necessity)
 - *Garratt v Dailey* (1955) 279 2d 1091
 - Battery to pull a chair out as someone is about to sit down
 - *McHale v Watson* (1964) 111 CLR 384
 - Riochet can constitute battery
 - *Reynolds v Clarke* (1726) 1 Strange 634
 - Explains difference between trespass and case (direct and indirect)
 - Direct attack to throw log (aware someone there) if log is thrown without knowledge someone is there, it is indirect.
- Fault
 - Must be shown that the defendant meant the consequences of the act (or was recklessly indifferent)
 - Hostility
 - *'The least touching of another in anger is battery'*
 - *Cole v Turner*
 - *Wilson v Pringle* (1897) QB 237
 - Least touching of my person in anger constitutes battery
 - *Boughey v R* (1986) 161 CLR 19
 - *"No general proposition that the intentional application of force to the person of an unwilling victim cannot constitute battery at common law unless it be accompanied by hostility"*
 - i.e. don't need hostility
- Significance of Context
 - Has trespassory contact followed directly from the defendant's voluntary act?
 - If yes- Question of fault: Were the consequences intended or was the defendant reckless as to them?
 - *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98
 - Security guard touched plaintiff on shoulder
 - Court looked at context
 - Certain times that contact is acceptable
 - Motive not relevant (to existence of tort- may be for damages)
- Protects physical integrity and personal dignity
 - *Stingel v Clarke* (2006) 226 CLR 442 at [57] per Gummow J

- Battery to throw water over clothes
 - *Pursell v Horn* (1838) 112 ER 966
- Battery to snatch item from plaintiff's hand
 - *Fisher v Carrousel Motor Hotel Inc* (1967) 424 SW 2d 627
- Battery to remove chair as sitting down
 - *Garratt v Dailey* (1955) 279 P 2d 1091
- Does not need to know of the interference at time it is committed (i.e. sleeping)

Assault

- Act or statement by defendant which directly produces apprehension in the plaintiff of battery to be committed on the plaintiff by the defendant, and where the defendant either intended that to be the result or should have foreseen it
- Actionable *per se*
- Intention- intention to cause apprehension in the plaintiff of battery
- Apprehension- anticipation of the battery (not fear)
- Does not matter if there is no intention to commit the battery
 - *Brady v Schatzel* [1911] St R Qd 206
 - Pointed unloaded gun
- Apprehension
 - Apprehension of impending contact must be personal
 - Must be reasonable
 - *McPherson v Beath* (1975) 12 SASR 174
 - Reasonable apprehension may not be necessary (if aware they were timid)
 - Intention must be to create apprehension
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 - *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98
- The Act
 - Completed battery not necessary
 - *Stephens v Myers* (1830) 172 ER 735
 - Defendant walked towards plaintiff whilst threatening plaintiff with words, did not reach plaintiff
 - Words alone can constitute assault
 - *Read v Coker* (1853) 138 ER 1437
 - Threat can be conditional and still constitute assault
 - *Police v Greaves* [1964] NZLR 2915
 - Leave or I will stab you
 - Despite choice court decided it constituted assault
 - Actions can negate the apparent assault
 - *Tuberville v Savage* (1669) 86 ER 684
 - If words undermine impact
 - Words can operate to remove ambiguity from an action
 - *Fogden v Wade* [1945] NZLR 724
 - If there is any ambiguity, there is no assault
 - *Innes v Wylie* (1844) 174 ER 800
 - Force threatened by other must not exceed the privilege the occasion gives rise to
 - *Rosza v Samuels*
 - Taxi driver produced knife when threatened by a minor physical assault committed assault
 - Use of a knife exceeded what the law allowed as self-defence in those circumstances
- Directness
 - Requirement is apprehension of imminent or immediate contact

- *Barton v Armstrong* [1969] 2 NSWLR 451
 - Threats made over telephone, calculated to instil fear in plaintiff
 - Plaintiff led to believe he was being followed and under surveillance
 - note: general concept of phone different now (due to mobiles)
- Words are not enough to constitute assault, generally a telephone call will not be sufficient
- Effect on victim's mind is the material factor, not the intention of the defendant
 - *Zanker v Vartzokas* (1988) 34 A Crim R 11

False Imprisonment

- An action in trespass to the person which is committed when the voluntary conduct of one person directly subjects another to total deprivation of freedom of movement without lawful justification (Laws of Australia, [33.8.1360])
- 3 elements
 - Voluntary act
 - Total deprivation of freedom of movement (no reasonable escape route)
 - Absence of lawful justification
- Basic points
 - Actionable *per se*
 - Unlawful restraint constituting false imprisonment is a question of fact on the evidence
 - For defendant to demonstrate lawfulness, not the plaintiff to establish unlawfulness
 - Need not be actual physical confinement and may extend beyond the use of force
 - Must be direct consequence of the voluntary act of the defendant
 - Plaintiff need not be aware of the restraint
 - *Meering Grahame-White Aviation Company Ltd* (1919) LT 44)
 - Restraint must be total
- The Act
 - Act constituting restraint need not be physical
 - *Symes v Mahon* [1922] SASR 447
 - Plaintiff told there was a warrant for his arrest- taken to Adelaide
 - Free to be in another carriage to police officer and was allowed to check into a hotel before reporting to police station
 - Was never locked up or restrained but was told what to do
 - Constituted false imprisonment (warrant was invalid)
 - *Myer Stores v Soo* [1991] 2 VR 597
 - Falsely accused of shoplifting
 - Escorted to security room
 - Denied right to travel at his own pace and on own route
 - Constituted false imprisonment
- Restraint must be total
 - *Bird v Jones* (1845) 7 QB 742
 - Road partially blocked
 - Other route available
 - Not falsely imprisoned
- Reasonable escape route
 - *Robinson v Balmain New Ferry* [1910] AC 295
 - Pay at end of ferry trip (signs informing patrons of this)
 - Entered terminal but did not take ferry
 - Not false imprisonment- reasonable escape route (pay a penny)
- Authority to restrain
 - Cannot restrain in order to pay a bill

- *Sunbolf v Alford* (1838) 150 ER 1135
 - Hotel bill not paid- not allowed to restrain
- Legislative authority is possible
 - *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98
 - Legislation must be '*Clearly expressed in unmistakable and unambiguous language*'
 - *Trevorrow v State of South Australia* (No 5) [2007] SASC 285 (1/8/2007)
- Liability
- *Maine v Townsend* (1883) 4 LR (NSW) 1, per Sir J Martin CK at 7
 - '*Before any person can have a verdict against him on such a count there must be evidence that he either directed the imprisonment, or was party to it, or gave oral or written directions for the arrest to be made... to make him liable he must be a party either directly or indirectly to the arrest.*'
- *Ruddock and Ors v Taylor* (2003) 58 NSWLR 262
 - Once plaintiff proves actual imprisonment onus on defendant to establish lawful authority
 - False imprisonment an intentional tort- liability turns on an intention to detain
 - Good faith not a defence
 - Element of directness- sufficiency of the nexus between the defendant's act and the imprisonment
 - Likens situation to that in *Scott v Shepherd*- events occurring afterwards direct results of the cancellation of the visa.

General Notes

- Act must be intentional or reckless to constitute battery (no need to intend harm)
- Plaintiff does not need to be aware of the battery
- An exceptionally timid person claim for assault only if the apprehension of imminent contact is reasonable
- Battery can occur without assault
- Assault can occur without a completed battery
- Plaintiff must be aware of assault
- Plaintiff does not need to be aware of false imprisonment (limited damages)

Defences

1. Self Defence

2. Mistake (not a defence)

3. Consent

- *Fontin v Katapodis* (1962) 108 CLR 177
 - Legal right to defend oneself
 - Self defence must be 'reasonable' and 'necessary'
 - Question was whether it was reasonably necessary for him to throw the piece of glass at Katapodis in order to protect his right of personal safety (no)
- Mistake generally not a defence
 - *Cowell v Corrective Services Commission* (1988) 13 NSWLR 714
- Role of consent
 - Implied consent to daily contact e.g. walking in a crowd
 - *Collins v Wilcock* [1984] 1 WLR 1172
- Sporting contact
 - *Guimelli v Johnston* (1991) Aust Torts Reps 68,707
 - Physical force as permitted by the rules and minimally outside of the rules
- Fraud can vitiate consent
 - *Dean v Phung* [2012] NSWCA 223
 - Plaintiff consented to necessary treatment (not additional treatment carried out by defendant)

Damages

4 types of damages:

1. Compensatory (to compensate for the actual damage or injury)
 2. Aggravated (as compensation for the injured feelings or outrage)
 3. Exemplary (indicate the court's disapproval of the defendant's conduct)
 4. Nominal (to recognise the merit of the action but no real damages warranted)
- Threefold purpose of exemplary damages
 - To punish the wrongdoer for reprehensible conduct
 - To deter not only the wrongdoer but others of like mind in the community from similar conduct
 - To ameliorate the victim's sense of grievance and thereby to abate the urge for self help or violent retribution, to the danger of public peace

Causation and Remoteness

Preliminary Points

- Necessary causal connection generally established if the plaintiff proves that he or she would not have been injured if the defendant had not been negligent
 - Necessary to show a clear link- harm suffered must be due to the breach of care
- A claim will be defeated if the loss was the result of a *novus actus interveniens*
 - A break in the chain of causation- something else stepped in between the breach and the harm
 - If broken, no liability
- A claim will be defeated if the injury was merely a coincidence
 - i.e. no direct causal link
- Causation is a question of fact which the courts have generally addressed by applying common sense to the facts
 - Question of fact- did this cause cause this?
- 'But for Test' is no longer an exclusive test
 - If but for the negligence, I was not have been harmed then causation was established
- Plaintiff has burden of proving that the defendant's negligence caused their damage (s 35)

1. What is causation?
2. Where does causation fit in the scheme of the negligence action
3. What tests should we apply?
4. How have the courts resolved complex cases?
 - Multiple sufficient cases
 - Medical negligence
5. What is the chain of causation and where does it end?
6. What is remoteness and where does it fit?
7. How do we apply the legislative provisions?

March v Stramare (1991) 171 CLR 506

- Truck that straddling centre of road because unloading produce for market, driver (Drunk and speeding) came around corner and hit back of truck
 - Question of who was responsible
 - What is the appropriate test for causation?
- Mason CJ:
 - Legal causation differs from philosophical or scientific notions of causation
 - Causation is the line marking the boundary of the damage and is a question of fact
- Deane J:

- 'But for' test is a useful aid, not a comprehensive definitive test.
- McHugh J:
 - The 'But for' test is a threshold test
 - Applied but for test in a practical/reasonable way

Bennett v Minister of Community Welfare (1992) 176 CLR 408

- '*Causation is essentially a question of fact to be resolved as a matter of common sense... the 'but for' test is a negative criterion of causation... not a comprehensive or exclusive test; value judgements and policy considerations necessarily intrude.*'
 - Mason CJ, Dean and Toohey JJ at 412-413
- Negligent part of defendants actions that must cause injury
- Note: *Roads and Traffic Authority v Royal* (2008) 245 ALR 653: Breach alone is not sufficient to establish causation (pg 397)
 - Collision between two cars- known dangerous stretch of road, clear evidence of reckless driving on part of both drivers
 - Evidence of poor road markings and obscured view
 - HC: Road traffic authority may have created a risky situation- not sufficient to create a causal link. Decided that the drivers were behaving in an inherently risky manner. Lack of care by drivers the most significant factor
 - Breach of duty by Roads Traffic Authority but did not establish causation

Process of determining causation

- Two 'limbs'
- 1. Question of fact: Would the harm that the plaintiff suffered have happened but for the wrongful act of the defendant? ((s34(1)(a) CLA)
 - First step in deciding causation
- 2. Question of Law: Given that 1. is satisfied, are there any value judgements, reasons of policy or other grounds for denying an obligation to compensate the plaintiff? (s34(1)(b) CLA)
 - Any value judgements, policy?
- The first step is a historical question, the second a normative enquiry (refer *Godfrey v New South Wales* (2003) Aust Torts Reports 81-700)
 - Process of applying two limbs- balancing the judicial equation
 - Prisoner negligently allowed to escape- held up a newsagent 3 months later
 - Godfrey working in newsagent- pregnant, suffered trauma and gave birth prematurely to her son
 - Historical Question: Would have happened if prisoner had been allowed to escape- no
 - Causation liability cannot extend forever
 - Determined no liability

Causation: Whether the act or omission made a difference to the outcome

- *Barnett v Chelsea Hospital Management Committee*
 - Doctor in breach of his duty of care refused to examine a patient complaining of vomiting
 - Patient suffering arsenic poisoning and died soon afterwards
 - Determined that even had the doctor carried out his duty of examination, it would have been too late for effective treatment
 - The loss therefore did not flow from the refusal of treatment- deemed no liability
 - Causation inquiry considers whether the act or omission of the defendant made a difference to the outcome

Courts inferring causation

- Facts sometimes lead to a situation of uncertainty which can only be addressed by the court drawing inferences of causation
- *Tubemakers of Australia v Fernandez*
 - Plaintiff received a blow to hand- employer liable
 - Caused swelling of hand
 - Months later developed Dupuytren's contracture
 - Nature of causal element in Dupuytren's remains uncertain- evidence that repeated blows to the hand might produce it
 - HC held initial blow to the hand to be the cause of the later condition (absence of other evidence)
- *Chance v Alcoa of Australia*
 - Plaintiff suffered caustic soda burns
 - Later developed 'dry eye'
 - Evidence that it was usual for caustic soda burn to produce dry eye condition- court interpreted to mean it was not impossible
 - Causal connection was established
- Element of certainty must be present- courts will not determine causation based upon speculation
- *Flounders v Millar*
 - *'Choice between conflicting interferences must be more than a matter of conjecture. If the court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail'*

Ipp Recommendations

- Demonstrate breach between cases and legislation
- Argues that the HC approach of appealing to 'common sense' provides little guidance
- Discusses the two step test and refers to it as:
 1. Factual causation
 2. Liability
- Ultimate question is the normative one to determine the appropriate scope of liability

Civil Liability Act 1936 (SA) (Part 6 Negligence, Division 2 Causation)

s 34 general principles

1. A determination that negligence caused particular harm comprises the following elements:
 - (a) That the negligence was a necessary condition of the occurrence of the harm (Factual causation); (i.e. 'but for' test) and
 - (b) That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability)

Adeels Palace Pty Ltd v Moubarak

- Function- person excluded and told to leave, came back with a gun. Negligently allowed back in, shot some people. Court apply test from legislation
- The proper starting point is the legislation
- The first element (factual causation) is determined by the 'but for' test: but for the negligent act or omission, would the harm have occurred?
 - If not negligently allowed back in- potentially would not have occurred
- Recognising that changing any of the circumstances in which the shootings occurred *might* have made a difference does not prove factual causation- neither plaintiff proved factual causation by pointing to possibilities that might have eventuated if circumstances had been different [50]

- Therefore, did not consider the second limb in great detail
- Decided on 2 limbs of causation
 - Followed up in legislation- CLA
 - s 34(1)(a)- 'but for' test
 - s 34(1)(b)- scope of liability

s 35 Burden of Proof

- In determining liability for negligence, the plaintiff always bears the burden of proving on the balance of probabilities, any fact relevant to the issue of causation

Multiple Causes

1. Where, however a person has been negligently exposed to a similar risk of harm by a number of different persons (the defendants) and it is not possible to assign responsibility for causing the harm to any one or more of them

- (a) The court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm¹ but
- (b) The court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability

Note (1): *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89

2. For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party

1. Where are concurrent sufficient causes, and
2. Concurrent causes, neither being sufficient on its own to cause the loss

Concurrent Sufficient Causes

- Courts generally draw inferences in favour of the plaintiff- despite a lack of absolute proof of casual connection
- *Bonnington Casting v Wardlaw* [1956] AC 613
 - Contracted lung disease
 - Inhaled noxious fumes (some of which his employers were liable)
 - Working at a number of places of employment
 - Plaintiff found to have discharged burden of establishing casual connection between his disease and the fumes for which the employer was to blame
 - Therefore- finding that the non-tortious fumes probably not a sufficient cause of the disease
 - The damage due to non-tortious fumes was regarded as not severable from that arising from the tortious
- *Minister of Pensions v Chennell* [1947] KB 250
 - 'Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant'
- *Ian Roderick Holladay v East Kent Hospital NHS Trust* [2003] EWCA Civ 1696
 - 'The respondent's breach of duty does not have to be the sole cause of the injury, or even the dominant cause, as long as it was a material cause' per Lord Justice Scott-Baker, [32]
- *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89
 - Plaintiffs exposed to asbestos in the course of their employment by more than one employer