

Law of Torts LAW1020 - Lecture Notes

Week 1

What is a Tort?

Tort

- A **civil wrong** that is not a breach of contract (not occurring out of a promise you made to someone, it is of an existing duty that most of us have) (can be a specific duty, like doctor to patient, or more general like not harming others in the street)
- The "wrong" occurs because there is a breach of a duty imposed by the law and the law aims to protect certain interests
- The "breach" gives rise to a right for a remedy (usually in the form of damages) and standing to sue
- Distinguish between:
 - Intentional acts → intention to harm
 - Negligent acts → breach of a duty to take care, accidental harm
 - Strict liability → law imposes an automatic liability in certain situations, e.g. employer and employee

Aims of Tort Law

- Compensation (Rogers & Whittaker)
- Deterrence → preventing certain behaviours, deterring people from engaging in a behaviour that society determines to be undesirable)
- Remedies → giving us the ability to ask the court for certain things for relief
 - Damages (general, special)
 - Exemplary (make an example out of a particular persons conduct which costs more money) & punitive damages
 - Injunctions (to stop a certain behaviour)

Tort Law reform **WRONGS ACT IS USEFUL IN EXAM**

- Torts → competency of the states
 - Wrongs Act 1958 (Vic)
- Old common law rules similar
- Enactment of civil liability reforms (2002/3) → (making changes to make it harder to get compensation) → implemented into the Wrongs Act 1958 (relevant for negligence)
 - Divergence among the states

Tort v Crime?

- Crime → "public" / "community" wrong attracting criminal sanction
- Tort → civil "private" wrong (infringing someone's rights)
- Criminal cases brought by Crown
- Tort cases brought by people with standing to sue (i.e.: victims)
- Objective of criminal law → punishment, deterrence, rehabilitation?
- Objective of tort law → compensation?
 - Blurring the boundaries
 - Exemplary and punitive damages
 - Criminal injuries compensation legislation
 - Battery/**assault**? (assault in tort law does NOT involve physical contact, it involves putting someone in fear or apprehension of physical contact)
 - Battery is the physical harm in tort law

- In criminal law, they only have assault and it covers both threats and actual harm
- Standard of proof
 - Criminal law: "beyond reasonable doubt"
 - Which is more believable, who has more witnesses etc.
 - Tort: "on the balance of probabilities"

Tort v Contract?

- Contract → duties arise from promises
- Tort → duties arise under the law
- Damages in contract → usually liquidated or predetermined representing loss of the bargain
- Damages in tort → usually unliquidated representing compensation
- Breaches of contracts can also give rise to actions in tort, like negligent acts by professionals (i.e.: negligent medical treatment or legal advice)

Trespass to the person

- Torts
 - Battery
 - Assault
 - False imprisonment
- Actionable "**per se**" (i.e. no need to show suffered loss or damage)



Hint! Think of 'trespass to the person' as an umbrella that covers battery, assault and false imprisonment

Battery

- Battery is wrongful conduct that directly and intentionally or negligently brings about harmful or offensive **contact** with the person of another (pg. 130 Mendelson) → if writing about a cause of action, always start with the definition, treat the reader as if they have never heard of it before!!!! Show your knowledge

Elements of Battery

1. Intentional conduct, or negligent
2. Positive and affirmative action directly resulting in contact with the person of another; and
3. Voluntary act

Hint! Outlining the elements of an action is very important in an exam

Intentional Conduct

- The intention goes to the *act* of the conduct
- What does this mean? A person must intend the *act*, not necessarily the *consequence* of it
- Look at starting point rather than the end

Example → throwing rocks from a bridge onto a car for amusement. If rock injures a driver, the person is still responsible despite not intending to injure the driver

Positive and affirmative action

- The conduct of the defendant must be positive and affirmative, not passive

- **Example** → standing still while someone crashes into you is passive not positive
- **Case** Fagan v Metropolitan Police Commissioner (1969) 1 QB 439 → accidentally stopping car on policeman's food and then **refusing** to move it amounted to battery (refusal constituted the positive and affirmative action)

Direct act resulting in contact with the person of another

- Contact must follow immediately upon the act - so that it can be termed part of the act
- This can include throwing an object towards a person
- **Case** Scott v Shepherd (1773) - Shepherd threw lighted squib (explosive) in a market. W picked it up and threw it at R. R threw it at Scott and it exploded in his face. 3 of 4 judges found battery (p. 133 Mendelson)

Further points to note

- Act must be **voluntary** (e.g. touching someone while having an epileptic fit is not voluntary)
- The plaintiff does not have to have **knowledge** of the contact (Sleeping Beauty)
- The defendant does not have to have knowledge of contact either (e.g. shooting ducks but hitting a person who didn't know was there instead)

IMPORTANT CASES

Williams v Milotin (1957) 97 CLR 465

Facts

- P, a cyclist, hit and injured D's truck
- Relied on section 36 of the Limitation of Actions Act (SA): "all actions for assault trespass to the person battery wounding or imprisonment shall be commenced within three years next after the cause of action accrued but not after"
- Leave was given to appeal the High Court
 - Intentional battery claim was rejected because outside 3 years
 - Sued for negligent
 - **i.e. negligent acts can be a battery**

Hint! 2 causes: (1) negligence and (2) trespass. In negligence P must prove fault. In battery, P must prove the facts and the D must prove lack of fault

Venning v Chin (1974) 10 SASR 299

Facts

- Woman injured when hit by a car in suburbs
- She sued the driver
- Her husband sued the driver for damages and loss of her services
- Hogarth J held that the female plaintiff could claim trespass to the person → the DEFENDANT must prove that: (1) the act was NOT intentional or (2) negligent
- Held that the female P had been contributory negligent, thus damages were reduced by 60%

This means the Plaintiff must prove elements of battery and the Defendant must show act was not intentional or negligent EXCEPT in highway accidents where the Plaintiff must prove fault.

Hutchins v Maughan (1947) VLR 131 (The action must be direct and not consequential)

Facts

- C droving a flock of ewes

- D warned C that he laid poisoned balls on the land around the area he was flocking the ewes
- C thought D was bluffing
- The dogs died from the poisoned balls
- C was awarded damages in Court of petty Sessions
- D gained an order to review the decision of the magistrate

Rixon v Star City (2001) 53 NSWLR 98

Facts

- P was an "excluded person"
- Seen by employers of D playing roulette
- Employee approached P, and required him to go to an interview room
- He was detained for over an hour until police arrived
- An action was assault was considered by the Court of appeal. The relevant facts concerned the initial encounter between the plaintiff and the employee (Sheldon) who approached him at the roulette wheel

Held

- Sheller JA
- OBSERVED: "the trial judge rejected Mr Rixon's case in battery on the basis that the touching lacked the 'requisite anger or hostile attitude' (NOT A REQUIREMENT FOR BATTERY)
- "The absence of anger or hostile attitude by the person touching another is not a satisfactory basis for concluding that the touching was not a battery"
- "...whether the physical contact imposed on the plaintiff was in excess of that "generally acceptable in everyday life"
- "Mr Sheldon had no intention of creating in Mr Rixon an apprehension of imminent harmful or offensive conduct (ELEMENT OF ASSULT)"
- This intent was lacking - there was no battery or assault

The onus of proof (on consent) is on the defendant

Sport and medicine are the two types of cases.....

Sports question:

What are the rules of the game? → you must have consented to the rules of the game

Is the contact reasonably associated with the game? Or is it so far outside of the sphere of contact associated that it is borderline criminal?

You consent to the physical contact in the RULES of the game

Also consent to reasonable contact in the sphere of the game

Can't consent to contact that is so far out of reasonable contact that it borderlines hurting someone

Giumelli v Johnston (1989), unreported

Facts

- P and D were in an AFL match
- P and D played for opposing teams
- P had ball and D collided with him in a "hip and shoulder" (within the rules of the game)
- Before contact, D raised his elbow in thrusting motion into P's cheekbone (against rules of the game)
- P sued D for battery
- D argued that P consented to the contact by participating in the AFL game

Ljubic v Armellin (2009) ACTSC 21 (13 March 2009)

- trespass and negligence

Summary Points

- Positive and voluntary act
- Intention or negligence

SUMMARY Battery:

1. Form of physical contact
2. Physical contact does not have to be hostile
3. Must be a positive act
4. Must have directness
5. Must have fault (not strict liability, but must be at fault)
6. Plaintiff must NOT have consented