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## 2 – Trespass to Person

**Assault** – any direct threat intentionally or negligently creating apprehension of imminent, harmful or offensive contact

**Battery** – a positive voluntary act (without lawful justification) which directly causes physical bodily contact with P's person – *Rixon v Star City*

**False Imprisonment** – Positive voluntary act causing total restraint of plaintiff's liberty

- Elements of an **Assault** – *Rixon v Star City Casino (2001)*
  1. An intentional, voluntary (deliberate or negligent) act
    - Intention: must show subjective intention to create apprehension – *Rixon*
    - Negligence: to determine negligence, must refer to what reasonable person would have done in the same situation – *Williams v Miltotin (1957)*
  2. Directly causing
    - Impact on defendant cannot be 'merely consequential'
      - *Scott v Shepherd (1773), Reynolds v Clark (1725)*
    - Must 'follow so immediately ... that it may be termed part of the act'
      - *Hutchins v Maughan (1947)*
  3. The plaintiff to reasonably apprehend
    - Objective - reasonable man would fear harm – *Macpherson v Brown (1975)*
    - Harm must be imminent bodily contact – *Zanker v Vartzokas (1988)*
    - If fear is unreasonable, will not be satisfied – *Macpherson v Brown (1975)*
      - Bray CJ in *Macpherson v Beathi (1975)* - Exception if person is exceptionally timid
  4. Imminent unlawful contact
    - Conduct may be acts, words, or both – *Fogden v Wade (1945)*
    - Words must be more than mere words, and be accompanied by threatening acts, i.e. 'the defendant being armed ... threatening police'
      - *Police v Greaves (1964), Barton v Armstrong (1973)*
    - Silence: can be threatening if they put plaintiff in state of fear of harm
      - *R v Ireland (1997), R v Burstow (1997) (R v Ireland and Burstow)*
    - Conditional threats
      - Requires intention to cause P to apprehend – does not require proof that D intended to 'follow it up or carry it through' - *Police v Greaves*
      - Normally involves an 'if...'
        - Conditional threats contemplated through modified test: 'is it reasonable for the plaintiff to anticipate reasonable force if he disobeys' – *Police v Greaves* (examination of context)
        - If threat is 'contradictory', does not create reasonable apprehension – 'if it were not assize time, I would not tolerate such language from you'  
*Tuberville v Savage (1669)*
        - D brandished knife, said to P 'I'll cut you to bits if you try' – satisfied test – *Rozsa v Samuels (1969)*
  5. Damages
    - Assault stands alone as a means for securing compensation in damages for conduct against the person which does not cause any physical interference
    - Damages likely to reflect lack of actual damage
      - *Stephen v Myers (1830)* – jury found in favour of plaintiff, awarded damages of 1 shilling
- Elements of **Battery** –
  1. A positive, voluntary act
    - Mere omission insufficient, positive act required – *Innes v Wyle (1844)*
    - Omission can become a positive act (continuing act) - *Fagan v Metropolitan Police Commissioner (1969)* – drove car onto foot, didn't get off
    - Intention: It is sufficient that defendant intends to perform the act causing the contact, rather than having to have intended the contact
    - No need to intend the harm – *Sibley v Milutinovic (1990)*



### 3 – Trespass to Land and Defences to Intentional Torts and *Wilkinson v Downton*

**Trespass to Land** – Voluntary, intentional (or negligent) entry onto plaintiff's land which directly causes physical interference with the plaintiff's exclusive possession of land – *Halliday v Nevill (1984)*

- Elements of Trespass to land
  1. Actual, exclusive possession of the land to the exclusion of all others
    - *Newington v Windeyer (1985)*
    - Trespass is a remedy for occupier, as such possessory license of ownership is not sufficient *Cowell v Rosehill Racecourse Co Ltd (1973)*
    - If relevant: concept of land
      - Rights of plaintiff in possession extends only to height or depth that is reasonably necessary for the use and enjoyment (varies)
        - *Bernstein v Skyviews (1978)* – 20-30m prescribed height limitation
        - *Elwes v Brigg Gas Co (1886)* – at least 2m underground
        - *Edwards v Sims (1929)* – up to a depth of 350m or more
  2. Voluntariness
    - Must be intentional or negligent, must be voluntary – *Public Transport Commissioner of NSW v Perry (1977)*
    - Objective test – irrelevant whether subjectively intended to invade interests of plaintiff
      - *Smith v Stone (1647)* defendant thrown onto land, carried upon the land by force, thus not voluntary, no trespass
      - *Public Transport NSW v Perry (1977)* – epileptic fit and fell on tracks, thus no trespass as involuntary
  3. Causation
    - Interference must be direct, must be the natural and probable consequence of defendant's act, not merely consequential – *Gregory v Piper (1829)*
    - *Southport Corp v Esso Petroleum Co Ltd (1954)* – oil discharged into river, carried onto plaintiff's property by tide – interference was consequential rather than direct consequence, therefore not trespass
  4. Interference with exclusive possession to land
    - D's act must interfere with exclusive possession *Bathurst City Council v Saban (1985)*
    - May be: (generally)
      - Actual entry by person on to land
      - Unauthorised contact by throwing/placing something *League Against Cruel Sports Ltd v Scott (1986)*
      - Continuing trespass – remaining after being asked to leave/after license (implied or express) to enter is revoked *Konskier v Goodman (1928)*
      - Grantee of an interest in land may sue after interest is interfered with
    - Specific application – intrusion by artificial structure can constitute trespass
      - Scaffolding: *LJP Investments v Howard Chia Investments (1989)*
      - A crane jib above house – *Graham v KD Morris & Sons Pty Ltd (1974)*
      - Bullet fired over plaintiff's property – *Davies v Bennison (1972)*
      - Mesh and swinging cranes with full loads – *Bendel v Mirvac Projects (1991)*
    - NB: protruding tree branches are not trespass, as consequential, instead private nuisance, which requires proof of damages (not actionable per se)
  5. If relevant: License to enter/trespass by licensee
    - Actions not trespassory where P grants D express or implied permission to enter
    - Examples – *Halliday v Nevill (1984)*
      - Entering upon normal route of entry to the front door of the house to do business with occupier

- Lawful communication
  - To recover property fallen or blown upon it
  - To lead away an errant child
  - For the questioning or arresting by police of a person observed committing an offence
  - *TCN Channel Nine v Anning (2002)*: Implied license is limited to a particular purpose
    - Implied license was limited to purpose of entering land and requesting permission to film – TV crew followed EPA and entered unlocked gate for purposes of filming, which was outside any implied license
  - *Plenty v Dillon (1991)* continuing trespass after license is revoked, even if revoked from law enforcement/police
    - Must leave as soon as practicable after revocation *Cowell v Rosehill (1973)*
6. If relevant: Police powers of entry
- Unless authorised by law, police have no special right without consent, must leave within a reasonable time when requested to do so – *Kuru v NSW (2008)*
  - Entry without warrant allowed: to prevent murder, if arrestable offence has been/about to be committed and person followed into house, or following an offender running away from an affray – *Plenty v Dillon (1991)*

### Defences to Intentional Torts

- Self Defence
  1. Degree of Force
    - Reasonable, proportional to any threat, not excessive *McClelland v Symons (1951)*
    - Cannot plead self-defence when retaliatory blow struck in revenge rather than protection from threat
    - Onus rests on prosecution to prove force was beyond self defence
      - *McClelland* – only struck attacker once, would be excessive if hit twice
  2. No other option available
    - Question of options available to defendant – question of fact for court to determine whether response was reasonable (could have left?) – *Fontin v Katadopsis (1962)*
  3. Reasonable belief in risk of death or serious bodily harm
    - Reasonable belief in risk if they do not defend themselves is sufficient
      - *Zecevic v DPP (1987)*
    - Onus on defendant to prove that actions were based on reasonable belief
      - *Pearce v Hallet (1969)*
    - Defence of another person *Watkins v Victoria (2010)*
      - Same elements, but in relation to danger other person is in
    - Defence of another's property
      - Reasonable necessity, same elements
      - *CLA s52* – no civil liability for conduct carried out in self-defence or in defence of another person or of liberty or property, if the conduct to which they are responding is unlawful
    - Defence of own property
      - Defendant must be in possession – may eject trespassers, but not an owner who has entered to take possession
        - Person with exclusive possession may re-enter using reasonable force to eject person no longer entitled to be there –
          - *Anthony v Haney & Harding (1832)*
      - Use of force must be reasonable, objective – *Shaw v Hackshaw (1983)*
- Consent – onus on defendant *Plenty v Dillon (1991)*
  1. Be voluntary