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**Intentional Torts**

**Trespass to the Person**

- Actionable *per se* without proof of actual harm
- All damage flowing from the tort is recoverable, not just that which was foreseeable
- Intention or negligence as to the act constituting the trespass must be present – *McHale v Watson* (1964) 111 CLR 384 – only an intention to touch the person/cross the border is sufficient, not an intention to cause harm – defendant must disprove negligence
- *Venning v Chin* (1947) 10 SASR 299 – highway accidents are an exception to the above rule – onus is on the plaintiff to prove either intention or negligence
- *Williams v Milotin* (1957) 97 CLR 465 – both an action for trespass by negligence and negligence itself are available, one may be used if the limitation period is exceeded for the other
- *Civil Liability Act 2002 s 3B* – “Civil liability excluded from Act (a)… 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”
- Contributory negligence is not available in an action for intentional trespass
- *Dale v Fox* [2012] TASSC 84 (7 Dec 2012) per Evans J – the plaintiff must demonstrate that the defendant voluntarily did the act which led to the battery – Dale sued Fox for shooting him with a shotgun, but it was shown that Fox didn’t mean to press the trigger

Battery:

- *Slaveski v Victoria* [2010] VSC 441 (1 Oct 2010) – “Battery is an act that directly and intentionally (or negligently) causes offensive physical contact with another’s person”
- *Battista v Cooper* (1976) 14 SASR 225 – Bray CJ held that they could be liability for “nervous shock” in the tort of battery where someone so close to the person physically assaulted had suffered such a shock – held that in such a case the element of “directness” was not satisfied in relation to the relative
- *Boughey v The Queen* (1986) 161 CLR 10 – touching does not have to be hostile to amount to battery
- Secretary, Dept of Health and Community Services v *JWB* (1992) 175 CLR 218 at 310-311 – “the onus is on the defendant to prove consent… the essential element of the tort is intentional or reckless, direct act of… contact with the body of the plaintiff”
- *Dean v Phung* [2010] NSWCA 223 – dental malpractice led to damages for battery and exemplary damages – consented to dental procedures but not what was administered
- *Rixon v Star City Pty Ltd* [2001] NSWCA 265 – quoted Goff LJ in *McDonald v Parnell* [2007] FCA 1903 at [99] on “exigencies of life” are a matter of “implied consent” - note that the ‘exigencies of life’ mean that whenever we walk around in a crowded place there is the chance that someone will bump into us accidentally

Assault:

- *Rixon v Star City Pty Ltd* [2001] NSWCA 265 – “Assault is an overt act indicating an immediate intention to commit a battery, coupled with the capacity of carrying that intention into effect”
- *NSW v Ibbett* [2006] HCA 57 – a police officer who raced into the garage where Mrs Ibbett’s son had parked and pointed his gun at her had committed an assault
- *Zanker v Vartzokas* (1988) 34 A Crim R 11 – how imminent does the threat have to be? – assault claim was successful because plaintiff was put in threat of imminent violence
- *Barton v Armstrong* [1969] 2 NSWR 451 – Taylor J’s comments – words alone can amount to an assault
False Imprisonment:
- *New South Wales v Williamson* [2012] HCA 57 (12 December 2012) – an action for false imprisonment is not an action for “personal injury” damages for the purpose of legislation limiting legal costs per French CJ
- *Bird v Jones* (1945) 7 QB 742 (UK) – all avenues of escape must be cut off and restraint total rather than partial
- *Zanker v Vartzokas* (1988) 34 A Crime R 11– does not have to be physically imprisoned within walls, simply so reasonable way out – trapped in a speeding car
- *Trevorrow v SA (no 5)* [2007] SASC 285 – do not have to know you are being imprisoned at the time to have an action – later overturned in *State of South Australia v Lampard-Trevorrow* [2010] SASC 56 by the full court: “we do not think it is realistic to describe the care and protection given by the carer of a child as restraint on the child, in the relevant sense of the term”
- *Coles Myer Limited v Thompson* [2009] NSWCA 299 – an employer can be vicariously liable for actions of an employee – store clerk had argument with customer over a DVD return, called police and accused fraud, employee made accusation knowing it was completely false
- *State of NSW v Kable* [2013] HCA 26 – overturned NSWCA verdict of state being vicariously liable for actions of the gaoler when he was imprisoned under a law later held to be invalid (and was not subsequently released) – High Court ruled that the decision of imprisonment was made by a judge of a superior court whose decision provided lawful authority even if determined later to be in error
- *Carnegie v State of Victoria* comments of full Victorian Supreme Court – “if imprisonment is proved it is for the defendant if he is to escape liability to prove a lawful justification for the imprisonment either at common law or by statute”
- *Zaravinos v State of NSW* [2004] NSWCA 330 – power must be used for the purposes for which it is given – power of arrest misused to detain someone for questioning when he came voluntarily for an “interview” – power of arrest under s352 of the *Crimes Act* 1900 should only be used if there was doubt the plaintiff would attend court
- *NSW v Riley* [2003] NSWCA 208 – must be informed of the reason for their arrest even if they have been taken into custody with a suspected a psychiatric problem

Trespass to Land
- s 72 of the *Civil Liability Act 2002* (NSW) removes any action for trespass against an aircraft “at a reasonable height”
- *League Against Cruel Sports v Scott* [1985] 3 WLR 400 – trespass to land can occur in negligence – hunter persisted in hunting with hounds near someone else’s land, knowing there was no way to stop the hounds from crossing the border
- *Stanley v Powell* [1891] 1 QB 86 (UK) – intention to take the next step, not trespass onto another’s land, constitutes the tort
- An implied license to enter may be granted if the person enters for a lawful purpose – *Plenty v Dillon* (1991) 171 CLR 635 – “coming on his lawful business to come through the gate, up the steps and knock on the door of the house”
- Property owner must revoke the implied permission – *Wilson v State of NSW* [2010] NSWCA 333 – house owner’s husband revoked permission to enter but owner did not
- Revocation of license to enter must be clearly communicated – *TCN Channel Nine Pty Limited v Anning* [2002] NSWCA 82
- Defence of statutory authority does not apply if excluded by the owner – *Plenty v Dillon* (1991) 171 CLR 635 – and warrant must be used for the exact reason it was given (cannot trespass with a warrant for a phone tap) – *Coco v The Queen* (1994) 179 CLR 427
Private Nuisance:

- *Hargrave v Goldman* [1963] HCA 56 – Windeyer J defined the tort of private nuisance to be an unlawful interference with the occupier’s use or enjoyment of land, or some right over, or in connection with it

- *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASC 79 per McLure P: “Nuisance protects a claimant’s interest in the beneficial use of land. It is not confined to the actual use of the soil but extends to the pleasure, comfort and enjoyment which a person normally derives from occupancy of land”

- Action on the case tort, as it is available where damage is indirect and may be actionable without proof of actual harm

- Harm that is actionable: flow of water onto property (*Proprietors of Strata Plan No 13391 v Abate*), tree roots (*Malliate v Sharpe* [2001] NSWSC 1057), slippage of land and duty to tell neighbour (*Yared v Glenhurst Gardens* [2002] NSWSC 11), excavation of land causing adjacent land to lose lateral support (only when land is undeveloped – without buildings on it) – *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* [2011] HCA 19

- Harm that is not actionable: right to privacy (*Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] 58 CLR 479, right to a view from land (*Bathurst City Council v Saban* (no 2) [1986] 58 LGRA 201, right to enjoyment of television reception (*Hunter and Others v Canary Wharf Ltd* [1997] 71 ALJ 508–509)

- Trees (*Disputes Between Neighbours*) Act 2009 (NSW) s 5 abolishes the action for nuisance “as a result of damage caused by a tree to which this act applies – trees applying are those situated wholly or principally on land describe in s 4 (mainly private property as opposed to publicly owned land) – under s 4(2) the legislation does not apply to land vested in, or managed by, a local council

- *Malliate v Sharpe* [2001] NSWSC 1057 – damage caused by nuisance must be foreseeable

- *Gales Holdings Pty Limited v Tweed Shire Council* [2013] NSWVA 382 – local council allowed Gales Company to become waterlogged by the way it discharged waste – rare breed of frogs established habitat there and thus Gales was denied development approval – council not liable as “frog damage” not foreseeable

- *Sleeman & Anor v SPI Electricity Pty Ltd* [2014] VSC 49 – “a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not the interfered with”

- *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 – defence of statutory authority only applies if the nuisance was an “inevitable consequence of the authorised undertaking”

Public Nuisance

- Despite the similarity of the names, the tort of public nuisance is separate from private nuisance, involving a wrong that affects the public at large in their reasonable comfort and convenience – it may in some circumstance be a crime, though very few such criminal actions are taken these days

- Initially was a tort of strict liability, but in more recent years the courts have held that there will only be liability if the interference with public rights was foreseeable

- Elements per Sholl J in *Walsh v Ervin* [1952] VLR 361:
  1. The need for “particular damage”
  2. But this particular damage need not be necessarily pecuniary loss;
  3. General damage (such as inconvenience and delay) must be substantial; direct and not consequential; greater in degree than that suffered by the general public;
  4. Merely nominal damages are not awarded;
  5. But exemplary damages may in an appropriate case be awarded
- Facts of *Walsh* involved an obstruction to a public highway caused by one farmer, which stopped the plaintiff (a neighbouring farmer) from using the road and having access to the road from his land
- *Silservice Pty Ltd v Supreme Bread Pty Ltd* (1949) 50 SR(NSW) 127 – defendant’s bread shop was so popular that long queues would gather outside on Fridays and obstruct entrance to the adjacent café – bakery was not held liable for obstruction caused by customers
- *Onus v Telstra Corporation Ltd* [2011] NSWSV 33 – injunction issued to prevent a telecommunications tower being built near a privately owned airport which would bring the need for radical changes to the operations of the airport to avoid collision with the tower and a resulting reduction in the owner’s income

**Trespass to Goods**

- Dixon J in *Penfolds Wines Ltd v Elliott* (1946) 74 CLR 204 – “Trespass is a wrong to possession” – Latham CJ in *Penfold* – “…without the infliction of material damage. The handling of a chattel without authority is trespass”
- Legal rights gained by possession – *Armory v Delamirie* (1722) 93 ER 664 – chimney sweep obtained brooch, handed to goldsmith to be valued, apprentice removed jewel, sweep sued for conversion – court gave damages at the level of the most valuable jewel unless evidence of the actual jewel could be produced (was not present at court)
- Bailment exists even if the goods are “transformed” and then returned – *Pangallo Estate Pty Ltd v Killara 10 Pty Ltd* [2007] NSWSC 1528 – grapes delivered to someone who made wine and then returned wine to original grape owners
- Bailee owes a duty to take reasonable care of goods, and if the goods are destroyed or damaged, the onus is on the bailee (rather than the bailor) to show they have taken reasonable care

**Conversion (Trover):**

- *Allianz Australian Insurance Limited & Anor v Rose Marie Lo-Giudice* [2012] NSWSC 145 – “the plaintiff has either possession or a right to immediate possession… at the time of conversion… the defendant intentionally deals with the goods in a manner repugnant to the possession… of the ‘true owner’ of the goods”
- An action on the case, so ‘indirect’ interference is actionable – need not be physical harm, but some substantial interference with the title or ownership – need not be intention to convert, only intention to exercise dominion over the chattel
- Things that may amount to conversion: disposal by way of sale; pledge followed by delivery; destruction of the goods; change in character of the goods; appropriation evidenced by refusal to deliver (Dixon J in *Penfolds*)
- Things that do not amount to conversion: damage to the chattel; use of the chattel; transfer of possession other than for the purpose of affecting the immediate right to possession (Dixon J in *Penfolds*)
- “Conversion is a tort of strict liability in the sense that a person may commit a conversion without any fault on their part” Redlich J in *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd and Others* [2003] VSC 291 – company liable for conversion after an employee regularly stole small pieces of gold from the gold refinery, even though no knowledge of the theft

**Detinue:**

- *Chep v Bunnings* [2010] NSWSC 301 – “a refusal to deliver up goods to a person having the immediate right to the possession of those goods”
- *Wong v Maroubra Automotive Refinishers Pty Ltd; Ayres v Maroubra Automotive Refinishers Pty Ltd (No 2)* [2015] NSWSC 222 – smash repairer refused to give over cars towed to their premises belonging to two drivers insured under NRMA, who were to have work done by an
approved NRMA repairer – drivers were successful in detinue, receiving damages for additional transport costs while they did not have their cars

**Malicious Prosecution**

- Need to show actual harm as well as ‘malice’, not just intention or negligence
- Judges or magistrates cannot be sued for malicious prosecution for making a decision to commit someone to prison – immunity applies only to them, police officers in some cases can be sued
- Elements are as follows: Prove that the person you are suing initiated an action against you; show that the proceedings terminated in your favour; show that the action was initiated or maintained in a malicious manner; prove that the defendant acted without reasonable or probable cause; and show that damage has been incurred (A v NSW [2007] HCA 10)
- *NSW v Abed* [2014] NSWCA 419 – Ms Abed was accused of attempted murder by her ex-husband’s wife, with the current wife, Mrs Younis, lying to attempt and incarcerate her – Mrs Younis was found liable for malicious prosecution, as well as Mr Younis as although he didn’t directly lie to the police and court, he backed up Mrs Younis and aided her in maintaining the story
- *Beckett v NSW* [2013] HCA 17 – a full 6 member bench unanimously agreed that “the termination of prosecution proceedings by the entry of a *nolle prosequi* was sufficient to establish… proceedings [terminated] in the plaintiff’s favour” (*Nolle prosequi* being a termination of the proceedings)
- *A v NSW* [2005] NSWCA 292 – the prosecutor does not have to believe in the guilt of the accused, merely that the evidence is strong enough that “upon grounds of justice a charge against him is warranted”
- Damage incurred must be either damage to reputation, to life, limb or liberty, or damage in an economic sense – *Savile v Roberts* (1698) 91 ER 1147

**Intentional Harm**

- Actual harm as well as intention to cause harm must be shown, but the harm may be indirect (an action on the case) or the “natural and probable result” of the action – Gummow J in *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69
- *Wilkinson v Downton* [1897] 2 QB 57 (UK) – D told Mrs W that husband had been gravely injured, this was a lie and Mrs W suffered a nervous breakdown and was hospitalised as a result, Wright J awarded damages
- *Giller v Procopets* [2008] VSCA 236 – while in property settlement proceedings after the breakdown of a de facto relationship, Mr P threatened to show video footage of sexual activity between the two (first filmed secretly, later with permission) – all three CA members found an action was available under *Wilkinson v Downton* but two of them held that it did not succeed as no “recognisable psychiatric illness” has been established
- Distress is not sufficient for an action under *Wilkinson* – *McFadzean and Ors v CFMEU and Ors* [2004] VSC 289
- Do not need to intend to harm the actual plaintiff, merely do harm to a group of persons involving the plaintiff through your action/s – *Bird v Holbrook* (1928) 130 ER 911 – defendant set a spring gun in his garden designed to catch someone in the act of stealing flowers, actually shot someone chasing a stray hen