**Week 2: Historical Background**

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

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<th>Intentional</th>
<th>Direct</th>
<th>Indirect</th>
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<tr>
<td>Intentional</td>
<td>Trespass</td>
<td>Case</td>
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<tr>
<td>Unintentional</td>
<td>Trespass OR Case (Negligence)</td>
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- Direct + intentional = trespass (Scott v Shepherd)
- Direct + Intentional/Negligent = trespass/case (William v Holland, approved in Williams v Milotin, and in Venning v Chin)
- Indirect = case (Hutchins v Maughan)
- Trespass is actionable per se – plaintiff does not need to prove damages while the nature of Case or negligence is such that damage is an essential element of the action.
- The old action of trespass was confined to instances of 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)

- Onus of proof of fault:
  - Generally, in Trespass, onus is on the defendant to disprove fault. Exception: highway accidents, onus on plaintiff
  - In negligence/action on the case → onus on the plaintiff

a) Direct/indirect injury

- The initial distinction between Trespass and Case was whether the injury was directly or indirectly caused by the defendant
  - Reynolds v Clarke (1725)
    - If a man throws a log into the highway, and in that act it hits me → Trespass because it is an immediate wrong
    - If the log lies there and you sustain injury by tumbling over it → case because it is not immediate
  - A direct injury → the injury was sustained in the course of the defendant’s act, not after the force of action was over (Reynolds, Scott v Shepherd).
    - An act that set in motion an unbroken series of continuing consequence, the last of which ultimately caused contact with the plaintiff, was still regarded as ‘direct’ (Scott v Shepherd)
    - As long as the chain of directness is not broken (Scott v Shepherd – not free agents, but compulsive necessity)
    - For example, a mad ox set loose in crowd makes the person who set it loose answerable to trespass, battery (example given by Nares J in Scott v Shepherd)
    - To punch a woman carrying a child, causing her to drop the child with the consequence of the child hitting head on the ground is to commit a DIRECT act against the child for battery (Haystead v Chief Constable of Derbyshire)
    - Scott v Shepherd (1773) (squib thrown in market – direct)
    - Rule: Where injury is immediate (direct), an action for trespass will lie. Where the injury is consequential (indirect), it must be an action of the case
Facts: Defendant threw a squib (firework) in the marketplace and it landed in a stall. The person at that stall threw it from that stall to protect himself and the goods, and it landed in another stall. The person at this stall then threw it to protect himself and the stall and it finally landed in Scott’s stall, burst and injured his eye.

Held: Judgement for the plaintiff:

- **Blackstone (dissenting)** – his principles were correct, but majority argued it was applied incorrectly, see De Grey):
  - Immediate wrong: throwing a log of timber in a highway and it hits a man → trespass exists (Reynolds v Clarke)
  - Consequential: throwing a log of timber on the highway and a man tumbles over (Reynold v Clarke)
  - It was consequential as two other rational agents dictated the direction of the squib. Free agents (Ryal and Willis) changed directions etc and could have thrown it somewhere else.

- **De Grey CJ**: The true question is whether the injury is the direct and immediate act of the defendant.
  - In this case yes, the unlawful act of throwing the squib by Shepherd is responsible for the subsequent conduction such that the subsequent throws are a **continuation of the first force and first act**.
  - There was no intervention by free agents (Willis and Ryal as Blackstone argued) because they were acting under a compulsive necessity for their own safety and self-preservation.

- The injury was a **direct result of the defendant’s action** → the ‘chain’ of action was not broken by intervention

  - An **Indirect injury** → the injury suffered was not occasioned by the act of the defendant, but was consequential.
    - It is consequential when some obvious and visible cause intervenes so that it is not part of the defendant’s act (Hutchins v Maughan)

- **Hutchins v Maughan (1947)** (dog eats poisonous bait)

- **Facts**: The defendant had laid poisonous baits on unfenced land. The plaintiff and his two sheep dogs went alongside the creek with the baits. The dogs picked up the baits and shortly after died.

- **Issue**: whether the injury suffered in the loss of dogs was immediate or consequential, that is, whether it was directly occasioned by the defendant’s act in laying the bait or was merely consequential

- **Held**:
  - The injury suffered was not occasioned by the act of the defendant, but merely consequential.
  - Herring CJ: The act itself did not occasion a prejudice (he had laid the baits before plaintiff even went to the creek)
  - An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act (log hitting man)
  - An injury is consequential when by some obvious and visible intervening cause, it is not part of the defendant’s act, but merely as a consequence of it (log on the highway; involuntary impulse in squib in Scott v Shepherd – thus not consequential)
The baits were laid by the defendant before the plaintiff took his dogs to the land in question. If the plaintiff chose not to come in the land and bring his dogs, he would not have suffered injury from the defendant’s act.

- Thus the doing of the act itself did him no mischief → before he would suffer an injury, he had himself to intervene by coming to the land and bringing his dogs.
- Thus the injury suffered was not immediately in point of causation and was not part of the defendant’s act of laying the bait (thus consequential)

b) Rule in Williams v Holland
- The Rule in Williams v Holland shifted the focus from direct/indirect injury in distinguishing between Trespass and Case to **intent**.
- Thus, where the plaintiff is injured by the defendant’s direct 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.

**Williams v Holland**
- **Facts:** Plaintiff was riding a horse cart and defendant was on another horse cart. Due to the carelessness of the defendant, the defendant’s cart collided with the plaintiff’s cart, resulting in injury. The plaintiff brought an action on the case rather than trespass.
- The defendant argued that since the injury occasioned was direct, it action should be trespass and case was not maintainable
- **Held:** Where the plaintiff is injured by the defendant’s direct act, the plaintiff may elect to bring an action on the case (rather than a trespass) provided that the defendant’s act is negligent
  - On the facts, the defendant was negligent and the act was not wilful (intentional) and thus it as held that case is maintainable, notwithstanding the act was immediate.

**Williams v Milotin** *(approved W v H rule in Australia)*
- **Facts:** An infant riding a bicycle on a street sustained injuries when he was hit by a truck being driven negligently. Action was brought after 3 years. Per the Limitation of Actions Act 1936-1948 (SA), actions for trespass must be commenced within 3 years of the incident while actions on the case within 6 years. Defendant argued that it was a trespass as the truck directly hit the plaintiff.
- **Issue:** Trespass or case?
- **Held:** Then the contact is direct and not intentional, action can be brought in trespass or case. If the injury was caused indirectly, action on the case is the only option.

**Fault in Trespass**
- Fault by the defendant, either intentional or negligent, is an essential ingredient in Trespass (Weaver v Ward).
- So if the defendant had **no intention to commit trespass** and was **not negligent** → no fault → no Trespass (Stanley v Powell)

**Weaver v Ward**
- **Facts:** The plaintiff alleged that the defendant had shot and wounded him during a military training exercise
- **Held:** There is no liability in trespass where the trespassory act was committed without fault by the defendant
Facts: The defendant was from a shooting party and fired at a bird. One of the bullets glanced off a tree and accidentally wounded the Plaintiff who was carrying cartridges and game for the shooting party. The jury held that the defendant had not been negligent.

Issue: Could the defendant be held liable in trespass for directly causing harm to the plaintiff?

Held: Given that the jury found no negligence, Denman J held that the defendant could not be liable in trespass:
- The gun was fired without negligence
- There was no intention by D to injure or shoot in the plaintiff’s direction → that is, there was no fault thus → no trespass

Onus of proof of fault - Trespass

- Generally in trespass, the onus is on the defendant to prove that the trespassory act occurred without the defendant’s fault (McHale v Watson).
- In the case of highway incidents however, the onus is on the plaintiff to prove fault on the part of the defendant (Venning v Chin).
- In both cases, the plaintiff must first prove a trespassory act attributable to the defendant as on the facts (Platt v Nutt). If the plaintiff proves the fact of the trespass and that it was a direct act of the defendant, P can establish a prima facie cause of action.
- In an action on the case/negligence, the onus is on the plaintiff to prove the defendant’s fault.
- Distinction with English common law:
  - Fowler v Lanning → Diplock J held that the onus of proof of intention or negligence in Trespass to the person is on the plaintiff.

Trespass:
- 1) Plaintiff has to prove the defendant has committed a DIRECT trespassory act (Platt v Nutt)
- 2) Highway case or not?
  - 2.1) no → the defendant bears the onus of proving he is not at fault (McHale)
  - 2.2) Yes → plaintiff bears the onus of proving defendant’s fault (Venning v Chin)

1) 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 committed the trespassory act of which the plaintiff complains (Platt v Nutt)

Platt v Nutt
- Facts: The defendant slammed a glass door during the course of a domestic argument with the plaintiff. The plaintiff put out her hand to stop the door, and she was injured when her hand smashed through the glass. She would not have been injured if she had not put her hand out to stop the door.
- Issue: Had the plaintiff proved enough to establish the tort of battery?
- Held: the defendant was not liable for trespass by battery, as the plaintiff had failed to prove that her injuries were caused by the direct act of the defendant, rather than as a consequence of her own wilful act in putting out her hand → thus no trespass action.
- Kirby P (dissenting)
Issue: was it for the plaintiff to prove, once the trespassory act was established, that the defendant intended the act or was negligent, or for the defendant to prove he did not intend the act or that he was not negligent?

Reasoning
- In McHale \(\rightarrow\) HC held onus on defendant
- In Hackshaw v Shaw, HC preferred Fowler – onus on plaintiff
- The onus of proof can have a significant impact on the outcome of the case, for instance, in Platt v Nutt, it was held that if the onus was on the plaintiff, she would have failed in her action.

2.1) In an action for trespass off Highway, the onus of fault is on the defendant who must disprove any intent or negligence.

- McHale v Watson (1964) (boy throws dart in the eye)
- Facts: The defendant, a 12-year-old boy, threw a dart-like piece of steel which hit the plaintiff in the eye. The plaintiff sued the defendant, alleging both trespass and negligence
- Issue: Did the plaintiff have to prove fault on part of the defendant?
- Held: in action for trespass, the onus is on the defendant to prove that he had not intended to injure the plaintiff, and had not been negligent (Windeyer J)
- On the facts, the defendants discharged this onus – thus was not liable.

2.2) Generally in Trespass, the onus lies on the defendant to disprove fault.
- However, highway accidents are an exception to this rule as the onus is on the plaintiff to prove either intention or negligence on the part of the defendant (same as England).
- Venning v Chin (hit while crossing road – negligently/directly but unintentionally – could go in trespass or case)
  - Facts: Plaintiff suffered personal injuries when she was struck by a car, driven by the defendant, while crossing a public road. Trial judge found P, the appellant, guilty of contributory negligence and ordered to reduce damages by 60%.
  - Held: the plaintiff, having elected to rely on negligence, may rely on the applicable statutory time limitations for that cause of action

Trespass for negligent injury
- While there is a tendency to associate trespass exclusively with INTENTIONAL wrongdoing, in Australia trespass is still actionable where the defendant’s fault comprises negligence
  - Trespass is not confined to intentional interferences
- In direct injury cases, the plaintiff may frame their action in trespass or case (Williams v Milotin – cyclist hit by truck)
  - Advantages of suing in trespass → onus of proof of fault on defendant

Negligence for intentional trespass
- Intentional infliction of harm to the person CANNOT be pleaded as negligence – it must be actioned in Trespass (New South Wales v Lepore, Williams v Militon)
- An action on the case for a direct act is maintainable ‘so long as it is not a wilful act’ (Williams v Holland, per Tindal CJ)
Week 3: Trespass to the person

- Here we look at three tort actions which protect a person from **direct** physical violation and **threats** of violence: Battery, Assault and false imprisonment.

- **The fundamental principle of personal inviolability**
  - Every person’s body is inviolate. Per Robert Goff in Collins v Wilcock, any touching of another person, however slight, may amount to a battery.
  - **Cole v Turner** (Holt CJ): the least touching of another in anger is a battery
  - Exceptions to personal inviolability principle:
    - Physical contact which is generally acceptable in the ordinary conduct of daily life does not constitute battery (**Cole v Turner** – gentle touching in narrow passage, **Rixon v Star City pty** – casino player – security hand on shoulder - attention)
    - Such physical contact are not actionable because they **are impliedly consented** to by all who move in society and so expose themselves to the risk of bodily contact (**Rixon**)
      - Accepted contact must be considered in its context (e.g. party or music fest)
    - **Distinction between drawing attention and restraint**:
      - A touch to only gain someone’s attention, without no greater degree of physical contact than reasonable necessary is not battery (**Rixon**)
      - If the contact restraints the plaintiff unlawfully, it will constitute battery (**Collins v Wilcock** – Police officer took hold of a Prostitute’s arm when the woman walked away and refused to answer questions)
        - In this case, - this was not to seek the woman’s attention because she already saw the police but refused to talk to them and walked away.
        - But if restraints a man from running into his house on fire or a motorist about to strike another he just had accident with – falls under contact reasonably necessary to the common course of life – not battery.

1. Battery

- A battery is a positive and **direct** application of force by the defendant causing **bodily contact** with the plaintiff **without his or her consent**
- It hinges on the notion of personal inviolability (**Collins v Wilcock**)
- To establish an action in battery, the elements that need to be satisfied are:
  1. **A Positive Act (not an omission)** (**Holmes v Mather** – dog freaks out horses)
     - For a battery, the contact must be **active** and not **passive**: (**Innes v Wylie** – policeman standing in doorway to block it ‘entirely passive like a door’ – not battery)
     - This active contact can take many forms/force: e.g. spitting (**R v Cotesworth**), pulling away chair the plaintiff is about to sit on so the plaintiff falls on the ground (**Hopper v Reave**), shining bright light into the plaintiff’s eyes.
     - **Holmes v Mather**:
       - Facts: A horse drawn carriage being startled by a dog.
Held: If D had sat there and done nothing and let the horses run away the carriage, it is the horses, not D, that is liable. But if D tries to guide the horses to prevent injury to himself and others, and hits the P, he is liable? This seems nonsensical.

There was no fault and thus not liable.

2. Direct act
   - The act of the defendant in question must be a direct act of force (Hutchins v Maughan – dead dog from bait)
   - What is direct?
     - Reynolds v Clarke (highway log).
     - Broad view taken of ‘direct’
       - An act that set in motion an unbroken series of continuing consequence, the last of which ultimately caused contact with the plaintiff, was still regarded as ‘direct’ (Scott v Shepherd – squib in marketplace)
       - As long as the chain of directness is not broken (Scott v Shepherd – not free agents, but compulsive necessity)

3. Causes physical contact with the plaintiff’s body
   - To have an action in battery, the defendant must have caused physical contact with the plaintiff’s body
   - The defendant does not necessarily have to physically touch the plaintiff, it may be an act, such as throwing an object, that results in battery (Scott v Shepherd – squib in market stalls)
   - Hostility not necessary:
     - In Wilson v Pringles, it was held that the intentional touching or contact must be ‘hostile touching’.
     - However, an element of ‘hostility’ is not essential as Lord Goff outlined in Collins v Wilcock which has been generally supported in Australian cases (Rixon v Star City – casino player – security hand on shoulder)
   - Distinction between drawing attention and physical restraint (Collins v Wilcock and Rixon Star)

4. The defendant acted intentionally or carelessly (Williams v Holland)
   - For an action in trespass to lie, the act may be intentional or careless, as long as it is direct (Williams v Holland)
   - An intentional act is one that is deliberate or wilful, that is, the defendant ‘meant to do it’ (McNamara v Duncan – AFL - elbow)
     - Here, it is not necessary for the defendant to intend to injure or harm the plaintiff, rather to intentionally perform the act which caused the offensive contact with the plaintiff’s body (McNarama v Duncan – AFL elbow)
     - Thus, it is irrelevant whether the defendant intended the consequences of the act, it only matters that the act was intentional
   - McNarama v Duncan
   - Facts: The plaintiff received an injury during a game of AFL due to a blow to the head by the defendant’s elbow
- **Issue:** did it matter that the defendant DID NOT MEAN TO INJURE THE PLAINTIFF?
- **Held:** Fox J found the defendant liable for battery against the plaintiff:
  - The striking of the plaintiff by the defendant was intentional – he ‘meant to do it’.
  - This intention does not necessarily mean that he meant to cause the plaintiff serious injury, but that he merely **INTENDED** to do the **ACT** that caused the injury (raising the elbow and sharply bending it while pursuing the plaintiff)
  - **Checking whether it falls under rules/generally acceptable:**
    - Such a posture is not part of any movement or manoeuvre which at the time and the circumstances was appropriate. It cannot be understood as an act in the ‘ordinary, legitimate, course of a game’ of AFL.
      - Voluntary means that the defendant must consciously bring about the bodily movement that results in contact with the plaintiff
        - If defendant voluntarily pulls the trigger of the gun, not knowing it has a bullet, which hits the plaintiff, defendant did not voluntarily fire the bullet (object that made contact with plaintiff) → no battery (Hogan v Gill) *check*
  5. **Without plaintiff’s consent**
    - Generally, physical interference with another person’s body is lawful if the person consents to it (In Re F, per Lord Goff).
    - Implied consent → such as jostling in a crowded bus, but generally falls under ‘ordinary conduct acceptable in everyday life’
      - However, **Giumelli v Johnston** (AFL game – implied consent to bodily contact, but not when it is outside rules and opposing player intends to cause bodily harm)
    - **In Re F** (sterilisation of mentally disabled lady)
    - **Facts:** F, woman aged 36, suffered from mental disability and engaged in sexual relationship with a male patient at a mental hospital. It was considered disastrous for F to conceive a child from a psychiatric point of view (Couldn’t cope emotionally with bearing a child). F’s mother applied for declaration for a sterilisation operation which F was unable to give consent to due to her mental incapacity.
      - **Held:**
        - Lord Brandon: a Doctor cannot lawfully operate on adult patients of sound mind, or give them any treatment involving the application of physical force however small, without their consent. If a doctor did, it would be a trespass to the person (battery)
        - Exception: where adult patients cannot give consent, e.g. for mental incapacity, the doctor may operate, provided that the operation or other treatment is in the best interest of the patient
          - Best interest: to save their life or ensure improvement or prevent deterioration of their physical or mental health
  6. **Knowledge not necessary**
    - Knowledge of the contact by the plaintiff is not necessary e.g. Kissing someone while they were sleeping would be battery.
The principal remedy sought by a plaintiff is usually damages – monetary compensation – for the tort/wrong.
- As Battery is actionable per se, damage is presumed by the courts – even if plaintiff cannot produce any evidence of damages, at least nominal damages are given.
- Three types: Compensatory, Aggravated and Exemplary
  - **Compensatory**
  - **Aggravated Damages**
    - Aggravated damages may be awarded as compensation for conduct which causes emotional hurt, insult and humiliation to the plaintiff (Henry v Thompson – police urinates on aboriginal man)
      - No actual physical harm required. In *Henry*, the man had an emotional break down the next day and was close to tears.
    - Thus unlike exemplary damages, they are compensatory in nature (Lamb v Cotogno – man jumps on car bonnet )
    - **Focus on party wronged (Plaintiff)** → the principle inquiry to be undertaking an assessment of aggravated damages is the reaction of the party wronged (Gray v Motor Accident Commission per Gleeson CJ, McHugh, Gummow and Hayne JJ)
    - Aggravated damages are given for conduct which shocks the plaintiff and hurts his or her feelings (Gray v Motor Accident Commission)
  - **Exemplary damages**
    - An additional sum beyond compensation awarded to punish the guilty and deter from such proceedings in the future (Lamb v Cotogno, Uren v John Fairfax)
    - **Rationale:** Awarded for various reasons such as for conduct that shocks the tribunal of fact, representing the community (Gray v Motor Accident Commission).
      - Usually when defendant consciously harms (hence overlap with criminal).
    - **Focus on wrongdoer (defendant):** In considering exemplary damages, the focus of the inquiry is upon the wrongdoer, not upon the party who was wronged (Gray v MAC, Gleeson CJ)
    - **Insurance:** The fact that the defendant is insured does not bar the plaintiff’s recovery of exemplary damages (Lamb v Cotogno, Gray v Motor – 7 year car crash)
      - **Lamb v Cotogno (1987)** (Man jumped on bonnet – flies off)
      - **Facts:** the defendant was the driver of a car and deliberately caused serious injury to the plaintiff by driving off while the plaintiff jumped on the bonnet of the car after a verbal dispute. D braked and P flew onto the road, suffering serious injuries. Any exemplary damages would be paid by the defendant’s insurer and not the defendant. P sued in Battery
      - **Issue:** Should exemplary damages be awarded when they would not be felt as punishment by the defendant himself because they would be paid by his insurer?
      - **Held:** Insurance does not bar exemplary damages. HC held award of exemplary damages are not only to deter the defendant, but also appease the victim and prevent vengeful acts. However, here, relatively small amount of exemplary damages were awarded.