**Trespass to the Person**

**Battery:**
1. an intentional (or negligent) act of the defendant,
2. which directly causes,
3. a physical interference or contact with the body of the plaintiff,
4. done without lawful justification

1.1 **An Intentional Act**
No liability without intention to cause the interference. You need to know of the likely consequences of actions. You act voluntarily, there is no hostility required.

**Beals v Hayward** 1960 - New Zealand case
16 year old boy, playing in fort that was on the neighbours property. Threw stones and behaved in an annoying matter. Asked to stop, didn’t comply. Threatened to shoot them. Then shot a blank, then shot a boy the next day. He intended to fire the gun, but he didn’t intend to apply force. Thus, it includes recklessness.

**Dale v Fox** [2012] TASSC 84
Group of men, charged with criminal offences, plotted to blow up government laboratory. Confrontation at defendants home, defendant pointed shotgun at plaintiff. Told them to leave whilst pointing at them. Gun misfired and shot the plaintiff in the eye. Defendant had no intention in firing the gun at the time, he would have if they had come closer. Defendant argued that he had no intent to fire the shotgun at the time. Accepted he didn’t knowingly fire the gun.

**Williams v Milotin** (1957) 97 CLR 465
Defendant negligently drove his truck into the plaintiff. Knocked defendant off his bike, acted not intentional but recklessly. Voluntary and intentional when directed by the defendants conscious mind. There is no sleep walking trespass.

1.2 **No Hostility Required but Beyond Conduct Acceptable in Ordinary Life**

**Cole v Turner** (1704) 87 ER 907 - Least touching of another is battery.

**Wilson v Pringle** [1987] QB 237
Hostility required, schoolboy prank out of control, friend pulled bag and boy fell over causing injury. Battery was intentional. There was no requirement for hostility to another person.

**In re F** [1990] 2 AC 1, Lord Goff at 73
Consent of the court was to sterilise the plaintiff. Would be done without hostility and the plaintiffs consent. She did not understand the circumstances. HELD: hostility was not required, that contact without hostility was still lawful. If hostility wasn’t required, there would be battery for a friendly slap on the back or a surgeon doing his job.

**Rixon v Star City Pty Ltd** (2001) 53 NSWLR 98
Plaintiff was playing roulette, touched on shoulder by employee. Judge said this could be battery and the fact that there was no hostility could mean that it could still be established, but this is not the law today, provided the defendant acts voluntarily and intends contact, that will be enough. There is an exception, contact in a result of normal life. Rixon held not liable as the act was to get the plaintiffs attention and was deemed acceptable as it was everyday conduct. Would be bad if he had pouched him or pulled him around.
2. The Requirements of Directness and Physical Interference

2.1 An active application of force
There must be a positive act from the defendant.

*Innes v Wylie* (1844) 174 ER 800
Requirement for positive action was not satisfied. Policeman didn’t allow man to enter the room. Policeman stood solid like a door or wall.

*Fagan v Metropolitan Commissioner of Police* [1969] 1 QB 439
Defendant ran over policeman’s foot. Noticed, refused to remove the car and turned it off. He realised it was on the foot there was an intent of injury. Ruled that there was a battery even though it was a passive act, he intended it to cause injury, there was an intentional action (turning the engine off).

2.2 An extended notion of directness
An interference has to so close follow the defendants act that it becomes part of the act.

*Scott v Shepherd* (1773) 2 Black W 892, 96 ER 525
Defendant threw firework made of gunpowder in a market place. Exploded and eventually took out a plaintiff’s eye. Before it landed, it landed in front of another group who kicked it on to plaintiff’s feet. Each of these acts were regarded as a continuation of the first. All was considered one act, until the firework exploded. Their intention was to injure somebody, they should have known.

*Hutchins v Maughan* [1947] VLR 131
Question of directness was important. Dogs die from eating rigged poisons bait laid by the defendant. Held that directness could not be established as it was not part of the act, simply consequential. Baits were just laid and the dogs went out and found them.

4. No Lawful Authority
Usually given by statute…

*Collins v Wilcock* (1984) 1 WLR 1172 - When contact is made with legal authority.
Police officer talking to prostitute. She walked away and he grabbed her, she scratched his face. Conduct of officer went beyond his powers, he didn’t have lawful authority to detain the prostitute under the statute governing his powers.

**The Onus of Proof**
In tort law the plaintiff has to prove the first two and the defendant has to prove the final two. Balance of probabilities here. That they were not at fault.
Not burden on plaintiff that they did not consent.

*Scalera v Non-marine underwriters* - 2000 UK case
Consent was a defence. No justification for sexual assault. Insurance company to defend a party in a home insurance policy for sexual assault. Held: the plaintiff didn’t have to prove lack of consent.

*Holmes v Mable* 1875 - Plaintiff failed to prove servant on behalf of the defendant, whose horse ran away, servant did his best but couldn’t control the horse and caused injury to the plaintiff.

*Venning v Chin* (1974) 10 SASR 299
Issue was no fault, plaintiff failed to prove the defendants consenting hitting her.
Assault

1. an intentional (or negligent) act or threat of the defendant,
2. which directly causes,
3. reasonable apprehension in the plaintiff of an imminent physical interference or contact with their person (or a person under their control),
4. done without lawful justification

Directness has the same meaning as it does in battery. But it has to so closely follow the defendants act that it can be part of the act. This act or threat must be intentional, that is the defendant must intend to create a reasonable apprehension in the mind of the plaintiff and that is a subjective issue (the mind of the plaintiff). Not necessary to prove the defendant actually intended to carry out the threat. Could be a gesture or act, doesn’t have to be verbal. We must apply a common knowledge approach to a threat, there has to be a possibility.

1. Direct Act or Threat of Physical Interference by the Defendant

1.2 Means to carry out the threatened contact

**Stephens v Myers** (1830) 4 C & P 349, 172 ER 735
Resolved at meeting that the defendant would be removed from the hall, defendant said he will pull the plaintiff from the chair. Approached the plaintiff with clenched fists, before he got there, church warden stopped him. HELD: “It is not every threat when there is no actual personal violence that constitutes an assault, there must, in all cases, be the means of carrying that threat into effect”. Jury found for the plaintiff, as the threat was likely to be carried out. Awarded 10 cents damage.

**R v St George** (1840) 9 C & P 483, 173 ER 921
Defendant pointed an unloaded gun. Any pistol, whether loaded or not, is a threat, if the plaintiff believes that it is loaded. Reckless conduct may be enough.

1.3 Words as Threats
Mere words without an act or gesture is enough, providing that they intended to cause an imminent physical interference or contact with their person.

**Barton v Armstrong** [1969] 2 NSWR 451
High profile politician threatened the plaintiff to sign deals. Some of the threats made over the phone. HELD the threats over the phone could give rise to a reasonable apprehension, even if they were not in the vicinity. They were not mere words, they constituted distinct threatening acts. Looked to the circumstances, it was quite realistic.

1.4 Conditional Threats

**Tuberville v Savage** [1669] 1 Mod 3, 86 ER 684
Statement was made as T put his hand on his sword after savage made fun of him. “If it was not a zize time I would not take such words from you”. Savage attacked and T lost an eye, T brought action against S. S said it was a zize as there was no action which could be brought so no assault. A conditional threat, not capable of constituting an assault does not apply.

**Police v Greaves** [1964] NZLR 295
Police officer exercising his duties. Defendant threatened police officer with knife, police man either stop carrying out his duty or be stabbed. It was held that the defendants words were enough to constitute an assault. But the plaintiff needs to be aware of the threat. The apprehension must also be a reasonable one.
False Imprisonment
1. an intentional or negligent act of the defendant,
2. which directly causes
3. a total restraint on the liberty of the plaintiff and thereby confines them to a delimited area
4. done without lawful justification

Making someone stay in a place against his or her will.
It protects one of the most fundamental rights, personal liberty, where one wants to go. Any restraint on the liberty of someone done unlawfully is false imprisonment.

1. Restraint must be total
   Does not have to be imprisoned, a comprehensive limitation of freedom in all directions is sufficient.

Bird v Jones (1845) 7 QB 742, 115 ER 668
No false imprisonment as plaintiff had multiple means of escape. Wanted to walk along a public road which had been closed. Plaintiff climbed fence and attempted to walk along it but was stopped by police officers. This was the only road closed to him, he was free to walk away and to talk an alternative route around the bridge. Unhappy with options held on bridge for a while, then tried to force his way through. HELD: Someone who is only held in one direction, and is at liberty to stay where they are or go another direction, there is no total restraint, only partial restraint on their liberty.

Burton v Davies [1953] QSR 26
Defendant drove plaintiff and another friend home. Dropped friend off, continued to drive with plaintiff (girl). Put arm around her, threats of screams made him stop driving and he let her leave the vehicle. HELD: there was total restraint as there was no safe escape at the time the plaintiff wanted to, there was no reasonable alternative. Judge analogised it like putting someone in a prison or room with only one exit, out the window with a very late drop.

Symes v Mahon [1922] SASR 447
Assertion of legal authority was enough to give rise to total restraint. Plaintiff on train, recognised by police officers as a wanted man. Travelled to police station on train in a different carriage, but despite this the judge ruled the plaintiff believed he had no reasonable means of escape.

Myer Stores Ltd v Soo [1991] 2 VR 597
Soo requested to come with security officers to the store security office for questioning as they believed he was a shoplifter from footage a week ago. Plaintiff believed he had no choice but to accompany the three men. Mr. Soo was detained incorrectly. Security officers took him to a room and not the police station as they said it would be embarrassing for him otherwise. Appeal court upheld the primary judges findings that Mr. Soo was totally restrained because he believed that if he did not follow the requests, physical force would be applied and he would be taken away. Furthermore, he was totally restrained in the security room as he believed he had no choice but to be there, even if the door was unlocked. Plaintiff voluntarily attended the police station a week later and because of that, this incident did not constitute false imprisonment. Others were held to be a total restraint.

Cubillo v Commonwealth of Australia (2001) 183 ALR 249
Removal of a part aboriginal child from parents to a home. At the time it was policy to do so. Mistreated for 6 years and wasn’t allowed to leave. Said she was falsely imprisoned, because the commonwealth had actively restrained her. HELD: The Commonwealth were not liable as they created the blanket policy and did not actively restrain. The appropriate person to sue was the actual person who removed and detained them. However, they could be jointly liable such as the above case of Soo.
1.2 Voluntary cases

Someone enters a place voluntarily but their right to be released is governed by a licence or contract.

The difference between cases are the plaintiff honestly believed he didn’t have a contract to pay for the wine, whereas Robinson knew that there was contractual terms.

1.3 Knowledge of Restraint not Essential

Person can’t be restrained without their knowledge. Much like assault. You have to know. Battery does not need knowledge.

The difference between cases are the plaintiff honestly believed he didn’t have a contract to pay for the wine, whereas Robinson knew that there was contractual terms.

1.2 Voluntary cases

Someone enters place voluntarily but their right to be released is governed by a licence or contract.

The difference between cases are the plaintiff honestly believed he didn’t have a contract to pay for the wine, whereas Robinson knew that there was contractual terms.

1.3 Knowledge of Restraint not Essential

Person can’t be restrained without their knowledge. Much like assault. You have to know. Battery does not need knowledge.

The difference between cases are the plaintiff honestly believed he didn’t have a contract to pay for the wine, whereas Robinson knew that there was contractual terms.
Defences to the Intentional Torts to the Person

1. Consent

The onus of proving consent is on the defendant. Consent operates as a complete defence in respect of the intentional torts, however, there are limits on the defence. Implied consent is to everyday conduct.

- Elements of a valid consent: All must be present
  - Competence (or capacity)
  - Voluntariness
  - Understanding

1.2 Competence (or capacity)

1.3 Voluntariness

Must be given voluntarily and not out of fraud or duress.

1.4 Understanding

R v Williams (1923) 1 KB 340 (D fraudulent about the nature of the act)

The defendant argued consent by the plaintiff to sexual intercourse. However, he had gained her consent by persuading her she required a ‘special’ surgical procedure to improve her signing voice (he was her teacher) and therefore there was no valid consent. The plaintiff had been induced by the fraud as to the nature of the act.

R v Clarence (1888) 22 QBD 23 (CA) (D infects his wife with gonorrhoea)

The defendant had sexual intercourse with his wife knowing that he was infected with gonorrhoea. He passed the infection to his wife. HELD: Conviction was quashed. The wife had consented to sexual intercourse and therefore no technical assault or battery occurred. Also, these were necessary ingredients of both ABH and GBH. (the position in relation to GBH has subsequently changed). It was irrelevant that the wife was unaware of the infection or whether she would have removed consent had she known since at the time a wife was deemed to consent to sexual intercourse with her husband.

Re F [1990] 2 AC 1, Lord Goff at 73

In this case the parents of an underaged girl gave consent which was sufficient. Furthermore, it was observed that rationalising contact platforms part of everyday life as being ‘founded upon implied consent to bodily contact’ was artificial, making particular reference to the difficulty in imputing consent to minors and those suffering mental disorders.

Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC 112 at 188 Lord Scarman stated:

“... A minor’s capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judiciary fixed age limit....”

Hegarty v Shine (1878) 14 Cox’s CC 145, (1978) 4 LR IR 288 (P consented to sexual act but not to contracting syphilis);

The plaintiff, who was the defendant's mistress, sought to recover in trespass for assault and battery for a venereal infection, claiming that though she had consented to inter-course, her consent was procured by the defendant's fraudulent concealment of his disease, and therefore the act of intercourse was an assault upon her. The case is complicated by the fact that the relations between the parties were immoral and that there were no false statements made of existing fact but merely concealment of a fact which, in view of the illegal relation of the parties, there was no duty to disclose. But the opinions of the majority of the judges in the Court of Queen's Bench and of all the judges in the Court of Ex-chequer Chamber HELD on the broad ground that a fraud which induced consent to an act whose nature was known did not vitiate consent so as to make such an act an assault.
1.5 Consent to Illegal Acts
Can a P consent to an illegal act?

*R v Brown* [1993] 2 All ER 75 (consensual acts of violence for sexual gratification);
Each of the defendants participated in sado-masochistic homosexual activity in which the victims in each case consented to the activity and did not suffer permanent injury. The defendants faced charges of assault occasioning actual bodily harm and unlawful wounding and plead guilty when the trial judge ruled that consent was not a defence. The defendants appealed on the consent issue. Consent is not a defence to an assault causing grievous bodily harm. Consent is immaterial when the unlawful act involves a degree of violence such that the infliction of bodily harm is a probable consequence. In this case there was drugs and drinking plus members of very young age. Actions included branding and torturing.

*Ms X v Lock*
Re-enactment from a scene of 50 shades of grey. Over enthusiastic whipping occurred during intercourse. The defendant argued consent, she argued they went to far. She signed a contract to extreme acts, she was allowed a safe word ‘red’ which she did not utter during the process. The jury found the man not guilty.

*Bain v Altoft* [1967] Qd R 32 (P willingly participated in fist fight).
Consent fight, beaten badly and sued the other fighter. Consent could be a valid defence, could be different if they used unnecessary force. However, each were using fists and not weapons. The court accepted the defence of consent.

1.6 Consent in Sport
Participants in body contact sports are taken to have impliedly consented to contact, that is, within the normal incidence of playing sport. Forever battery may be proven if the contact because outside the rules of the game.

*Sibley v Milutinovic* (1990) Aust Torts Reports 81-013 (contact outside the rules of the sport might be a battery)
Both players held liable. Plaintiff kept tackling and the defendant jumped up and punch him in the face. Would be different if this was in practice and a game, also there will be consideration to the skill and quality of the player.

*MacNamara v Duncan* (1971) 29 ALR 584 (context);
Australian Rules case where the plaintiff’s skull was fractured to a move outside of the rules of the sport. This was a case about the head which is an untouchable and protected zone in the sport. The plaintiff did not consent to a move.

*Condon v Basi* (1985) 1 WLR 866 (conduct which went beyond what the P had consented to).
Side tackle turned out to be a foul and there was no implied consent to this.

The plaintiff and the defendant were on opposing in a game of strain football. The defendant used a legal hip and shoulder tackle, however just before the contact, the defendant raise his elbow thrusting action to the plaintiff's which is against the rules of the game. This blow constituted a battery.
2. Self Defence

An act of self defence is regarded by the law as an instinctive reaction in circumstances where there is little opportunity for rational analysis of all the possible courses open. The defendant’s interference is justified by the need for the threat of harm to their person. Criminal Law where there is no need for belief to be reasonable.

An individual may use force to defend himself or herself against threats or attack by another person provided that:

1. the force used is ‘reasonably necessary’ and
2. not excessive [ie, out of proportion to the situation confronting them].

Justified when:
- The force used is ‘reasonably necessary’

**McClelland v Symons** [1951] VLR 157 (P pointed rifle at D who responded with use of metal rod)
The defendant was larger than the plaintiff and threatened him with his fists. The plaintiff picked a rifle, loaded it and pointed at the defendant saying ‘I’ve brought the gun to shoot you and here it is’. The defendant then struck the plaintiff on the head with a metal bar and ended up being sued for battery, it was held that he was not guilty of battery as he was acting in reasonable self defence. It was held that each blow is a separate battery and each blow has to be reasonable given the circumstances.

- The force is proportional (reasonable)

**Fotin v Katapodis** (1962) 108 CLR 177 (P hit D with a bar, D threw glass, cutting P’s face)
Plaintiff was a customer at the class department. The defendant was an employee. They got into an argument and the defendant refused to apologise for falsely accuses the customer of not paying his account. The plaintiff picked up a T-square from beside the defendant’s bench and hit the defendant on the shoulder. The defendant then through and off-cut of glass at the plaintiff’s face. It was held that this act of self-defence was unreasonable.

- Mistaken belief

**Ashley v Chief Constable of Sussex Police** (2008) 1 AC 962
Police shoot P because he was of the mistaken belief that P was armed.

2.2 Defence of Others

Generally applies to people closely related/associated such as family or workmates.

**Goss v Nicholas** [1996] TasR 133
The plaintiff and a female friend went to the house of a man to complain of certain words the man's daughter had used against the friends daughter. Is heated up at the doorstep and the plaintiff repeatedly wag his finger at the ladies saying he would be ‘on the warpath’ if the daughter was not punished. The defendant then came running past and punched and struck the plaintiff in the face, alleging that his actions were reasonably necessary in the defence of the man. Judges held that it force should only be used when reasonably necessary and proportionate to the threat. This was not.

2.4 Defending land or premises

**Hackshaw v Shaw** (1984) 155 CLR 614 (D shot trespassers)
Hackshaw owned a farm and tried to catch some petrol thieves, he lay awake for them on the property at night. A car arrived and a man got out of the car and the defendant shot at the car attempting to immobilise it and ended up shooting the plaintiff (a 16 year old girl). Shooting a trespasser is not reasonable force as it was excessive, reasonable force would mean possibly not a gun.
3. **Provocation**

Provocation is no defence in tort law, however, it may operate to reduce an award of exemplary or aggravated damages.

*Fontin v Katapodis* (1962) 108 CLR 177 (limit to exemplary damages but cannot be used to limit compensatory damages).

Plaintiff struck the defendant with a weapon, a wooden T-square. It broke on his shoulder. There was not much trouble from that. But then the defendant picked up a sharp piece of glass with which he was working and threw it at the plaintiff causing him severe injury.

4. **Necessity**

The defendant must establish that:

1. the circumstances constituted an urgent situation of imminent harm; and
2. the act was reasonably necessary to preserve life or protect property (and not merely convenient)
3. there was no fault on the part of D for creating the imminent harm

*Southwark London Borough Council v Williams* [1971] 1 Ch 734 (Homeless Ds squatted in P’s home);

It was found that there was insufficient urgency and the threat of peril to allow it as a defence to destitute squatters trespassing in empty council dwellings. And imminent threat is one that is about happen, this was the case in *Cope v Sharpe (no 2)* [1912] 1 KB 496 where there was a fire approaching.

*Proudman v Allen* [1954] SASR 336 (D attempted to prevent damage to car);

Defendant could not move his parked car because of another parked car. Friends came along and moved it. It began moving to other cars and the defendant opened the cars door and steered it away. The defendant’s act of opening the door of the plaintiff's car and steering it away from other part vehicles was justified even though the car ran off a cliff into the sea. HELD that his actions was that of a reasonable man.

*Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 (D hiding in gunship; Police fire canister in gun shop and start a fire).

Police fired gas canisters into the gunshop where a dangerous psychopath was hiding. Over this person had spread inflammable powder on the floor which would be ignited by the heated gas canisters. The police failed to ensure that the adequate firefighting equipment was available. The shop burnt down, despite the emergency situation, the defence of necessity was allowed due to the negligence of the police.

5. **Discipline**

At common law, parents could traditionally inflict discipline on children (reasonable & moderate & to correct wrong behaviour); Husbands to Wives & Teachers to Pupils:

*R v Terry* [1955] VLR 114 (A killed 19 months old child by ‘disciplining’ her with series of blows)

Court held that a parent has a lawful right to inflict reasonable and moderate corporal punishment. However, it must be moderate, reasonable and must have a proper relation to the age, physique and mentality of the child.

*R v Reid* [1973] 1 QB 299 (Husband physically ‘punished’ wife);

*Ramsey v Larsen* (1964) 111 CLR 16 (Teachers can detain students for a break of school discipline).

6. **Mistake**

Mistake of fact or law is not a defence to the intentional torts although it may be relevant in cases of mistaken self-defence where the defendant reasonably but mistakenly believes that the plaintiff is about to attack him or her.

- An intentional conduct done under a misapprehension;

*Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714

Prisoner held for a longer period that which they were sentenced. It was an honest mistake by the prison but was not held to be a sufficient defence.
7. **Incapacity: Insanity or Infancy**

“No man shall be excused of a trespass… except it be judged utterly without his fault”. Insanity itself is not a defence to trespass.

*Morriss v Marsden* [1952] 1 All ER 925
The defendant violently attacked the plaintiff in the hallway of a hotel. The defendant was a certified lunatic at the time who was aware of the quality of his acts but did not know that were wrong. The defence failed because the defendant was capable of forming the necessary intention. There for a mentally ill person will be liable for assault if the nature and quality of the act was known.

Discusses the mental elements for insanity. It should not reduce the defendants capacity.

*Hart v AG of Tasmania*, Unreported Judgment 29 May 1959, Burbury CJ (Re-printed in (2006) 14 TasR 1)
A 5 year old child held liable in battery from slashing a playmate with a razor.

8. **Illegality (Ex Turpi Causa)**

This case considered the issue of negligence and whether or not a landowner used reasonable force when confronting a trespasser on their property and whether they owed them a duty of care.

Mr Newbery, old man, owned an allotment which had a shed in which he kept various valuable items. The shed was subject to frequent break-ins and vandalism. Mr Newbery had taken to sleeping in his shed armed with a 12 bore shot gun. Mr Revill, on the night in question, accompanied by a Mr Grainger, went to the shed at 2.00 am in order to break in. Mr Newbery awoke, picked up the shot gun and fired it through a small hole in the door to the shed. The shot hit Mr Revill in the arm. It passed right through the arm and entered his chest. Both parties were prosecuted for the criminal offences committed. Mr Revill pleaded guilty and was sentenced. Mr Newbery was acquitted of wounding. Mr Revill brought a civil action against Mr Newbery for the injuries he suffered. Mr Newbery raised the defence of ex turpi causa (no right of action arises from a base cause), accident, self-defence and contributory negligence.

**Damages**
The failure to prove any actual financial loss does not mean that the plaintiff should recover nothing. The damages are at large. An interference with personal liberty even for a short period is not a trivial wrong. The injury to the plaintiff's dignity and to his feelings can be taken into account in assessing damages (Watson v Marshall and Cade [1971] HCA 33; 124 CLR 621. Dr hospitalised, alleged ‘conspiracy’ & sued for false imprisonment).
4.1.5 Right to Grow Things on Your Land

*St. Helen's Smelting Co. v Tipping* (1865) 11 HLC 642, 11 ER 1483
Damage to land; Plaintiff alleging Defendants copper smelting works damaged the plaintiffs hedges, fruit trees and shrubs. It was held the defendant was liable as smelter produced acid rain into the environment. Defendant was not able to use and enjoy their own land.

4.1.6 Smells and Fumes

Common law recognises that land owners have the right to enjoy their land free of unreasonable smells and fumes.

*Bamford v Turnley* (1860) 122 ER 27
Turnley burnt bricks in a kiln which sent noxious fumes to the surrounding country, affecting various neighbours. It made them and their servants ill. Bamford sued to prevent the nuisance. At trial it was held that the brick smoke was reasonable because the defendant had only been using the kiln in order to build a home.
The court held that even if an action is being performed for the public benefit it may still constitute a nuisance. The public gain and the loss of the individual must be balanced – there will always be winners and losers in society; the losers in society should be compensated for their loss. If the defendant is not able to compensate the plaintiff through the profit that they make undergoing the activity, then it must not be in the public interest that the activity goes on.

**RATIO**
Even if actions are for the public good they cannot go on causing harm to individuals without compensating them. Sometimes injunctions are too harsh as they stop creative acts, or acts that greatly benefit the public.

4.1.7 Right From Harassment and Assault

*Khorasandjian v Bush* (1993) 3 All ER 669
The plaintiff was an eighteen year old girl who had had a friendship with the defendant, aged 28. The friendship broke down and the plaintiff said she would have no more to do with him, but the defendant did not accept this. There were many complaints against the defendant, including assaults, threats of violence, and pestering the plaintiff at her parents’ home where she lived. As a result of the defendant’s threats and abusive behaviour he spent some time in prison.

4.1.8 Noises and Vibrations

*Sturges v Birdgam* (1879) 11 CH D 852
Plaintiff successfully sued in nuisance for the noise and vibration from the use of the defendant’s pestles and mortars in his confectionary business.

*McKenzie v Powley* [1916] SALR 1
A Salvation Army brass band, people singing at 7am, shouting praises was held to be a nuisance.

*Halsey v Esso Petroleum* [1961] 1 WLR 683
Plaintiff owned a small terrace house near a large oil storage and issuing depot. Trucks were coming on a 24 hour basis and all the noises (circumstances) combined were found to be unreasonable and stopped the plaintiff enjoying their land. Ordered and injection so the oil company could not work overnight.

*Cohen v City of Perth* (2000) 112 LGERA 234
The noise of the daily run of the rubbish trucks was held to be excessive noise.

*Vincent v Peacock* [1973] 1 NSWLR 466
The court awarded an injunction to restrain the defendant from singing, shouting, whistling and using unacceptable, language as it interfered with the plaintiffs enjoyment of their home.