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Law of Torts Special Study

G158/RM

SPECIAL STUDY MATERIAL

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Afternoon

Duration: 1 hour 30 minutes

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INFORMATION FOR CANDIDATES

- This document consists of **8** pages. Any blank pages are indicated.

G158 LAW OF TORTS

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extract adapted from the judgment of Byles Serjt in *Read v Coker* [1853] 13 CB 850 Court of Common Pleas.

The claimant was in arrears with his rent. One day the defendant told him to leave the premises. When he refused the defendant instructed his workmen to make him do so. They surrounded the claimant, rolled their sleeves up and threatened the claimant that if he did not leave they would break his neck. The claimant then alleged assault by the defendant and his workmen and succeeded.

BYLES SERJT:
To constitute an assault there must be something more than a threat of violence. An assault is thus defined in Buller's *Nisi Prius*: "An assault is an attempt or offer, by force or violence, to do a corporal hurt to another, as, by pointing a pitchfork at him, when standing within reach; presenting a gun at him; drawing a sword and waving it in a menacing manner. But no words can amount to an assault."

So an assault is said to be "an attempt or offer to beat another without touching him; as if one lifts up his cane or his fist in a threatening manner at another; or strikes at him but misses him; this is an assault, which Finch describes to be 'an unlawful setting upon one's person'".

JERVIS CJ:
If a man comes into a room, and lays his cane on the table, and says to another, "If you don't go out, I will knock you on the head," would not that be an assault? Clearly not: it is a mere threat, unaccompanied by any gesture or action toward carrying it into effect.

SOURCE 2

Extract adapted from *Tort Law Text Cases and Materials.* S. I. Strong and Liz Williams. Oxford University Press. 2008. Pp 408-10.

Analytically, assault can be cast in two different lights. Some assaults can be described as an incomplete battery, brought about when the defendant tried but for some reason failed to come into physical contact with the claimant. The other type of assault results when the defendant never intended to touch the claimant but nevertheless created a reasonable anticipation of physical contact in the mind of the claimant ….

To prove civil assault, the claimant must establish that the defendant had the same type of mental state as in battery – meaning an intention to do the act that led to the assault …. In assault, the claimant need only prove an intent to cause the apprehension of unlawful physical contact ….

In the past the tort of assault could only exist when someone intended, but failed for some reason to commit a battery …. Under the modern law, it is only necessary that the act in question raise the reasonable apprehension of immediate physical contact.

Similarly, at one time words alone could not constitute assault. However, in the criminal case of *R v Ireland* [1998] AC 147, the House of Lords stated that any words that raise a reasonable apprehension of immediate (in other words, within a minute or two) battery can constitute assault. In that case the defendant rang up the victim on the phone but said nothing, only occasionally uttering some heavy breathing. Lord Steyn stated that 'There is no reason why something said should be incapable of causing an apprehension of immediate personal violence'. In the case of the silent caller, the victim may be 'assailed by uncertainty about his intentions. Fear may dominate her emotions'. Even though the case was brought in criminal court, rather than civil court, tort law would come to a similar conclusion if faced with similar facts, since Lord Steyn's view echoes the central premise of civil assault, i.e. the infliction of the fear of unwelcome physical contact.

Traditionally, and under contemporary law, courts have held that words can negate an act that would otherwise constitute assault ….

Immediacy is a critical part of the tort of assault. In *Thomas v National Union of Mineworkers (South Wales Area)* [1985] 2 All ER 1, the plaintiff was a miner who was bussed to work during a strike held by the National Union of Mineworkers. As the bus crossed the picket lines, the striking miners made threatening gestures, accompanied by verbal threats. However, the court held that the strikers were not liable for assault, since it was impossible for the striking miners to get to the plaintiff through the line of police protection and the exterior of the bus itself. Therefore a person who stands on one side of a brick wall and shouts, 'I'm going to beat you to a pulp with my bare hands!' does not constitute much of a threat to people standing on the other side. An assault has not occurred even if the person is an All England rugby player with a penchant for brawling on and off the pitch. The brick wall means that there is no immediate threat of harm. If the short tempered rugby player were standing on the far side of a chain link fence with an elephant gun, claiming 'I'm going to shoot you', it is a different matter. In that case, an assault likely exists, since the elephant rifle can shoot through the fence. On the other hand, if the rugby player stands on his side of the chain link fence and says, 'I'm going to get my elephant gun and shoot you', his actions do not constitute assault, since anyone on the far side of the fence has a sufficient amount of time to escape before the rugby player returns with his rifle ….

When considering whether an assault has occurred, one must look at the reasonableness of the claimant's reaction to the alleged assault. The test the courts use is objective, rather than subjective, meaning that they will look at what a reasonable person would think in the same circumstances rather than what this individual claimant thought.

SOURCE 3

Extract adapted from the judgment of Lord Denning MR in *Letang v Cooper* [1965] 1 QB 232 CA.

A woman was sunbathing in the grounds of a hotel when the defendant negligently drove over her legs. Her complaint was issued more than three years later and so her normal action for personal injury in negligence was time barred under the Limitation Act, so she claimed as an alternative under trespass, for which the general limitation period of six years applied. She succeeded in the High Court but failed in the defendant's appeal.

LORD DENNING MR:
The argument, as it was developed before us, became a direct invitation to go back to the old forms of action and to decide this case by reference to them. The statute bars an action on the case [negligence] after three years, whereas trespass to the person is not barred for six years.

The truth is that the distinction between trespass and case is obsolete …. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. 'The least touching of another in anger is a battery', per Holt CJ in *Cole v Turner* [(1704) 90 ER 958], if he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus it is not enough nowadays for the plaintiff to plead that 'the defendant shot the plaintiff'. He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.

The modern law on this subject [has been] well expounded …. But I would go this one step further: when the injury is not inflicted intentionally, but negligently, I would say that the only cause of action is negligence and not trespass. If it were trespass, it would be actionable without proof of damage; and that is not the law today.

SOURCE 4

Extract adapted from *Tort Law.* Kirsty Horsey and Erika Rackley. Oxford University Press. 2009. Pp 384 and 388-89.

Applied literally, battery covers all forms of contact …. Nevertheless, while some form of limitation is common sense, the courts have experienced difficulties in finding a theoretical basis as to where to draw the line between a battery and ordinary social contact.

An early, somewhat narrow, attempt to distinguish lawful from unlawful touching was made by Lord Holt CJ in *Cole v Turner* who stated that 'the least touching of another in anger is a battery'. This was interpreted by the Court of Appeal in *Wilson v Pringle* [1987] to mean that in order for a battery to be committed there must be some 'hostile' intent. In this case, a 13-year-old boy suffered serious injury to his hip when a fellow pupil pulled his school bag off his shoulder in an act of horseplay. The Court …. held that liability depended on whether the pupil's actions had been 'hostile' and not simply a schoolboy prank:

> Hostility cannot be equated with ill-will or malevolence. It cannot be governed by the obvious intention shown in acts like punching, stabbing or shooting. It cannot be solely governed by an expression of intention, although that may be strong evidence. But the element of hostility, in the sense in which it is now to be considered, must be a question of fact for the tribunal of fact …. (Croom-Johnson LJ).

This is not particularly helpful. All it does is to restate the question that needs to be answered: What is hostile intent? Hostile intent appears here to mean 'little more than that the defendant has interfered in a way to which the claimant might object' (Rogers). But what is 'hostile' to one person may seem quite the opposite to another. Is an over-enthusiastic slap on the back or a surgeon's mistaken amputation of a leg to be regarded as 'non-hostile' and therefore not a battery?

A better approach … is that of Goff LJ in *Collins v Wilcock* [1984] [1WLR 1172] who stated that touching will only amount to a battery where it does not fall within the category of physical contact 'generally acceptable in the ordinary conduct of general life'. Although this approach was criticised as 'impractical' in *Wilson v Pringle*, Lord Goff (now in the House of Lords) restated his views in *Re F (Mental Patient: Sterilisation)* (1990) [2 AC 1] and explicitly rejected any requirement of hostility as unnecessary:

> It has recently been said that the touching must be 'hostile' to have that effect …. I respectfully doubt whether that is correct. A prank that gets out of hand, an over-friendly slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient consented to it – all these things may transcend the bounds of lawfulness, without being characterised as hostile.

Thus, being jostled at the bar in a nightclub would not be a battery – it being conduct generally acceptable in a busy club – although … having your bottom pinched while waiting at the bar would ….

It is likely therefore that this will be the approach adopted in future cases ….

Ultimately, Goff LJ's notion of generally acceptable touching falls foul of the same definitional difficulties as Croom-Johnson LJ's in *Wilson v Pringle*, what constitutes contact 'generally acceptable in the ordinary conduct of human life' is just as problematic as what can be considered hostile. Consider, for example, the over-familiar work colleague who greets everyone – male and female – with a 'friendly' pat on their bottom – does this constitute acceptable or unacceptable behaviour?

Conaghan & Mansell have argued that Goff LJ's notion of 'generally acceptable conduct' is open to feminist charges of bias, as male perceptions of acceptable conduct are hidden under a guise of neutrality, thereby precluding the recognition of womens' experiences and their divergences from those of men: 'what men may see as a compliment, women often experience as an insult; what men offer as a gesture of intimacy and friendship, women may perceive as an invasion of privacy'.

SOURCE 5

Extract adapted from the judgment of Viscount Haldane LC in *Herd v Weardale Steel, Coal and Coke Co.* [1915] AC 67 HL.

Close to the start of their shift miners believed the work they were being asked to do was unsafe. As a result they asked to be taken to the surface but the employers refused. The miners were sued in the County Court for breach of their employment contract. They appealed arguing that they had been falsely imprisoned but their appeal was unsuccessful because the employer had a right to expect them to stay underground for the duration of their shift.

VISCOUNT HALDANE LC:
By the law of this country no man can be restrained of his liberty without authority in law. [However] if a man chooses to go into a dangerous place at the bottom of a quarry or the bottom of a mine; from which by the nature of the physical circumstances he cannot escape, it does not follow that he can compel the owner to bring him up out of it.

There is another proposition which has to be borne in mind, and that is the application of the maxim *volenti non fit injuria*. If a man gets into an express train and the doors are locked pending its arrival at its destination, he is not entitled, merely because the train has been stopped by a signal, to call for the doors to be opened to let him out. He has entered the train on the terms that he is to be conveyed to a certain station without the opportunity of getting out before that, and he must abide by the terms on which he has entered the train. So when a man goes down a mine, from which access to the surface does not exist in the absence of special facilities given on the part of the owner of the mine, he is only entitled to the use of these facilities on the terms on which he has entered. It results from what was laid down in *Robinson v Balmain Ferry*. There was a pier, and by the regulations a penny was to be paid by those who entered and a penny on getting out. The manager of the exit gate refused to allow a man who had gone in, having paid his penny, but having changed his mind, to come out without paying his penny. It was held that that was not a false imprisonment; *volenti non fit injuria*. So, it is not false imprisonment to hold a man to the conditions he has accepted when he goes down a mine.

SOURCE 6

Extract adapted from *Law of Tort.* 9th Edition. John Cooke. Pearson Longman. 2009. Pp 390 and 393.

The remaining importance of trespass to the person is in the area of civil liberties ….

Following *Wilson v Pringle* there is some dispute as to the extent to which consent is a defence to trespass to the person, or whether it is a part of the tort itself. The argument centres around the requirement of hostility. If the contact must be made with hostile intent, then any consent to the contact would negate an inference of hostility. The substantive importance lies in the burden of proof. Does the claimant have to prove a lack of consent or does the defendant have to establish there was consent? There is no clear answer to this, but the preferable view in the light of developments in the medical cases is that consent is a defence and the burden of proof is on the defendant.

Express consent does not present problems where the claimant is legally capable of giving it. A surgeon will be protected from an action in battery by the signing of a consent form by the patient.

Implied consent presents more difficulties. It has been rejected in favour of necessity in medical cases. A participant in a sporting event is said impliedly to consent to contacts in accordance with the rules of the game. A punch thrown at an opponent will not be within the rules and there will be a battery committed …. In boxing no action will lie for a punch within the rules, as a participant consents to this by getting into the ring. But a foul punch is not consented to and may give rise to a battery action.

Any consent given will be limited to the act for which permission is given. A customer going to the hairdresser consents to having their hair cut and any other treatment they specifically agree to. But a customer who gives consent for a permanent wave does not agree to a tone rinse. The hairdresser will be liable in battery ….

The consent must be real and not induced by duress, fraud or misrepresentation ….

Self-defence is a defence where reasonable force is used in defence of the claimant's person, property or another person. The burden of proof in self-defence in civil proceedings is on the defendant. What amounts to self-defence will be a question of fact in each case but the basic principle is that the force used must be reasonable in proportion to the attack.