

UNLOCKING THE LAW

UNLOCKING TORTS

4th edition

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13

Trespass to the person

AIMS AND OBJECTIVES

After reading this chapter you should be able to:

- Understand the basic origins and character of trespass to the person
- Understand the elements that are common to all forms of the tort
- Understand the definition of and essential elements for proving assault
- Understand the definition of and essential elements for proving battery
- Understand the definition of and essential elements for proving false imprisonment
- Understand the definition of and essential elements for proving an action for intentional indirect harm under *Wilkinson v Downton*
- Understand the basis of liability under the Protection from Harassment Act 1997
- Critically analyse each tort
- Apply the law to factual situations and reach conclusions

13.1 The origins and character of trespass

13.1.1 Historical origins

Trespass was one of the two original forms of action (see Chapter 1.1). The term has survived to the present day in the context of specific torts, one being trespass to the person. The essence of all modern forms of trespass can be found in the old idea that trespass was the appropriate remedy for any direct and forcible injury. As will be seen, trespass to the person relates to direct and forcible injury to the person. Before turning to the tort itself it is necessary to consider the legal meaning of:

- direct
- forcible and
- injury.

13.1.2 Direct

The traditional explanation of this word is that the injury must follow so closely on the act that it can be seen as part of the act. This is still true but perhaps implies that injuries caused by a car accident are also direct which is not legally the case. Such injuries are regarded as consequential. (For a more detailed discussion of this point see Chapter 4.2.) As Lord Denning explained:

QUOTATION

'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 ... trespass to the person. ... 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.'

Letang v Cooper [1964] 2 All ER 929, CA

This difficult proposition is easier to understand when the facts of the case are considered.

CASE EXAMPLE



Letang v Cooper [1964] 2 All ER 929, CA

While on holiday in Cornwall, Mrs Letang was sunbathing on a piece of grass where cars were parked. While she was lying there, Mr Cooper drove into the car park. He did not see her. The car went over Mrs Letang's legs injuring her. She claimed damages on the basis of both negligence and trespass to the person. It was agreed by both sides that the action in negligence was statute-barred, i.e. the action had not been commenced within the requisite three-year time limit. The question was therefore whether or not her claim could succeed in trespass to the person where the time limit of six years had not expired?

JUDGMENT



'If [the action] is intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence ... [The plaintiff's] only cause of action here ... (where the damage was unintentional), was negligence and not trespass to the person.'

Lord Denning

The definitions of each of the three component parts of trespass to the person incorporate the word intentional as well as direct. The old meaning must, however, be understood if the rest of the law is to make any sense! These issues are discussed in more depth in Chapter 1.

13.1.3 Forcible

While the word itself conjures up a picture of force which causes or is capable of causing physical injury, in reality the law uses the term to describe any kind of threatened or actual physical interference with the person of another. An unwanted kiss can be a trespass to the person (*R v Chief Constable of Devon & Cornwall, ex p CEGB [1981] 3 All ER 826*).

13.1.4 Injury

Given the explanation of forcible it comes as no surprise to learn that injury is interpreted widely and can include any infringement of personal dignity or bodily integrity.

Actual physical harm is not an essential ingredient of trespass to the person although in many cases it may have occurred. The tort is actionable per se. In other words it is not necessary to prove actual damage. It is only necessary to prove that the actions of the defendant fulfil the requisite criteria.

13.1.5 The tort

Trespass to the person has three components which may occur together or separately. Each of itself gives rise to a cause of action. The components are:

- assault
- battery
- false imprisonment.

Assault and battery will each be defined and explained, the defences applicable to both these torts being considered together. False imprisonment will then be considered separately.

Trespass to the person can be committed in one of three ways (see Figure 13.1).

13.2 Assault

13.2.1 Definition

The tort can be defined in various ways. For example:

- 'The act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery amounts to an actionable assault' (R E V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (20th edn, Sweet & Maxwell, 1992), p. 127).
- 'Assault is an act of the defendant which causes the claimant reasonable apprehension of the infliction of a battery on him by the defendant' (W V H Rogers, *Winfield and Jolowicz on Tort* (16th edn, Sweet & Maxwell, 2002), p. 71).
- 'An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person' (Goff LJ in *Collins v Wilcock* [1984] 3 All ER 374).

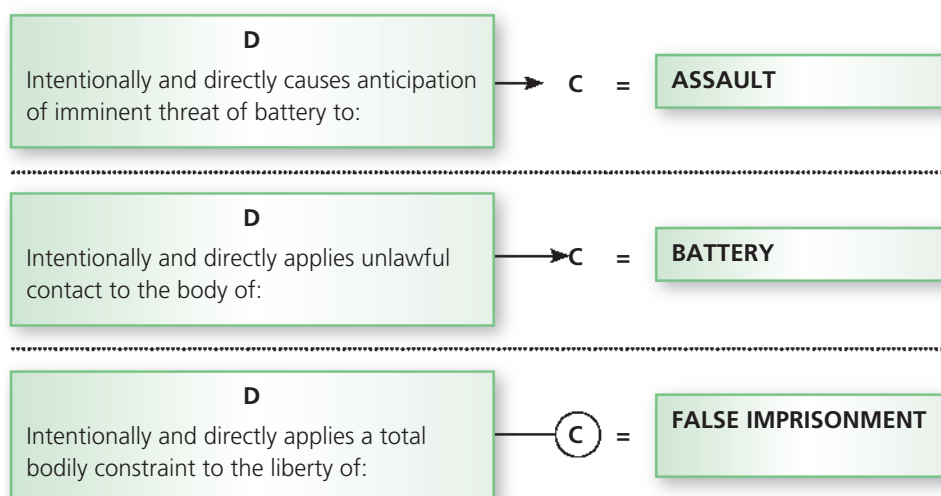


Figure 13.1 How liability is established in the different types of trespass to the person.

As will be seen, none of these definitions covers all the essential elements of the tort. A better definition is perhaps: an assault is some direct and intentional conduct by the defendant which causes the victim reasonably to fear that unlawful force is about to be used upon their person.

13.2.2 Ingredients of the tort

Direct and intentional

The words direct and intentional have the meaning discussed in section 13.1.

Conduct

Conduct in this context amounts to something which threatens the use of unlawful force. An obvious example is shaking a fist under someone's nose causing them to fear that they are about to be punched. In most cases it may be true that the assailant's actions clearly convey the necessary threat, but this is not always so.

In the modern world threats can be conveyed in many ways. Apart from physical action, the most obvious way is by means of a verbal threat. Traditionally, the use of threatening words alone could not amount to an assault (*R v Meade and Belt* [1823] 1 Lew CC 184). This may have been satisfactory in 1823 but in the twenty-first century there are other means of communication, for example by telephone and email. To the victim a verbal threat by these means may be just as credible as a gesture supported by threatening words. In criminal cases there has been recognition that words alone can indeed amount to an assault. In *R v Ireland* [1997] 4 All ER 225 the House of Lords held that silent telephone calls, sometimes accompanied by heavy breathing, could amount to a criminal assault. Lord Steyn, rejecting the proposition in *R v Meade and Belt*, said:

JUDGMENT



'The proposition ... that words can never suffice, is unrealistic and indefensible. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence ... Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions ... She may fear the possibility of immediate personal violence. As a matter of law the caller may be guilty of an assault.'



Figure 13.2 Assault.

R v Ireland is of course a criminal case but it is very likely that if a civil action for assault based on words alone was to be brought, the decision would be that an assault had potentially been committed. Whether or not this would be the actual decision would depend on whether or not the other elements of the tort were satisfied.

Words can have the opposite effect by making it clear that the assailant does not intend to carry out the threat.

CASE EXAMPLE



Turberville v Savage [1669] 1 Mod Rep 3

The assailant put his hand on his sword and said 'If it were not assize-time, I would not take such language from you.' The victim alleged that he had been in fear that he was about to be attacked.

The statement was in fact a declaration by the assailant that he did not intend to attack the victim because the judges were in town. The intention as well as the act makes an assault.

Reasonable fear

The victim's fear that the threat is likely to be carried out must be reasonable. In part this depends on a subjective test which looks at the victim's perception of the situation. In *R v St George* [1840] 9 C & P 483 the judge said:

JUDGMENT



'It is an assault to point a weapon at a person, though not loaded, but so near, that if loaded, it might do injury.'

Parke B

The victim in such a case fears perfectly reasonably that he is about to be shot. If, however, the victim knew that the gun was unloaded, any fear would likely be held to be unreasonable.

It follows that the threat must be capable of being carried out at the time it is made. (In the case of telephone threats, the House of Lords in *R v Ireland* indicated that the fear should be that the assailant would be likely to turn up 'within a minute or two'.) What, however, would be the position if the defendant was to be prevented from carrying out the threat?

CASE EXAMPLE



Stephens v Myers [1830] 4 C & P 349

The claimant was acting as chair at a parish meeting and was seated at some distance from the defendant with other people seated between them. The meeting became angry and a majority decision was taken to expel the defendant. He said that he would rather pull the claimant out of the chair than be expelled and went towards him with a clenched fist. The defendant was stopped by other people before he was close enough actually to hit the claimant. The general opinion of others present was that the defendant would have hit the claimant had he not been stopped before he could do so.

The defendant was advancing in a threatening way so that had he not been stopped he would have hit his victim.

It is clear that Mr Stephens' perception that he was about to be hit was reasonable; at the time it was made, Mr Myers was in a position to carry it out. Where the assailant is not in such a position, the outcome may be different.

JUDGMENT



'if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing, that, within a second or two of time, he would have reached the plaintiff, it seems to me that it is an assault in law.'

Tindal CJ

CASE EXAMPLE



Thomas v National Union of Mineworkers (South Wales Area) [1985] 2 All ER 1

The claimant was a miner who continued to work during a particularly bitter strike by members of the NUM. The claimant and colleagues were bussed into work through a large crowd of striking miners who made threatening gestures and shouted threats at those on the bus.

For liability for assault to occur, there had to be the ability to carry out the threat at the time it was made. The crowd was kept away from the claimant and the others by a large number of police officers. They were also protected by being on a moving bus.

It seems therefore that ability to carry out the threat must exist at the time the threat is made. It has been seen, however, that this rule has been somewhat relaxed in the area of criminal law (*R v Ireland*). Whether this will enable the courts to devise an effective remedy for threats conveyed via email or the use of other technology remains to be seen. Abusive and threatening emails and text messages are being reported by the media as part of the growing problem of bullying in schools and the workplace. Perhaps it will not be long before this area of the law is reconsidered.

13.3 Battery

13.3.1 Definitions

Different definitions can be found in different sources. Thus:

- 'Battery is the intentional and direct application of force to another person' (W V H Rogers, *Winfield and Jolowicz on Tort* (16th edn, Sweet & Maxwell, 2002), p. 71).
- 'The application of force to the person of another without lawful justification' (R E V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (20th edn, Sweet & Maxwell, 1992), p. 125).
- 'Battery is the actual infliction of unlawful force on another person' (Goff LJ in *Collins v Wilcock*).

The problem is that none of these definitions covers all the requisite elements for liability. A better definition is here the defendant, intending the result and without lawful justification or the consent of the claimant, does an act which directly and physically affects the person of the claimant.

13.3.2 Ingredients of the tort

Intention

Life would be intolerable and the courts would be overloaded if every touch we received while going about our daily business was actionable. It is clear that the touching must be intentional if there is to be liability for battery, while non-intentional touching may amount to negligence. (See *Letang v Cooper* in section 13.1.2.) It must be remembered that it is the touching which must be intentional; it does not matter whether or not the defendant intended to cause injury although this may be relevant to the element of hostility discussed later in this section.

A problem can arise where the defendant intends to hit one person but misses and hits someone else. In such cases the doctrine of 'transferred malice' comes into play. The intention was to hit someone; the fact that the actual person hit was not the intended target is irrelevant.

CASE EXAMPLE



Livingstone v Ministry of Defence [1984] NI 356, NICA

A soldier in Northern Ireland fired a baton round targeting a rioter. He missed and hit the claimant instead. It was held that the soldier had intentionally applied force to the claimant.

Direct

The battery must be the direct result of the defendant's intentional act. This is easily seen when a punch or other form of physical touching occurs.

Case law dating back over the centuries shows just how widely the courts are prepared to stretch the meaning of direct.

CASE EXAMPLE



Gibbons v Pepper [1695] 1 Ld Raym 38

The defendant whipped a horse so that it bolted and ran down the claimant. The defendant was liable in battery for the claimant's injuries.

CASE EXAMPLE



Scott v Shepherd [1773] 2 Wm Bl 892

Shepherd threw a lighted squib into a market house. It landed on the stall of a ginger bread seller. To prevent damage to the stall, Willis picked it up and threw it across the market. Ryal, to save his own stall, picked it up and threw it away. It struck the claimant in the face and exploded, blinding him in one eye.

The defendant intended to scare someone although he did not intend to hurt the particular person who was actually injured. He was liable in battery, Willis and Ryal being held to be Shepherd's 'instruments'.

QUOTATION

'the law insists, and insists quite rightly, that fools and mischievous persons must answer for consequences which common sense would unhesitatingly attribute to their wrongdoing'.

W V H Rogers, Winfield and Jolowicz on Tort (16th edn, Sweet & Maxwell, 2002), p. 235

CASE EXAMPLE



Pursell v Horn [1838] 8 A & E 602

The defendant threw water over the claimant. The force applied does not have to be personal contact and the defendant was liable in battery.

CASE EXAMPLE



Nash v Sheen [1955] CLY 3726

The claimant had gone to the defendant's hairdressing salon where she was to receive a 'permanent wave'. A tone rinse was applied to her hair, without her agreement, causing a skin reaction. The defendant was liable in battery.

Although, as the cases illustrate, the courts have been prepared to take a fairly wide view of what amounts to a direct touching, the one thing that does appear to be clear is that only a positive act will suffice. There is unlikely to be liability in battery for an omission.

CASE EXAMPLE



Innes v Wylie [1844] 1 Car & Kir 257

A policeman stood and blocked the claimant's entrance to a meeting of a Society from which the claimant had been banned.

JUDGMENT



'If the policeman was entirely passive like a door or a wall put to prevent the [claimant] from entering the room, and simply obstructing the entrance of the claimant, no assault has been committed on the claimant'.

Denman CJ

Touching

Originally any touch however slight would amount to a battery. In *Cole v Turner* [1704] 6 Mod Rep 149 this appeared to have been qualified by Lord Holt when he said that 'the least touching in anger is a battery'. Does this mean that the touching, in addition to being intentional, must also be hostile?

Goff LJ, in *Collins v Wilcock* [1984] 3 All ER 374 (for facts see section 13.4.1), stated that 'the fundamental principle, plain and incontestable, is that every person's body is inviolate'. He went on to expound this by quoting from *Blackstone's Commentaries* in which Blackstone explained that the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.

Goff LJ explained: 'a broader exception has been created ... embracing all physical contact which is generally acceptable in the ordinary conduct of daily life'. While it may be a matter of personal opinion as to what constitutes generally acceptable conduct, it is clear from the judgment that actions such as tapping someone on the shoulder to gain their attention would not amount to a battery.

These relatively clear ideas were thrown into confusion in 1986 when the Court of Appeal seemed to prefer Lord Holt's explanation in *Cole v Turner*.

CASE EXAMPLE



Wilson v Pringle [1986] 2 All ER 440

A schoolboy admitted that he had pulled a bag which was over the shoulder of another boy. The other boy fell over and was injured. Summary judgment on the basis of battery was entered for the claimant, the defendant eventually appealing to the Court of Appeal.

JUDGMENT



'it is not practicable to define a battery as "physical contact which is not generally acceptable in the ordinary conduct of daily life." In our view ... there must be an intentional touching or contact in one form or another of the [claimant] by the defendant. That touching must be proved to be a hostile touching ... 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 expressed intention, although that may be strong evidence. But the element of hostility ... must be a question of fact ... It may be imported from the circumstances.'

Croom-Johnson LJ

In the event, the schoolboy's act of pulling the bag was merely a prank, the necessary element of hostility was lacking.

Wilson v Pringle created more questions than answers. The explanation given is not entirely helpful. It is still necessary to ask 'what does hostility mean?' The question was partially answered in *R v Brown* [1994] 2 All ER 75.

CASE EXAMPLE



R v Brown [1994] 2 All ER 75

The case concerned a group of sado-masochistic homosexuals who willingly cooperated in the commission of acts of violence against each other for sexual pleasure. The men were prosecuted for malicious wounding contrary to s20 Offences Against the Person Act 1861. The equivalent civil action would be based in battery. Following their conviction, the case reached the House of Lords where one of the issues considered was whether or not hostility on the part of the inflictor of an injury was an essential ingredient for battery.

Having seemingly approved the view in *Collins v Wilcock* that hostility could not be equated with ill-will or malevolence, Lord Jauncey went on to say that if the appellants' actions:

JUDGMENT



'were unlawful they were also hostile and a necessary ingredient of [malicious wounding] was present'.

It seems therefore that if the touching is unlawful, then it is hostile. As will be seen in the next part of this chapter, lawful authority in a variety of forms is a full defence to the

tort. *R v Brown*, although a criminal case, appears to go some way to providing an explanation of when a touching will be regarded as hostile.

The question remains, however – is a hostile intent necessary in order to establish liability? Where does this leave medical treatment which has been given against the wishes of a patient? Doctors after all act with the intention of doing good for their patients. The issues raised by medical cases will be discussed in the next part of this chapter.

13.4 Defences to assault and battery

These are dealt with in one section as the same defences are available to each tort.

13.4.1 Lawful authority

If a person committing assault and/or battery has legal authority for the action, there can be no liability for that act. Statute gives two groups such authority.

Police officers

The powers of police officers are found in statute and, provided an officer acts within the scope of those powers, there can be no complaint for trespass to the person. If, however, the action goes beyond what is permitted, a police officer may be liable in the civil courts in the same way as any other person.

CASE EXAMPLE



Collins v Wilcock [1984] 3 All ER 374

A police officer needed to obtain a woman's name and address in order to caution her for soliciting for the purpose of prostitution. The officer detained the woman by holding her by the elbow. The woman scratched the police officer and was charged with assaulting a constable in the execution of her duty. The question was whether the police officer was acting lawfully when she held the woman's elbow to detain her.

JUDGMENT



'The fact is that the [police officer] took hold of the [woman] by the left arm in order to restrain her. In so acting she was not proceeding to arrest the [woman]; and since her action went beyond the generally acceptable conduct of touching a person to engage his or her attention, it must follow ... that her action constituted a battery on the [woman], and was therefore unlawful.'

Goff LJ

Reasonable force may be used to make an arrest (Criminal Justice Act 1967 s3). What is reasonable depends on the facts. The general rule is that the force must be proportionate to the crime being prevented. The use of lethal force will seldom be necessary and might be thought to be a breach of Article 2 of the European Convention on Human Rights. In *McCann, Farrell and Savage v UK* [1995] 21 EHRR 97, ECtHR, arising from the deaths of three IRA suspects killed by members of the SAS in Gibraltar, it was accepted that lethal force can be used provided it is reasonably justifiable.

Health professionals treating people with mental illness

The Mental Health Act 1983 permits treatment for mental disorder to be given to patients who have been compulsorily detained using powers granted by the Act. By s63, treatment

may be given without the consent of the patient, the Act including additional safeguards for extreme treatment such as psychosurgery and electro-convulsive therapy. Treatment otherwise than for the mental disorder is governed by the same rules which protect people who do not suffer from mental disorder.

13.4.2 Consent

If the claimant consents to the actions of the defendant, the claimant has no cause of action. Consent may be express or implied. It can be argued that there is implied consent to the jostling which occurs in a packed train during the rush-hour.

Sport

A person who takes part in a contact sport such as soccer, rugby or boxing, consents to the touching that occurs when the sport is played according to the rules.

CASE EXAMPLE



Simms v Leigh Rugby Football Club [1969] 2 All ER 923

A broken leg resulted from a tackle during a rugby game.

By voluntarily taking part in a contact sport, players consent to touching which occurs provided it is within the rules of the game. In this case the tackle had been lawful therefore no battery had occurred.

If the touching is not permitted within the rules of the sport, then it is unlawful. The victim has not consented and the assailant may be liable for trespass to the person.

Medical treatment

For consent to be effective in relieving the defendant of liability, it must be real. The victim must understand what it is they are consenting to and the consent must be freely given.

JUDGMENT



'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault.'

J Cardoza Schloendorff v Society of New York Hospital [1914] 211 NY 125, at 126

A person with capacity has an absolute right to give or withhold consent to treatment. In *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649 Lord Donaldson MR said:

JUDGMENT



'the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.'

This can give rise to some very difficult questions for health professionals as is shown in the case of Ms B.

CASE EXAMPLE



Ms B v An NHS Hospital Trust [2002] EWHC 429 (Fam)

Ms B was completely paralysed, able to move her head very slightly and to speak. She was being kept alive on a ventilator and had no hope of any recovery. She faced the rest of her life like this and informed those caring for her that she wanted the ventilator turned off. She was effectively saying that she withdrew her consent to the treatment. The doctors who had been caring for her for over a year found it impossible to accept her decision and argued that she lacked capacity to make her own decisions. Ms B sued for a declaration that she had the necessary capacity and that her continued treatment was a trespass to her person.

Having heard detailed evidence from the medical point of view and from psychiatrists who had examined Ms B as to her mental capacity, the judge, Dame Elizabeth Butler-Sloss P, said:

JUDGMENT



'I am ... entirely satisfied that Ms B is competent to make all relevant decisions about her medical treatment including the decision whether to seek to withdraw from artificial ventilation. Her mental competence is commensurate with the gravity of the decision she may wish to make.'

The defendants were therefore liable for trespass during the time Ms B had been treated against her will and a small sum by way of damages for battery was awarded. (Ms B was transferred to another hospital where her decision was respected and she died a few weeks later.)

On reading the facts of this case, there must be some sympathy for the doctors who knew that Ms B would die if they respected her refusal of treatment. This is an extreme example of the dilemma which is frequently faced by health professionals. Every case will depend on its own particular facts but some principles to assist in making decisions can be found in case law.

The fact that a person is suffering from mental disorder does not of itself mean that they lack capacity. The Mental Health Act 1983 only permits treatment without consent for the actual mental illness.

CASE EXAMPLE



Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290

Mr C, suffering paranoid schizophrenia, was a patient in Broadmoor and unlikely to be well enough to be released from hospital. He developed gangrene in 1993 and the doctors believed that unless his foot was amputated, he would die. He applied for an injunction to prevent amputation then or at any time in the future.

Mr Justice Thorpe was satisfied that despite his illness, Mr C:

JUDGMENT



'sufficiently understands the nature, purpose and effects of the proffered operation'.

The judge approved the test set out by the Law Commission (para. 2.20 Law Commission Consultation Paper No. 129 Mentally Incapacitated Adults and Decisions Making), namely:

- Does the patient understand and retain treatment information?
- Does the patient believe it?
- Can the patient weigh the information in the balance to make a choice?

The injunction was granted. Mr C in fact survived as the gangrene was successfully treated by other means.

Where a person genuinely lacks capacity to make their own decisions treatment will be lawful if it is in that person's best interests.

CASE EXAMPLE



Airedale NHS Trust v Bland [1993] 1 All ER 821

Tony Bland was in a persistent vegetative state and unlikely ever to improve. His brain stem continued to function but he had to be fed by artificial means. His parents and those caring for him wished to discontinue artificial feeding which had the inevitable consequence that he would die.

Goff LJ explained:

JUDGMENT



'The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care.'

Lord Lowry took the view:

JUDGMENT



'if it is not in the interests of an insentient patient to continue the life supporting care and treatment, the doctor would be acting unlawfully if he continued the care and treatment'.

Lord Browne Wilkinson argued:

JUDGMENT



'the initial question is "whether it is in the best interests of Antony Bland to continue the invasive medical care." ... This is a question for the doctor.'

The unanimous decision of the House of Lords was that the treatment, which was not in the best interests of Tony Bland, could lawfully be withdrawn.

Once capacity is established, then the patient must be given the information needed to make the decision, whether it is to have travel immunisation or to undergo major surgery. In the case of *Chatterton v Gerson* [1981] 1 All ER 257, Bristow J said:

JUDGMENT



'In my judgment once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real.'

It must be remembered that an action will only lie in assault or battery where there has been no consent, whether from the patient, the court or a person authorised by the patient to make decisions on their behalf. Failure to ensure that the patient is given sufficient information does not negate the consent which may have been given but may give rise to an action in negligence.

Consent can only be valid if it results from the exercise of free will. Coercion, whether by a relative or a health professional, will mean that the decision is invalid.

CASE EXAMPLE



Re T (Adult: refusal of medical treatment) [1992] 4 All ER 649

T had been seriously injured and required a Caesarean section. She signed a form refusing a blood transfusion. Her condition deteriorated and a transfusion became necessary.

JUDGMENT



'the patient is ... entitled to receive and indeed invite advice and assistance from others in reaching a decision ... It is wholly acceptable that the patient should have been persuaded by others of the merits of such a decision ... It matters not how strong the persuasion was, so long as it did not overbear the independence of the patient's decision.'

Lord Donaldson MR

On the facts, the court held that T's decision was the result of over-persuasion by her mother. Her refusal of a transfusion was invalid.

13.4.3 Necessity

Trespass to the person may be justified where it is essential to prevent harm to others, for example pulling someone back from the path of a speeding car. It may also be used in medical cases to justify treatment of a person without capacity. A health professional is entitled to do all that is necessary to deal with an emergency if a person is, for example, unconscious and there is nothing to indicate that the proposed treatment would be refused.

It is clear that this defence may overlap with the 'best interests' approach described in section 13.4.2 where the patient permanently lacks capacity.

CASE EXAMPLE



F v West Berkshire Health Authority [1989] 2 All ER 545

F, aged 36, had serious mental disability and the mental capacity of a child of four. She had formed a sexual relationship with another patient. The concern was that pregnancy would be disastrous for her and contraception was out of the question. Her doctors sought a declaration from the court that an operation for her sterilisation would be lawful.



'to fall within the principle [of necessity] not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person ... [I]n the case of a mentally disordered person ... action properly taken ... may extend to include such humdrum matters as routine medical or dental treatment, even simple care such as dressing and undressing and putting to bed.'

Goff LJ

It was held that it was in F's best interests to be able to maintain the sexual relationship and thus, under the doctrine of necessity, the operation for sterilisation should take place to protect her from a possible pregnancy.

13.4.4 Parental authority

Despite the continuing debate over whether or not corporal punishment ought ever to be inflicted on a child, a parent will not be liable for assault or battery if the force used is by way of reasonable chastisement. The child must understand the purpose of the punishment, which must be proportionate to the wrong committed by the child.

The defence is only available to a parent. In *A v United Kingdom*, *The Times*, 1 October 1998 it was held by the Court of Human Rights that Article 3 of the Convention on Human Rights prohibited caning of a child by a step-parent on the basis that it amounted to 'inhuman and degrading treatment'.

As the debate about corporal punishment continues, it will be interesting to see whether the protection of Article 3 is extended to corporal punishment by parents. The Scottish Parliament has debated a Bill to outlaw smacking of young children by their parents but this foundered in part on the difficulty of defining what amounts to 'smacking' and on difficulties of enforcement.

13.4.5 Self-defence

The use of reasonable force to effect an arrest has been discussed above at section 13.4.1 and the rules are similar. Anyone is entitled to use reasonable force in self-defence or to protect others. The force used must be proportionate to the danger.

CASE EXAMPLE



Cockcroft v Smith [1705] 11 Mod 43

There was a scuffle in court between a lawyer and a clerk. The clerk thrust his fingers towards the lawyer's eyes so the lawyer promptly bit off one of the clerk's fingers. This was held not to be a proportionate response to the threat!

Whether or not the force used is proportionate is a question of fact. A recent criminal case has aroused a lot of discussion after a farmer, Tony Martin, was found guilty of manslaughter when he shot a burglar in the back from the top of the stairs. The jury was satisfied that this was a disproportionate response to the threat. In a similar case, *Revill v Newbery* [1996] 1 All ER 291, an allotment holder, fed up with frequent thefts from his allotment, was found to have used disproportionate force when he shot a thief through a hole which he had drilled in a shed.

The use of force in response to words is unlikely to be reasonable unless the words convey an immediate and real threat of the use of force.

CASE EXAMPLE



Lane v Holloway [1967] 3 All ER 129

A poor relationship existed between neighbours and when one came home drunk and rowdy, the woman next door told him to be quiet. He replied 'Shut up you monkey-faced tart.' This led to an argument between the neighbour and the woman's husband. The neighbour made a friendly and ineffectual shove at the husband who responded by beating him so badly that he needed 18 stitches for facial injuries. The beating was not a proportionate response to the drunken neighbour's gestures.

The defence can be raised in both criminal assaults and civil. However, there is a difference in approach between the criminal law and the civil law.

CASE EXAMPLE



Ashley v Chief Constable of Sussex Police [2008] UKHL 25

An armed police officer shot and killed a man during a raid on a house although the man was in fact not armed. He was initially charged with manslaughter but this was dropped. The man's father brought an action in assault and battery and the police claimed that the officer had acted in self-defence. It was held that the defence could not apply where it was based on facts that did not in fact exist and were unreasonably if honestly held because of things that had been said in briefings before the raid. This contrasts with the criminal law where the defence may have been available in the circumstances.

ACTIVITY



Self-assessment questions

1. Explain the importance of the judgment in *Letang v Cooper*.
2. Give a definition of
 - a. assault
 - b. battery.
3. State precisely what is meant by the requirement of 'intention'.
4. Is hostile intent necessary to establish liability for battery?
5. Explain the criteria by which the courts will decide whether or not a person has capacity to give consent to medical treatment.

13.5 False imprisonment

13.5.1 Definition

False imprisonment occurs when a person is unlawfully restrained (whether by arrest, confinement or otherwise) or prevented from leaving any place.

13.5.2 Ingredients of the tort *Restraint*

The restraint must be total. If there is a reasonable means of escape, the restraint cannot amount to false imprisonment.

CASE EXAMPLE



Bird v Jones [1845] 7 QB 742

Part of Hammersmith Bridge was closed off for seating to watch a regatta. Mr Bird insisted on walking on that part of the Bridge and climbed into the enclosure. He was prevented from getting out at the other end. There was nothing to stop him from going back the way he had come and crossing the Bridge on the other side which had not been closed off.

JUDGMENT



'A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing.'

Coleridge J

The claimant was not imprisoned as he was free to leave by the way he had entered.

It can be seen from this judgment that imprisonment need not be supported by physical barriers. A police officer who unlawfully tells someone that they are under arrest may be liable even if he does not touch the victim. The victim is not expected to risk being arrested should they try to escape. The detention in such circumstances is in 'conception only' but is nonetheless real. In fact a police cordon was held to be false imprisonment in *Austin v Commissioner of Police for the Metropolis* [2005] EWHC 480 (QB) (although in the case it was justified for the protection of others).

Surprisingly, false imprisonment can occur even if the victim is unaware of it at the time.

CASE EXAMPLE



Meering v Grahame-White Aviation Co Ltd [1919] 122 LT 44

The claimant was suspected of stealing paint. He was taken to a waiting room where he was told that he was needed to give evidence. He agreed to stay. Unknown to him, the works police had been told not to let him leave and waited outside the room to prevent him from doing so. The Metropolitan Police arrived and he was arrested. He claimed that he had been falsely imprisoned for the hour he had waited.

JUDGMENT



'it appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic.'

Lord Atkin

The issue of knowledge was also considered in *Murray v Ministry of Defence* [1988] 2 All ER 521.

CASE EXAMPLE



Murray v Ministry of Defence [1988] 2 All ER 521

A woman's home was entered and searched in connection with terrorist matters. She knew the purpose of the visit but was not actually arrested until she left the house 30 minutes later. It was unclear whether or not she was aware that she was being detained throughout the period before the arrest.

Lord Griffiths, while accepting that she was probably aware of her detention, said that it is not:

JUDGMENT



'an essential element of the tort of false imprisonment that the victim should be aware of the fact of denial of liberty ... If a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages.'

It is clear that the judges place great importance on the protection of the liberty of an individual. *Murray v MOD* was a case concerning terrorism in Northern Ireland. The Northern Irish Court of Appeal had been happy to conclude that there had been no false imprisonment, the House of Lords disagreed.

Intentional act

Until recently there was some doubt as to whether the detention had to be intentional or if negligence would suffice. In *Sayers v Harlow Urban District Council* [1958] 1 WLR 623 a woman who was accidentally locked into a cubicle in a ladies' toilet was held not to have been falsely imprisoned. However this view has changed, the House of Lords holding that false imprisonment is a tort of strict liability, thus intention is immaterial.

CASE EXAMPLE



R v Governor of Brockhill Prison, ex p Evans (No 2) [2000] 4 All ER 15

Ms Evans was sentenced to two years' imprisonment but had spent time in custody prior to sentence. This time entitled her to a reduction of the actual period spent in prison. Using Home Office guidelines, her release date was calculated as 18 November 1996. Judicial review established that the guidelines were wrong and her release date should have been 17 September 1996. The House of Lords held that she had been falsely imprisoned between those dates as false imprisonment is a tort of strict liability. Its consequences cannot be escaped even when, as in this case, the defendant had acted in line with law accepted as correct at that time.

In contrast in the following case it was not false imprisonment when a prisoner was restricted to his cell during an unofficial strike by prison officers.

CASE EXAMPLE



Iqbal v Prison Officers Association [2009] EWCA Civ 1312

A prisoner complained that he had been falsely imprisoned when he had been kept in his cell for six hours during a strike by prison officers and would normally have not been locked in his cell during those hours. The Court of Appeal dismissed his claim on the basis that the strike involved an omission not a positive act and therefore could be contrasted with the *Brockhill Prison* case.

Lord Neuberger MR stated:

JUDGMENT



‘a prisoner is no longer lawfully in the custody of a prison governor once his term of imprisonment expires: ergo he has a right, as against the prison governor, to be released, and it would therefore be unlawful for the governor not to release him. Once his term of imprisonment has expired a prisoner has an absolute right to leave prison, whereas . . . the claimant had no right to leave the Prison, and he had no even arguable right to leave his cell save if permitted by the Governor.’

13.5.3 Defences

Reasonable condition for release

A person is entitled to impose a reasonable condition for the release of the claimant. This may be a question of fact, as in *Robinson v Balmain New Ferry Co Ltd* [1910] AC 295 when the Privy Council held it was reasonable for a charge of 1d to be made when a passenger changed his mind about waiting for a ferry and wanted to leave. He would have had to pay a similar sum had he completed his journey.

The facts of *Robinson v Balmain* are perhaps unlikely to recur with any frequency. A more likely scenario in *Herd v Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67 held that reasonable contractual provision could amount to a defence.

CASE EXAMPLE



Herd v Weardale Steel, Coal and Coke Co Ltd [1915] AC 67

A miner went underground at 9.30 a.m. for a shift ending at 4 p.m. After a dispute he demanded to be raised to the surface at about 11 a.m. He was in fact raised at about 1.30 p.m.

The House of Lords held his only right to be raised was at the end of his shift or in emergency. It mattered not that the cage could have been used before then as indeed happened.

JUDGMENT



‘There were facilities [to raise him] but they were facilities which, in accordance with the conditions that he had accepted by going down, were not available to him until the end of his shift.’

Lawful arrest

A lawful arrest made in accordance with the Police and Criminal Evidence Act 1984 s24(4), as amended by the Serious Organised Crime and Police Act 2005 s110, cannot amount to false imprisonment. A police officer or private citizen who acts within the provisions will not be liable. A private citizen making a citizen’s arrest should be wary as a private citizen only has protection if an arrestable offence has actually been or is being committed by the person arrested and the police have been speedily involved. Store detectives are particularly vulnerable.

CASE EXAMPLE



White v W P Brown [1983] CLY 972

A woman was locked up for 15 minutes by a store detective. This amounted to false imprisonment.

A police officer does not lose the protection if the arrest is mistaken, provided the arrest was reasonable in all the circumstances.

Detention for medical purposes

The Mental Health Act 1983 provides for the lawful detention of persons suffering from mental disorder. The provisions of the Act must be scrupulously followed as breach can mean that false imprisonment has occurred. This has caused difficulties where a person has been clearly ill and in need of treatment which can only be provided in hospital but whose illness does not meet the necessary criteria for compulsory detention. In *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] AC 458 the House of Lords held that in such a case, the common law doctrine of necessity would apply to render the detention lawful. The case was then taken to the European Court of Human Rights as *HL v United Kingdom* (Application No. 45508/99) [2004]. The court found that the reasoning of the House of Lords could not stand and this provision of the Mental Health Act 1983 breached the applicant's rights under Article 5(1) of the European Convention on Human Rights.

The Mental Incapacity Act 2005 contains a provision that will ensure that all patients detained in a psychiatric hospital will have the right to challenge the legality of their detention by application to a Mental Health Review Tribunal.

Powers to detain persons suffering from physical disease also exist. The Public Health (Control of Disease) Act 1984, subject to strict safeguards, permits the removal to and detention in hospital of a person suffering from a notifiable disease.

Montgomery refers to a case where a person suffering from AIDS and 'bleeding copiously' was prevented, by court order under powers in the 1984 Act, from discharging himself from hospital. By the time the appeal was heard, the danger was past and the order was no longer needed, but the initial order was not criticised by the appeal court (J Montgomery, *Healthcare Law* (2nd edn, Oxford University Press, 2003), p. 35).

ACTIVITY



Self-assessment questions

1. Give a definition of 'false imprisonment'.
2. Consider whether the judgment in *R v Governor of Brockhill Prison, ex p Evans* means that false imprisonment should be regarded as a tort of strict liability.

13.6 Intentional indirect harm and protection from harassment

Trespass to the person deals with direct harm which is intentionally caused while negligence deals with direct harm which is caused unintentionally. This leaves a gap. What about the situation where harm is caused intentionally but indirectly? Nothing discussed so far in this chapter covers this situation. It would be wrong if a person were able to escape liability for harm which is caused intentionally but indirectly. The gap is partly filled by old law relating to wrongful interference and by the modern statute, the Protection from Harassment Act 1997.

13.6.1 Acts intended to cause harm

The law in this area is not very clear but it seems that a person who acts intentionally with the result that injury is indirectly caused, whether or not the injury is intentional, may be liable.

CASE EXAMPLE



Wilkinson v Downton [1897] 2 QB 57

The defendant, as a practical joke, told the claimant that he had been sent to tell her that her husband had been involved in an accident. Her husband as a result was lying in a public house with two broken legs. She was told that she was to take a cab to bring him home. As a result of this 'prank' the claimant suffered a violent shock causing serious physical consequences which threatened her reason. Her illness involved her husband, who was in reality at all times in the best of health, in substantial expense. Wright J held that a person who 'wilfully [does] an act calculated to cause physical harm to the [claimant] ie to infringe her right to personal safety and has thereby in fact caused physical harm' is liable if there is no justification for the act. 'This wilful injury is in law malicious, although no malicious purpose to cause the harm which was caused, nor any motive of spite, is imputed to the defendant.'

It must be noted that there was an acceptance by the judges that the defendant very probably had no intention of causing anything other than a laugh by his actions. The consequences were not intended by him nor could there be any liability for negligence. Despite its lack of clarity, the judgment was approved in the later case of *Janvier v Sweeney* [1919] 2 KB 316.

CASE EXAMPLE



Janvier v Sweeney [1919] 2 KB 316

During the First World War, a woman was told by a caller that he was a detective representing the military authorities and that she was the woman they wanted as she was suspected of corresponding with a German spy. She was extremely frightened and as a result suffered nervous shock, being ill for a prolonged period of time.

In the Court of Appeal it was held that the defendant was liable. Stating that this was a much stronger case than *Wilkinson v Downton*, Duke LJ acknowledged that in this case the defendant's intention was to terrify the victim for the purpose of obtaining an unlawful object.

The law was nonetheless left in a state of some confusion. Does the defendant's act have to be calculated to cause harm? Does actual physical or psychiatric harm need to result from the act? The issue has been further considered by the Court of Appeal in *Wong v Parkside Health NHS Trust and another* [2001] EWCA Civ 1721.

CASE EXAMPLE



Wong v Parkside Health NHS Trust and another [2001] EWCA Civ 1721

The claimant alleged harassment against her by three fellow employees and an inadequate response by the employer. One of the issues considered was the precise scope of the tort of intentionally causing harm.

Reviewing the authorities Lady Justice Hale considered whether actual injury needed to be established and whether there needed to be intention to cause injury. She stated:

JUDGMENT



‘for the tort to be committed ... there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant’s interest in his freedom from harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result so that the defendant cannot be heard to say that he did not “mean” it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as a result of his behaviour and his deliberately engaging in that behaviour.’

It seems therefore that for the tort to be established it must be proved:

1. that the defendant intended to infringe the claimant’s ‘right to personal safety’ (*Wilkinson v Downton*) or ‘interest in his freedom from harm’ (*Wong v Parkside Health NHS Trust*); and
2. that actual injury, physical or psychiatric, occurred as a result.

This has subsequently been confirmed by the House of Lords.

CASE EXAMPLE



Wainright v Home Office [2004] AC 406; [2003] UKHL 53

The claimants, a mother and her son (who suffered from cerebral palsy and arrested development), went to prison to visit her other son who was on remand. The prison had a drug problem and the son on remand was suspected of supplying drugs so the governor had instructed that his visitors should be strip searched and denied their visiting rights if they refused, though the claimants were unaware of this order in advance of the visit. They were taken to separate rooms. The mother’s naked upper body was first examined and then her sexual organs and anus were visually examined, causing her great and visible distress. The son was at first reluctant to take off his underwear, suffered fits of sobbing and shaking, and when the officer examined his naked body that officer also lifted up his penis and pulled back his foreskin. The trial judge held that there was liability in battery and that the strip search was a course of action intended to cause physical or psychiatric harm for which the defendant was also liable. The Court of Appeal disagreed with this latter point, doubted the existence of the tort of *Wilkinson v Downton* in the modern context and upheld the defendant’s appeal. The claimants appealed to the House of Lords on the basis that, first, there was a tort of invasion of privacy (this was rejected by the House of Lords – see 14.6.2) and alternatively that damages could be awarded for emotional distress falling short of psychiatric harm where it was intentionally inflicted. The House of Lords accepted the continued existence of the tort in *Wilkinson v Downton* but held that there could be no liability for distress falling short of a recognised psychiatric injury and that, on the facts of the case, the intention essential for proving the tort could not be proved. The appeal was dismissed.

On the requirements for an action in *Wilkinson v Downton* Lord Hoffmann stated:

JUDGMENT



'Commentators and counsel have been ... unwilling to allow *Wilkinson v Downton* to disappear beneath the surface of the law of negligence ... I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that ... you have to be very careful about what you mean by intend ... imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not.'

Despite the attempts of the Court of Appeal in *Wainright* to abolish the tort, *Wilkinson v Downton* has been used even more recently as the sole basis of a successful claim.

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CASE EXAMPLE



C v D [2006] EWHC 166 (QB); [2006] All ER (D) 329 (February)

A school headmaster was alleged to have sexually abused a pupil. The abuse took various forms, two of which could not be brought under trespass to the person. One was a video made by the defendant of the claimant in the school showers, the second involved the defendant pulling down the claimant's trousers and underwear in the school infirmary and staring at the claimant's genitals. While the trial judge did not feel that psychiatric injury was foreseeable as a likely consequence, he nevertheless did feel that the defendant was reckless as to whether he caused psychiatric harm to the claimant, conforming to the House of Lords in *Wainright*, and on this basis he held the defendant liable.

13.6.2 Protection from Harassment Act 1997

The problem faced by those who suffer harassment where there is no resulting injury is now dealt with by statute.

The Act provides that a person who pursues a course of conduct which he knows or ought to know amounts to harassment of another person may be guilty of the criminal offence of harassment. By s3 the Act gives the victim a remedy in civil law.

Conduct will amount to harassment if the course of conduct is such that 'a reasonable person in possession of the same information [as the defendant] would think the course of conduct would amount to harassment of the other' (s1(2)). The conduct can include causing the claimant to fear violence (s4(1)) or to cause the claimant alarm or distress (s7(2)). A 'course of conduct' means that the behaviour must occur more than once but it is clear that the defendant's intention is irrelevant as the judgment is that of the 'reasonable person'.

No actual physical or psychiatric harm need result from the harassment. Alarm or distress will suffice.

There is no remedy under the Act for a 'one off' incident thus the defendant in *Wilkinson v Downton* would not be liable under the Act. The Act does however 'fill a gap' by providing a remedy for many situations where distress is caused, for example by means of 'stalking', telephone calls, emails or text messages.

13.6.3 A developing tort of harassment?

As the concept of harassment is gradually more closely defined, remedies are becoming available where the claimant has been subjected to conduct which does not amount to a threat but which nonetheless causes the claimant real harm. It may be that the Act will be enough to fill the gap but it is not yet clear that this will prove to be the case.

There has been much recent case law with quite different results. The best publicised of these cases is *Green*.

CASE EXAMPLE



Green v DB Group Services (UK) Ltd [2006] EWHC 1898

The claimant worked as an assistant company secretary for Deutsche Bank. She was subjected to constant abuse by a group of female staff, was constantly undermined by a male colleague and despite reporting this to her manager and seeking help the company did nothing to support or help her. She suffered a period of sickness with depression as a result and on returning to work suffered a relapse and was unable to return to work. The judge awarded her £800,000 for personal injury and loss of future earnings for the mental illness resulting from the bullying. The award was based on both negligence and breach of the 1997 Act.

In *Howlett v Holding* [2006] EWHC 41 (QB) the Act was used to grant an injunction to put a stop to a campaign of victimisation waged against a former mayor by a disgruntled constituent. However, in *Merilie v Newcastle PCT* [2006] EWHC 1433 (QB) a dentist failed in a claim for harassment against her former employers because she suffered a lifelong personality disorder making her evidence unreliable since it was based only on her own perceptions.

Tort	Required state of mind	Whether direct or indirect	Whether contact required	Frequency	Whether damage needed
Assault	Intention	Must be direct	No contact	Can be a single threat	No – only apprehension
Battery	Intention	Must be direct	Must have contact	Can be a single unlawful contact	No – can be harmless contact
False imprisonment	Question whether it always has to be intentional	Must be direct	Contact not necessary	Can be a single total restraint	No – need not even be aware
<i>Wilkinson v Downton</i>	Intention	Must be indirect	No contact	Can be a single infliction	Yes must suffer from physical or psychiatric harm
Harassment under the Protection from Harassment Act 1997	Intention	Can be either	Can be either	Must be more than one act of harassment (a course of conduct)	Only needs fear, alarm or distress – but could include psychiatric harm

Table 13.1 The differences between the different torts making up trespass to the person.

Courts have accepted that the course of conduct must be sufficiently serious for a claim of harassment to succeed.

CASE EXAMPLE



Ferguson v British Gas Trading Ltd [2009] EWCA Civ 46

The claimant had been a customer of the defendant. After she changed to a different supplier British Gas continued to send her bills for gas that they had not supplied her with and later sent her several letters threatening to cut off her gas supply, to start legal proceedings against her and to inform a credit rating agency. Despite the claimant contacting the company several times, the sending of the bills and threatening letters continued. They were in fact generated by a computer rather than by an individual. The claimant alleged harassment by the company. It argued that, since the claimant knew that the correspondence was unjustified and that it was generated by a computer she should not have taken it as seriously as if it came from an individual employee. The Court of Appeal held that, while the course of conduct must be serious for a claim under s3 of the Protection from Harassment Act, the fact of there being parallel criminal and civil liability was not generally significant in determining civil liability. The court considered that the conduct of the company was sufficiently serious to amount to harassment, and that there was no apparent policy reason why a corporation should be treated differently to an individual.

In *Jones v Ruth* [2011] EWCA Civ 804, a case involving neighbours, the Court of appeal also identified that foreseeability of harm is not necessary when awarding damages under the Act. The conduct must be serious and deliberate and once that is proved damages can be awarded.

ACTIVITY



Self-assessment questions

1. Explain how the principle of *Wilkinson v Downton* differs from trespass to the person.
2. Consider how the principle of *Wilkinson v Downton* has been developed in later cases.
3. What are the basic requirements of the statutory tort created by s3 Protection from Harassment Act 1997?
4. Explain whether or not the principle of *Wilkinson v Downton* still has a role in protecting an individual from harm.

SAMPLE ESSAY QUESTION

Discuss the effectiveness of the tort of trespass to the person in protecting people's bodily integrity.

Outline the basis of an action in trespass to the person

- Three types - assault, battery and false imprisonment
- **All** are actionable per se so a remedy is available without proof of damage
- *Wilkinson v Downton* covers intentional indirect harm
- And also an action for harassment under the Protection from Harassment Act 1997

Explain the essential elements for assault

- Directly and intentionally causing the claimant to apprehend an imminent battery
- Involve threatening behaviour and the threat must be real and imminent
- And create a feeling of being threatened in the claimant
- Words can negate the fear of assault
- But words alone were traditionally insufficient
- Silent telephone calls have been accepted in criminal law

Explain the essential elements for battery

- Directly and intentionally applying unlawful force
- Judges have given direct a broad interpretation
- Hostility was identified as a requirement and has been said 'the least touching of another in anger is battery'
- But this could not apply in medical battery

Explain the essential elements of false imprisonment

- A total bodily restraint without safe means of escape
- But need not be physical
- And the claimant need not be aware of the restraint
- And the restraint may be justified by a contractual relationship or legitimate expectation

Discuss the range of available defences

- Defences to assault and battery include statutory authority, lawful arrest, Mental Health Act, consent, necessity parental authority, self-defence using reasonable force
- Defences include lawful arrest and detention under PACEA (as amended) (but note different rules for citizen's arrest), Mental Health Act and consent

Discuss the effectiveness of the tort

- Fact that the tort is actionable per se
- In assault damages are difficult to assess
- Difficulties associated with use of words
- Assault may be ineffective for threats of future harm
- In battery no need for actual harm to be proved
- And a broad view is applied to 'direct'
- Requirement of hostility is problematic
- Consent in sporting context and medical context
- Discuss how the defences may limit the effectiveness, particularly in relation to complaints about the police

KEY FACTS



Key facts on trespass to the person

Assault	Case/statute
<p>Threat to use force against person of someone else.</p> <p>Actual harm need not be intended – intention to touch will suffice.</p> <p>Words alone traditionally not an assault.</p> <p>But following verbal threat will suffice for criminal assault. Will this suffice for the tort?</p> <p>Words can negate threat.</p> <p>Victim must believe threat.</p> <p>It must be possible to carry out the threat – contrast with –</p>	<p><i>R v Meade and Belt</i> [1823]</p> <p><i>R v Ireland</i> [1997]</p> <p><i>Turberville v Savage</i> [1669]</p> <p><i>R v St George</i> [1840]</p> <p><i>Stephens v Myers</i> [1830]</p> <p><i>Thomas v NUM</i> [1985]</p>
Battery	Case/statute
<p>Use of force against another person.</p> <p>Actual harm need not be caused – an unwanted kiss will suffice.</p> <p>Use of force must be direct but this is widely interpreted.</p> <p>There must be a touching - is hostility required?</p> <ul style="list-style-type: none"> • no in • but yes in • and <p>(Note when HL held that if action is unlawful it is also hostile.)</p> <p>Problem of medical cases - no hostile intent - does this case help?</p>	<p><i>R v Chief Constable of Devon & Cornwall</i> [1981]</p> <p><i>Scott v Shepherd</i> [1773];</p> <p><i>Pursell v Horn</i> [1838]</p> <p><i>Nash v Sheen</i> [1955]</p> <p><i>Collins v Wilcock</i> [1984]</p> <p><i>Cole v Turner</i> [1704]</p> <p><i>Wilson v Pringle</i> [1986]</p> <p><i>R v Brown</i> [1994]</p> <p><i>R v Brown</i> [1994]</p>
Defences to assault and battery	Case/statute
<p>Lawful authority – statutory powers given to police officers but any force used must be proportionate.</p> <p>Statutory powers given to those treating people with mental illness.</p> <p>Consent: sport – consent extends only to play within the rules of the game.</p> <p>Medical treatment – every adult with capacity has right to consent to or refuse treatment.</p> <p>Where person lacks capacity, treatment lawful if in the person's best interests.</p> <p>Necessity – act must be essential to prevent harm.</p> <p>Parental authority provided child understands why it is being punished and the punishment is proportionate; applies only to a parent.</p> <p>Self-defence – reasonable force proportionate to the threat may be used.</p>	<p>Police and Criminal Evidence Act 1984</p> <p><i>Collins v Wilcock</i> [1984];</p> <p><i>McCann, Farrell and Savage v UK</i> [1995]</p> <p>Mental Health Act 1983</p> <p><i>Simms v Leigh RFC</i> [1969]</p> <p><i>Re T (Adult: Refusal of Treatment)</i> [1992]; <i>Ms B v An NHS Hospital Trust</i> [2002]</p> <p><i>Airedale NHS Trust v Bland</i> [1993]</p> <p><i>F v West Berks HA</i> [1989]</p> <p><i>A v UK</i> [1998]</p> <p><i>Cockcroft v Smith</i> [1705];</p> <p><i>Revill v Newbery</i> [1996]; <i>Lane v Holloway</i> [1967]</p>

False imprisonment	Case/statute
Total restraint preventing a person from leaving any place; not total if safe means of escape. Restraint need not be physical; can occur even if claimant unaware. Tort of strict liability.	<i>Bird v Jones</i> [1845] <i>Meering v Grahame-White Aviation Co Ltd</i> [1919]; <i>Murray v Ministry of Defence</i> [1988] <i>R v Governor of Brockhill Prison, ex p Evans (No 2)</i> [2000]
Defences to false imprisonment	Case/statute
Reasonable condition for release. Lawful arrest in accordance with Police and Criminal Evidence Act 1984 but note risk for private citizen if no crime actually committed by the arrested person. Detention of people with mental illness under Mental Health Act 1983 or under common law doctrine of necessity.	<i>Robinson v Balmain New Ferry</i> [1910]; <i>Herd v Weardale Steel</i> [1915] <i>White v W P Brown</i> [1983] <i>R v Bournewood Community and Mental Health Trust, ex p L</i> [1999]
Intentional harm	Case/statute
Provided act intended to cause harm, there can be liability even when elements of trespass to the person cannot be proved. Actual injury, physical or psychiatric must occur. No liability for distress falling short of a recognised psychiatric injury.	<i>Wilkinson v Downton</i> [1897]; <i>Janvier v Sweeney</i> [1919] <i>Wong v Parkside Health NHS Trust</i> [2001] <i>Wainright v Home Office</i> [2004]
Protection from Harassment Act 1997	Case/statute
Criminal offence to pursue a course of conduct which perpetrator knows or ought to know amounts to harassment of another. Statutory tort entitling victim to damages. Conduct can be anything which a reasonable person in the circumstances would think amounts to harassment. Course of conduct means it happens more than once. Defendant's intention is irrelevant. No actual harm need be caused.	s1 s3 s1(2) <i>Green v DB Group Services (UK) Ltd</i> [2006]

Conclusion

Trespass is an old tort which has to some extent been developed to deal with modern life. The gaps are partly filled by liability for intentional harm and by statute. It is likely that further developments will occur, partly resulting from the widespread use of information technology.

SUMMARY

- Trespass involves a direct interference with the claimant's person.
- It is actionable per se so there is no requirement to show that damage occurred.
- There are three types: assault, battery and false imprisonment.

Assault

- Intentionally and directly causing another to fear imminent unlawful contact.
- No contact is required but there must be threatening actions.
- Words alone are insufficient but can be a criminal assault – although words can negate an assault.
- The victim must believe the threat and it must be possible to carry it out.
- Consent, self-defence and necessity are all possible defences.

Battery

- Intentionally and directly applying unlawful force to a person.
- Courts have taken a broad view of what is direct.
- There is dispute over whether hostility is also a requirement.
- Battery is important in medical treatment – medical treatment in the absence of consent is generally a battery except where there is some justification for not obtaining consent – and it also has a context in sport where players act outside the rules.
- Consent, necessity and self-defence are all possible defences.

False imprisonment

- Involves total bodily restraint – with no safe means of escape.
- Can occur even where the claimant is unaware of the restraint.
- But it is not possible when the defendant has legitimate expectations that the claimant will remain for a set period of time.
- Consent, mistaken arrest (in the case of police officers) and lawful arrest are all possible defences.

Intentional indirect harm

- Possible where an action in trespass is impossible – but there must be personal injury whether physical or psychiatric.

Harassment

- Under the Protection from Harassment Act 1997 – but there must be a 'course of conduct' – so at least two events.