

Intentional Torts to the Person (and Related Actions)

Some reminders:

- 1) Torts v Tort
 - Some statutory, most common law
 - Some allow injunctions freely, for most compensatory damages = norm
 - Some strict liab [and explain], most involves some measure of fault
- 2) Torts as recipes
 - Definition with elements to fulfill that could be useful
 - but can be alternatives as to the definition of one particular area of tort
- 3) Establishing a tort's ingredients doesn't equal success in court → defences exist

A. Introduction

There is in tort law a **default hierarchy of protected interests**. Peter Cane sketches this hierarchy in detail in his book, *The Anatomy of Tort Law* (Hart, 1997).

Cane, and other tort scholars, attribute great significance to certain types of interests.

1. Sanctioned conducts > law takes a firm stand
 - e.g., intentionally harming people
2. Hierarchy of different types of interests
 - e.g., pure economic loss vs personal injury > value more on fundamental rights such as bodily integrity and freedom of movement
 - can sue regardless of harm is really caused, generous to P

This significance is often suggested to explain why certain torts—including the most ancient of the ones we will consider in these lectures—are **actionable *per se***.

- actionable in themselves, regardless of tangible harm

See, eg, Lord Dyson in *Lumba v Secretary of State for Home Dept* [2011] UKSC 12, at [64].

Trespassory torts (such as false imprisonment) are actionable *per se* regardless of whether the victim suffers any harm. An action lies even if the victim does not know that he was imprisoned [because, as Lord Griffiths once pointed out]... “The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable **even without proof of special damage**”.

Similarly, the importance of certain interests is said to explain the relative ease with which injunctions can be obtained for certain torts (incl the trespass torts).

I think that there is *something* in some of these claims, but I am not completely convinced: see J Murphy, “Tort’s Hierarchy of Protected Interests” [2022] *Cambridge Law Journal* 356.

Note: Unlike negligence

- Do not need to show tangible harm
- Protect highly cherished values (that court puts high weights on)

The intentional torts to the person that we will consider are:

- Battery (protects physical wellbeing)
- Assault (protects psychiatric wellbeing)
- False imprisonment (protects liberty)
- Intentional infliction of harm (modern version of the rule in *Wilkinson v Downton*)
- The (possible) tort of harassment

There are also certain specific defences to these torts that we deal with as well.

B. Battery

In a recent decision of the District Court, the **nature of battery** was explained.

Wong Weng Chi v Secretary for Justice [2020] HKDC 420

Battery is the actual infliction of unlawful force on another person... Every person's body is inviolable. Any touching of another person, however slight, may amount to battery. (Deputy Judge Lee.)

This is right, but a bit too simplistic.

There are in fact several key elements in the tort of battery that are evident from the following working definition of the tort in *Street on Torts*:

*Battery is any act of the defendant that **directly and intentionally** (or perhaps **negligently**) causes some **physical contact** with the person of the claimant **without** the claimant's **consent**.*

→ Ingredients: Directness, intentionality, physical contact, absence of consent

1. Directness

The **hallmark of any trespass**—whether to the person, land or personal property—is the requirement that there be directness in the application of force.

- Direct infliction

Punching you is battery, but leaving a hazard on your doorstep—so that when you step out the next day and trip over it—is not.

- Here only have intentionality but not directness

Reynolds v Clarke (1725) 2 Ld Raym 1399

If a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must maintain an action on the case; because it is only prejudicial in consequence. (Fortescue J)

- Direct > trespass (immediate wrong) ; vs indirect > non-trespass

D's hitting P while wearing a glove counts as battery.

- Contacting surface is not of a concern

Also, striking someone with a sword would (by **extension**) count, too, as would (by extension again) shooting someone.

- (Extension (of how the trespass is conducted) is also direct trespass)

A noteworthy criminal law case

DPP v K (1990) 1 WLR 1067

Facts	Child taking sulphuric acid, put in hand drier > later comes hands got burned
Issue	tort of battery? Criminal battery but tort battery?
Held	<p>Constitutes the equivalent crime</p> <ul style="list-style-type: none"> • there can be a battery even if the application of force is not completely direct and there is a delay between the defendant's actions and force being applied to the victim
Note	<ul style="list-style-type: none"> - Could have criminal counterpart, essential to criminal law: element of mens rea, proof of intention - But they are not exactly the same e.g., different standard of proof, departure in substances - E.g., case, substance of intention (definition of intention in criminal law) - But Q of whether there should be tort of battery as criminal law has covered it

2. State of Mind

(a) *Intention and negligence?*

At one time one could have said with confidence that both **intentional** and **negligent** acts could result in liability in battery *so long as there was a direct violation of P's bodily integrity*.

Holmes v Mather (1875) LR 10 Ex 261

Facts	<ul style="list-style-type: none"> • P a young girl, injured when D's horse bolted, because of the dog barking and started it; where the dog is the belonging of D, D in control of the horse • P: sue, on ground of direct physical contact, either intentional or negligent
Held	<ul style="list-style-type: none"> • could not sue, reason on that <u>D had neither intentionally or negligently caused the horse</u>; not a reasonable person would foresee how the dog would react and cause the event • D not liable
Note	Intentional conduct encompasses deliberate, reckless or negligent action

But then the law got into a muddled state

Letang v Cooper [1965] 1 QB 232.

Facts	<ul style="list-style-type: none"> - <u>D negligently driven to P's land</u>; reversed over P's legs with his car, caused injury; P claim in negligence - P attempted to sue more than 3 years later (*material; Time limitation of 3 years of suing on negligence)
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	<ul style="list-style-type: none"> - Other multiple alternatives to sue: battery (time limitation of 6 years); but if overlaps, cannot sue for battery - Possible but two turn their back in court:
Issue	<p>whether it was possible to make a claim under trespass to the person if the action was negligent rather than intentional as until then the tort of trespass to the person had been applied to both types of situation.</p> <ul style="list-style-type: none"> - Sue under battery (trespass to the person)? Or sue under negligence?
Held	<p>D's action is not intentional > the only proper action is in negligence (but not battery) > time-barred for suing in negligence</p> <ul style="list-style-type: none"> - Lord Denning: No overlaps in tort of battery and negligence; - Another lord justice diplored: historically possible to sue on the overlap, but if sue for negligence > have to prove negligence, in addition need to prove harm - diff reasoning but same decision <p>• Final decision: actions do not lie; action fails</p>
Note	<ul style="list-style-type: none"> - Distinction between the <u>torts of negligence</u> and <u>the trespass to the person based on intent</u>. - The the law on trespass to the person (battery) has been narrowed: does not include negligence - Trespass to the person only include intentional ones (?)

For now—the **point is not yet settled**—we can only say that *if there is a different remoteness test*, then this may prove of value to the claimant who relies on negligent trespass.

(b) *What exactly must be intended: **actions** or outcomes?*

Wilson v Pringle [1987] 1 QB 237

It is the act not the injury which must be intentional. An intention to injure is not essential in an action for trespass to the person. It is the **mere trespass by itself** which is the offence. (Croom-Johnson LJ.)

Facts	School boy pulling the strap of the bag of a boy before him and caused injury
Note	<p>➔ Distinguish: Intent to the act vs intent to the outcome</p> <ul style="list-style-type: none"> - Only the act is relevant, similar to strict liability - E.g., Stepping on someone else's land that one genuinely believes he is on his own land with reasonable ground, but the infringement itself is enough to hold him liable for the trespass

Weaver v Ward (1616) Hob 134

Facts	- P & D both soldiers, at military exercise; not hitting the intended target and injured P, intend to trigger the weapon but not to injure the person
Reasoning	D intending to release the object > intention as to the act , not the outcome
Held	D liable

Leame v Bray (1803) 3 East 593.

“It is immaterial whether the injury be wilful or not” (Ellenborough CJ)

BUT what about transferred intent?

- A challenge here, vs criminal law: a contentious issue

There are various cases which, *in combination*, suggest that such an approach *might* be taken.

Scott v Shepherd (1773) 2 Wm Bl 892:

though criminal cases are no rule for civil ones ... yet in trespass I think there is an analogy. (De Grey CJ.)

Facts	<ul style="list-style-type: none">- Firework, D throws a firework into a crowded market in B; no. of people picked up the firework and eventually injured P- In D's defense the action is not a direct act, but others throwing the firework
Issue	- Directness issue, that not A directly causing injury of D (intention not a problem here)
Held	<ul style="list-style-type: none">- the injury was the direct and unlawful act of D who originally threw and intended to throw the firework; The other people were not 'free agents' in this situation and threw on the squib for their own safety and this was justifiable.- The throwing on was classed as a continuation of the defendant's action, which was intended.• D liable
Note	<ul style="list-style-type: none">- Not the same rule but there could be analogy- Notion of transfer of intent in criminal law, may be applied in tort despite not align completely

Haystead v Chief Constable of Derbyshire [2000] 3 All ER 890.

There is no difference in logic or good sense between the facts of this case and one where the defendant might have used a weapon to fell the child to the floor, save only that this is a case of reckless and not intentional battery (Laws LJ.)

Facts	Punched a woman holding a baby, woman dropped the baby and baby got injured
Issue	whether the man could be found to be guilty of battery and assault of the child if there was <u>no physical application of force directly</u> from the man to the physical body of the victim
Reasoning	<ul style="list-style-type: none"> - No difference of hitting the woman with weapon or not - There is transfer of intent
Held	D liable; convicted of battery and assault of the child
Note	the <u>direct application of force</u> could be applied <u>through a medium</u> that is controlled through the actions of a person

Bici v MOD [2004] EWHC 786

Facts	<ul style="list-style-type: none"> - Tort law case, two ppl in a car, A & B; military conflict, - D shot A, A in possession of a gun, but not B; fired the gun, D hit B instead
Reasoning	<ul style="list-style-type: none"> - The <u>doctrine of transferred malice applied</u> to the tort of battery - where a soldier deliberately fired against one person but hit another person instead because he had "intentionally" applied force to the person who was struck
Held	D liable
Note	Can apply the doctrine of transfer of intent to hold the person liable

Livingstone v MOD [1984] NILR 356

In my judgment when a soldier deliberately fires at one rioter intending to strike him and he misses him and hits another rioter nearby, the soldier has "intentionally" applied force to the rioter who has been struck ... Therefore I consider that the soldier who fired the baton round which struck the plaintiff was guilty of battery to the plaintiff. (Hutton J.)

Facts	<ul style="list-style-type: none"> - D a soldier did not hit the rioter but P instead; D had not deliberately shot P with intention
Issue	<ul style="list-style-type: none"> - whether it was possible for a claim in battery to be made given the fact that <u>the claimant had not been the intended target</u> and that <u>he had been hit accidentally</u>.
Reasoning	<ul style="list-style-type: none"> - based on a reasoning similar to the doctrine of transferred malice in criminal law
Held	<ul style="list-style-type: none"> - Held guilty of tort of battery
Note	<p>Can be challenged??</p> <ul style="list-style-type: none"> - Issue challenged here: 1. first instance case; 2. Northern Ireland case, not the best persuasive one (no transfer of intent in tort law?) <p>CHECK AGAIN</p>

But recall *Wilson*: “It is the act not the injury that must be intentional”.

(c) **Harm and Hostility**

One clear thing from the case law is that **harm is not required for a battery**: it is a tort that is **actionable *per se***—*ie*, **without proof of any injury or damage to C**.

***Yu Ka Yui v Chong Chi Fai* [2017] HKEC 236**

In contrast with negligence, the tortious causes of action of assault and battery are **actionable *per se***: viz **without the need to prove any ensuing damages suffered by the victim** of such torts so long as their necessary legal ingredients are present. (Ho J.)

So must the conduct be hostile as was suggested in *Wilson v Pringle*?

***Cole v Turner* (1704) 6 Mod Rep 149** (facts not important)

The least touching of another in anger is battery [but] if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery (Holt CJ). [He had in mind jostling in a crowd.]

Note	- Problem: in anger? Is it necessary? Hostility requirement? > might not be a best understanding of law currently In certain circumstances it is non-avoidable and acceptable
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***F v West Berkshire Health Authority* [1989] 2 All ER 545** (facts not important).

Note	Doctor acting in patient’s best interest? Who cannot give consent due to the patient’s inability?
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***Saeed v Secretary for Justice* [2015] HKCU 233**

Although it has been said that an element of hostility is required for battery, such **hostility is not to be equated with ill-will, but evidence is required of an act contrary to the claimant’s freedom** from unwarranted physical contact. (Li J.)

➔ **Hostility plays no role**, the point is only about

Who bears the burden of proof?

Freeman v Home Office (No 2) [1983] 3 All ER 589

Facts	- In a prison setting, P claimed that they had been given drugs against their wills; as he was not capable of consenting to them; argued that the actions are not consented
Issue	- Issue: role of consent in battery
Reasoning	P had consented to the administrative of drugs; he had been informed the broad terms of the purpose of the treatment; the consent is real and valid
Held	D not liable; there is consent of P
Note	Element to prove in tort of battery: Absence of consent; - burden of proof on P to show that there is no consent to the act

C. Assault

1. Introductory observations

The commission of an assault will often occur just before the commission of a battery. But it makes sense to deal with assault after dealing with battery because the tort of assault refers to battery. Here is my definition (from *Street* again).

- Academic authorities, but not an official authorities > do not cite it, but can be a reference

*An assault is any act of D that **directly and intentionally** causes P **reasonably** to apprehend the **imminent infliction of a battery**.*

- Directness and intentionality: see battery
- Tort of assault, **protects psychiatric/mental integrity** (vs battery protects physical integrity); protecting us from wrongful inflictions of fear
- 3 classic trespass (torts of battery, assault & false imprisonment) can occur in conjunction with one another e.g., a gang of people surrounding you within a very close space, not allowing you to escape and causing you fearful about being battered
- In problem question: note any possible conjunction of the three trespass; and make clear distinguishment among them if they do not present all tgt

The two torts usually go in tandem, *but need not* do so (eg, a person hit from behind).

2. Reasonable apprehension of imminent battery necessary

- A more refined definition, but not just fear: **reasonable** + **imminent** (Separate requirements)
- **Reasonableness**: e.g., one may simply be paranoid with genuine fear -> law also requires the element of reasonableness (floodgate of ppl bringing a claim)

Stephens v Myers (1830) 4 P & P 349

Facts	P asking D to leave a meeting; D threw P out of his chair, approached P with a fist; P sue for assault
Reasoning	D liable bc P was reasonably fearful about the battery about to be committed - fear must be reasonable
Held	D liable
Note	Objective test here, would a reasonable person be similarly fearful

Pong Seong Teresa v Chan Norman [2014] 6 HKC 515

Whether the act complained of by the plaintiff constitutes an assault must depend on all the circumstances including the nature of the act and the manner in which it was made and the court would decide **whether such act would put a reasonable person in fear of physical violence**. (Chan J.)

Facts	D shouting rude and abusive words to P; with hostility; D denied intention, that he was not actually going to hit P but simply angry
Reasoning	- does not matter what P genuinely did, really intended or act violently or not; but what D genuinely felt - Will look to whether such act would put a reasonable person in fear of physical violence - Requires to be reasonable fear
Held	Assault here
Note	Reasonableness test applied in HK

Cf McBride and Bagshaw. They think that knowledge of P's paranoia can be a basis on which to turn an ordinarily innocuous act (nose-rubbing) into an assault.

[Essay Q]

- McBride and Bagshaw: If P knows that D suffers from paranoia, and trigger P's fear by playing on that paranoia -> can be an assault
- Murphy: disagree
 - despite the view could be anchored to what Elias J said in the Beachy case, first instance case)
 - (1) Not sth that can be reconciled with other cases found in the law (e.g., Stephens v Myers Chan norman case) of what a reasonable person would think
 - (2) First instance judges dealing with diff matter (transferred intent in battery), merely speaking obiter, cannot be a ground for the decision

➔ Follow higher authorities: Stephens v Myers Chan norman case

NB If the police are present and will obviously prevent D from carrying out a threat, there is no assault.

- Strong police presence to prevent the battery: apprehension of the would-be offender before they got the chance to really commit the offence

***Thomas v NUM* [1985] 2 All ER 1**

The tort of assault is not, in my view, committed, unless the capacity in question is present at the time the overt act is committed. Since the working miners are in vehicles and the pickets are held back from the vehicles, I do not understand how even the most violent of threats or gestures could be said to constitute an assault. (Scott J.)

Facts	Mine workers strike; some break the strike but ppl remained on strike; miners on vehicles waving banners, making violent gestures; ppl on the bus who were breaking the strike claimed that they were assaulted
Issue	<ul style="list-style-type: none"> - Legitimately claimed assaulted? Reasonable? - not issue of imminent here: but is dealt with in the first sentence: at the time the overt act is committed
Held	<ul style="list-style-type: none"> • No assault here <p>With a lot of police around, can't say reasonable fearful in the circumstances; not granting the ground to sue for battery</p> <ul style="list-style-type: none"> - No prospect of battery being committed - Threat of battery must be existed here and now - Miners on vehicles, cannot possibly be in real threat
Note	Still no specific definition of how imminent should be to constitute a battery

***Wong Kwai Fun v Li Fung* [1994] 1 HKC 549**

The plaintiff ... could easily have access to and did on a number of occasions visit the property, absolutely uninvited ... [Thus] [i]n the circumstances, it was reasonable for the defendant to apprehend imminent danger that the threats were presently able of being carried into execution. These threats amount to trespasses to the person of the defendant. (Woo J.)

Facts	D issued threat to P from outside of P's house; through an intercom
Issue	Imminency
Held	<ul style="list-style-type: none"> • Assault here, Can be an assault if the circumstances are right: - P can have easy access, P could foresee battery could be here anytime - P having no other ways out, sufficiently imminent in this case
Note	But court does not suggest what specifically is sufficiently imminent

Cf Wong Wai Hing v Hui Wei Lee [2000] HKEC

Facts	Treats issued about future violence ;
Held	D liable
Note	Tolerance shown to treats about the future <ul style="list-style-type: none">- Hard to be imminent if following “here and now” requirement in Thomas- Case of very near future might be an exception, can be an argument: imminence enough

If **gestures are accompanied by words** that **negate the apparent threat in the gestures**, there will, again, be **no assault**.

Tuberville v Savage (1669) 1 Mod Rep 3

the declaration of the plaintiff was, that he would not assault him, the Judges being in town.

Facts	D put his hand on his sword and said “I will hit you with this, if judges are not here”
Issue	
Reasoning	can be expressed another way that if judges are not in town he won’t hit the person > cannot be reasonable fear if interpreted this way
Held	No assault
Note	

D. **Intentional Infliction of Harm** (revamped rule in *Wilkinson v Downton*)

This tort derives from the case from which it takes its name.

- Refined name of rule from Wilkinson; The name refers to what it is protecting
- Intentional infliction of emotional distress (American way of expression)
- Murphy: not accurate naming? See below
- Neither battery nor assault, but protects the same two interests
- Different from battery and assault: **Does not require the directness** as in tort of battery or assault: **just conduct & intention** to cause harm

Wilkinson v Downton [1897] 2 QB 57

[D had] **wilfully** done an act **calculated to (objectively likely to) cause physical harm** to the plaintiff ... which in fact caused physical harm to her. (Wright J.)

Facts	Practical joker (D) joked about P's husband's health condition; merely a prank but P reacted badly; bc of the shocking "news", P becomes extremely physically ill, and suffered physical harm afterwards <ul style="list-style-type: none">• First affected psychiatrically > physical harm afterwards (note back in the time cannot sue for psychiatric harm in negligence)
Reasoning	<ul style="list-style-type: none">• Calculated to = objectively likely to• Imputed intention (rejected in <i>O v Rhodes</i>)
Held	Case of physical harm, claimable
Note	Murphy: distress is the wrong name; wrong to say this is a tort about emotional distress <ol style="list-style-type: none">1. <u>majority</u> of the damages is to compensate for the <u>physical harm</u>2. "Distress" is not accurate, as <u>law does recognise some psychiatric conditions</u> despite mere distress not compensable3. Wright J: the original case is about physical harm <p>Rule in Wilkinson: where D has wilfully committed an act or made a statement calculated to cause physical harm, and which does cause physical harm (including psychiatric injury), it is actionable.</p>

NB D's act smacks of negligence here. But, at that time, psychiatric harm wasn't recoverable in negligence.

- Q: superceding the law of negligence? (question of not that distress is claimable in tort of assault?)

O v Rhodes [2016] AC 219

Facts	Pianist suffered abused; autobiography detailing childhood with abuse; former wife feared that their son reading the book would cause mental harm to the children -> injunction to publish the book
Reasoning	<ul style="list-style-type: none"> Action in tort relevant here, 3 elements in Wilkinson (1) <u>Conduct > not found, autobiography not directly towards his son, merely directing to the large public</u> (2) <u>Mental > not found, no intention to cause harm to his son</u> (3) consequence Reject the imputation of intention in Wilkinson Separate tort for physical and psychiatric harm
Held	Claim failed; no tort of Intentional Infliction of Harm of the pianist
Note	Problematic in Wilkinson: objectively likely to cause harm > can impute an intention? Still recognise

Held *Wilkinson v Downton* remains an extant tort with a **conduct** element, a **mental** element, and a **consequence** element.

- Court held that tort under *Wilkinson v Downton* consists of three elements:

“The **conduct** element requires **words or conduct directed towards the claimant**, for which there is **no justification or reasonable excuse**.” [*Me v John G, go to board*].

- Vs criminal law:

Justification (understanding reason why one do it, and law think it is okay to do it) vs **excuse** (understand why one do the act but still not justified to do the act e.g., provocation to an act, lesser penalty); look into D’s interests

- But in tort law:

fundamentally different from criminal law; law looks at both parties’ interests as view them as equally important; different goals to achieve (to restore to the position where the tort has never been committed)

- Murphy: duress is also a defense in tort (civil law recognised that despite no precedents, they do not exist but should exist)

“[The] necessary **mental** element is **intention** to cause **physical harm** or **severe mental or emotional distress**.”

- Lower threshold than as the consequence element (e.g., intention for murder: intention to kill or to cause serious bodily harm)
- Distress relevant to the mental element (but now is no longer relevant)

“[The **consequence** element requires] physical harm or [a] recognised psychiatric illness.”

- Isn't tort unless someone's physically or psychiatrically harmed

➔ Not tort about distress; but distress features in the mental element

NB Lady Hale/Lord Toulson did away with imputed intention.

Imputation of an intention by operation of a rule of law is a vestige of a previous age and has **no role in the modern law of tort**. It is unsound in principle. It was abolished in the criminal law nearly 50 years ago and its continued survival in the tort of wilful infringement of the right to personal safety is unjustifiable.

- The aspect of imputation of intention by operation of a rule in *Wilkinson* is no longer law now
- Where the ruling in *Wilkinson* is now formulated in terms of the 3 distinct elements by court in *Rhodes*:
- Is not tort of distress despite it being mentioned

Excursus: Relationship with negligence

- Has not been surpassed by the tort of negligence's willingness to compensate for distress, although Lord Hoffman has been superseded by the law of negligence
- Still cannot sue for mere distress, it must be of a recognised kind to be claimable

➔ The law now is: still cannot sue for distress, not the way to encompass distress
➔ In *Rhodes*: not superseding law of negligence; tort of assault is a separate tort that covers physical harm and psychiatric harm in its way

Wainwright v Home Office [2004] 2 AC 406

Reasoning	Cannot sue for distress;
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E. Harassment

Many of the cases in which the *Wilkinson v Downton* tort have been invoked in Hong Kong actually involved acts of harassment.

It is probable that the HK courts will be influenced by the line taken in *Rhodes*, going forwards ***in relation to isolated acts causing indirect harm***.

But in relation to campaigns of harassment, things are far hazier.

- Conduct intended to cause harm; lacks element of directness as in battery and assault

- A & B in loving relationship but breaks down, one breaks the relationship and the other is dissatisfied; cause of conduct e.g., treats about future conducts over phone

Lau Tat Wai v Yip Lai Kuen Joey [2013] 3 HKC 361

I shall take the term 'harassment' to mean a course of conduct by a person, whether by words or action, **directly** or **through third parties**, sufficiently **repetitive in nature** as would **cause**, and which he **ought reasonably to know would cause**, worry, **emotional distress** or **annoyance** to another person. (Chan J.)

- Recognised tort of harassment in this case
- Covering distress here; A separate tort?

Cf Pong Seong Teresa v Chan Norman [2014] 6 HKC 515

- No tort of harassment recognised
- Despite court granted injunction; as the jurisdiction to grant an injunction was not limited to restraining acts which in itself were tortious or unlawful
- Tort of harassment in HK? Not defined in cases; An open question, to be revisited
- Vs in other jurisdictions: Case of harassment (e.g., over phone) taking different approaches e.g., English legislation, Australia's right to privacy

F. False Imprisonment

- Protects fundamental interest in liberty; in freedom of movement
- Directness and intentionality

Lumba (supra).

All that a claimant has to prove in order to establish false imprisonment is that he was **directly and intentionally** imprisoned by the defendant, whereupon the **burden** shifts to the **defendant** to show that there was lawful justification for doing so. (Lord Dyson.)

Usually, when there is a false imprisonment, there will also be an assault or battery, too.

- E.g., a gang of ppl surrounding & not allowing one to escape (false imprisonment), causing one fearful of battery (assault)

1. D's State of Mind and Directness

This tort must be **intentional** in the sense that the defendant must **intend to do an act** which is at least substantially certain to effect the confinement.

Cf Iqbal v Prison Officers Association [2010] QB 732

in my view, the claimant must show not merely an intentional act or omission ... but also **an intention to deprive the claimant of his liberty** (Smith LJ)

- Intentional does not seem the same in the context compared to other torts
- **Intention to the outcome in false imprisonment** but not just the act (to intend to deprive the person's liberty); but arguable as to the outcome or the act

Q: Within the context of the intentional tort of law, the courts can't make their mind up as to what intentionality should mean. Either candidate is plausible, but there should be commonality across the intentional torts. Discuss. [essay Q]

Intended act vs intended outcome

- Argument for intended act
 - serve as a stronger deterrence
 - Refer to criminal law: emphasizing mens rea (requires element of intentionality), deter intentional conduct
- Argument for intended outcome
 - In tort law: the goal is to compensate for harm done, put the party back in the position where tortious act is not done
 - Deterrence is not the goal; intended outcome (the end result) reflects this goal
 - E.g., when harm is not caused, there is no claim of compensation

2. Restraint

(a) Total Restraint

The courts insist upon **total (as opposed to partial) restraint** of the person.

Bird v Jones (1845) 7 QB 742

Facts	D (policemen) prevented P from passing in the direction P wished to go, but was allowed to pass in the only other direction in which he could pass; P raised action against D for false imprisonment
Issue	Completely restraint?

Reasoning	<ul style="list-style-type: none"> Partial obstruction and disturbance does not constitute imprisonment The act must completely prevent the claimant from leaving the area If there is reasonable means of egress (way of getting out), it would not be restraint
Held	No total restraint > not false imprisonment

Consider situation:

- locked in the room, left onen door open, but outside the open door there is a grizzly bear
- even if there is other choices of getting out of the situation, it should be reasonable for it not to be restrain
- as it would be no difference to leave a door open in this case and this woud possibly imprisonment)

(b) Length of Restraint

Restraint need not be for a long time.

Bird v Jones (1845) 7 QB 742.

[I]mprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time (Lord Denman CJ).

(c) (P's) Knowledge of Restraint

Does the victim have to know of the deprivation of liberty? For years, the authorities were divided. But then the highest appeal courts stepped in.

- What one is really deprived of; or having no sense that one is being restrained
- Agrument: regardless of knowledge; or

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

The law attaches **supreme importance to the liberty of the individual** and if he suffers a wrongful interference with that liberty it should remain **actionable** (Lord Griffiths).

Facts	A woman suspected involved in an army; being searched the premise & arrested;
Issue	Never told she would be confined but merely brought to a room; having no knowledge of being restrain; would it be a restrain? Lawful arrest?
Held	The person need not need to know for it to be a restrain

Note	<ul style="list-style-type: none"> Obiter in the case, but approved in Lumba <p>Murphy: right approach</p> <ul style="list-style-type: none"> e.g., ppl with mental insufficiency, or a baby; they would not have the concept but does not mean they can be denied with their human rights if not taking this approach, it would differentiate between citizens rights and liberty similar to battery: however slightest touching of another person is a battery; it is actionable per se; where harm is not an element required
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Lumba v Secretary of State for the Home Dept [2011] UKSC 12

Trespassory torts (such as false imprisonment) are **actionable *per se* regardless of whether the victim suffers any harm**. An action lies even if the victim does not know that he was imprisoned (Lord Dyson).

Note	<p>Criminal law case (do not cite this in tort law case)</p> <ul style="list-style-type: none"> principle can be reconciled recognise the idea of recognition of the principle of protecting basic human right; fundamentality of a person's liberty
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A-G v Chan Luen Yung [1989] 1 HKC 470 (criminal law case)

the fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being **possible for a person to be imprisoned in law without his being conscious of the fact**

Facts	Person having profound learning difficulties, forcibly affixed to their bed
Note	Principle of fundamentality of a person's liberty reconciled here

(d) Imprisonment by Omission?

Herd v Weardale Steel, Coal and Coke Co [1913] 3 KB 771

Facts	Miner doing things underground, not provided the facility (the lift) for him to come up to the ground; where the mine as the only means of exit; P detained in mine; D argued not under a duty to
Reasoning	<ul style="list-style-type: none"> P in breach of the employment contract by refusing the work he was assigned to; the breach of contract justified his detention

	<ul style="list-style-type: none"> • Omission: no duty to provide the facility • BUT, recognised that: but if there is duty already in place, then there can be false imprisonment for the failure to release someone • In tort: where there is obligation of D regarding the totality of
Held	D not liable
Note	Criminal law case

But what if D is under a duty to confer liberty on P (*eg*, at the end of his shift)?

- if there is duty already in place, then there can be false imprisonment for the failure to release someone

R v Governor of Brockhill Prison, ex p Evans (No 2) [2001] 2 AC 19

Facts	Prison governor restrained prisoners beyond their term
Held	the tort would be committed where there was an obligation on a prison governor to release a prisoner after they'd served the totality of their sentence
Note	Criminal case

G. **Damages**

Given that battery, assault and false imprisonment are all actionable *per se*, the compensatory damages that they yield may not come to a very significant amount.

How much can one, for example, realistically expect for an unwanted kiss?

- Puzzle 1: intentionality in play
 - Different damages for deliberate wrongdoing compared to non-deliberate ones?
 - Would the law do enough if the remedies are the same?
- Puzzle 2: damages where there is no harm
 - Nominal damages

On the other hand, these torts do yield **aggravated** and (potentially) **exemplary** damages, (for the rules on which see later notes).

H. Defences

1. Self-defence

One is perfectly at liberty to **defend oneself when under attack by another person**. So, if A swings a punch at B, B may respond in kind. But things aren't entirely straightforward.

(a) Proportionality

D's response must be **reasonable** and **proportionate**.

Cockcroft v Smith (1705) 2 Salk 642

[A man may not] in case of a small assault, give a violent or an unreasonable return.
(Holt CJ.)

What constitutes reasonable force by way of response is a **question of fact**.

Facts	Initial perpetrator points his finger into D's eyes, D bites the tip of the finger
Held	Unreasonable & disproportionate response
Note	No concrete answer of what is acceptable; what is determined reasonable is context-dependent; look at the facts <ul style="list-style-type: none">- e.g., one reacting to the treat about future outcome, might not be proportionate at time of the person issuing the treat<ul style="list-style-type: none">• Proportionality is about temporality (response to here and now), the magnitude of the response

(b) Mistakes as to a Threat and Self-defence

Since self-defence can be used **in anticipation of a battery**, what happens when A genuinely thinks B poses a threat and strikes in anticipation of a battery that would never actually come, because A was mistaken about the existence of a genuine threat?

- Anticipatory self-defense, by the one who first strike; as response to a mistaken, perceived attack
- Can be response of a perceived act (anticipation of an act); can be the one who strike first but can still be a defence

Ashley v Chief Constable of Sussex [2008] 1 AC 962

Facts	<ul style="list-style-type: none"> Police came to P's house in the dead of night; disturbed by the forced entry and naked when police stomped into the room; shot Ashley Defense of police: believed she was armed (that she is a known user of handguns) and she was a treat, as the defense to land the first blow
Reasoning	<ul style="list-style-type: none"> Not enough to be a defense; Must honestly and reasonably believed that the person poses a treat where court does not accept that this is a reasonable belief, as that was at night Ashley in bed TEST: Whether or not you could ever mistaken the treat where there is no real threat; Q left open: <u>court is not sure whether it is ever actually possible to satisfy this test where there is no real threat</u>
Held	Ashley has an arguable claim of assault and battery in tort
Note	<ul style="list-style-type: none"> Criminal law (equivalent defense noted in court): honestly believe can be a defense; (mens rea to be proven, aim to punish the wrong man) <u>But in tort this "genuine belief" is not enough</u>: two parties, both interests at stake; would be wrong to just side one party bc of lack of mental element (if honest belief is a self-defense for the police it would be unfair to the innocent party Ashley) Be careful when reading cases, as there would be different underlying principles

- Q: can one reasonably believing so be a defense? The test of
- Change of facts: consider Ashley armed with an unloaded gun
- Murphy: the test is easy to satisfy (reasonable to think that people who hold the gun would be a loaded gun to pose real danger)

2. **Lawful Arrest**

(a) **Common Law Power**

There is a power vested in anyone—police and citizens alike—to **effect a lawful arrest of anyone committing a breach of the peace**.

- Common law power and statutory power sit along side with each other in lawful arrest;
- Common law comes first (historically speaking, to break down the law apart from statutory power)

R (Laporte) v Chief Constable of Gloucestershire [2007] 2 All ER 529

every citizen in whose **presence a breach of the peace** is being, or reasonably appears to be about to be, committed has the **right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so**; and those **reasonable steps** in appropriate cases will include detaining him against his will.

Facts	<ul style="list-style-type: none">- P a peace protestor complained about war in Iraq; police of the view to prevent the protest turning ugly > took away protestors; returned to origin with police escort;- P claimed peaceful protest and no breach of peace > that this is not lawful arrest but false imprisonment
Issue	Concern power of arrest of police in concern of common law arrest
Reasoning	No general power to do whatever was reasonable in the circumstances; the duty to prevent breaches of the peace must be kept within proper bounds
Held	Police's actions were disproportionate
Note	If the reason is to prevent the actual breach of peace

Notably, upskirting photography has repeatedly been treated as as **an act amounting to, or likely to cause, a breach of the peace many times.**

HKSAR v Chan Kwai Hung [2010] HKCU 1577

There were a number of people in the shop at the time of the appellant's activities anyone of whom could have discovered the appellant's activities. If they had done so I am satisfied that **the effect of the appellant's conduct would have caused sufficient outrage** to make it likely that one or more of them would not confine themselves simply **to the force reasonable to effect the arrest of the appellant.**

Facts	In a shop; D taking upskirt photo, accused of behaving not socially appropriate
Issue	Issue of power of arrest
Held	D behaving in this fashion > likely to trigger violence response if someone seeing this and cause possible breach of peace

(b) **Arrests under Statute**

Statutory arrests can be placed in two broad camps: **police arrests** and **citizens' arrests**.

- General idea that under certain circumstances that citizen and police have the power of arrest (details are not the focus here)

(i) **Police arrests**

The police have two sets of arrest powers: (the more forgiving) arrests **under warrant** *and* **arrests without warrant**.

Police arrests under warrant

Magistrates can grant a power of arrest by s 31 of the Magistrates' Ordinance (Cap 227).

If a police officer acts in accordance with a power of arrest thus granted, that officer is **not responsible for any errors or irregularities in the warrant**: s 60 of the Police Force Ordinance (Cap 232).

Thus, if the basis for the arrest is flawed, the police officer is not liable for what would otherwise be a battery.

- Does not matter for the purpose of defense, if warrant is granted on flawed basis, as long as there is a warrant, the arrest would be lawful
- The mistake by the Magistrate would be irrelevant: police still obtain the power to arrest even if the the ground for the grant is not rooted

Police arrests without warrant

The police also have (along with everyone else) a general power of arrest.

The Criminal Procedure Ordinance (Cap 221), s 101(2)-(5) confers this general power.

- (2) Any person may arrest without warrant any person whom he may **reasonably suspect of being guilty of an arrestable offence**.
- (3) Any person to whom **any property** is offered to be sold, pawned, or delivered, and who has reasonable ground to suspect that any arrestable offence has been or is about to be committed on or with respect to such property, may, and, if he can, shall, without warrant, **apprehend the person** offering the same and **take possession of the property** so offered.
- (4) Every person who finds any person **in possession of any property** which he, on reasonable grounds, suspects to have been **obtained by means of an arrestable offence** may arrest such last-mentioned person without warrant and take possession of the property.
 - Arrestable offence: offences that trigger the power of arrest
 - Offences regarding stolen goods

Loosely, then, police officers can arrest people committing crimes or doing things that they **reasonably believe to be crimes**.

NB This very general power of arrest conferred on the police is supplemented by further, more specific powers of arrest, search and seizure of property granted by the Police Force Ordinance (Cap 232), s 50.

The details of these provisions are too complex/detailed for our purposes.

Citizens' powers of arrest

Citizens enjoy exactly the same general power of arrest without warrant under the Criminal Procedure Ordinance. But there is an important qualification that applies to citizens.

It is contained in section **101(5)**:

- (5) Every person who arrests any person under any of the provisions herein contained shall (if the person making the arrest is not himself a police officer) **deliver the person so arrested, and the property, if any, taken possession of by him, to some police officer** in order that he may be conveyed **as soon as reasonably may be before a magistrate**, to be by him dealt with according to law, or himself convey him before a magistrate, as soon as reasonably may be, for that purpose

In other words, loosely, the citizen, **has to hand the arrestee over to a police officer or a magistrate** where reasonably practicable.

- duty to transmit the person being arrested to police officer or to a magistrate as soon as reasonably

NB Section 101A makes it clear that **reasonable force may be used** in effecting arrests.

- Subsequent admentment
- Requirement of **reasonableness**, specifically under common law but not statute

Crawley v A-G [1987] HKLR 379

You look at **all the circumstances** of the case and ask yourself **whether reasonable precautions or unreasonable precautions or unnecessary measures are taken...** the officer having custody of the prisoner must always consider, and be allowed and encouraged to consider, whether the special circumstances of the particular case justify or demand a departure from the standard procedure

Facts	Storage of food in a resto; a person handcuffed wrongly to the station?; P was suspected of committing an offence; P claimed this is excessive force
Held	Force used affecting the arrest was excessive ; having power to arrest does not mean all kind of force can be used in effecting it <ul style="list-style-type: none">- Excessive force: context-dependent- e.g., need not to handcuff an old lady

Note	Situation someone might just look like he has done an arrest; Q of reasonably; e.g., someone merely helping to hold the stolen good but it would be reasonable to suspect that he is the thief, it would still be lawful arrest
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Important Note

If the grounds for an arrest (or, say, a police search of an individual) are not made out, **any touching will be a battery** and the arrestee may lawfully resist that arrest.

A-G v Kong Chung Shing [1980] HKLR 533

Reasoning	Arrest without warrant is lawful if the suspicion is based on reasonable grounds; <u>BUT if there is no reasonable ground to support the suspicion</u> , it would be an unlawful arrest
Held	no reasonable grounds to support any suspicion on the part of the arresting officer

3. Consent

(a) General Considerations

Under common law, if A **consents (expressly or impliedly) to B's touch** (eg, ordinary physical contact in a football match) A cannot sue B.

Chan Kin Bun v Wong Sze Ming [2006] HKCU 429

By willingly taking part in the game, Mr Chan impliedly consented to any contact which could be reasonably expected to occur in the course of the game. (Saunders J.)

If A consents to the risk of a touch from B (eg, a careless foul in football match) there can be **no battery**.

- (1) **Consent generally operates as defense** (sometimes as opposition of tort of battery); where one gets consent and cannot be sued

NB Assent of the second kind is captured by the Latin maxim, *volenti non fit injuria* ("no wrong is done to one who consents").

It is often said that these are the same defence: eg, *Glofcheski*, ch 16. But that is wrong in my opinion.

- (2) Interchangeable terms in some textbooks: language of consent & non fit injuria (no wrong is done when one is assent); Murphy disagrees

Volenti can apply to negligence, but consent (strictly speaking) cannot.

(3) Why distinguishing the two terms: Distinguish the two as when things are different, we think of different name; they deserve different name

- **Consent means your agreement to a certain thing;**
 - when giving consent, there is a certainty of physical contact, agreed on the risk
 - e.g., dentist situation, giving consent to the dentist to drill your teeth, cannot sue the dentist for battery)
- **But sometimes giving consent is to avoid the risk of contact;**
 - Volenti non fit injuria: if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party
 - **voluntary assumption of risk**
 - ppl might agree on the risk to make contract with them, but does not mean that they are willing to make the contact; but merely to avoid the contact
 - e.g., consider the footballer situation: getting on the field accepting risk of contact
- In trespass tort: more sensible to be consent; vs in negligence tort: non fit injuria
 - In negligence e.g., getting on a car where the driver has a bit of alcohol; agreeing the risk of crash of car; the driver would only negligently but not deliberately crash the car -> non fit injuria fits more in this context

Note that consent is an expression of complete willingness.

From this it follows (1) P must be competent to form such a view, and (2) the view expressed must be genuine..

Problems arise in three ways:

- (i) P lacks competence;
- (ii) (ii) P's consent was procured by fraud,
- (iii) P's consent was procured by duress.

(i) Fraud

If P's consent has been obtained by fraud, then there is **no valid consent**.

Appleton v Garrett [1997] 8 Med LR 75

Facts	Dental surgery; where the dentist deliberately withheld information about the necessity of the treatment (in the knowledge that they would not have consented to the treatment had he made them aware of the facts) <ul style="list-style-type: none">- obtained consent from the patient; where the patient later found out it was not needed, later tried to claim battery
Issue	whether liability for trespass to the person was made out where consent is given under fraud

Held	lack of consent to the treatment on teeth (which in fact did not require treatment) > suffice to establish battery
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Chan Wai Hung v HKSAR [2000] 2 HKLRD 662

Facts	D claimed first aid demonstration; V defrauded & agreed; thin excuse of perpetrate a sexual assault
Reasoning	Consent accounts for nothing under fraud

(ii) Consent obtained by duress

- Not valid consent

Freeman v Home Office (No 2) [1983] 3 All ER 589

Facts	Imprisonment given medicine; no general consent given; P argued there is no valid consent given due to institutional pressures and influences they are under
Reasoning	Element of consent is to be considered
Held	No consent
Note	Weird decision?

But can this be right when consent (and the related concept of volenti) is treated as a defence?

(b) Consent to Medical Treatment

We need to treat adults and children separately because adults will—at least presumptively—be autonomous, whereas children will not.

- **Question of capacity**; difficult for the law to attach importance to the words by person in their incapacity
- E.g., young children, might not have the mental capacity to give a valid consent
- Draw distinction between adult and children

(i) adults

The idea that, in the absence of some lawful justification, treatment may not be given to an adult was stated clearly in the *F* case.

F v West Berkshire Health Authority (supra)

Every human being of **adult years and sound mind** has a right to determine what shall be done with his own body.

Facts	A 36-year-old woman having mental capacity of a minor; her mom sought a declaration from the court to the effect that it would be lawful to sterilize her
Issue	<ul style="list-style-type: none"> - whether it was lawful for a doctor to perform such an operation on a patient who is mentally incapable of giving consent - whether the court has jurisdiction to make such a declaration of legality - whether such a declaration must be sought before such an operation can be performed.
Held	Court held that operation was lawful as it is at the best interest of the daughter; consent works here
Note	Every sound man have the right to consent; *adult and sound mind* <ul style="list-style-type: none"> - Not fallen into the terms (not and adult; and not with sound mind) > touching would be battery

NB Patients cannot be expected to know the intricacies of every medical procedure. So the law takes a realistic stance.

- Not limited to written consent; can by conduct and words
- Consider situation where one consented to things that they do not understand e.g., patient agreeing to medical treatment that they do not comprehend all part
- Limit to what is conveyed: Q of how much one need to know to make the consent valid

Chatterton v Gerson [1981] QB 432

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.

Facts	Disclosing risk of a surgery, but did not realise all the risk; action based on negligence of failure to disclose all the risk (not the focus here)
Reasoning	What is proposed in broad term > consent would be valid <ul style="list-style-type: none"> - If understand the broad term and gives consent > cannot sue doct for things that go wrong on battery (as exonerated by consent) - But does not mean that cannot sue on negligence for the failure of duty they own you, to make you form a consent
Held	Valid consent, no battery; doctor fulfilled his duty of care in negligence

Tai Kut Sing v Choi Chun Kwan [2002] HKCU 311

I am not satisfied that the plaintiff has proved battery in this case ... Although it was not made clear to the plaintiff how the defendant would proceed, the plaintiff, nevertheless, willingly submitted to the defendant's treatment without making any enquiry as to what form the treatment would take. (Toh J.)

Facts	Perform procedure; P later unhappy about it
Reasoning	No battery, as P have understood the broad term of what would happen, despite not knowing the exact mechanics behind

(ii) children

In the case of children, the matter is mainly governed by common law.

- No comprehension of anything

Gillick v West Norfolk and Wisbech AHA [1986] AC 112

Facts	A woman wanted a declaration on the legality of giving contraception on teenage girl; an expectation on parents would give valid consent
Issue	the extent of the parental right to control a minor child
Held	<p>In some circumstances a minor would be able to give consent in their own right, without the knowledge or approval of their parents:</p> <ul style="list-style-type: none"> • The test: a minor will be able to consent to treatment <u>if they demonstrate “sufficient understanding and intelligence to understand fully what is proposed”</u> • Children acquired a capacity to grant a valid consent as they get progressively older that would happen gradually • Capacity of what would be performed will be acquired with increase of their age; a 13-year-old have the capacity <ul style="list-style-type: none"> - Some are matters of complexity of doctor’s - Not uncommon for parent to consent on things perform on children; <ul style="list-style-type: none"> • Application for a declaration was dismissed

Re P (A Minor) (Wardship: Medical Treatment) [1994] 1 HKLR 60

Facts	Court grant consent to a risky procedure; despite low successful rate
Note	Court have the capacity to grant consent for children, rationale to protect children

4. Necessity

- defense of necessity
- a separate defense if a doctor ask in the situation where it is necessary, in interest of a patient, then it is not an offence

(a) Common Law

At common law there exists a **defence of necessity**.

F v West Berkshire AHA [1990] 2 AC 1

Upon what principle can medical treatment be justified when given without consent? We are searching for a principle upon which, in limited circumstances, recognition may be given to a need, **in the interests of the patient**, that treatment should be given to him in circumstances where he is (temporarily or permanently) disabled from consenting to it. It is this criterion of a need which points to the principle of necessity as providing justification. (Lord Goff).

Facts	See above: mother sought declaration on operation on her daughter
Held	the operation was lawful as it was in the best interests of the daughter

(b) Mental Health Ordinance (Cap 136), s 59ZA

Where someone is mentally incapacitated for the purposes of this Ordinance, treatment may be given

- (a) to **save their life**
 - (b) **prevent damage** or **deterioration** in their mental or physical health
 - (c) **effect an improvement** in their mental or physical health
- statue giving entitlement to act
 - align with the concept of treatment to patient's best interest

NB The second and third bases won't always entail necessity. But they do correspond to the best interests idea that was aired in *F v West Berkshire*. (And it was that case that inspired this provision.)

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