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SUPREME COURT OF VICTORIA

HORKIN v NORTH MELBOURNE FOOTBALL CLUB SOCIAL CLUB

Brooking J

22 July 1982 — [1983] VicRp 12; [1983] 1 VR 153

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES FOR ASSAULT & BATTERY – WHETHER CONTRIBUTORY NEGLIGENCE AVAILABLE AT COMMON LAW OR UNDER STATUTE IN AN ACTION FOR BATTERY.

HELD: That contributory negligence was not at common law and is not under the statute (Wrongs Act 1958, S25) available in an action for battery,

CLAIM: The Plaintiff, Mr Horkin (P) brought an action for damages for assault and battery against The North Melbourne Football Club Social Club (D). The statement of claim contained also a claim for damages in negligence in relation to the same incident, to be dealt with only if the claim for battery did not succeed. P. put his case as one of battery; not relying on any assault in the technical sense.

FACTS: P, a Carlton supporter, attended a football match between North Melbourne and Carlton at North Melbourne in 1978. After the match, P, who had a pass issued by D. entitling him to enter certain areas, attended at the North Melbourne Football Club Social Club. At some stage he was apparently in a room where he was not entitled to go. After leaving this room he went to where the incident giving rise to the action occurred, in or near the foyer, a part of the premises comprehended by his licence from D.

Between 12.30 p.m. and 7 p.m. P. had consumed a considerable amount of intoxicating liquor. His Honour was satisfied that at the time of his removal from the premises, P. was intoxicated and argumentative, speaking in a loud voice and wanted to go into the "after-match room" to see "Jezza". The court was satisfied that when P. was intercepted, at this time that D's employees acted with moderation in doing so and that they told him more than once that he had had enough to drink and should leave. He refused to leave and tried to force his way past S., one of D's employees, and it was only after this that W. and S. took him by the arms and marched him to the outer door. They used no more force than was necessary. P. was at this stage a trespasser and up to this point what would otherwise have been a battery was a justifiable use of reasonable force to remove him from the premises.

There was dispute about how P. sustained the injury to his elbow. Was he propelled forward by D's servants, or did he, having walked through the doorway later stumble or in some other way accidentally fall into a rockery? His Honour was satisfied that P., having reached the doorway, was violently propelled through it by one or more of D's employees and this caused him to fall onto the concrete and dislocate his elbow, that this use of violence was unlawful as not being necessary for the removal of P. from the premises. No issue was raised as to D's responsibility for the acts of its employees. It was found that P. was the victim of a battery for which D. was in law responsible. Counsel for P. did not ask for P's claim to be considered in negligence.

DEFENCE: D. set up contributory negligence only in relation to the claim made in negligence Counsel for D. submitted that contributory negligence can lead to an apportionment under the *Wrongs Act* where P.s claim is for battery. His Honour dealt first with the facts upon the assumption that contributory negligence was available to reduce damages in an action for battery, and found that by his behaviour P. failed to take reasonable care for his own safety and that this failure contributed to his injury. His actions brought about the situation in which D.'s employees acting lawfully by way of removing a trespasser found it necessary to use, and did use, force to expel him by marching him to the door. He created a situation in which the use of force to expel him was the natural and lawful consequence of his own misbehaviour. The degree of force used was,

in the end, after he reached the door unlawful, and was not the necessary consequence of his own condition and behaviour, but a causal connection was shown between his own negligence and his injury. Assuming apportionment was applicable His Honour would have apportioned responsibility 70% to D 30% to P.

QUESTION: Does contributory negligence operate to reduce damages in an action for battery? Trespass to the person may be either intentional or negligent, and accordingly there can be a negligent battery so far as the law of tort is concerned. It was found the application of force to P.s body constituting the battery was "intended". "Fault" is defined in s25 of *Wrongs Act* 1958 as "negligent breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence". If the words "negligence breach of ... liability in tort", called the first limb of the definition, apply to a plaintiff, then it would in the present case be necessary to consider whether the trespass to land of which P. was guilty (for he had become a trespasser) or the battery he committed by trying to force his way past S. was a cause of the damage which he suffered. If, on the other hand, the first limb of the definition was inapplicable to a plaintiff, the present P.s damages were liable to reduction under the statute only if at common law contributory negligence afforded a defence to an action for battery. The view of His Honour was to treat the first limb of the definition as concerned only with defendants, adopting the opinion of Herring CJ and Barry J in *Winter v Bennett* [1956] VicLawRp 94; (1956) VLR 612, 622; [1957] ALR 15; and supported by the opinions expressed in *Quinn v Burch Bros (Builders) Ltd* (1966) 2 QB 370, 378; [1966] 2 All ER 283; 1 KIR 9; [1966] 2 WLR 1017; *AS James Pty Ltd v Duncan* [1970] VicRp 90; (1970) VR 705, 726; *Venning v Chin* (1974) 10 SASR 299, 316-7; (1975) 49 ALJR 378, per Bray CJ. It followed that D. in the present case, could not rely on the torts of trespass to land and battery committed by P. to found an apportionment and that apportionment was not possible unless at common law the defendant to an action for battery could set up contributory negligence.

His Honour agreed with the views of Gray CJ and Jacobs J in *Venning v Chin* (*supra*) that the common law afforded the defence of contributory negligence to a negligent defendant sued in trespass in respect of a highway accident, and with Diplock J in *Fowler v Lanning* (1959) 1 QB 426, 433-4; [1959] 1 All ER 290; [1959] 2 WLR 241, that at common law contributory negligence was an answer in all cases of unintentional trespass, on or off the highway.

His Honour considered the unresolved question of whether the defence of contributory negligence formerly availed, and now by statute avails, the intentional trespasser. His Honour discussed at length the authorities referred to in Australia, England, Commonwealth countries and the United States, the old books on pleading & practice and textbooks on tort, old and recent Provocation as a defence to an action for battery was discussed also.

Finally, His Honour discussed the question of causation and stated that once it is accepted (as it must in Australia, having regard to *Alford v Magee* [1952] HCA 3; (1952) 85 CLR 437; [1952] ALR 101) that contributory negligence is not wholly to be referred to the theory of causation, it becomes easier to ground in principle the view that contributory negligence affords no defence at common law to an action for battery. Given that one may consider whether it is fair or reasonable to regard the plaintiff as in any real sense the author of his own harm (*Alford v Magee* at p461), it is easy to understand why the law should, as a matter of policy, withhold the defence in cases of intentional as opposed to negligent trespass to the person and to say that the reason why contributory negligence is no defence where the defendant intended to inflict injury is to be found in the difference between the fault of the defendant and that of the plaintiff; the difference is not merely in degree but in kind, and the social condemnation attached to the fault differs markedly. Similarly, Glanville Williams suggests that the exclusion of the defence in cases of intentional wrong doing is both a penal provision, aimed at repressing conduct flagrantly wrongful, and the result of the ordinary human feeling that the defendant's wrongful intention so outweighs the plaintiff's wrongful negligence as to efface it altogether. His Honour held that contributory negligence was not at common law and is not under the statute available in an action for battery.

DAMAGES: Where the facts warrant it, exemplary damages may be awarded for battery: *Fontin v Katapodis* [1962] HCA 63; (1962) 108 CLR 177; [1963] ALR 582; 36 ALJR 283; *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118; (1966) 40 ALJR 124; but did not consider the case as an appropriate one for an award of either exemplary or aggravated damages, having regard to the view he formed of the circumstances of the battery.