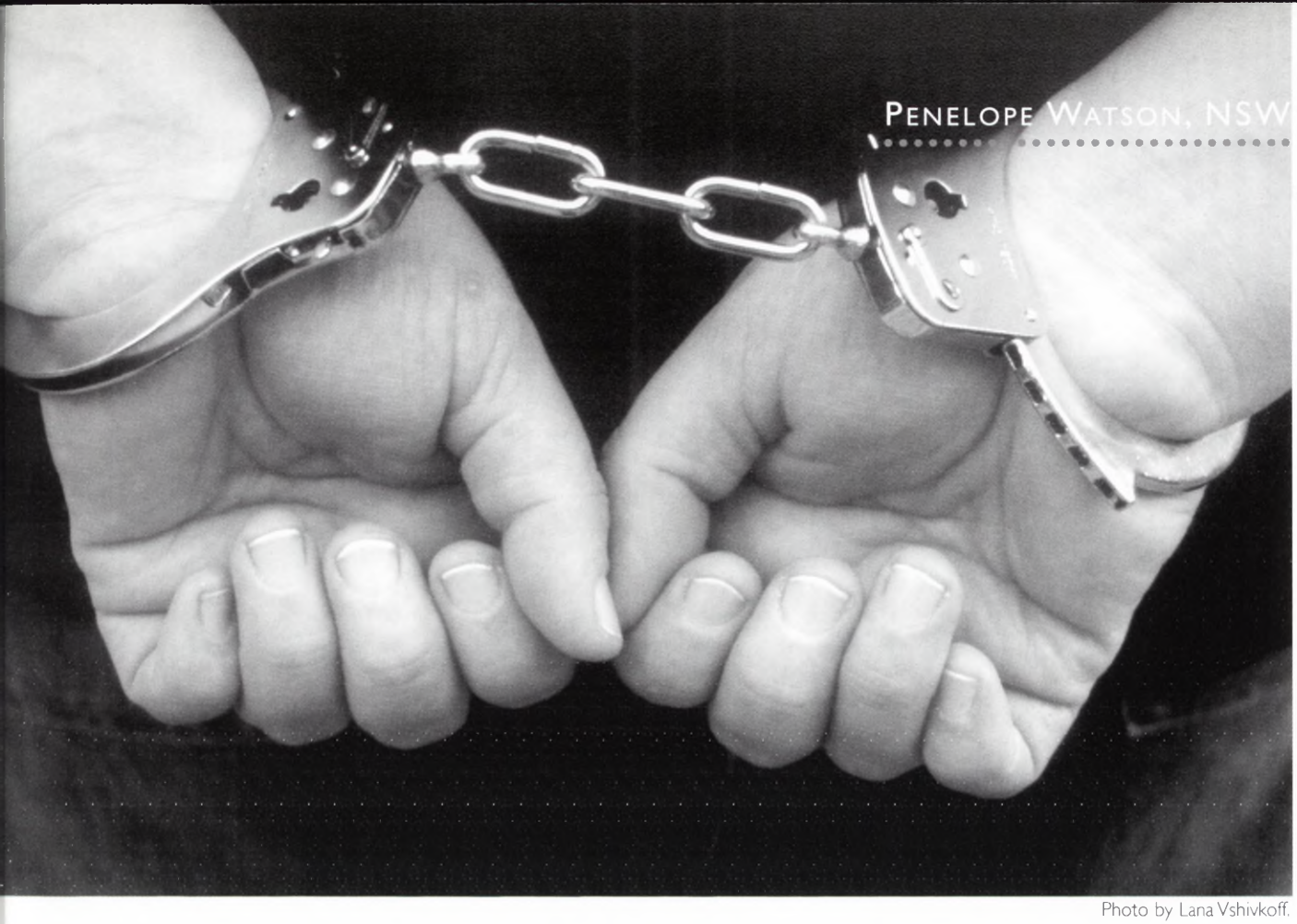


PENELOPE WATSON, NSW

Photo by Lana Vshivkoff.

Vi et Armis: Law of trespass to the person

This article provides a brief overview of the law of trespass to the person and highlights some of the more topical and interesting modern applications for this ancient group of torts.

Penelope Watson is a Lecturer in the Division of Law at Macquarie University in Sydney **PHONE** (02) 9850 7000
EMAIL penelope.watson@mq.edu.au

Trespass to the person consists of the separate intentional torts of assault, battery, and false imprisonment. Ingredients common to all three are the requirements of fault (either intention or negligence), directness, and lack of consent or lawful justification.

Trespass is actionable *per se*, so that actual harm need not be proved. Battery requires physical touching or interference with the plaintiff's body, assault must give rise to an apprehension of imminent harmful or offensive contact, and false imprisonment requires a deprivation of liberty amounting to a 'total restraint'.

HISTORICAL BACKGROUND

Trespass, the French word for *transgressio* or wrongdoing, was a group of 'peremptory' writs or forms of action which emerged in the common law around the end of the twelfth century. Early forms were limited to trespasses done 'with force and arms against the King's peace' (*vi et armis et contra pacem regis*), that is direct, forcible interference with the person, ▶

goods, or land of another, including assault, battery and false imprisonment.

This original peacekeeping function of trespass explains its partial similarity to criminal law. 'Trespass on the case' developed later, allowing recovery for consequentially inflicted injuries. Trespass was applied to all direct physical contacts, even if not forcible.

As a result of industrialisation during the nineteenth century and the multiplicity of injuries arising from workplace and running down accidents, the roles of trespass and action on the case altered.

Williams v Holland[1] allowed plaintiffs to choose between the two where an injury was direct but not wilful, so that trespass became predominantly a remedy for intentional wrongs.

Procedural reforms in the United Kingdom in the nineteenth century abolished the forms of action. However, as Maitland so famously remarked, 'the forms of action we have buried, but they still rule us from their graves'.[2]

The intentional torts, especially in Australia, are in many ways still bound by their historical roots, and differ in important respects from the more modern torts derived from actions on the case. Trespass has developed along separate lines in Australia and England.

ELEMENTS OF TRESPASS

Directness

Arguably, the directness requirement was an 'accident of history...elevated by eighteenth century misunderstanding'[3] into a rule. Whether this is true or not, 'the invariable principle...is that where the injury is immediate on the act done, there trespass lies; but where...consequential, there the remedy is in case.'[4]

The much quoted example of the log thrown onto the highway, differentiating between being hit with the log (trespass) and falling over it (case), illustrates the distinction.[5] However, this distinction has been frequently criticised.

In *Scott v Shepherd*, a lighted squib (firecracker) was thrown into a crowded marketplace. Two intermediaries each picked it up and threw it on before it exploded, causing serious injury. This was held to be direct because they acted from 'a compulsive necessity for their own safety and self-preservation'.

Yet in *Hutchins v Maughan*,[6] the plaintiff drover failed to establish directness when his dogs (chattels) died as a result of eating poisoned baits laid on the defendant's land. Similarly, oil discharged from a stranded tanker and carried by the tide onto the shore was held not to constitute direct interference.[7]

Fault

Since *Weaver v Ward*,[8] it has been clear that 'no man shall be excused from trespass...except it may be adjudged utterly without his fault'. Trespass 'does not lie if the injury...although direct...was caused unintentionally and without negligence'.[9]

For the purposes of battery, an intentional, wilful or voluntary act is one which the plaintiff 'meant to do',[10] irrespective of any intention to injure.

In fault, the principle issue is the role of negligence, while associated questions concern onus of proof. The Court of

Appeal decided in *Letang v Cooper* that 'the distinction between trespass and case is obsolete'.

'Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally…[where injury is inflicted unintentionally] his only cause of action is in negligence.'[10]

In *Williams v Milotin,* the High Court said 'there is no difficulty in distinguishing between [negligence and trespass] either notionally or historically… [T]he two causes of action are not the same now and they never were… The essential ingredients in an action of negligence for personal injuries include the special or particular damage – it is the gist of the action – and the want of due care. Trespass to the person includes neither.'[12]

Actionable *per se*

All trespass is actionable *per se*, reflecting the great importance attached to bodily integrity and property in the early common law. While actual damage is not part of the cause of action, it will of course be relevant in the calculation of damages.

REVERSED ONUS OF PROOF

In *Fowler v Lanning*, Diplock J referred to a 'formidable body of academic opinion', but no judicial authority, supporting the view that highway cases were an 'exception to a previously existing general rule that the onus of proof of absence of negligence… in…trespass to the person lies upon the defendant.' Accordingly, he held that the onus of proving negligence lay with the plaintiff.

This was consistent with authority in the United States and Canada, and was followed in New Zealand, but rejected in Australia in *McHale v Watson.*[13]

Windeyer J said: 'I think the latter view [onus on defendant] is correct. I take the law to be as stated in *Blacker v Waters*[14] and *Williams v Milotin.* I have not overlooked the learned discussions by Diplock J in *Fowler v Lanning.*'

Bray CJ held in *Venning v Chin*,[15] following *McHale,* that 'in trespass generally the onus lies on the defendant to disprove negligence, but… highway accidents are an exception to this rule and [there] the onus is on the plaintiff to prove either intention or negligence.'

In *Secretary, Department of Health and Community Services v JWB and SMB*,[16] McHugh J said that 'consent may make the act [contact with the body of the plaintiff] lawful, but if there is no evidence on the issue, the tort [of battery] is made out'.

In *Platt v Nutt*, Kirby P, dissenting, argued: 'The only way of restoring a satisfactory conceptual approach and consistency…is to bring other…cases into line with the law now clearly established [in highway cases]… [A] more coherent ▶

approach...can be found by resort to the general rule...that those who assert must prove.'

ASSAULT AND BATTERY

Assault and battery both have all the hallmarks of trespass. A traditional definition of assault is 'an overt act indicating an immediate intention to commit a battery, coupled with the capacity of carrying that intention into effect.'[17] Assault is unusual in that it allows recovery for a purely emotional response in the absence of physical invasion.

Cases such as *Tuberville v Savage*,[18] involving conditional threats, fail because the condition makes it plain that there is no present intention to effect the threat. A future threat may still constitute assault, as in *Zanker v Vartzokas*.[19] There the defendant's threatening words, coupled with his false imprisonment of the woman in a fast moving car, were sufficient to instil a continuing fear, 'having as much effect in an hour or so as it has at the moment of utterance'.

The significance of the false imprisonment, clearly a separate offence, was that it 'put [the defendant] in a position of dominance and in a position to carry out the threatened violence'.

In *Barton v Armstrong*,[20] a threat conveyed by telephone was held to be assault, notwithstanding the supposed rule that words alone cannot constitute assault. Taylor J regarded the test as requiring 'impending', rather than immediate or imminent, contact.

The relevant contact in battery has been portrayed as 'angry, revengeful, rude or insolent',[21] and more recently as 'hostile'.[22]

It is clear, however, that malice is not an element, given the fundamental principle, plain and incontestable, that every person's body is inviolate, and that any touching of another's person, however slight, may amount to a battery.[23]

In *Collins*, a police officer who took hold of the plaintiff's arm was held to have committed battery, highlighting the important role trespass can play in the protection of civil liberties. Contact need not be with the defendant's person, or even a weapon or object. Recent successes against tobacco smokers in battery, by plaintiffs objecting to forced passive smoking, demonstrate this.

As explained in *Collins*, accidental contacts such as jostling in crowds, which make up 'the exigencies of everyday life', are not battery, either because there is implied consent, or because they fall 'within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life'.

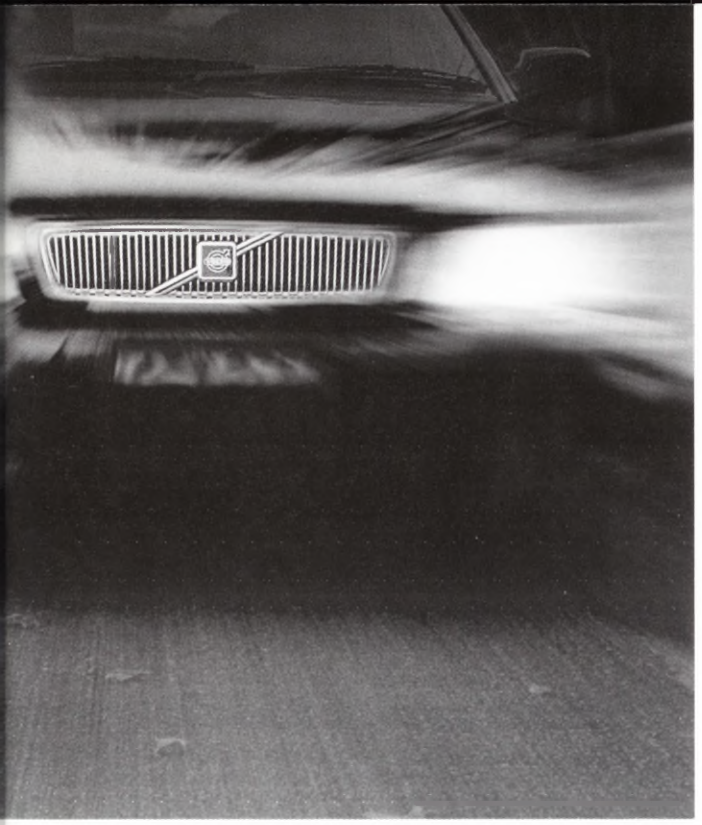
Injunctions Restraining Assault and Battery

Trespass to person is interesting for its possible use as a weapon in domestic violence and sexual abuse and harassment cases. Damages are obviously of limited utility against uninsured family members, and in contexts of ongoing violence, but injunction may offer a way forward.

In *Egan v Egan*,[24] followed in *Zimitat v Douglas*,[25] Oliver J said: 'I cannot see any logical reason why, where there is a clear threat of further assault – against the background of a clear history of assaults...this court should be powerless to interfere...by way of an injunction.'

Egan dealt with an application by a mother against her violent son, while *Zimitat* concerned de facto spouses. In *Zimitat*, Hoare J noted the House of Lords' view in *Gouriet v Union of Postal Workers*[26] that ordinarily an injunction is not granted to restrain criminal acts. However, he pointed out that injunctions are freely awarded to restrain property trespasses even where crimes are involved.

An attempt to use an *ex parte* interim injunction to prevent assault failed in *Corvisy v Corvisy*,[27] although it was accepted that jurisdiction exists in NSW by virtue of section 66(1) of the *Supreme Court Act* 1970 (NSW).



Similarly in *Parry v Crooks*,[28] King CJ accepted that power to grant injunctions extended in principle to all torts, but said it should not be exercised to restrain future assault, except in the 'most exceptional circumstances.' Zelling J, dissenting, would have granted the injunction.

The 'exceptional circumstances' rule was discarded by the United Kingdom Court of Appeal in *Korasandjian v Bush*.[29] This may offer some hope to Australian plaintiffs, despite the House of Lords' rejection of the decision on other grounds.

FALSE IMPRISONMENT

False imprisonment relates to 'total restraint' on the plaintiff's liberty or freedom of movement, without lawful authority. As the 'gist of the action...is the mere imprisonment', the restraint will be unlawful unless the defendant proves otherwise.[30]

Less than total obstruction of movement will suffice as a defence,[31] so the question becomes was there reasonable means of escape?

In *Zanker* and *Burton v Davies*,[32] jumping from a fast moving car was held not to be reasonable means of escape, nor was swimming ashore from a boat in *R v Macquarie*.[33] However, paying a small fee to exit a wharf, or waiting for the next ferry, was reasonable means in *Balmain New Ferry Co Ltd v Robertson*.[34]

Physical confinement or force need not be present, as long as there is 'complete submission ...to the control of [the defendant]'[35] so that the plaintiff's will is 'effectively overborne'.[36] Here, the plaintiff's reasonable belief is the key.

Even in situations where the plaintiff is unaware of restraint, false imprisonment could still exist. However, no more than nominal damages would be available.[37]

The act of imprisonment must be the act of the defendant or their agent, or the defendant must be active in promoting and causing the imprisonment.[38]

Where wrongful arrest is alleged, as in *Myer Stores Ltd v Soo* and *Dickinson v Waters Ltd*, there will often be a choice between suing in trespass (false imprisonment) or malicious prosecution. False imprisonment is preferable because it has all the advantages of trespass, whereas malicious prosecution is 'held on tighter rein' than any other tort.[39]

Trespass is a vehicle for testing and protecting rights and liberties.

AGGRAVATED AND EXEMPLARY DAMAGES

'Damages in false imprisonment are generally awarded not for a pecuniary loss, but for a loss of dignity, mental suffering, disgrace and humiliation. Any deleterious effect on the plaintiff's health will also be compensated... False imprisonment by its nature gives rise to aggravated damages.'[40]

At common law, all forms of trespass may result in exemplary (punitive) or aggravated (compensatory) damages. ▶

Section 21 of the *Civil Liability Act* 2002 (NSW) prohibits the award of exemplary and aggravated damages for personal injury where the causal act or omission is negligence. Negligent trespass causing personal injury could be caught by the provision if the courts do not contain the operation of the Act to the tort of negligence. Clearly, section 21 could not apply to any form of intentional trespass, nor to negligent false imprisonment.

Aggravated damages for false imprisonment may result from persistence in the accusation and assertion of facts. Absence of apology and failure to admit mistake are also relevant.

Where there is more than one tortfeasor, malice must be proved against each, both for aggravated and exemplary damages.[41]

The leading Australian case on exemplary damages is *Lamb v Cotogno*,[42] which permits exemplary damages to be awarded in negligence. *Fontin v Katapodis*[43] demonstrates that they can be awarded in assault and battery, and that provocation may reduce exemplary damages but cannot affect compensatory damages.

All trespass is actionable per se, reflecting the great importance attached to bodily integrity and property.

DEFENCES TO TRESPASS

Defences to trespass are consent, necessity, self-defence, and legal authority.

Consent

A valid consent consists of three elements: volition, information and capacity. Some controversy exists as to whether lack of consent is an aspect of the cause of action in trespass, or operates as a defence.

In Canada and Australia, the onus of negativing consent rests on the defendant, but the opposite is true in England. Consent may be expressed or implied, oral or written, and will often be implied from conduct.[44] Written consent forms are not conclusive evidence.[45]

Australia, England and Canada have rejected the United States doctrine of 'informed consent'. In Australia, doctors need only inform patients 'in broad terms' of the nature of the procedure.[46] For most adults, competence is presumed, but this is not the case for minors and mentally ill or intellectually impaired adults.

Gillick v West Norfolk Area Health Authority,[47] approved in Australia in *Secretary, Department of Health and Community Services v JWB and SMB*,[48] establishes the law on children's consent.

In the sporting context, consent issues usually relate to the degree of force used in contact sports. *Volenti non fit injuria*

does not apply free of limitations. Cases such as *McNamara v Duncan*[49] and *Guimelli v Johnson*[50] demonstrate that players do not consent to blows that are both deliberate and outside the rules, although commonly encountered infringements of rules may fall within implied consent.

In *Pallante v Stadiums Pty Ltd (No 1)*,[51] it was suggested there is a distinction in boxing between blows struck in hostility with the intention to inflict substantial physical injury, and blows struck predominantly as a matter of skill in accordance with rules designed to minimise injury. Outside the ring, a consenting participant in an unlawful fight has no action in trespass.[52]

Necessity

Necessity is a defence to trespass where the reasonable person perceived a situation of imminent danger and took steps reasonably necessary in the circumstances.[53]

'The safety of human lives belongs on a different scale of values from the safety of property.'[54] What is reasonable is a question of fact. Squatting is not a reasonable response to homelessness.[55] And neither cannibalism[56] nor throwing others overboard[57] is a reasonable response to being cast adrift in a lifeboat.

Emergency medical treatment of patients is justified by necessity, unless there is evidence of refusal of consent. Force-feeding a suffragette was held not to constitute battery in *Leigh v Gladstone*,[58] although today it would seem that any such action could only be justified pursuant to statute.

Self-Defence and Defence of Others

'It is both good law and good sense that a man who is attacked may defend himself,...but may only do what is reasonably necessary.'[59] Reasonable force will depend on the circumstances. Relevant factors include the possibility of alternatives to force, whether the most reasonable method of resistance was selected, whether the defendant's act went beyond the limits of defence into revenge, whether the violence continued after the danger had passed, and whether the attack was violent or reasonably anticipated to be so.[60]

Legal Authority and Lawful Arrest

Trespass can play a powerful role in protecting civil liberties and acting as a watchdog on police use of power. Issues under this defence tend to turn on the validity or applicability of the power relied upon and need not be discussed further here.

CONCLUSION

Trespass is a group of torts with a great deal of modern relevance in situations as diverse as threatened sexual assault, protection of civil liberties, medical treatment, sport, ordinary physical altercations, passive smoking, domestic violence and many others. The fact that it is actionable *per se* makes it particularly suitable as a vehicle for testing and protecting rights and liberties.

The reversed onus of proof can make trespass a more compelling choice than negligence in suitable cases. Its deep historical roots still shape trespass, in ways that have allowed it to adapt well to modern demands. PL

Endnotes: **1** (1833) 10 Bing 112. **2** Maitland (1909) *Forms of Action*, at 296. **3** J H Baker (1979) *An Introduction to English Legal History*, 2nd ed. **4** *Leame v Bray* (1803) 3 East 593 at 602-3. **5** *Scott v Shepherd* (1773) 2 Wm Bl 892 at 894; endorsed in *Leame v Bray*. **6** [1947] VLR 131 (SC). **7** *Southcorp Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182 (CA) at 195-6. **8** (1616) Hob 134. **9** *Fowler v Lanning* [1959] 1 QB 426 at 439. **10** *McNamara v Duncan* (1979) 26 ALR 584 at 587. **11** *Letang v Cooper* [1965] 1 QB 232. **12** (1957) 97 CLR 465 at 473. **13** (1964) 111 CLR 384. **14** (1928) 28 SR (NSW) 406. **15** (1974) 10 SASR 299. **16** (1992) 175 CLR 218. **17** *Clerk & Lindsell*, 12-12. **18** (1669) 1 Mod 3. **19** (1988) 34 A Crim R 11. **20** [1969] 2 NSWR 451. **21** Hawkins (1824) *Pleas of the Crown*, 8th ed. **22** *Wilson v Pringle* [1987] QB 237. **23** *Collins v Wilcock* [1984] 1 WLR 1172. **24** [1975]Ch 218. **25** [1979] Qd R 454. **26** [1978] AC 435. **27** [1982] 2 NSWLR 557. **28** (1981) 27 SASR 1. **29** [1993] QB 727 (CA). **30** *Myer Stores Ltd v Soo* [1991] 2 VR 597 (AD) at 599. **31** *Bird v Jones* (1845) QB 742. **32** [1953] St R Qd 26. **33** (1875) 13 SCR (NSW) 264. **34** (1906) 4 CLR 379. **35** *Symes v Mahon* [1922] SASR 447. **36** *R vGarrett* (1988) 50 SASR 392 (FC). **37** *Meering v Graham-White Aviation Co Ltd* (1919) 122 LT 44; approved in *Murray v Ministry of Defence* [1988] 1 WLR 692. **38** *Myer Stores Ltd v Soo* [1991] 2 VR 589; *Dickinson v Waters Ltd* (1931) 31 SR (NSW) 593. **39** J G Fleming (1998) *The Law of Torts*, 9th ed, at 673. **40** *Myer Stores Ltd v Soo* [1991] 2 VR 589 at 603. **41** See *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 265; *Broome v Cassell* [1972] AC 1027. **42** (1987) 164 CLR 1. **43** (1962) 108 CLR 177. **44** *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 102. **45** *Chatterton v Gerson* [1981] QB 43.2. **46** Ibid. **47** [1986] 1 AC 112. **48** (1992) 175 CLR 218. **49** (1971) 26 ALR 584. **50** (1991) Aust Torts Reps 81-085 (SA FC). **51** [1976] VR 331 at 343. **52** *Bain v Altoft* [1967] Qd R 32 (FC). **53** R P Balkin and J L R Davis (1996) *Law of Torts*, 2nd ed. **54** *Esso Petroleum Co Ltd v Southport Corporation* [1953] 2 All ER 1204 at 1209-10. **55** *Southwark London Borough Council v Williams* [1971] Ch 734. **56** *R v Dudley and Stephens* (1884) 15 Cox CC 624. **57** *US v Holmes* (1842) 1 Wall Jr 1. **58** (1909) 26 TLR 139. **59** *Palmer v R* [1971] AC 814 at 831-2 (PC). **60** supra 53 at 149.