Are the Torts of Trespass to the Person Obsolete? Part 2: Continued Evolution

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This article re-examines the liability currently imposed by the courts for trespass to the person. It demonstrates that the process for imposing such liability has evolved so that the courts now both carefully scrutinise how the defendant engaged in the conduct which interfered with the plaintiff's personal security and finely balance a range of competing interests. To the extent that the process for imposing liability for trespass to the person is not dissimilar to the process for imposing liability in the tort of negligence, this article questions whether the torts of trespass to the person might now be viewed as obsolete. The article is in two parts. Part one (previously published) examines the historical development of trespass to the person. This part two explores whether it is possible to identify anything distinctive about the process for determining liability in trespass to the person (as it has continued to evolve) when compared with the process for determining liability in negligence.

INTRODUCTION

Despite dating back to the medieval writ system, fundamental questions persist as to the nature of the liability imposed in trespass to the person. Is the liability imposed by reason of the defendant's wrongdoing[1] or regardless of the defendant's wrongdoing and therefore strict?[2] Referred to as "intentional" torts, must the defendant have intended to engage in the conduct which caused the interference with the plaintiff's personal security ("intended conduct"), intended to interfere with the plaintiff's personal security ("intended interference") or intended to harm the plaintiff by interfering with the plaintiff's personal security ("intended harm")?[3] Does negligent, as well as intentional and reckless conduct, attract liability in respect of the torts?[4]

In an effort to address such questions, Part 1 of this article (previously published) examined the historical development of trespass to the person. That examination showed that the process for determining liability in trespass to the person has changed considerably over time. Specifically, it showed that the courts have become both more able and more willing to balance competing interests when imposing liability for trespass to the person, slowly shifting the focus from *what* the defendant did (engage in conduct which interfered with the plaintiff's personal security), to an analysis of *how* the defendant did it and the circumstances in which the interference occurred.

This shift in focus has brought the process for determining liability in trespass to the person much closer to the process for determining liability in negligence. They became so close that the English Court of Appeal in *Letang v Cooper*[5] abolished claims for negligent trespass, such that all claims in England and Wales for negligent trespass must now be brought within the tort of negligence. But could the English Court of Appeal have gone even further? This second part of the article examines the continued evolution of trespass to the person and suggests that the torts of trespass to the person have now evolved to the

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[1] Despite usually being defined by reference to moral standards, wrongdoing is defined for these purposes as conduct personally engaged in or not engaged in by the defendant that attracts legal responsibility.

[2] Peter Cane, "Responsibility and Fault: A Relational and Functional Approach to Responsibility" in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart, 2001) 81, 99.

[3] This being the interest primarily protected by the torts of trespass to the person; William Blackstone, Blackstone's Commentaries (Clarendon Press, 1803) 129 (see below). Re intention see FA Trindade, "Intentional Torts: Some Thoughts on Assault and Battery" (1982) 2 *Oxford Journal of Legal Studies* 211.

[4] See discussion of following cases below: *Williams v Milotin* (1957) 96 CLR 465 and *Letang v Cooper* [1965] 1 QB 232.

[5] *Letang v Cooper* [1965] 1 QB 232.

point that the process for determining liability in trespass to the person is very similar to the process for determining liability in negligence. To this extent, it is argued that the various techniques for balancing competing interests within the torts of trespass to the person have been overtaken by the more advanced techniques within the tort of negligence and are now best considered obsolete.

CONTINUED EVOLUTION

Although the controversy surrounding the availability of claims for negligent trespass remains unresolved, it has not put a stop to further developments within the torts of trespass to the person. The courts have continued to hone the process for imposing liability in trespass to the person by incorporating or developing increasingly sophisticated techniques to balance competing interests. Those various techniques will now be examined.

Reallocation of Issues from Trespass to Negligence

Consider the current tendency of the courts to exclude certain issues from the torts of trespass to the person and to reallocate them to the tort of negligence. This trend is most apparent in cases concerning alleged mistreatment of prisoners and cases of medical treatment where doctors have failed to obtain a patient's informed consent.

1. Mistreatment of Prisoners

The loss of liberty endured by prisoners is authorised by the state. Although the tort of false imprisonment is not available in respect of the original term of imprisonment, it is well established that a prisoner may bring a claim in respect of the tort where a prisoner is detained beyond the authorised period.[6] A claim for false imprisonment might also be brought where the grounds for the original imprisonment are subsequently found to be mistaken.[7]

More recently questions have been raised as to whether a prisoner might bring a claim for false imprisonment where the prisoner has been subjected to more restrictive conditions in the course of their imprisonment than may have originally been authorised. The Ontario Court of Appeal was the first court to consider the issue in the 1985 case of *R v Miller*.[8] Following a disturbance in the jail, the prisoner had been confined to a "Special Handling Unit" which involved the prisoner being "cut off from all association with other inmates and … confined to his cell for all but one hour of the day".[9] The prisoner was never given an opportunity to address the evidence which formed the basis of the decision to isolate him in the Special Handling Unit. Instead, he was told that he could only secure his release into the general prison population following a period of "good behaviour". After some three months in the Special Handling Unit, the prisoner successfully applied for a writ of habeas corpus[10] and was released into the general prison population. The Court held that although the initial imprisonment was authorised, the prisoner was "not without some rights, or residual liberty".[11] On this basis, the Special Handling Unit could be construed as a "prison within a prison" and the prisoner's ongoing detention within the Unit amounted to false imprisonment.[12]

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[6] *Moone v Rose* (1868–69) LR 4 QB 486; *Mee v Cruikshank* (1902) 86 LT 708; *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714; *Governor of Her Majesty's Prison Brockhill; Ex parte Evans* [2001] 2 AC 19.

[7] *Ruddock v Taylor* (2003) 58 NSWLR 269; [2003] NSWCA 262. Successful appeal to High Court was on the basis of whether the grounds for the original detention existed or not; *Ruddock v Taylor* (2005) 222 CLR 612; [2005] HCA 48.

[8] *R v Miller* [1985] 2 RCS 613.

[9] *R v Miller* [1985] 2 RCS 613, 618.

[10] "A prerogative writ directed to a person who detains another in custody and commands him to produce or 'have the body' of that person before the court".; Roger Bird, *Osborn's Concise Law Dictionary* (Sweet & Maxwell, 7th ed, 1983).

[11] *R v Miller* [1985] 2 RCS 613, 637.

[12] *R v Miller* [1985] 2 RCS 613, 637.

The decision in *R v Miller* was followed by the English Court of Appeal in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* and *Weldon v Home Office*, only to be overturned by the House of Lords on appeal (the appeals were heard conjointly).[13] The prisoners in the cases had again been isolated in special facilities within the respective jails. The concerns of the House of Lords in following *R v Miller* were explained by Lord Bridge of Harwich (with whom the other judges agreed):[14]

> I sympathise entirely with the view that the person lawfully held in custody who is subjected to intolerable conditions ought not to be left without a remedy against his custodian, but the proposition that the conditions of detention may render the detention itself unlawful raises formidable difficulties. If the proposition be sound, the corollary must be that when the conditions of detention deteriorate to the point of intolerability, the detainee is entitled immediately to go free. It is impossible, I think, to define with any precision what would amount to intolerable conditions for this purpose. … The examples given by Ackner LJ of a flooded or gas-filled cell are so extreme that they do not, with respect, offer much guidance as to where the line should be drawn. The law is certainly left in a very unsatisfactory state if the legality or otherwise of detaining a person who in law is and remains liable to detention depends on such an imprecise criterion and may vary from time to time as the conditions of his detention change.
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> The logical solution to the problem, I believe, is that if the conditions of an otherwise lawful detention are truly intolerable, the law ought to be capable of providing a remedy directly related to those conditions without characterising the fact of the detention itself as unlawful. I see no real difficulty in saying that the law can provide such a remedy. Whenever one person is lawfully in the custody of another, the custodian owes a duty of care to the detainee. If the custodian negligently allows, or a fortiori, if he deliberately causes, the detainee to suffer in any way in his health he will be in breach of that duty. But short of anything that could properly be described as a physical injury or an impairment of health, if a person lawfully detained is kept in conditions which cause him for the time being physical pain or a degree of discomfort which can properly be described as intolerable, I believe that could and should be treated as a breach of the custodian's duty of care for which the law should award damages.

Lord Bridge held that issues relating to the conditions of imprisonment would be more appropriately dealt with by the tort of negligence. The benefits of using the tort of negligence in this regard, as demonstrated by the examples used by Lord Bridge, was the capacity it gave the courts to more finely balance the competing interests of the state and the individual (including issues such as limited state resources[15] and difficulties in controlling prison populations). It also removed the risk that imprisonment in those specific conditions would, at a certain point, become unlawful. Lord Bridge expressly acknowledged that the tort of negligence was not a perfect fit given that the nature of the harm suffered by prisoners in such circumstances was not always physical. In Lord Bridge's view, however, this difficulty was outweighed by the benefits that the tort of negligence could deliver in terms of balancing the parties' interests.

A number of other common law jurisdictions have subsequently refused to follow *R v Miller*, choosing to reallocate issues concerning the mistreatment of prisoners to the tort of negligence. The above comment by Lord Bridge was expressly approved by the New South Wales Court of Appeal in *Prisoners A-XX Inclusive v New South Wales*.[16] In that case prisoners had applied for a writ of habeas corpus on the basis that the refusal of the prisoner authorities to supply prisoners with condoms was unlawful. The New Zealand Court of Appeal similarly refused an application for a writ of habeas corpus in *Bennett v Superintendent of Rimutaka Prison*,[17] a case in which a prisoner was moved to maximum security following unsubstantiated complaints by a fellow prisoner.[18]

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[13] *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* and *Weldon v Home Office* [1992] 1 AC 58.

[14] *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* and *Weldon v Home Office* [1992] 1 AC 58, 165–166.

[15] A consideration now expressly provided for in Australia under the various *Civil Liability Acts*. See, eg, *Civil Liability Act 2002* (Tas) s 38.

[16] *Prisoners A-XX Inclusive v New South Wales* (1995) 39 NSWLR 622.

[17] *Bennett v Superintendent of Rimutaka Prison* [2002] 1 NZLR 616.

[18] Although the preferred response to habeas corpus was the public law method of judicial review, rather than the tort of negligence.

As evident from *R v Miller*, it was open to the courts to deal with the mistreatment of prisoners through the torts of trespass to the person. Prior to the development of a single tort of negligence, this would have indeed been the only option. It is significant then that, since the development of the tort of negligence, the courts have chosen not to expand the torts of trespass to the person but instead deal with the mistreatment of prisoners through the tort of negligence. The reason appears to be a concern with the inability of the torts of trespass to the person to effectively balance competing interests where the interference with the plaintiff's personal security is intentional.

2. Medical Battery

A similar tendency to reallocate issues from the torts of trespass to the person to the tort of negligence can be seen in cases concerning medical treatment where doctors have failed to provide a patient with sufficient information about the treatment to enable the patient to give fully informed consent.

It is well established that a doctor cannot be held liable for battery where a patient has consented to the medical treatment.[19] Such consent must be given freely and voluntarily and must not have been induced by duress or fraudulent misrepresentation,[20] either as to the nature of the medical procedure[21] or its necessity.[22] More recently questions have been raised as to whether a patient's consent to medical treatment can be vitiated for the purposes of the torts of trespass to the person on the basis that the doctor did not provide the patient with sufficient information about the medical treatment to enable the patient to give fully informed consent. There is a strong history of vitiating consent on such grounds in the United States.[23] Courts in common law countries, however, have chosen not to deal with the issue in the context of battery, but to reallocate the issue to the tort of negligence.

Consider the 1980 decision of the Supreme Court of Canada in *Reibl v Hughes*.[24] The patient in the case underwent elective surgery. The doctor did not inform the patient that there was a risk that the patient might suffer a stroke during or after the elective surgery. After the surgery, the patient suffered a massive stroke, leaving him paralysed on the right side of his body. The patient sued the doctor both in battery and negligence. With respect to the battery claim, the patient argued that although he had consented to the procedure, he would not have given that consent had he been made aware by the doctor of the risk of stroke. The Court held that the failure of the doctor to provide information pertaining to the medical treatment should be dealt with in the tort of negligence rather than the torts of trespass to the person:

> In situations where the allegation is that attendant risks which should have been disclosed were not communicated to the patient and yet the surgery or other medical treatment carried out was that to which the plaintiff consented (there being no negligence basis of liability for the recommended surgery or treatment to deal with the patient's condition), I do not understand how it can be said that the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity. I can appreciate the temptation to say that the genuineness of consent to medical treatment depends on proper disclosure of the risks

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[19] *Schloendorff v Society of New York Hospital* (1914) 105 NE 92.

[20] Kit Barker et al, *The Law of Torts in Australia* (OUP, 5th ed, 2012) 71.

[21] For example, *R v Williams* [1923] 1 KB 340 in which the defendant singing teacher was held liable for battery after sexually assault a student after telling her it was necessary to improve her singing performance.

[22] For example, *Dean v Phung* [2012] NSWCA 223 in which a dentist falsely represented to a patient that he need root canal therapy and proceeded to fit crowns on all of the patient's teeth.

[23] *Canterbury v Spence* (1972) 464 F 2d 772, 780: "the concept, fundamental in American jurisprudence, that 'every human being of adult years and sound mind has a right to determine what shall be done with his own body…' True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible." Though note, in some jurisdictions, there have been more recent moves towards the Commonwealth position; see Mark A Geistfeld, "Conceptualizing the Intentional Tort", Public Law and Legal Theory Research Paper Series (Working Paper No 17-31, New York University School of Law, 2017) 28–30.

[24] *Reibl v Hughes* (1980) 114 DLR (3d) 1.

> which it entails, but in my view, unless there has been misrepresentation or fraud consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than battery.

This aspect of the decision in *Reibl v Hughes* was followed by the House of Lords in *Sidaway v Board of Governors of the Bethlem Royal Hospital*[25] and approved by the Supreme Court in *Montgomery v Lanarkshire Health Board*.[26] As Baroness Hale explained:[27]

> It is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body (the unwanted pregnancy cases Page 35 are an example: see *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309). Thus, as Jonathan Herring puts it in Medical Law and Ethics (2012), 4th ed, p 170), "the issue is not whether enough information was given to ensure consent to the procedure, but whether there was enough information given so that the doctor was not acting negligently and giving due protection to the patient's right of autonomy".

As can be seen, the courts are yet again concerned with the inability of the torts of trespass to the person to effectively balance competing interests in cases where the interference with the plaintiff's personal security is intentional. Although there is the capacity to deal with issues of informed consent through battery (as demonstrated by the American cases), the English and Canadian courts have chosen to limit the growth of the torts of trespass to the person and reallocate the issue to the tort of negligence. The High Court of Australia has reached a similar position with respect to informed consent in Marion's case[28] and *Rogers v Whitaker*.[29]

Expansion of "Exigencies of Everyday Life"

Further evidence that the torts of trespass to the person continue to evolve can be found in the more expansive use of the "exigencies of everyday life" exception by current courts. The exception is traced to the 1704 case of *Cole v Turner* in which Holt CJ said that a trespass would not arise if two people bumped into one another in a narrow passage "without any violence or design of harm".[30] The exception is now being used to suggest that a range of intentional interferences (either in the sense of intended harm or intended interference) with a plaintiff's personal security might be excused.

In *Collins v Wilcock*,[31] for instance, Robert Goff LJ (as he then was) commented:[32]

> most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped. Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life.

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[25] *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871.

[26] *Montgomery v Lanarkshire Health Board* [2015] AC 1430 (though decision differs from *Sidaway* in its rejection of the Bolam test).

[27] *Montgomery v Lanarkshire Health Board* [2015] AC 1430, 1468.

[28] *Secretary, Department of Health & Community Services v B* (1992) 175 CLR 218.

[29] *Rogers v Whitaker* (1992) 175 CLR 479.

[30] *Cole v Turner* (1704) 6 Mod 149; 90 ER 958.

[31] *Collins v Wilcock* [1984] 1 WLR 1172.

[32] *Collins v Wilcock* [1984] 1 WLR 1172, 1177.

The following example was given by the English Court of Appeal in *Wilson v Pringle*[33] to similar effect:[34]

> A modern instance is the batsman walking up the pavilion steps at Lord's after making a century. He receives hearty slaps of congratulations on his back. He may not want them. Some of them may be too heavy for comfort. No one seeks his permission, or can assume he would give it if it were asked. But would an action for trespass to the person lie?

In *Wilson v Pringle* itself, such reasoning was applied to prevent summary judgment being given in trespass against a 13-year-old boy who had pulled a class mate's school bag off his back in the course of "ordinary horseplay".[35] The Court went so far as to find that for an "intentional touching" to amount to battery, the touching must be a "hostile touching" (in the sense that not only must the interference with the plaintiff's personal security have been intended by the defendant, but the defendant must also have intended to harm the plaintiff). A full trial was therefore needed so that evidence could be led in this regard.

Although the requirement for a "hostile touching" has been subject to some criticism in England and Wales,[36] use of the requirement appears to be increasing in other jurisdictions. In *Lloyd's of London v Scalera* (*Scalera*), for instance, the Supreme Court of Canada held that "contact must be 'harmful or offensive' to constitute battery".[37] A similar rule exists in many American States.[38] In *Northern Territory v Mengel*,[39] the High Court of Australia noted that although an intention to do the act which interfered with the plaintiff's personal security might have once been sufficient to found an action in trespass, the current trend was towards it being necessary to establish an intention not only to do the act, but an intention to inflict harm.[40]

What then might be driving this resurgence of the "exigencies of everyday life" exception? One clue might be found in the fact that the resurgence started in England and Wales. As previously noted, the courts of England and Wales were the first to remove the availability of an action in negligent trespass. As a result, the standard of a reasonable person is no longer available to the courts as a method to balance the competing interests of parties when imposing liability in the torts of trespass to the person. Where a defendant has intentionally caused the plaintiff harm, it is difficult to see the interests of the parties as competing; the interests of the plaintiff will generally trump, subject to any defences the defendant might establish. As the above examples demonstrate, however, there may be a need to more carefully balance the interests of the parties where the defendant intended to interfere with the plaintiff's personal security, but did not intend to harm the plaintiff. Now that negligence has been removed from the torts of trespass to the person, there is no ready method to undertake this balancing process. That the "exigencies of everyday life" exception might be fulfilling this role can be seen in the following statement from *Wilson v Pringle*:[41]

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[33] *Wilson v Pringle* [1986] 1 QB 237.

[34] *Wilson v Pringle* [1986] 1 QB 237, 248.

[35] *Wilson v Pringle* [1986] 1 QB 237, 245.

[36] Lord Goff of Chieveley subsequently criticised the requirement for a "hostile touching" in *F v West Berkshire HA* [1990] 2 AC 1 (somewhat surprisingly given his earlier comments in *Collins v Wilcock* [1984] 1 WLR 1172): "In the old days it used to be said that, for a touching of another's person to amount to a battery, it had to be a touching 'in anger'; and it has recently been said that the touching must be 'hostile' to have that effect (see *Wilson v Pringle*). I respectfully doubt whether that is correct. A prank that gets out of hand; an over-friendly slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it – all these things may transcend the bounds of lawfulness, without being characterised as hostile."

[37] *Lloyd's of London v Scalera* (2000) 185 DLR (4th) 1, [18].

[38] William L Prosser, *Handbook on the Law of Torts* (West Publishing, 4th ed, 1971) 37.

[39] *Northern Territory v Mengel* (1995) 185 CLR 307.

[40] *Northern Territory v Mengel* (1995) 185 CLR 307, 341: "the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of *harm*." (emphasis added).

[41] *Wilson v Pringle* [1986] 1 QB 237, 253.

> Although we are all entitled to protection from physical molestation, we live in a crowded world in which people must be considered as taking on themselves some risk of injury (where it occurs) from the acts of others which are not in themselves unlawful. If negligence cannot be proved, it may be that an injured plaintiff who is also unable to prove a battery, will be without redress.

The effectiveness of the "exigencies of everyday life" exception as a method for balancing competing interests is open to challenge. First, the absence of a general framework for determining whether conduct occurs in the course of "everyday life", or is alternatively "offensive", results in a general lack of transparency. Consider the situation where one person touches another on the arm. As noted above, a tap on the back (as opposed to an "over-friendly" slap on the back[42]) may occur in the course of "everyday life". It would therefore be surprising if a court found that a person who put their hand on the arm or a shoulder of another person to say hello to be liable in trespass.[43] Despite this, it was found in *Collins v Wilcock* that the act of a police woman placing her hand on the plaintiff's arm was not in the course of "everyday life" and amounted to a trespass. Similarly, in *Rixon v Star City Pty Ltd*,[44] the New South Wales Court of Appeal found that the act of a security guard placing his hand on the plaintiff's shoulder was not in the course of "everyday life" and amounted to a trespass. It is unclear what the difference between these situations is. It may be that in *Collins v Wilcock* and *Rixon v Star City Pty Ltd* the fact that the defendants were exercising sanctioned force was significant,[45] tipping the balance of interests in the plaintiff's favour. Although arguably the most rational basis upon which to distinguish the cases, the courts did not expressly address such concerns when applying the "exigencies of everyday life" exception.

This leads to a further problem with the exception; who it is directed at. Whether the defendant's conduct occurred in "everyday life", or was alternatively offensive, is determined solely from the standpoint of the plaintiff. This explains why the fact that the defendants in *Collins v Wilcock* and *Rixon v Star City Pty Ltd* were exercising sanctioned force was not expressly considered by the courts in those cases. The question then is whether it is possible to effectively balance the interests of the parties solely from the standpoint of the plaintiff? In some instances, the parties interests can be effectively balanced from the standpoint of the plaintiff, as in cases of "jostling" in a supermarket or a busy street[46] or where mud is splashed upon a dress when a vehicle goes through a puddle.[47] In other situations, however, it will not be possible to effectively balance the interests of the parties from the standpoint of the plaintiff. Consider the following scenarios considered by the Reporters of the Third Restatement of the Law of Torts: Intentional Torts to Persons.[48] In scenario 1, a mother is holding a young child in her arms on a crowded train when the child reaches out and intentionally touches the breast of a female passenger. Scenario 2 occurs on the same train, except this time an adult intentionally touches the breast of a female passenger. For all intents and purposes, the experience of the physical touch in both scenarios is the same. From the standpoint of the female passenger who may not have observed the act of touching, it may be difficult to distinguish between the two.[49] Despite this, it is likely that the conduct in scenario 1 will be found to fall within the "exigencies of everyday life" or be classified as "non-offensive", whereas the conduct in scenario 2 will not. The difference is *who* is doing the touching and their likely motivations. To the extent that the standpoint of the defendant is not considered when applying the "exigencies of everyday

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[42] Lord Goff, n 37.

[43] See *Mandel v The Permanent* (1985) 7 OAC 365 in which the court found that an employee of a company did not commit a battery by touching the elbow of an irate customer in an attempt to get her to leave.

[44] *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98; [2001] NSWCA 265.

[45] Either by the government or the casino as owner of the land.

[46] See quote from *Collins v Wilcock* [1984] 1 WLR 1172, n 37.

[47] *Holmes* v *Mather* (1875) LR 10 Ex 261, 267.

[48] American Law Institute, *Third Restatement of the Law of Torts: Intentional Torts to Persons* (Discussion Draft, 4 April 2014) 26–27.

[49] If, eg, it was a brush of the hand, rather than a grab.

life" exception, the capacity of the courts to effectively balance the interests of the parties when using the exception is limited.

Other

There are various other indications that the torts of trespass to the person continue to evolve, although the opportunity to fully explore the extent of the evolution has so far been limited.

Consider the defence of necessity, particularly in respect of medical battery. The availability of the defence has traditionally been limited to emergency situations where patients have been unable to consent to life-saving treatment. Whether the defence could extend to situations in which a patient is in a state of being permanently unable to consent, such as an intellectually-impaired adult, was considered by the House of Lords in *F v West Berkshire HA*.[50] Legal issues in such cases are generally highly sensitive and require courts to consider a broad range of factors. The specific issue in *F v West Berkshire HA* was whether the court should approve an application to perform a procedure to sterilise an intellectually-impaired woman. Lord Goff of Chieveley (with whom a majority of the other Lords agreed) framed the availability of the defence in the following terms:[51]

> to fall within the principle, 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.

Lord Goff was evidently mindful of the need to balance competing interests and took steps to incorporate the best available method to do that, the standard of the reasonable person, into the defence.

Consider further the burden of proof with respect to establishing consent. Traditionally, the defendant has borne the onus of proving that the plaintiff consented to the interference with their personal security for the purposes of the torts of trespass to the person. This is still the position in Australia.[52] Since the decision of the Court of Appeal in *Freeman v Home Office*,[53] the burden in England and Wales has been placed on the plaintiff. An explanation for this shift in the onus of proof has controversially been proffered by Iacobucci J of the Supreme Court of Canada in *Scalera*,[54] a case concerning sexual assault:[55]

> To repeat, sexual contact is only "harmful or offensive" when it is non-consensual. To succeed in an action for intentional battery, one must prove both that (a) the defendant intended to do the action; and (b) the reasonable person would have perceived that action as being harmful or offensive. For sexual activity, an action is harmful or offensive if it is non-consensual. Therefore in sexual battery, the trier of fact must be satisfied that the defendant intended to engage in sexual activity which a reasonable person would have perceived to be non-consensual.

Iacobucci J was in dissent on this point. The explanation he gave, however, is consistent with the more expansive use of the "exigencies of everyday life" exception by current courts as a means for balancing the competing interests of parties in cases in which the interference with the plaintiff's personal security was intentional.

Is the Approach to Determining Liability in Respect of the Torts of Trespass to the Person Distinct?

The historical development and continuing evolution of the torts of trespass to the person reveals a constant search to develop an effective method to carefully scrutinise how the defendant engaged in the conduct which interfered with the plaintiff's personal security and finely balance the competing interests

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[50] *F v West Berkshire HA* [1990] 2 AC 1.

[51] *F v West Berkshire HA* [1990] 2 AC 1, 75.

[52] *Dean v Phung* [2012] NSWCA 223.

[53] *Freeman v Home Office* [1984] QB 524.

[54] *Lloyd's of London v Scalera* (2000) 185 DLR (4th) 1.

[55] *Lloyd's of London v Scalera* (2000) 185 DLR (4th) 1, [107].

of the parties in the circumstances in which the interfered occurred. When the writ of trespass was first developed, the method was quite crude; the act of engaging in conduct which directly interfered with the personal security of the plaintiff was sufficient to attract liability. Considerable advances were made with the development of a single tort of negligence and the more general use of the standard of a reasonable person, but this did not offer much assistance in what is now the core area of the torts of trespass to the person, intentional wrongdoing (either in the sense of intended harm or intended interference). Since then, courts have tried to either incorporate negligence tests into the torts of trespass to the person (eg, the defence of necessity) or have reallocated issues to the tort of negligence (conditions of imprisonment and informed consent). Saving that, the courts have been left to struggle on with old methods that continue to prove ineffective (the "exigencies of everyday life" exception).

It can now be seen that the controversy surrounding claims for negligent trespass is not an isolated issue; it is part of a broader search to develop effective methods within the torts of trespass to the person to carefully scrutinise how the defendant engaged in the conduct which interfered with the plaintiff's personal security and finely balance the competing interests of the parties in the circumstances in which the interference occurred. The question raised by the continued evolution of the torts of trespass to the person is whether the approach to determining liability in respect of such torts remains distinct. This question arises because a focus on how the defendant has acted and the balancing of competing interests have long been hallmarks of liability imposed in the tort of negligence.

The question can only be answered in the positive if it is possible to identify a form of liability imposed in the torts of trespass to the person that does not involve the courts carefully examining how a defendant has acted and balancing the parties' competing interests. Arguably, not even the core cases of trespass to the person are any longer capable of satisfying this test. Consider a situation where one person intentionally punches another in order to inflict harm. There is no doubt that a trespass occurs in this situation (subject to the availability of any defences). In determining liability, a court will focus on how the defendant acted, specifically noting that the defendant intended to harm the plaintiff. Although a court's inquiries will generally stop at this point (subject to the availability of defences), it does not necessarily follow that the court is not involved in a process of balancing the parties' competing interests. It is just that in such cases the deliberate nature of the defendant's conduct outweighs any broader interests of the defendant so that the plaintiff's interests trump.[56] That a balancing process is indeed being undertaken by the courts in cases of intended harm by a defendant is most evident in prisoner mistreatment cases and medical battery cases with key issues traditionally resolved within the torts of trespass to the person now being reallocated to the tort of negligence.

When viewed in these terms, it is difficult to isolate an approach to determining liability in respect of the torts of trespass to the person which is distinct. It is therefore necessary to consider whether the torts of trespass to the person have evolved to the point that they have been overtaken by the tort of negligence and should now be viewed as obsolete. There are a number of advantages in so doing:

(1) Certainty and consistency – As noted at the beginning of this article, there are a number of significant questions that have persisted as to the nature of the liability imposed in the torts of trespass to the person. These questions can now be addressed. For instance, it can now be seen that liability imposed in respect of interferences with personal security is not strict (in the sense of liability imposed regardless of personal wrongdoing), but is in fact fault-based (for even direct physical contact can be excused on the basis of the "exigencies of everyday life").[57]

The continuing uncertainty surrounding the nature of the "intention" sufficient to attract liability in the torts of trespass to the person might also be resolved. Such uncertainty emerged when the courts began to shift the focus from what the defendant did (engage in conduct that interfered with the plaintiff's personal security) to how the defendant did it. It can now be argued that the form of intention that is most relevant for the purposes of imposing liability in respect of interferences with

[56] Mark Geistfeld has made a not-dissimilar observation from a moral perspective by focusing on the need for conduct to be "aggressive" before it falls within the intentional torts; Geistfeld, n 24.

[57] Although focusing on the process employed by courts when imposing liability in tort law raises questions as to whether this distinction is any longer useful. See forthcoming work titled "Tort Law as a Form of Institutionalised Sympathy".

personal security is an intention to harm the plaintiff (for when such an intention exists, the plaintiff's interests will generally trump). It can also be seen that negligent, intentional and reckless interferences with personal security can attract liability, although the parties' interests may be balanced differently depending on the nature of the interference.

Furthermore, the anachronistic differences in the various tests for establishing liability for interferences with personal security can now be put to one side. As the courts are undertaking the same process of examining how the defendant acted and carefully balancing the interests of the parties irrespective of the particular type of interference with personal security, there is no basis upon which differences in burden of proof or limitation periods can be rationally maintained.

(2) Effectiveness – History has shown the process of determining the "standard of the reasonable person" and assessing whether the defendant acted in accordance with that standard to be a highly effective method for balancing competing interests when imposing liability in tort for interferences with personal security. This is largely because there is sufficient flexibility in this method to factor in considerations from the standpoint of both the plaintiff (seriousness and likelihood of the interference) and the defendant (standard of a reasonable person and cost of acting reasonably). It will no longer be necessary to resort to ineffective methods, such as the "exigencies of everyday life" exception, to balance such interests. This will enable the balancing process to become much more transparent (eg, giving courts a chance to explain why touches by police are different from other touches).

(3) Capacity to further develop the law – The archaic form of trespass to the person has arguably hindered the development of the law. Consider the decision of the Supreme Court of Canada in *Norberg v Wynrib*.[58] The doctor in the case had agreed to provide painkillers to a patient in exchange for sexual favours. The doctor defended the claim in battery on the basis that the patient consented to the sexual relations. Although the Court unanimously awarded the plaintiff damages in respect of the damage caused by the doctor's conduct, the judges struggled to find an effective means to negate the plaintiff's consent. Three of the judges[59] held that the consent was vitiated on the basis of unconscionability. Two further judges[60] held that the doctor owed the patient a fiduciary duty and that nothing the patient had done barred her from pursuing the claim. Arguably the most straightforward way to deal with the issues in the case, and the approach adopted by the final judge,[61] was to recognise that the doctor had failed to act as a reasonable doctor in suggesting the arrangement in the first place. Any consent given by the patient in such circumstances, could not excuse the doctor's breach of the duty of care owed to the patient. The majority might have felt more comfortable with this approach if the process of determining the "standard of the reasonable person" and assessing whether the defendant had acted in accordance with standard was available more generally as a method for balancing competing interests in respect of interferences with personal security.

Admittedly, recognising that the torts of trespass to the person are obsolete may also have its difficulties (although none of which are insurmountable).

(1) Need to prove damage – A plaintiff generally needs to prove that they have suffered loss as a result of the defendant's failure to exercise reasonable care before they can succeed in negligence. This will make it difficult for a plaintiff to obtain a nominal award of damages where there has been an interference with the plaintiff's personal security which did not result in damage.[62] Although the cost of commencing legal proceedings means that such claims are relatively rare, there may be a need to formally recognise an interference with personal security (which does not result in physical injury) as a form of compensable damage in the tort of negligence. Historically, concerns about indeterminate liability have led courts to place various limits on the recovery of psychological

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[58] *Norberg v Wynrib* (1992) 92 DLR (4th) 449.

[59] *Norberg v Wynrib* (1992) 92 DLR (4th) 449, [49] (La Forest J, Gonthier and Cory JJ concurring).

[60] *Norberg v Wynrib* (1992) 92 DLR (4th) 449, [83] (McLachlin J, L'Heureux-Dube J concurring).

[61] *Norberg v Wynrib* (1992) 92 DLR (4th) 449, [145] (Sopinka J).

[62] Although it will not affect the availability of other remedies, such as injunctions.

damage in the tort of negligence, such as the requirement for a plaintiff to prove they have suffered a recognised psychiatric illness.[63] In cases where the defendant intended the interference (particularly in cases of intended harm), indeterminacy becomes a lesser concern. It was on this basis that Lord Bridge of Harwich was able to suggest in *R v Miller* that damages for the psychological damage caused by an intentional interference with personal security should be recoverable. [64]

(2) Burden placed on plaintiff to prove consent – Although in some jurisdictions plaintiffs already bear the burden of proving that they did not consent to the interference with their personal security,[65] there will necessarily be a shift in the burden of proof in this respect in other jurisdictions. As McLachlin J explained in *Scalera*, this burden can be very difficult to discharge in some particular fact situations, including sexual assault. The tort of negligence, however, has a role in standard setting in the community.[66] Given the power imbalance that can exist in sexual relationships, there may be some advantages in reframing the issue in terms of whether the defendant acted reasonably by expressly confirming the presence of consent before proceeding with sexual relations.[67]

(3) Nomenclature – Introducing "intention" into the tort of negligence may appear a "contradiction in terms".[68] This is because the term "negligence" has generally been used to describe an element of fault which stands in contrast to the "intentional" torts of trespass to the person. The term "negligence", however, is used to describe more than just an element of fault; it is used describe an approach to determining liability in tort which involves the courts finely balancing the competing interests of the parties and carefully scrutinising how the defendant engaged in the conduct which interfered with the plaintiff's interests. Confusion might be avoided by devising new terms which clearly distinguish the tort (duty to act reasonably) from the fault element (failure to take reasonable care).

(4) Abolition of concurrent liability – The House of Lords accepted in *Ashley v Chief Constable of Sussex* (*Ashley*)[69] that there could be concurrent liability in trespass and negligence. It is a logical concomitant of the argument put forward in this article that there cannot be any prospect of concurrent liability in trespass to the person and negligence as the process for determining liability in respect of those torts is essentially the same. It follows that there is only one, as opposed to two different forms of liability in tort. The situation might be contrasted with the prospect of concurrent causes of action in tort and contract where there are very clear differences in the processes for determining liability between those causes of action. At first glance, therefore, the decision in *Ashley* is at odds with the argument put forward in this article. It is important, however, to understand the decision in its broader context.

Ashley involved the killing of an unarmed suspect by a police officer. The police officer was found not guilty of murder and the Chief Constable had accepted liability to pay compensation to the family of the suspect on the basis that the police officer had acted negligently. The family of the suspect then commenced an action for battery which the Chief Constable sought to summarily dismiss. Had the Lords dismissed the claimed in battery, they would have been acknowledging that an action could lie in negligence, but not trespass. This would have been a rather unusual finding given the police officer had shot the suspect. The Lords would also have been denying that there was a role for reasonableness in determining whether self-defence was available in battery, in that an honest

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[63] See, eg, *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281.

[64] Allan Beever has made comments to similar effect; "The Form of Liability in the Torts of Trespass" (2011) 40 *Common Law World Review* 40, 397 (citing WVH Rogers, *Winfield and H Jolowicz on Tort* (Sweet & Maxwell, 17th ed, 2006) 123).

[65] See above ff n 53. See also American Law Institute, *Restatement Second, Torts* §10.

[66] *Harriton v Stephens* (2006) 226 CLR 52, [205] (Callinan J), [248] (Crennan J).

[67] "Why, for civil law purposes, should not a person who proposes to make physical advances of a sexual nature to another be expected first to make sure that the advances will be welcome?"; Lord Scott of Foscote, *Ashley v Chief Constable of Sussex* [2008] 1 AC 962, 974.

[68] Peter Handford, "Intentional Negligence – A Contradiction in Terms?" (2010) 32 *Sydney Law Review* 29.

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

but mistaken belief in the need for self-defence would have been sufficient to strike out the claim. Finally, a dismissal would have resulted in acceptance of the Chief Constable's concession that the defendant bore the burden of proving self-defence in a trespass claim.[70] Each of these points would have been out of line with the previous trajectory of cases in which the English courts had been progressively bringing the processes for determining liability in trespass to the person and negligence much closer together (which is the very argument this article makes). It is therefore possible that the Lords refused to summarily dismiss the action in battery (with the consequence that the prospect of concurrent liability was left open) to avoid indirectly responding to the above issues without the opportunity for full argument to be heard.

CONCLUSION

This article has shown that the torts of trespass to the person have evolved to the point that it is no longer possible to isolate a form of liability imposed in respect of those torts which does not involve the courts finely balancing the competing interests of the parties and carefully scrutinising how the defendant engaged in the conduct which interfered with the plaintiff's personal security. The process for determining liability for trespass to the person is therefore not unlike the process for determining liability in the tort of negligence, the principal difference between the two processes being the sophistication of the techniques employed by the courts to balancing those competing interests. To the extent the courts have sought to continually improve the balancing techniques employed in the torts of trespass to the person, it might now be argued that the torts of trespass to the person have been overtaken by the tort of negligence. As with other forms of outdated technology, the torts of trespass to the person are now best viewed as obsolete. It follows that liability for all interferences with personal security should now be determined in accordance with the tort of negligence.

Recognising that the torts of trespass to the person are now obsolete is a significant step. To the extent that such a step can produce a more coherent understanding of the liability imposed for interferences with personal security, it is a step that can be justified.

[70] Contrary to the decision of the Court of Appeal in *Freeman v Home Office* [1984] QB 524 that the burden of proving the defence of consent to trespass lay on the claimant.