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Intentional Trespass to Person and Its Issue of Consent

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ABSTRACT

Trespass to Person is a Tort which basically means hindrance to a person's civil rights, without justification. It can be intentional, deliberate or unintentional. This paper introduces the three types of intentional trespass namely; assault, battery and false imprisonment. It mainly focuses on the issues of consent in Trespass of Person. It justifies that consent is an affirmative defense. The burden to prove, absence of consent lies with the plaintiff which is somewhat a hassle. This paper discusses about how unintentional trespass is different from intentional trespass.

Keywords: *Intentional Trespass; Consent; Onus of Proof; Negligence.*

I. INTRODUCTION

Injuries occur for a variety of reasons, they can happen because another person was negligent or reckless, or because the person wanted to intentionally inflict an injury. Intentional torts occur when a person intentionally acts in a certain way that leads to another person's injury. These intentional torts are classified as torts of Trespass of Person Intention on the part of the defendant and a lack of consent on the part of the plaintiff are important elements of trespass of person. Intentional trespass is categorized into assault, battery and false imprisonment. An Assault is an attempt to put another person in reasonable fear or apprehension of a possible battery. While battery is the actual striking of another person without lawful justification. False imprisonment means the total restraint to the freedom of a person without a lawful excuse.² The plaintiff is eligible to recover compensation for the suffering due to the plaintiff. The defense of consent is available to the defendant.

(A) Objectives

This paper mainly focuses on the issue of consent and its application in trespass and only a brief introduction to Trespass of Person is given. This research was conducted with the following objectives in mind.

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² AVTAR SINGH HARPREET KAUR, INTRODUCTION TO THE LAW OF TORT S AND CONSUMER PROTECTION 101-108 (LexisNexis 2013).

1. To get a basic understanding intentional Trespass of Person.
2. To understand the issues of consent in Trespass of Person
3. To determine the difference between intentional and unintentional trespass.

(B) Hypothesis

H₀₁: The plaintiff faces difficulty in proving a lack of consent in Trespass of Person.

H_{a1}: The plaintiff faces no difficulty in proving a lack of consent in Trespass of Person.

(C) Research Questions

- Is a lack of consent an element in trespass or is consent a defense?
- In case of trespass, on whom does the onus of proving 'consent' lie?

(D) Research Methodology

The research design of this research paper is descriptive in nature. It brings together information collected from various secondary sources like online articles, books, research journals and blogs. Relevant literature from books and online electronic database and libraries using a comprehensive set of keywords. On the basis of data analysis some suggestions have been given. The data collected has been the major source for proving the above hypothesis and answering the research question.

(E) Review of Literature

(Kaur, 2013) explains Trespass of Person. He mentions that damage is not essential and the claimant does not necessarily have to prove that damages were incurred. The landmark case of *White v Johnston* has been used to explain the issue of consent in Trespass of Person. It specifies that the burden of proving lack of consent lies on the plaintiff. (Stickley, 2015). The other issue that consent poses is that consent although is a defense in trespass it can also be considered an essential element (Pluck, 1940). In the book by (Bhangia, 2008) the tree types of trespass have been explained in detail it also explains the remedies available to the plaintiff. (Deise, 1917) talks about how the principle of trespass has developed through the years. (Mitchell, 1990) wrote a paper on the 'how negligence or unintentional trespass is different from intentional trespass'.

II. RESEARCH ANALYSIS

(A) Issue of Consent in Trespass

Trespass against a person is the interference with the plaintiff's basic rights. It is vital to note that absence of consent is an important factor in this Tort. In Tort law, Consent takes place

when the plaintiff participates or agrees to participate in the defendant's conduct. Consent can be implied or expressed. Implied consent is the Consent that is not explicitly granted by a person, rather maintained indirectly.

Battery requires intentional physical contact without lawful justification. In case of certain sports consent is implied for contacts which are permitted by the rules of that particular sports. Hence a boxer cannot sue his opponent for batter or a basketball player cannot claim compensation for a hard foul committed by the defendant. Although consent in trespass against a person seems simple enough there lies certain issues with it. In certain cases, consent is considered to be an essential element of trespass, while at times it may be considered as a defence by the accused. The issue with consent lies in the fact that the burden of proving that consent was given, always lies on the plaintiff.

(B) Issue of Consent- Defense or Element

According to some scholars, the alack of consent to interference is in the very gist of trespass to person. They consider a lack of consent as an element of trespass of person. It is argued that the very definition of Trespass says that it is the interference with a person's civil right. However, in battery a lack of consent does not appear to be expressed as an element of action. Instead, it is considered as a defense in Tort. Consent as a defense is available to the defendant when he is being sued for an intentional Tort. The defense is simple, anyone voluntarily giving consent to any action of the defendant cannot file for damages also claim that the same act is an intentional Tort. It follows the maxim of *volenti non fit injuria*. It means that when an individual gives his consent for a conduct on the part of the defendant he cannot file a suit for the same, provided the part that consent was given is proved. Still it remains unclear whether consent is a true defense.

In the case of *Brabazon v. Joannes Bros*³ it was held that it was the defendant's responsibility to show the shopkeeper has consented to the demonstration of the fly spray that proved to be allergic to his wife and thus made her sick. This judgment was overturned on appeal noting that the burden of proof lies on the plaintiff, to show a lack of consent on their part. Although consent is a defense it cannot be said to be a confirmatory defense. Therefore, if a plaintiff wants to show a lack of consent on his part in a case of trespass to person, he will have to establish that all its elements are present. Instead of calling consent a defense. Consent is considered to be an affirmatory defense.

³ *Brabazon v. Joannes Bros.*, (Wis. 1939) 286 N.W. 21

(C) The Issue of Consent – onus of proof on plaintiff

Actori incumbit onus probandi meaning Burden of Proof lies on the plaintiff. Even though consent is considered as a defense in Torts- for an intentional trespass to person, it is the plaintiff who has to prove that the consent on his part was not obtained by the defendant. Consent forms an affirmative defiance to trespass. These defenses are the once that are to be proved by the plaintiff. In all the other Tort s the defendant is the one who has to prove a lack of consent.⁴ At times it becomes difficult for the plaintiff to prove that consent was not given. Due to which he may not receive any compensation. The underlying concern of consent is that consent may be misinterpreted or misrepresented especially in case of implied consent. ‘Consent given’ is judged on the basis of ‘an objective standard’ which means the determination of whether the consent was implied or not is decided by asking the question if a reasonable person could conclude that consent was given? The part of ‘reasonable person’ is not quite modest, it might just differ situation to situation. Such issues make it difficult for the plaintiff to prove, a lack of consent.

(D) Unintentional Trespass and Contributory Negligence

In the case of *Beals v. Hayward*,⁵ McGregor J.⁵ a question of whether, in an action for trespass intention or negligence must be proved or not,⁶ and if yes on whom will the onus of proof lie. Direct and intentional interference with a person’s rights are dealt under Tort of trespass and indirect or unintentional are called negligence. Although it seems simple, even in trespass the plaintiff has to prove that the Tort committed against him was intentional or it was negligence on the part of the defendant. Some examples of negligence consist of car accidents, slip and falls, medical malpractice, dog bites, and workplace accidents. Ramifications usually involve recompense or restitution. When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of contributory negligence.⁷ Contributory negligence also forms a defense against trespass of person. The plaintiff has to prove that the trespass committed by him was negligent on his part. An example could be A falsely imprisoning B in a confined room without his knowledge. Here if it is proved that A did not have prior knowledge about this, the proceeding against him was dropped.

⁴ Stickley, A., *The issue of consent - for the plaintiff or defendant to prove in trespass to person?*, Australian Civil Liability, 90-92 (2015), <https://eprints.qut.edu.au/85336/>.

⁵ *Beals v. Hayward*,⁵ McGregor J, [1886] 2 TLR 311

⁶ A. G. DAVIS., *trespass to the person Must intention or negligence be proved?* 23, THE MODERN LAW REVIEW (674-678), 674 (1960)

⁷ Srishti Chawla, *Negligence in Law of Tort s*, IPLEADERS (April 4, 2019), <https://blog.ipleaders.in/negligence-in-the-law-of-Tort-s/>

III. CASE LAWS

1. **White v Johnston [2015]: New South Wales Court of Appeal (an intermediate appellate court in Australia)**

The plaintiff sued her dentist for performing non-therapeutically treatment. It was held that the ‘Dental Treatments’ were assault committed on the plaintiff. The issue of consent arose in this case as to which party should carry the burden of proving that there was, absence of consent on the plaintiff’s part. The Court of Appeal documented that there was no binding authority on the question. The case was referred to pass judgment. The court said that the appellant carried out these treatments for his financial gain and not for treating the respondent. Therefore, there was no consent. The respondent was awarded general damages of \$140,000, \$10,000 in aggravated damages and \$150,000 in exemplary damages.⁸

2. **Freeman v Home Office (1984): Court of Appeal.**

The plaintiff was a prisoner who claimed that the prison staff had forcibly administered him medication despite his refusal. The defendant argued that the administration of the drug was done with the consent of the prisoner. During the appeal, the claimant said that the consent he gave was not real as it was done under duress. This time the court decided in favor of the defendant. It was held that the claimant was capable of giving his consent in the said situation. This Case is Authority for... While prisoners are at risk undue influence, this does not render them legally incapable of giving consent. Whether their consent is real and valid must be assessed on the facts.⁹

IV. CONCLUSION AND SUGGESTIONS

The purpose of the paper was to highlight the importance of understanding the term consent itself as it is used in Tort Law and then show how it is interpreted in Trespass of Person and the ways in which it can be applied to in a civil wrong. This paper covers certain issues of concern that arise in trespass. One of the major issues here is that onus of proof of consent lies on the plaintiff and not the defendant. Consent is an affirmative defense suggesting that it may only be available when the element of intention was present. In a case of trespass, it is important to prove that the trespasser had the intention of committed the said Tort. The initial hypothesis was hence found to be true.

As discussed earlier, proving that he did not consent to the act of the defendant is the

⁸ White v Johnston, (2015) NSWCA

⁹ Freeman v Home Office, (1984) 2 WLR 802

responsibility of the plaintiff. This should not be the case, at least not at all times. Civil courts should allow the defendant to prove that the plaintiff had consented. Another suggestion would be an introduction of a new Tort liability for lack of informed consent. Informed consent is consent given by a person after knowing all the risks and consequences of an act. This liability already exists in the medical profession. A liability can be introduced in trespass where the plaintiff could present a case that risks on the commission of the act were not explicitly mentioned by the defendant. Provided the defendant had prior knowledge of such risks being involved.

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