TWO VIEWS ON CONSENT IN TRESPASS TO THE PERSON

Editor's Note:

The following two notes take divergent views on the issue of where lies the onus to prove consent in trespass to the person. In the first article, Professor Hertz dismisses two recent Canadian cases which held that the onus was upon the defendant. Citing American and English authority, Professor Hertz argues that one of the elements of a trespass is lack of consent, and therefore the onus lies on the plaintiff to prove that lack. Professor Picard in the second note supports the position she took in a previous article that, in Canada, the onus of proving consent lies upon the defendant.

A TEACUP TEMPEST: ONUS TO PROVE CONSENT IN TRESPASS TO THE PERSON

In "Volenti Non Fit Injuria: A Guide",[1] I stated that "the onus of proof of lack of consent in trespass lies with the plaintiff, whereas the defendant has the burden of proving *volenti* in other areas of tort law".[2] In a companion article,[3] Professor E. J. Picard disagreed, citing a number of recent cases to prove that the onus was always on the defendant, even in trespasses to the person.[4] The clearest of those cases is *Schweizer* v. *Central Hospital*,[5] where Thompson, J. categorically states: "In the instant case, following *Cook* v. *Lewis*,[6] I find that the onus of establishing a sufficient and effective consent rested upon the Defendants and that they have not met or discharged that onus".[7] In *Kelly* v. *Hazlett*,[8] Morden J. likewise places "[t]he onus . . . on the defendant to prove facts that indicate a valid consent as far as the basic nature of the operation [which defendant performed upon plaintiff] is concerned".[9] Morden J. cited no authority for his ruling.

American authority is completely contrary to this proposition; English authority seems against it as well. Finally, the reliance on the rule in *Cook* v. *Lewis* would appear to be misplaced as support for putting the onus on the defendant, because the ancient doctrine of trespass places the burden of showing an authorized contact upon the plaintiff.

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1. L. Klar (ed.), *Studies in Canadian Tort Law* (1977).
2. *Id.* pp. 103-104. The exception to the onus rules in trespass is trespass to land, where the defendant has the burden of showing leave and license, *id.* 104 n.24.
3. "The Tempest of Informed Consent", in Klar, *id.* at 129.
4. *Id.* at 134.
5. (1974) 6 O.R.(2d) 606, 53 D.L.R.(3d) 494 (Ont. H.Ct.).
6. [1951] S.C.R. 830, [1952] 1 D.L.R. 1.
7. (1974) 6 O.R.(2d) 606 at 623, 53 D.L.R. (3d) at 511.
8. (1976) 75 D.L.R. (3d) 536, 1 C.C.L.T. 1 (Ont. H. Ct.).
9. 75 D.L.R.(3d) at 563, 1 C.C.L.T. at 32. *See also Reibl* v. *Hughes* (1977) 78 D.L.R.(3d) 35 (Ont. H. C.). On appeal, a new trial was ordered: Brooke, J.A. Ont. C.A., June 18, 1978, unreported.

The first Restatement of Torts states the principle clearly:

> . . . [A] privilege prevents conduct which would otherwise be tortious in character from so being. There are two general forms of privilege, one derived from the consent of the other, the second conferred by law irrespective of the other's consent and very often, against his express dissent. In respect to invasions of interests of personality there is this important distinction between the two types of privilege. The non-consensual privileges are invariably matters to be alleged and proved by the defendant and their absence need not be shown by the plaintiff. On the other hand, the absence of consent is inherent in the very idea of those invasions of interests of personality which at common law were the subject of an action of trespass for assault, battery or false imprisonment. Therefore, the absence of consent is a matter necessary to constitute an actionable assault, battery or false imprisonment, as such to be proved by the plaintiff, and is not an exculpatory matter which, as such, must be alleged and proved by the defendant.[10]

Case law[11] and comment[12] support the Restatement rule.

The rule in England cannot be as categorically stated. However, Professor Street writes:

> On principle it would seem that the absence of consent is so inherent in the notion of a tortious invasion of interests in the person that the absence of consent must be established by the plaintiff.[13]

The case most clearly supporting Professor Street is *Latter* v. *Braddell.*[14] The plaintiff was a housemaid, and her employers suspected that she was pregnant. They told her to go to her room and submit to their doctor's medical examination. Although plaintiff protested against the examination at all times, she disrobed for the doctor's touch. Subsequently, the plaintiff brought an action of assault against her employers and the doctor. At the end of the plaintiff's evidence[15] the trial judge took the case against the employers from the jury and allowed it to proceed against the doctor. The jury found for the doctor. The plaintiff obtained a rule to show cause why a new trial should not be granted.

Although in the Common Pleas Division the judges did not agree on the sufficiency of the evidence concerning consent, both agreed that the plaintiff must show her *lack* of consent. Lopes J. who found for the plaintiff, said:

> If the plaintiff voluntarily consented, or if, in other words, the assault was committed with her leave and license, the action is not maintainable; and to justify the ruling of the learned Judge, what was done must have been so unmistakably with the plaintiff's consent that there was no evidence of non-consent upon which a jury could reasonably act.[16]

Lindley J. who had been the trial judge below, explained:

> [T]here was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress's orders . . . there was no evidence . . . to show that what [the employer] ordered to be done was done against the plaintiff's will in any accurate sense of that expression. This, however, is what has to be established.[17]

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10. *Restatement, Torts* (1934), s. 13, comment f.
11. *Kritzer* v. *Citron* (1950) 101 Cal. App. 2d 33, 224 P.2d 808 (Ct. App. Div. 2); *Lynch* v. *Egbert* (1971) 360 Mass. 90, 271 N.E. 2d 640; *Ford* v. *Ford* (1887) 143 Mass. 477, 10 N.E. 474 (per Holmes , J.); *Wells* v. *Van Nort* (1919) 100 O.S. 101, 125 N.E. 910; *Dicenzo* v. *Berg* (1940) 340 Pa. 305, 16 A.2d 15.
12. W. Prosser, *Handbook on the Law of Torts* (1971), s.18
13. H. Street, *Law of Torts* (3rd ed. 1963) 18. *See also* Clerk & Lindsell on Torts (14th ed. 1975) s.675.
14. (1881) 50 L.J.Q.B. 15, (C.P.), *aff'd* (1881) 50 L.J.Q.B. 448 (C.A.).
15. 50 L.J.Q.B. 155 at 167.
16. *Id.*
17. *Id.* at 169.

He cited *Christopherson* v. *Bare*,[18] a case involving pleading. The judge unanimously held that to be an assault, an act must be done against the will of the party assaulted. This has been held to put the burden upon the plaintiff to show lack of consent.[19]

In Canada, as elsewhere, it is for the plaintiff to prove that there was an assault or other trespass and for the defendant to prove lawful excuse or justification.[20] An assault, however, has been said to be "[t]he striking of a person against his will".[21] This suggests that the consent issue is subsumed in the plaintiff's need to show a trespass to the person in the sense of *Cook* v. *Lewis*.

The judgment in *Schweizer* v. *Central Hospital* reasons as follows. Under *Cook* v. *Lewis*, once the plaintiff has shown an injury "by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault' ".[22] That onus can be discharged by the defendant's establishing an absence of intent or negligence on his part. The *Schweizer* court thus assumes that the onus of proving the plaintiff's consent must likewise fall on the defendant.

Every touching, even if directly by the defendant to the person of the plaintiff, is not a trespass. A tap on the shoulder to attract attention is not;[23] a spit in the face is.[24] The distinction between the two is the essence of trespass *vi et armis*: there is no trespass unless it is "unlawful" or "wrongful," and it is the plaintiff's burden to show that quality in the application of force to the person.

Cook v. *Lewis* and *Stanley* v. *Powell*,[25] upon which it relied, say nothing to the contrary. In both cases, in fact, it was obvious that there could have been no consent by the plaintiff. Although neither involved an intentionally inflicted injury, both were "wrongful" and (under the position adopted in *Cook* v. *Lewis*) required disproof of negligence by the defendant.

At common law,

> Trespass . . . would lie only for a direct and *unauthorized* interference with land, goods, or person. A plaintiff could not use it who had voluntarily submitted himself or his property to the defendant's ministrations, as where he complained of the carelessness of a doctor or a farmer or a veterinary surgeon. A bailor could not use it if the bailee damaged or destroyed the goods.[26]

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18. (1848) 11 Q.B. 473; 116 E.R. 554.
19. *Hegarty* v. *Shine* (1978) L.R. Ir. 288 at 296 (C.A.) *See also Herring* v. *Boyle* (1834) 1 C.M. & R. 377 at 380, 149 E.R. 1126 at 1127 (Exch.) *(per* Alderson, B., during argument): "The plaintiff was bound to prove his dissent [to being confined] and not leave that question in ambiguity."
20. *Mann* v. *Balabon* [1970] S.C.R. 74, 8 D.L.R. (3d) 548.
21. *Bruce* v. *Dyer* [1966] 2 O.R. 705 at 710, 58 D.L.R. (2d) 211 at 216 (H.Ct.), *aff'd.* [1970] 1 O.R. 482n., 8 D.L.R.(3d) 592n. (C.A.).
22. [1951] S.C.R. at 839, [1952] 1 D.L.R. at 15.
23. *Coward* v. *Baddeley* (1859) 4 Hurl. & N. 478, 157 E.R. 927 (Exch.); *Wiffin* v. *Kincard* (1807) 2 Bos. & Pul. (N.R.) 472, 127 E.R. 713 (C.P.). *See* III W. Blackstone, *Commentaries on the Laws of England* (J. Wendell ed. 1850), at 120-121.
24. *R.* v. *Cotesworth* (1704) 6 Mod. 172, 87 E.R. 928 (K.B.).
25. [1891] 1 Q.B. 86. In fact, there is some doubt if *Stanley* has anything to do with the onus of proof. *Fowler* v. *Lanning*, [1959] 1 Q.B. 426 at 438 (*per* Diplock, J.).
26. C.H.S. Fifoot, *The History and Sources of the Common Law* (1949) 66 [emphasis added]. *See also id* at 110.

In one ancient anonymous case,[27] the plaintiff loaned a horse to the defendant, who afterwards killed it. As plaintiff showed no unauthorized interference with his possession, it was strongly suggested that only case, and not trespass, would lie.[28] In *Putt* v. *Rawsterne*,[29] the plaintiff brought an action in trover, to which the defendant replied that the plaintiff was barred as he had previously failed in an action for trespass involving the same goods. Since to prove trespass, the plaintiff would have had to prove a wrongful taking, but in trover only a demand and denial, the new action was allowed. The court was clearly of the opinion that the action for trespass had failed as the plaintiffs "had no evidence to prove a wrongful taking, but only a demand and denial." Trespass could not lie where the plaintiff had voluntarily given over the goods to the defendant although trover might.

One can draw the conclusion from these cases that, at common law, the plaintiff needed to refute any contention of authorization to demonstrate the "wrongfulness" of a touching. Thus the consent issue should continue to lie on him whether one follows *Cook* v. *Lewis* or the English or American authorities[30] on the issue of onus in proving negligence or intent. To say otherwise would make any touching *prima facie* wrongful, with the burden on the defendant to show otherwise. In the context of doctor cases, such as *Schweizer* or *Kelly*, the doctor would always have to show that he had obtained consent. Suppose that both doctor and patient were dead, and nothing could be shown except that there had been an operation. Under the circumstances, should we have a rule which assumes that there was no consent?

On the other hand, if A shoots B, and both are dead, does B's action for battery fail? Of course not: even if consent would prevent the action, the mere occurrence plainly makes out a case of "no consent." In other words, when the defendant's acts are violent, the plaintiff's mere showing of the act will be sufficient to obviate consent. And so it should be — the defendant's acts are *prima facie* wrongful. But, where the defendant's acts are only technical batteries at best, there is every reason to put the burden of disproving consent on the plaintiff. In the latter instance, the defendant is liable only if he has done a wrong, and the gravamen of the act is acting without consent, not merely acting.

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27. *Anon* (1390), Y.B. Hill 13 Rich. 2 (Ames Foundation ed. Plucknett), at 103-104. Reprinted Fifoot, *supra* n. 26-83.

28. The case was withdrawn without decision.

29. (1682) Raym. Sir T. 471, 83 E.R. 246 (K.B.). Variously denoted as *Putt* v. *Roster*, (1682) 2 Mod. 216, 83 E.R. 1098 (K.B.); *Putt* v. *Royston* (1682) 2 Shaw K.B. 211, 89 E.R. 896 (K.B.). *See also Wm. Leitch & Co., Ltd.* v. *Leydon, Barr & Co.* [1931] A.C. 90 (H.L.).

30. *E.g., Fowler* v. *Lanning* [1959] 1 Q.B. 426; *Brown* v. *Kendall* (1850) 6 Mass. (6Cush.) 292.

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