

## TRESPASS TO LAND

The issue is whether [P] can sue [D] for [damages/injunction] in the tort of trespass to land after [D] [action] to [P]. This engages the elements of [element].

The protection of a landowner's right to exclusive use of their land is at the heart of trespass, as Lord Camden stressed, "the great end, for which men entered into society, was to secure their property"

Trespass is...

- An unjustified direct interference with the land in the possession of another (Wu).

### 1. Intention

For a claim in trespass to succeed, the act must be intentional.

- A positive or voluntary act is required
- You can be held liable under vicarious liability for your agents *Matheson*
- Failure to exercise proper control over something may make you liable even if you had no intention yourself *League*
  - Question* – trespass is an intentional tort, yet 'failing to exercise proper control' sounds like negligence? Contention over how intentional the act must be?

### 2. Trespass act

- There must be an act of trespass committed for a claim to succeed. As per *Entick* – every invasion of private property, be it ever so minute is a trespass (unless there is law excusing invasion)
- (If it is not clear cut) Here, the trespass is not as simple as that in *Entick*. The action (x) still could be a trespass because in analysis of the following factors...

### 3. Causing entry onto "land" (+airspace)

It has been found that airspace can be considered part of one's land (*Davies & Bernstein*)

Note s 97 Civil Aviation Act 1990

- Imposes restrictions of what is reasonable for aircraft flight heights. Permits what could otherwise be a trespass. Implies that the Latin Maxim does apply as to "the heavens" as planes have been made exempt from trespass as stated by the maxim.
- Marks differences between a permanent sign as in *Kelson* and a transient aircraft
  - Davies* – (Australian SC, not binding but persuasive)
    - Property rights extend from the heavens right down to hell ("cujus est solum ejus est usque ad coelum et ad infernos")
    - "so far as the ability to use land, and the air above it, exists... any intrusion above land is a direct physical breach of the negative duty not to interfere with the owner's use of his land, as in principle a trespass"

VS.

- Bernstein* – (HC, UK)
  - Doubted that the Courts intended the ptf. to have *unlimited rights* – limit to heights as is necessary for the ordinary use and enjoyment of his land
- Other examples
  - Kelson* – sign protruding 8 inches onto the property was trespass (*Entick* ever so minute)
  - Gifford* – sign protruding 4ft and 8 inches was sufficient

- d. Differences?!
  - i. *Bocardo (HL)* – potential application of Latin maxim regarding drilling, but chose to follow *Bernstein* – at this level underground it is probably not interfering with the owner’s ordinary use of their land.
  - ii. BUT *Bernstein* is difficult to apply in trespass because trespass is actionable per se so it does not always make sense that it must interfere with the ordinary use and enjoyment of the land?

#### 4. Who has a standing to sue?

- a. The plaintiff must have possession or right to possession of the land to sue.
- b. Possession is not equal to ownership
- c. Owner can only sue if ownership interests are affected
- d. A licensee may sometimes be able to sue if you have a long term license to be there
  
- e. *Questions surrounding whether a man in a stadium, hit by paint splatters, could succeed in trespass where he is not the owner of the property*
- f. *Licensees? Tenants have a greater chance of success than spectators? Long terms occupants vs. intermittent visitors.*

#### 5. Directness

For a trespass claim to succeed the dfts. acts must be physical and done by hand directly on to the ptf’s. land. There is some contention between cases as to the application of directness...

- a. Interference must be a natural and probable consequences of the dfts. act *Gregory*
- b. Interference must be direct and immediate, **not merely consequential** *Esso*
  - i. Where there are larger forces at work, such as tides, it is less likely to be direct – consequential *Esso*

... but *Esso* seems to create a higher threshold than *Gregory*.

#### 6. Unlicensed (implied licenses)

- a. Express license – legislative authority *Entick*
- b. Implied license?
  - i. A member of the public coming on lawful business has an implied license to come onto occupier’s land and knock on his door *Robson*
  - ii. Police have independent rights & a duty to stop breaches of peace *Robson*
  - iii. SC held implied license for police in the execution of his duties, even though the ptf. accepted the dft. for different purposes *Tararoa*
- c. No implied license?
  - i. There can be no implied license if it is known that the ptf. would not grant access for the purpose which the dft. took action *TV3*
  - ii. Ask whether the intentions of the person were the kind of this that would attract an implied license *TV3*
  - iii. A person does not have a license to enter on the land for purposes that are lawful but improper *Robson*
  - iv. No implied license for police when there was no reason/ warrant for their intrusion *Hamed (Tuho)*
- d. Authority to give implied licenses?

- i. No trespass where given the leaves and license of a person in possession of land OR exercising own rights *Robson*
- ii. There is an implied authority in a person who invites someone inside a dwelling *Robson*
- e. Revoking (ask, what will negate the implied license)
  - i. An implied license can be revoked *Robson*
    - Express refusal on entry or specific sign “no admittance to police officers” *Robson*
    - A license may be revoked by notice, oral or visual or with unequivocal words or acts *Robson*
  - ii. When a license is revoked the licensee must be given a reasonable amount of time to leave the premises *Robson*

## 7. Actionable per se

- a. Trespass is actionable per se, “though the damage may be nothing,” those who invade private property will be liable to action *Entick*
- b. ‘without damages being proved’ *Davies*

## 8. Remoteness of damage

*Although trespass is actionable per se, where damages occur a remedy can ensue. However, not all damage resulting from trespass is actionable. Rather strength of the causal link between the dfts. act and the damage is assessed on relevant policy factors* *Mayfair*

- a. What was the dfts. intention to trespass/ cause damage
  - i. If a dft. intends to cause the damages, they may be liable for remote consequences of their actions
  - ii. There can be an intentional trespass but not damage
- b. Liability will depend on whether the damage was RF
  - i. The more RF, the less remote – the damage must be a natural or direct consequence of the trespass *WM No. 1*
- c. No liability if unintentional or negligent
- d. What was the causal link between the trespass (wrong) and the damage?
  - i. Cf to *Polemis* plank – explosion
- e. What was the type of damage?
  - i. Law is more ready to redress personal damage than property damage (economic loss)
- f. Likelihood of insurance (less impt.)

McMullin J: (*Mayfair*)

- a. Foreseeability
- b. Natural consequence
- c. Probable consequence
- d. Direct consequence

## 9. DEFENCES **LEASON**

- Don't focus on elements – look to purposes and principles
- Factual analogies
- Trends and themes:
  - i. Protest rights vs. property rights
  - ii. Unlawful acts vs. property rights

*The case at hand reveals a conflict between (rights) vs. property rights. In **Leason**, property rights were held to be very important and trump any right to protests consistent with democratic principles.*

### a. DEFENCE OF NECESSITY

*This defence provides for when the circumstances compel you, with no reasonable alternative to take a course of action (such as the one here) that would otherwise be illegal. There are 2 elements which must be satisfied.*

#### (1) Duress of circumstances & necessity proper:

- Reasonable belief of imminent threat or death?
- Were the actions reasonable in the circumstances (was there any way of actually knowing the truth?)
- Was there no realistic choice but to break the law?
- Was the illegality proportional to the peril; no more was done than reasonably necessary (conclusion?)
- Was there a sufficient nexus between the threat and the choice to unlawfully respond?

“Did the dft. believe in good faith... objectively reasonabl(y) that their actions were necessary to preserve life, prevent serious harm or render assistance to another?” *Dehn v AG*

→ Court in **Leason** was not swayed by the dfts. genuine moral motivations. It was not an act of recsue, rather a symbolic one of protest. It is a carefully guarded principle that rights of property are respected. It allows for true emergencies.

### b. DEFENCE OF SELF OR ANOTHER

*Covers situations where one person exerts force against another in order to defence themselves or a third party. (s 48 Crimes Act – criminal law but also civil law. S 48 should be interpreted strictly because it is a strict exception to the general rule that citizens cannot use force in our society)*

- Force:** usually against a person, but the Courts have not ruled out property
- In defence of self or another?**
- Was the use of force reasonable and necessary? (objective)**
  - Reasonableness must be judged “in its actual social setting, in a democratic society with its own appointed agents of the enforcement of law”
    - Imminent threat
    - Proportionality - force of defence match the attack?
    - Alternative options? (the law does not tolerate vigilantes – there must be a connection between acting the defending)

#### **Examples:**

*R v Wang* – the accused stabbed drunk husband to death after he threatened to kill her. Alternative route was available. Unacceptable behaviour.

*R v Jones* – this defence should be used sparingly and as a strict exception to the rule that our citizens cannot use force in society

*R v Savage* – must be under real threat of danger, not sufficient that there might be some future danger to him.

*Not reasonable to destroy public property, take steps towards anarchy – should have engaged in rational/ reasonable debate.*

- Law will not tolerate vigilantes** – defence is even more limited when not defending yourself, but the community “interest”
- Democratic society** – govt. police should be made through law & those who suffer infringement of their lawful rights are entitle to the protection of the law

### c. EX TURPI CAUSA

Rests on the principles that law will not provide a remedy for someone who is acting illegally or immorally - "from a dishonorable case of action does not arise"

#### (1) Reliance approach

- Liability will be excused if the claim **can only be made in reliance on illegal or immoral acts of the ptf.** (did the ptf. have to mention their illegal activity when suing the dft.? If so, this defence can be used)
  - o Strengthening of defence if they **do not** rely on the illegal act e.g. they have first and foremost an ownership or possessory interest.

#### (2) Causation approach

- Did the illegality or turpitude directly cause the dft. to act (trespass), or was it merely the background/ motivational factor?
  - o For the dft. to not be liable – the claim must be inextricably linked to the illegality rather than simply giving occasion for the conduct. Here illegality "provides the motive"

#### (3) Conscience approach

- Liability will be excused if it would be affront to the public conscience to allow the ptf. claim to succeed (because of the illegality)
- The court should not condone vigilante behaviour (people take law into their own hands) as this would be highly offensive to the public.
- This approach was **rejected by the HL** but still applied in *Leason*.
  - o *Note that public conscience can be divided - e.g. Springbok tour*