

TRESPASS TO LAND

Trespass

Unjustified, direct interference with land in the possession of another (*Wu*)

English law provides very strong protection against intentional incursion onto a person's land to ensure that possessory rights are protected.

Key elements:

- ✓ Intentional
 - NB: extended to failure to exercise proper control (*League v Cruel Sports*)
- ✓ Act or failure to leave when told to
 - *Robson v Hallet*: implied license can be revoked, but must give a reasonable time to leave
- ✓ Cause an entry on land
- ✓ Land?
 - *Davies*: have rights to airspace vs. *Berstein*: ordinary use and enjoyment of land
- ✓ Direct?
 - *Gregory v Piper*: includes natural and ordinary consequences
 - *Esso*: directness required
- ✓ Unlicensed or unjustified – defences?
- ✓ Actionable per se
 - *Mayfair v Pears*: damage relates to remedies
- ✓ Standing to sue: must be someone that owns the land in question or has a possessory interest

Entick v Carrington → Right to ownership, rule of law

Defendants were King's messengers: broke into plaintiff's house with a warrant from the Secretary of State to search for plaintiffs and bring him and his books/papers into custody.

Trespass to land is a deliberate direct act by which a defendant enters the plaintiff's land.

Lord Camden CJ: "Every invasion of private property, be it ever so minute, is a trespass."

- The great end for which men entered into society, was to secure their property: society and property rules formed to avoid the chaos of might-is-right attitudes
- **Trespass requires no showing of damage (actionable per se):** "he is liable to an action through the damage be done"

Land? Issue of whether land includes airspace

Davies v Bennison → **Trespass to airspace**

Defendant shot and killed the plaintiff's cat, firing a bullet from his yard into her yard. Was this trespass?

Trespass: actionable without damage being proved (actionable per se)

- Ownership: right to use/deal with/enjoy something to a definite and almost unlimited extent

Ownership of land extending to airspace?

Cujus est solum maxim: "What is owned on the ground is owned in the heavens"

- *Pickering v Rudd*: disapproved maxim, would result in absurdity e.g. astronaut liable for trespass
- *Keyan v Hart*: above also leads to absurdity e.g. if you fire at an animal and it hits and leaves the bullet in = trespass, but if you fire and miss so the bullet hits the ground = not trespass

Person has a right to build tall towers and the space above their land is reserved for that: *but difficulty is then how far these rights go*

Bernstein of Leigh (Baron) v Skyviews & General Ltd → **Trespass to airspace**

Defendant company took photos of Bernstein's property and offered to sell them to him. He took offence and sued the company for trespass to land.

Land includes subsoil and airspace

Davies: *cujus est solum* (what is owned on the grounds is owned in the heavens)

= Owner does have certain rights in the air space above land

- ✓ Line of authority for this usually deals with structures attached to land (e.g. overhanging buildings or wires), or removal of a sign 8 inches above the ground (*Kelston*)
- ✓ *Winfield on tort*: trespass to air space if they fly so low to come within the area of ordinary usage

Protected rights in airspace are limited to the area 'reasonably necessary for ordinary use and enjoyment of land'

No support in authority that landowner's rights in the air space above his property extend to an **unlimited height**

- This would lead to absurdities e.g. satellite being trespass

Landowner's rights in air space is restricted for ordinary usage and enjoyment of land

Here: defendant's aircraft did not infringe the plaintiff's rights = so no trespass

- ✓ **Approved in *Bocardo* (2011)**

NB: unclear how high 'usual enjoyment and use' really is

NB: Inconsistency with *Entick* ("be it ever so minute" = would include airplane)

Section 97 of the Civil Aviation Act

"Flight of an aircraft must be reasonable to be protected from trespass"

- Legislation corrected absurdity in law for specialised circumstances (flights)
- Suggests that *Davies* maxim stands for other circumstances, other than flights

Bocardo

Company drilling through the subsoil for oil → Trespass?

Protectable rights in airspace are limited, but rights in subsoil are not necessarily determined by *Bernstein*.

Directness

Gregory v Piper → **Necessary and ordinary consequences**

Plaintiff went through the defendant's property to get to his stable. Defendant disputed plaintiff's right to do so, employed someone to lay out a wall of rubbish to obstruct the way. Some of this rolled naturally to obstruct the way. Some of this rolled naturally and ran against the plaintiff's wall. Plaintiff said this was trespass, defendant argued not as he gave direct orders that the rubbish shouldn't touch the plaintiff's walls.

If the interference is a natural consequence of an action, it is still trespass.

- ✓ It was a natural consequence that some rubbish slid down, and therefore trespass.
- ✓ **Consequential and indirect actions included** (different to *Esso*)

Esso Petroleum Co. Limited v Southport Corporation → **Direct causation**

Defendant owned a ship which became stuck in an estuary; the ship captain ordered that they deposit oil to refloat the ship. This became deposited on the plaintiff's foreshore. The plaintiff brought claims in nuisance, trespass and negligence; the trial judge did not distinguish due to remedies of inevitable accident and necessity available.

Trespass to land requires the defendant to have done a physical act directly on the plaintiff's land.

- ✗ The oil was not trespass, as the interference was not sufficiently direct.
- ✗ Carrying of oil onto land was consequential (carried in on tide)

Requires direct causation

Unjustified or unlicensed entry

Robson v Hallet → **Implied license**

Three police officers were called out to a house, and walked up to the front door. The sergeant was invited inside by the tenant's son and the other two police officers remained outside in the garden. Mr Robson Senior then told the sergeant to "Get out" and the sergeant immediately attempted to leave. When he got to the front door, Mr Robson jumped on his back and began punching him. The other officers came to his aid and were also assaulted.

Implied license

If there is license (permission) to do what would otherwise be a trespass, there is no liability.

License can be **express** (i.e. saying 'come on in!') vs. **implied**

- ✓ **Implied license granted when a house has a garden in front without a locked gate**
- ✓ The occupier of any house gives implied license to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on his front door
- ✗ Implied license can be rebutted through **express refusal** e.g. sign on property, being told to 'get out'
- ✗ **Must be given a reasonable time for a person to leave when the implied license is revoked**

TV3 Network Services Ltd v Broadcasting Standards Authority → **Ambit of implied license**

TV3 reported came onto Mrs S's land to try get an interview. A filming crew was recording surreptitiously from a neighbouring piece of public land. Mrs S would not have consented to being filmed.

Victoria Park Racing & Recreation Grounds: a person is entitled to look over the plaintiff's fence and describe what he sees

- ✓ No trespass for filming crew

Implied license for reporter?

- ✗ Implied license is limited to lawful purposes, trespass is insidious motives
- ✗ Purposes for which it is known/understood that the occupier would not have given consent is outside the ambit of implication

Harris v Attorney-General → **Message of revocation must be clear**

Whether "fuck-off" was a sufficient revocation of implied license.

Needed to make it clear that it was a solid revocation, otherwise is just a meaningless expletive.
(i.e. with a gesture, or "fuck off out of my house")

Intention

League against Cruel Sports Limited v Scott → **Extends intention**

League established to oppose/prevent cruelty to animals (specifically deer foxes hunting). The League acquired open lands where deer could take refuge and escape the hunting. The defendant then allegedly trespassed as its hounds went through this land on the course of a hunt.

Defendant must **intend the act which constitutes the trespass** but does not need to intend to infringe on the plaintiff's rights.

- ✓ Intention to cause hounds to enter such land as they are running freely
- ✓ OR if by failure to exercise proper control he caused them to enter such land

Remoteness

Mayfair Ltd v Pears → **Remoteness**

Defendant parked car unlawfully in a car parking deck. The car mysteriously caught fire, and spread causing significant damage. Was he liable for all damages after initial trespass?

Remoteness in trespass differs from remoteness in negligence → goes to the remedy/damages given

✓ As trespass is **actionable per se**

Here, it was undisputedly trespass → issue was whether the defendants were liable to pay for the entire building, or whether this was too remote from the initial trespass.

Here, the *Wagon Mound No 1* test of reasonable foreseeability was not applicable as the fire was not RF.

Cooke P adopted a consideration approach based on the particular facts of the case:

1. Trespass was intentional but the defendant did not have intention to cause any damage
 2. The fire was not reasonably foreseeable, and no negligence on the part of the defendant
 3. Causal link between trespass and the fire damage was not that direct
 - Especially note that the additional links in the chain of causation (*as extra person had to come in to start the fire*)
 4. Loss was economic - law more ready to redress personal injury than property damage
 5. Rejected in below courts
 6. Insurance: plaintiff had property insurance, therefore burden of fire damage more spread out - whereas defendant less likely to have this comprehensive insurance
- = Therefore, on the balance of these considerations: Cooke P found it unfair to impose liability

McMullin J agreed with Cooke P broadly, but not with the approach of a series of considerations

- Instead, should consider broadly – foreseeability, justice and policy

Result: Trespassers will not necessarily be liable for all damage that would have occurred but for the trespass. Remoteness principle can apply in some circumstances.

Defences

1. Defence of another
2. Defence of necessity
3. Defence of illegality: principle of *ex turpi causa*

Leason v Attorney-General → **Ex Turpi Causa**

Appellants entered GCSB facility in Waihopai Valley and deflated a satellite dome to expose and prevent harm caused by Second Iraq war. Three protestors went to the spy-domes by Marlborough. They caused \$1.2 million of damage. They were acquitted by the jury in a criminal trial, but the Govt sued in trespass in order to make an example of them.

Ex turpi: three approaches

1. Conscience test

Euro-Diam Ltd v Bathhurst: *ex turpi* rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal/immoral conduct

- Whether the plaintiff's actions would **affront the public conscience** where they to be supported by the court
- i.e. if claim is based on illegal conscience

Test: would it be offensive to the public conscience to hold the defendant liable given the illegality of the plaintiff's actions?

- ✗ Here, the defendant's attempted to say that the Government's actions were illegal (spying, contributing to deaths in Iraq)
- ✗ But, CA held that they could have gone about this protest differently (peaceful protest with no damage to property)
- ✗ It would be a bigger affront to the public conscience to condone 'vigilante' behavior

2. Reliance test

Where the claim made by the Crown (trespass) is done on the basis of an illegal act.

Does not really work for trespass:

- ✗ The basis the trespass claim Crown is relying on is their ownership/possession of the land (rather than the illegal war in Iraq)
- ✗ The only way this could succeed would be if they were established on the land illegally

3. Causation test

Where illegality or turpitude caused the trespass

- *E.g.* if the plaintiff chased the defendant with a sword, and the defendant ran onto the plaintiff's land to escape them → this could not be held to be a trespass, as the plaintiff caused the defendant to trespass
- *Example within Leason*: plaintiff piled land on the boundary line between their property and the defendant's property, and the defendant trespassed onto the plaintiff's land to tidy up the mound → *ex turpi* defence would succeed because the defendant only entered plaintiff's property to remove the soil damage caused by the plaintiff

Test: did the illegal actions of the plaintiff cause the trespass?

- ✗ Defendants attempted to rely on the illegal actions of the Govt in spying/contributing to deaths in Iraq
- ✗ Court said this may have been their motivations, but it was not what **caused** the trespass
- ✗ Their actions (getting out snipers, cutting wire, walking onto Govt property, slashing dome) was what actually caused the trespass

4. Consistency or coherence?

Canadian courts have adopted different policy reasons: the need for consistency, coherence of the law, integrity of the legal system

Law around illegality is flexible, unsettled and **capable of development**

- Law is in a state of flux, with blurred edges
- Unsure which approach should be followed