

Trespass to Land

1. Define

- A voluntary and positive act of the D that directly and intentionally or negligently interferes with the P's exclusive possession of land
- In order for P to be successful in the claim, P must prove the following elements on the balance of probabilities.

2. Is there land?

- Includes surface of the land/boundary and any fixtures attached to it, anything growing on its surface, the ground beneath the land and the airspace above the land. (*Blackstone*)
- Airspace above is to *such height as is necessary for the ordinary use and enjoyment of his land* (*Bernstein*)
 - Relevant test is whether the incursion was at such a height 'that it *may* interfere with any ordinary uses of the land which the plaintiff *may* see fit to undertake'. (*LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd*)
- Earth beneath the surface (*Bocardo SA v Star Energy UK Onshore Ltd*) The landowner owns all substrata beneath his property up to an undefined depth where the notion of ownership becomes absurd (pressure and temperature) and not worth arguing about.

3. Standing to sue

- The P must have "exclusive possession" of the land, actual or constructive possession is sufficient. (*Newington v Windeyer*)
 - The very act of possession itself can give a P an exclusive right to possession against the whole world, except someone with a better title (*Newington v Windeyer*).
- NOTE: this excludes a licensee. A mere license to be on land is not sufficient as it does not confer a right to "exclusive possession" (*Vaughan v Shire of Benalla*)
 - *Licensee*- someone who is given special permission to be on that land

4. Positive Voluntary Act

- **Voluntary**: Not an involuntary act, but one *willed* and *directed* by D's conscious mind. A control of your body that led to that act. (Actions that are not willed: sleep walking, seizures, automatism act, severe drunkenness)
- **Positive**: D took active measures, and was not merely passive "like a door or wall" (*Innes*)
- **Actionable Per Se**: No need to show actual damage/harm has occurred (only action occurring is sufficient): No damage to the land is required.

5. Interference

- "Slightest physical crossing" of the boundary/land will suffice (*Lavender v Betts*)
- Cutting off electricity and gas does not constitute actual physical interference with the land (*Perera v Vandiver*)
- Entering land with an express or implied license will not constitute to trespass
 - Implied License to the means of access to the entrance of a house if; the path or driveway is left unobstructed; the entrance gate is left unlocked; and there is no indication that entry is forbidden; provide the entry was for a legitimate purpose (*Halliday*)

- License can be limited by reference to people or purpose (*Lincoln Hunt*)
- License will not exist where P has clearly indicated in advance that permission is refused (*Rinsale*)
- Remaining on land once the license has been revoked will be trespassory (*Cowell*) if these requirements are met:
 - He/she has received (reasonable) notice that the license is revoked; and
 - He/she has been given a reasonable time in which to withdraw from the land
- May also be **continuing trespass** (continues to remain on land) so long as there was an initial trespass (*Konskier v Goodman*)

6. Directness

- Said to be direct when the injury follows so *immediately upon D's act* that it may be termed as part of the act. (*Hutchins v Maughan*)
- Must have no intervening cause (*Hutchins*). Some intervening acts include:
 - **Voluntary Human Acts** (including the acts of P) (*Myers v Soo*). Involuntary Human Acts which includes those acts taken *reflectively* and in *self-defence* (*Scott v Shepherd*), do not continue intervening acts.
 - **Natural Forces** which include wind (debatable), tide (*Southport v Esso Petroleum Co*) and usual freak of nature of natural forces such as an earthquake or tsunami waves.
- If a tort is carried out by an **agent** (police officer), authorized/instructed to by a **principal** (manager), then directness is **still satisfied** as committed by the principal (*Coles Myer v Webster*)

7. Fault

- **Intentional** or **Negligent** trespass (*Williams v Milotin*)
- The burden of proof is on the D to show that he/she did not **intend** the outcome, or was careless (**negligent**) about the outcome of their act (*McHale v Watson*; *League v Scott*)

On the balance of the above arguments, the court is likely to find...

8. Defences

- Onus of proof = D

Consent

- **Express** consent (written down) or **implied** (determined from situation). It must cover the act in question (*McNamara v Duncan*)
- If P consented to D's act D will have a defense against the act of trespass
- Must be real and genuine consent (ie. Voluntary): no fraud or duress
- **Implied License**
 - There is an implied licence to use the means of access to the entrance of a house if:
 - the path or driveway is left unobstructed;
 - the entrance gate is left unlocked; and
 - there is no indication that entry is forbidden: (*Halliday v Nevill*)
 - Implied licences be limited by reference to people or purpose (*Lincoln Hunt Australia Pty Ltd v Willesee*)