

## TRESPASS TO LAND

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### STEP 1: DEFINE

→ A **voluntary** and **positive** act of the Defendant that **directly** and **intentionally** or **negligently**, physically interferes with the Plaintiff's **exclusive possession of land**.

### STEP 2: STANDING TO SUE

Plaintiff must have exclusive possession of the land in order to have standing to sue in TTL. This stems from ownership/possession of land.

Hierarchy of possession: **Owner>Tenant>Squatter**

#### Landlord/tenants:

- **OWNER** of land has right to possession; however
- If **LEASED TO A TENANT**, tenant has legal right to possession and can sue in TTL.
- (Even against the landlord, as the tenants have paid to be there)→\***Possession trumps Ownership**\*

#### Licensees:

- A license exists where a person has been given permission (consent) to go onto another's land.
- A mere licensee **does not** have standing to sue in TTL. A license will not confer the right of exclusive possession.

#### Squatters:

- The act of possession itself can provide 'some' exclusive right to possession, unless it is challenged by someone with a higher title.
- An existing squatter has more possessory interests over land compared with a new squatter that tried to move in (*Newington v Windeyer*)
- If squatters are sued by owner, they cannot use defence of necessity.
- NOTE: a mere licensee has no standing to sue in TTL, whereas a squatter has some standing (only if against someone with no proprietary rights).

### STEP 3: ACTIONABLE PER SE

→ No need to show tangible damage

### STEP 4: VOLUNTARY

→ Voluntary act that interfered with the exclusive possession of P's land

- **Consciously** brought about by bodily movement
- **Freely chosen** or **willed**
- Not voluntary – reflex, sleepwalking, unconscious

### STEP 5: POSITIVE

→ D is only liable for his positive acts, NOT his omissions (*Innes v Wylie*)

### **STEP 6: DIRECTNESS**

→ The trespass must be directly related to D's conduct

- Boarding a plane that lands on P's land is not a trespass.
- The action must be direct and not merely consequential (**Hutchins v Maughan**)
- Interference is direct when it **follows so immediately** upon D's act that may be **termed part of that act** (**Hutchins v Maughan**)
- Actively promoting someone else to do it still satisfies directness

### **STEP 7: INTERVENING ACTS**

→ D must have set in motion an unbroken series of continuing consequences, the last of which caused the contact

**An indirect/intervening act is sufficient to abrogate liability of a trespass.**

#### Human Actions

- Human actions including the actions of the plaintiff (**Myers v Soo**)
- Except for those taken reflexively and in self-defence (**Scott v Shepherd; Platt v Nutt**)

#### Natural Forces

- **Southport Corporation v Esso Petroleum Co**: in this case, Esso's oil which landed on Southport's land was not direct enough – there was no intervening act. (they were successful in negligence, but not trespass to land)

### **STEP 8: FAULT**

→ **Intention or negligence** is sufficient to satisfy the fault requirements for TTL

- D **knows of the risk**
- D **fails to exercise** proper control (**League Against Cruel Sports v Scott**) → A body (animal/mechanical) under a person's responsibility and **reasonable** control, who engages in a trespass will hold said owner liable for the trespass.

### **STEP 9: INTERFERENCE WITH LAND**

**Land includes:**

- Surface
- Fixtures
- Anything growing from land
- Subsoil/below surface
  - The plaintiff's right to exclusive possession extends as far below the surface of the earth as human activity can attend (**Bocardo v Star Energy**)

- Airspace
  - To such heights as it is necessary for the ordinary use and enjoyment of his land and the structures of it (**Bernstein v Skyviews**)
  - Relevant test is whether interference of a nature and at a height which **may interfere with any ordinary uses of the land that P may undertake. (LJP v Howard Chia)**
  - **Wrongs Act s30** –No trespass if a plane flies over your property.

The **merest crossing** over land is sufficient by a person or something in control of a person (**Lavender v Betts**)

**Continuing a trespass:** An act will also be trespassory if your permission to remain on the land is revoked and you/your object remain for an unreasonable amount of time. (**Konskier v Goodman**)

#### **STEP 10: BURDEN OF PROOF**

Typically lies with the **Defendant – he has to prove on BoP that he was not at fault (McHale v Watson)**. EXCEPTION: Highway Cases where the burden falls on the **plaintiff (Venning v Chin)**.

#### **STEP 11: CONCLUSION**

On balance, it appears as though P would/would not be able to establish that D committed a trespass to land.

## NEGLIGENCE: DUTY OF CARE

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### DEFINE NEGLIGENCE:

D may be liable in negligence (**s43 Wrongs Act**) with respect of P's personal injury for [insert conduct]. The burden of proof is on the P to prove all 5 elements (**Holloway**) on the balance of probabilities.

### STEP 1: DEFINE

When one person is placed in a position that would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger (**Heaven v Pender**)

### STEP 2: DETERMINE IF SETTLED LAW THAT:

#### 1. Duty of care exists

- The law has been clear that the relationship between P and D gives rise to a DoC
  - Doctors have a Duty to be careful of their patients (**Rogers v Whitaker**)
  - Road users and other road users (**Chapman v Hearse**)
  - Drivers and passengers (**Imbree v McNelly**)

#### 2. Duty of care does not exist

- The law says for policy reasons, there will be no DoC between P and D
  - Barristers (**D'Orta-Ekenaike v Victorian Legal Aid**)
  - Parents and their children (**Robertson v Swincer**)
  - Child protection agencies – no duty to those being investigated (**Sullivan v Moody**)
  - Police and prosecutorial authorities – no duty to those under investigation unless there is an implied or express assumption of responsibility: (**Cran v State of NSW**)

#### 3. No Settled Law

- There is no settled law on whether a DoC exists or does not exist
- For these *novel* situations, ask the following:
  - **Firstly**, was it **reasonably foreseeable** that the PI could be injured by D's actions? (**Donoghue v Stevenson**); **AND**
  - Secondly, are there **sufficient salient features** of a duty relationship to find that a duty exists? (**Sullivan v Moody**)

### STEP 3: TEST FOR REASONABLE FORESEEABILITY

**Objective test** → "what would a reasonable person be thinking at that period in time before doing that particular act, and did that act/omission fall below the reasonable standard?" (**Donoghue v Stevenson**)

→ Is it RF of a person in D's position that careless conduct of any kind may result in damage of some kind to P or class or persons to which P belongs to (**Chapman v Hearse**)

1. This 'reasonable person' must have foreseen a **real**, rather than **fanciful/far-fetched** possibility of injury. (**Sullivan v Moody**)
2. You don't need to foresee the '**precise sequence of events**,' the question is whether a consequence of the same general character as what occurred is reasonably foreseeable. (**Chapman v Hearse**)
3. The damage must extend directly to P or **to a class** of persons to which P belongs (**Chapman v Hearse**)
4. There must have been a reasonable possibility that the particular class of people could have been put at risk by the conduct of D.

**NOTE: The question is not what the D subjectively thought at the time, but what a RP in the position of the D could have foreseen!**

#### **STEP 4: SALIENT FEATURES**

→ Reasonable foreseeability is necessary but not sufficient to establish the existence of a DOC on its own (**Sullivan v Moody**). It is therefore necessary for the P to show that the salient features of the case weigh in favour of imposing a DOC.

Can be applied across varied facts and are used to **weigh-up the likelihood of a DoC** existing in a particular case

**Conflict of Duties:** Does the finding of a duty conflict with an already existing duty? (Points against a relationship) (**Sullivan v Moody**)

**Conflict of laws:** Is there a better-suited area of law under which the P's action should be brought? For example: defamation. (**Sullivan v Moody**)

**Illegality:** Is the P behaving illegally at the time? (points against a duty relationship) (**Sullivan v Moody**)

**Floodgates:** would a finding of a duty of care in this case risk flooding the courts with claims of liability? Policy argument – do we risk flooding the court with future claims?

**Vulnerability:** Is P particularly vulnerable and did D know this? (points towards a duty)

- It can be argued that **PL** was vulnerable to **D's** negligent [**act**] in the sense that **PL** could not reasonably have been expected to have taken steps to have guarded against the harm that is suffered (**Perre v Apand**)

**Indeterminate Liability:** Indeterminacy of liability is a factor that will ordinarily defeat a claim that the defendant owed a duty of care to persons such as the plaintiff. Indeterminacy arises when the defendant would not be able to determine how many claims might be brought against him or her or what their general nature might be. Would a finding of duty in this instance risk flooding the courts with claims of liability? If the class of persons is reasonably ascertainable then IL is not likely to be an issue. If member of unascertainable class then IL is an issue (*Perre v Apand*).

**Control:** Did the D have significant control over the actions that led to the risk to P? (If yes, points to relationship)

**Autonomy:** Would a duty be inconsistent with D's autonomy? (*CAL (No 14) v Motor Accidents Insurance Board*)

**Coherence with other areas of law:** Would a duty cohere with other areas of law? (*CAL (No 14) v Motor Accidents Insurance Board*)

#### **STEP 5: CONCLUSION**

On the balance of probabilities, the reasonable foreseeability test combined with the salient features approach indicate that D did owe P a DoC.

## **PARTICULAR DUTY SITUATIONS: PURE ECONOMIC LOSS**

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Pure economic loss involves **economic harm** suffered by P as a result of D's negligence, which does **not** follow on from personal injury or damage to P's property (this is consequential economic loss and *must* be distinguished from PEL).

Two types of PEL:

- PEL caused by **reliance on advice or information**
- PEL caused by **act** or **omission**

To determine duty: weigh up **reasonable foreseeability** and **salient features**.

Traditional reluctance to compensate due to:

- Competition and legitimate business activity
- Indeterminate liability
- Extent of the harm

### **STEP 1: IDENTIFY NEGLIGENT ACT AND HARM SUFFERED**

D may owe a DoC to P in negligence not to cause pure economic loss (PEL) by their negligent act of [identify act]

### **STEP 2: IS THERE PURE ECONOMIC LOSS?**

PEL is financial loss that is not the loss of personal injury or injury to P's property

### **STEP 3: TEST FOR REASONABLE FORESEEABILITY**

→ Was it reasonably foreseeable that the P might suffer PEL as a result of the carelessness on the part of D?

**Generally**, damages are **not** recoverable for economic loss, which is **not** consequential upon injury to person or property

**Exception** – D knew or ought to have known that a particular person (e.g. Caltex), not merely a member of an unascertainable class (e.g. users of oil from the gas pipeline), will be likely to suffer economic loss (Caltex Oil)

- **NOTE:** This case has been superseded (just the starting point) as there are now cases that show that not just a particular person but classes of people can be exceptions

#### **STEP 4: SALIENT FEATURES** (choose approx. 5)

→ Reasonable foreseeability is necessary but not sufficient to establish the existence of PEL on its own (**Sullivan v Moody**). It is therefore necessary for the P to show that the salient features of the case weigh in favor of imposing a PEL DoC

#### **PERRE V APAND:**

##### **Indeterminate Liability:**

- Less likely to find a DOC if it would make the D liable to an unascertainable class of people.
- Where the class is so extensive, it cannot be determined (humans)

##### **Control:**

- D is in control of the circumstances or activity which cause the harm to P
- Was D in control (broadly) of the activity that caused the harm?

##### **Vulnerability:**

- Can P take reasonable steps to protect themselves/is it reasonable to expect P to guard themselves from certain interferences?
- If vulnerable, points towards DoC.

##### **Actual or Constructive knowledge of risk of harm:**

- Did D know or ought to know of the risk of harm? Points towards DoC

#### **JOHNSON TILES:**

##### **Contractual regime:**

- Courts are reluctant to impose a DoC that interferes with a pre-existing contractual regime
- Courts want to enforce the parameters of liability agreed to

##### **Statutory regime:**

- Are there rules governing duties of the D?
- If yes, points against a DoC.

##### **Interference with legitimate business activity:**

- Are there other existing duties to P? A duty to prevent PEL could interfere with the duties and safety to workers whom a duty already exists.

##### **Assumption of responsibility:**

- Did P rely and D assume responsibility. Points to Doc.

#### **STEP 5: CONCLUSION**

On balance of probabilities, it appears as though P would/would not be able to establish that D caused the PMH suffered