

TOPIC 5: RIGHTS AND DUTIES ASSOCIATED WITH LAND

TRESPASS TO LAND: 'A voluntary and positive act of the defendant that directly and intentionally or negligently interferes with the plaintiff's exclusive possession of land'

Meaning of Land –

a) ACTUAL LAND AND SOIL – buildings, fixtures, anything growing on surface; +
b) AIRSPACE – airspace above considered part of land (*Davies v Bennison*). However, it is not a trespass to pass over someone's land at a height greater than the owner needs for ordinary use and enjoyment (*Bernstein v Skyviews*). But residential property can extend to a very high height – court takes a liberal view (*Graham v KD Morris*). **Wrongs Act, s. 30:** "No action shall lie in respect of trespass or nuisance by reason only of the flight of the aircraft above property at a height above the ground which, having regard to wind, weather, other reasonable circumstances and ordinary incidents of such flight, as long as the Air Navigation Regulations are complied with". **Note**, however, that trespass to land is not assessed by whether the D's actions interfere with P's present ability to use and enjoy their land, but rather by reference to future ability to use and enjoy land (*LJP Investments v Howard Chia*); +
c) GROUND BENEATH – trespass below ground is unlimited beneath a person's property. Airspace restricted because of public interest; no public interest below ground (*Bocardo v Star Energy*).

Defendant's Act – intrusions must be a) **positive and voluntary** – no omissions, b) **direct** – must directly cause the intrusion (*Southport v Esso*), and c) intrusion must be **intentional or careless** (*League Against Cruel Sports v Scott*).

Continuing Trespass – will arise where, having committed the initial trespass, the person/object giving rise remains on the land (*Konskier v Goodman*).

Standing to Sue – the person with the right to sue must have a **possessory interest** in the land i.e. exclusive possession, or actual/constructive possession. Mere licenses to be on land will not confer a possessory interest and no claim in trespass (*Vaughan v Shire of Benalla*). However, even someone in wrongful possession – but possession nonetheless – can bring an action against a subsequent trespasser if they are not the **rightful owner** (*Newington v Windeyer*).

Injunctions – injunctions are not automatic; damages are preferable and given when sufficient. However, if failure to award an injunction will cause **irreparable damage** (*Lincoln Hunt v Willesee*) and only when there is a **substantive action** (*ABC v Lenah Game Meats*) will an injunction be awarded.

Revocation of license – a license can be revoked at any time by occupier. Licensee will not be trespassing until they a) have received notice that the license is revoked, and b) have been given reasonable time to withdraw and take their possessions (*Cowell v Rosehill Racecourse*).

Crossing the Boundary – slightest crossing of the boundary constitutes a trespass. The point at which D crosses is point of trespass (*Lavender v Betts*). However, there must be some sort of physical incursion; failures to act, omissions, or halting something from crossing the boundary is not considered trespassory (*Perera v Vandiyar*).

Licenses – a D will not be liable in trespass if they are given a license to be on the land. This license can be express or implied, and D must show existence. SCOPE – Residential: Implied license to use means of access to the entrance, so long as a) the path/driveway is left unobstructed, b) the entrance gate is unlocked, and c) there is no indication that entry is forbidden. An implied license only extends to entry for a **legitimate purpose**, such as delivery or lawfully communicating with owner (*Halliday v Nevill*). Businesses: Implied license to enter when making **bona fide** attempt at seeking info or doing business. This is **legitimate purpose** of entry. Even where license exists, entering for a purpose not covered is trespass (*Lincoln Hunt v Willesee*). Implied license will not exist when it is clearly indicated **in advance** that permission is refused (*Rinsale v ABC*).

PRIVATE NUISANCE: 'The substantial and unreasonable interference with the plaintiff's use and enjoyment of their land'.

Forms of Interference – Test: 'Inconvenience materially interfering with the **ordinary comfort** of human existence, not according to dainty modes of living' (*Walter v Selfe*). **PHYSICAL DAMAGE** – as long as it is **not trivial**, physical damage will always be unreasonable interference (*St Helen's*). **DAMAGE TO SENSIBILITIES** – usually noise and smell. Range of factors to consider:

1. **Live and Let Live** (*Kennaway v Thompson; Jeffrey v Honig*)
2. **Locality** (*Sturges v Bridgman; Pittar v Alvarez*)
3. **Intensity of Discomfort** (*Feiner v Domachuk; Polsue Alfieri v Rushmer*)
4. **Time/Duration/Freq.** (*Seidler v Luna Park; Cook v Forbes*)
5. **Practicality of avoiding interference** (*Clarey v Principal*)
6. **Malice** (*Hollywood Silver Fox v Emmett*)
7. **Social Utility** (*Munro v Southern Dairies; Lester-Travers v Frankston*)

Unprotected Interests – nuisance does not protect a) freedom from view or b) freedom to view (*Victoria Park v Taylor; Hunter v Canary*).

Standing to Sue – only parties with **exclusive possession** of land can sue eg. owner tenant. A licensee will generally not have standing (*Oldham v Lawson; Hunter v Canary*). **Who can be sued?** Either the a) **creator** of the nuisance i.e. whose behaviour created the interference (*Fennel*) or b) **adopter, continuer** – actively makes use/fails to take reasonable steps (*Sedleigh; Hargrave*)

Hypersensitivity – conduct which causes harm to a trade/person will not be nuisance where conduct is reasonable and does not interfere with ordinary use and enjoyment of land (*Robinson v Kilvert*)

Nuisance Cont.

Defences

1. *Coming to the nuisance* – not a defence in itself, but may impact upon the remedy the plaintiff receives. Injunctions usually not awarded for coming to nuisance (*Miller v Jackson*).
2. *Statutory authorisation* – defence can only be used when a) the authorisation imposes a mandatory duty to act – not merely a permissive power (*Lester-Travers v Frankston; Geddis v Proprietors of Bann*), and b) the nuisance created was inevitable i.e. could not have reasonably been avoided (*Manchester Corporation v Farnworth*).

Remedies

1. *Self-Help (Abatement)* – an occupier whose land has been subjected to a nuisance may take *reasonable steps* to abate it. However, they need to give notice or receive consent in the form of an implied license before doing so. If *protracted, unreasonable steps* are necessary to bring about the end of a nuisance, the law will not condone those steps, especially if more serious tortious indiscretions are caused eg. trespass to land, conversion.
2. *Damages* – in order to receive damages for nuisance, the plaintiff must demonstrate *reasonable foreseeability* i.e. it was reasonably foreseeable the defendant's act would cause the interference; consequences not too remote (*Cambridge Water v Eastern*).
3. *Injunctions* – injunctions may be awarded where damages would be *inadequate*. However, in awarding an injunction, the court takes several factors into account: i) *Behaviour* – malice, coming to the nuisance, other factors (*Miller v Jackson; Kennaway v Thompson*); ii) *Delay* – whether there was a delay in bringing the case; iii) *Magnitude of Interference* – small inconvenience = damages; iv) *Blameworthiness of Defendant*; v) *Self-Help*; vi) *Feasibility* – practicality of an injunction being enforced.

TOPIC 6: VICARIOUS LIABILITY

VICARIOUS LIABILITY – ‘where one person is held responsible for a tort committed *by another person*, transferring the obligation to pay remedy from the tortfeasor to someone else’ (strict liability – employer always liable for employee, regardless of whether employer is blameworthy).

Vicarious Liability – The Tests

An employer will be vicariously liable for the torts committed by an employee *in the course of the employee's employment*. The law draws a distinction between employees (**contracts of service**) and independent contractors (**contracts for service**).

Test 2: The Organisation Test – *is the worker engaged and integrated as part of the business, or is the work done for the business but the worker not integrated?* More integrated – work more integral – employee (*Stevens v Brodrigg*)

Test 1: The Indicia Test (Multifaceted Approach)

The court determines the *nature and content* of the relationship, balancing a variety of indicia to determine the character of the worker i.e. employee or independent contractor. Factors include:

- i) *Skill level* – level of skill necessary; ii) *Emanation of the Business* – whether worker identified as part of business; iii) *Employer control over manner of performance*; iv) *Holidays* – ability to take own leave; v) *Equipment* – whether provided or own brought; vi) *Degree to which work encompasses firm* – whether integral to the labour of the firm or not (*Hollis v Vabu*)

Scope of Employment – once a worker is determined to be an employee, it must be ascertained whether the tort they committed was *within the scope of their employment*. The *Salmond Test* (‘Traditional Test’) is generally used:

‘An employee acted within the scope of their employment if their action was: a) *authorised act* or b) *an improper mode of performing an authorised act*’. Authorised acts can either be under actual authority – express or implied – or ostensible authority – employer creates impression that employee is authorised to act in a particular manner.

Negligent Acts – an act may be in the course of employment even if *expressly forbidden*; merely improper mode (*Bugge v Brown*). However, a distinction must be drawn between improper mode (*Limpus*) and wholly unauthorised (*Beard*).

Intentional/Criminal Acts – employer will not be vicariously liable for *unauthorised acts* and acts *wholly outside scope of employment* (*Deatons v Flew*). But if acting in improper mode of authorised task (*Morris v Martin*) or in furtherance of employer (*Lloyd*), emp. liable.

Sexual Abuse – vicariously liability divided issue: *Gleeson CJ, Kirby & Gaudron JJ*: *Sufficient Connection Test* – is vicarious liability because there is a significant connection between the creation/enhancement of risk and the wrong accruing. *Callinan, Gummow & Hayne JJ*: *Traditional Test* – no vicarious liability. Criminal wrong antithetical to teacher's duty and wholly outside scope (*NSW v Lepore*).

Further indicia include:

- vii) *Obligation to Work* – if worker obligated to work and dictated how to work; viii) *Setting own hours* – ability to set own working hours; ix) *Ability to work for others*; x) *Ability to delegate work*; xi) *Type of Payment* – whether for hours worked or amount of work completed (*Stevens v Brodrigg*)