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SAMPLE

TOPIC 8 THE TORT OF TRESPASS TO LAND

TRESPASS TO LAND

- DEFINITION: a direct unauthorized or unlawful interference with land in possession of another person: *Southport Corp v Esso Petroleum Co*
 - o Include things that are fixed to the land, under or above with limitations e.g. structures
- Trespass is actionable per se
 - o Actionable without proof of actual damage
- Relevant interference must be intentional or negligent (fault element)
 - o **Intentional** = entering into someone's property without permission, or remaining on property after permission to be there has been revoked
 - o **Negligent** = if something falls into A's backyard from B's land as a result of B's negligence
 - o Burden is on the alleged trespasser to prove the absence of intention or negligence

TITLE TO SUE

- The only person who has title to sue is the person who has actual and exclusive possession of the land at the time of the interference
- P have to occupy the whole of the property to the exclusion of all others
- Trespass to land is a wrong to possession, not ownership as such: *Newington v Windeyer*
- Consider: an owner in possession, a landlord/lessor, a tenant/lessee, a licensee, a squatter
 - o OWNER IN POSSESSION: if you're an owner of property and you occupy it, you're clearly an owner in possession
 - Ownership + Possession
 - o TENANT/LESSEE: if an owner is a lessor/landlord and leased the land to a tenant/lessee, the tenant/lessee have exclusive right of the land for the duration of the lease
 - E.g. if there is a trespass to leased property, the proper P is the tenant/lessee not the landlord/lessor: *Rodrigues v Ufton*
 - o LANDLORD/LESSOR: lessor/landlord gives up possession if they lease the land
 - But landlord/lessor can bring an action on the case against anybody who has trespassed on the land, suing for permanent damages on reversionary interest (since the property reverts back to landlord at the end of lease)
 - o LICENSEE: a licensee is not a lessee, rather they merely have a contractual right to enter and use the property for a purpose, but no exclusive possession of it, cannot exclude others
 - E.g. guest at someone's home or hotel, or patient in the hospital: *Kaye v Robertson*
 - o SQUATTER: anyone who has exclusive possession to the property have a right to possession even if they had wrongfully taken possession of it
 - E.g. P did not own or lease The Grove but had de facto possession, so there is no defence for N to argue that Ps were wrongfully in possession, because that wrongful possession would still have given Ps better title than N have: *Newington v Windeyer*

Newington v Windeyer (1985)

- FACTS: 'The Grove' was an open space of land in Woollahra, no registered owner → Ps' houses that faced onto The Grove → Ps gave evidence that they had been in possession of that land for over 50 years even though they don't have ownership → N's property backed onto The Grove and decided to put a gate on her property for access to The Grove as if it was her land
 - o P argued that any entry by N or her guests through her gate into The Grove to her property constituted trespass
- ISSUE: Whether this constituted trespass given there was no registered owner
- HELD: Any entry by N or her guests did constitute a trespass
- REASONING: while the Ps are not the owners of the registered title of The Grove, the Ps were in fact in possession of the Grove because they had used and maintained it for over 50 years, and it did not prevent them from maintaining an action of trespass

- As long as a person does not abandon possession, possession for less than 12 years enables him to exclude from the land any person who doesn't have a better title
- Ps had engaged in many acts of ownership over a period of nearly 50 years: employed someone to mow the lawn, maintained the trees and cut them down when necessary, paid rates in respect of the land, had blocked off attempts from people to use it, etc.
- PRINCIPLE: For title to sue, P must be in possession of the land when the tort occurs with or without owning the land.

Rodrigues v Ufton (1894) landlord

- FACTS: P was the owner of property comprising a dwelling house and backyard which was in possession and occupation of her tenants → D, the owner of adjoining property, disputed the P's title to a strip of land forming part of her backyard → D entered P's property, destroyed the existing fence and erected a new fence which excluded P from enjoyment of the disputed strip of land
- ISSUE: whether or not a landlord could bring an action for trespass even though their property was occupied by a tenant
- HELD: since P was not herself in possession, she could not maintain an action of trespass, only people in possession could
- NOTE: As P was in possession of the land by her tenants, and as a fence was permanently put up which would interfere with her possession, she was awarded damages for reversionary interest
- PRINCIPLE: An action on the case may be maintained for an injury to the reversion done by trespass. The damage must be done to his reversion or injury of such a permanent nature as to be necessarily prejudicial there to show 'substantial injury to the reversion'.

Kaye v Robertson (1991) licensee

- FACTS: Kaye was a well-known actor who was taken to hospital after a very serious car accident left in a semi coma, barely aware of what was going on → 2 press photographers managed to get into his hospital room and were taking photos of him in this state for the newspaper → an injunction was sought to get the press from publishing these photographs
- HELD: no law protecting privacy in England at that time and thus no action for invasion of privacy
- REASONING: he was a mere licensee in the hospital, he could've been moved out at any time i.e. he didn't have a right to exclusion possession and thus didn't have title to sue them in trespass
- NOTE: court nonetheless prevented the press from publishing the photos arguing that, if they went ahead and published, this would be a tort of injurious falsehood i.e. implying that Kaye had given permission to have these photographs published, which he hadn't

ELEMENTS FOR TRESPASS TO LAND

Element #1 direct interference

- The interference to the land must be direct
- Action in trespass is only available when the contact with P's property is a direct result of D's acts:
 - Southport Corp v Esso Petroleum Co*
 - Before the development of the tort of negligence, there were two types of action that was concerned with P: action of trespass and action on the case
 - Action of trespass = the result of a directly caused damage
 - Action on the case = the result of an indirectly caused damage
- Trespass can occur not just via the initial interference but be also a continuing trespass until a person or an object is gone
 - E.g. if you dump a whole lot of things on someone's land, this is not only a trespass when you initially do it, but is said to be a continuing trespass until you remove the things

Southport Corp v Esso Petroleum Co (1954)

- FACTS: Esso owned an oil tanker that was stranded and deliberately discharged some oil to move the oil tanker → Southcorp then sues the trespass of the oil washed up on their shore
- HELD: it was an indirect interference thus cannot rise an action of trespass
- REASONING: Esso did not directly discharge the oil onto the shore, rather the tides had carried the oil and deposited it on the shore

Element #2 unauthorised or unlawful

- The trespass may be intentional or negligent, but it must be a voluntary act to constitute a trespass:
Public Transport Commission of NSW v Perry

Public Transport Commission of NSW v Perry (1977)

- FACTS: Perry got a ticket to travel on the train and was lawfully standing on the platform waiting for the train → Perry had an epileptic fit and she fell unconsciousness onto the track → train driver did not stop injured her → Perry sued due to driver's negligence
- PTC NSW argued that there was no duty of care owed to Perry as a trespasser on the tracks
- HELD: Perry had a paid ticket so she was a lawful entrant, and she did not go onto the tracks voluntarily, intentionally or negligently → Perry is only a trespasser if she voluntarily enters an area of the property that is forbidden (here she fell onto the tracks)

- A person is a trespasser when they enter land or put an object without authority or unlawfully
 - o Authority to enter land may be expressed or implied: *Halliday v Nevill, Coco v R*
 - o But there are limits to implied authority to enter land, implied licence does not extend to unauthorised conduct: *TCN Channel Nine v Anning*
- Grey area: What if one enters with consent or for a lawful purpose but then breaches a condition of entry? Does the person then becomes a trespasser or only when asked to leave?
 - o E.g. invites someone to enter property, but then they steal something, whether they become a trespasser if they are asked to leave
 - o If he has entered for the unauthorised purpose of stealing, clearly he would not have expressed or implied authority to do so
 - o If he entered for a lawful purpose, but is subsequently asked to leave, he becomes a trespasser if he then fails to leave within a reasonable time (and can be ejected with reasonable or proportionate force)

Halliday v Nevill

- FACTS: 2 police officers saw a man known to be a disqualified driver reversing out of the driveway of a house → driver saw them and drove back into the driveway, so the police officers walked up the driveway and arrested him
- ISSUE: Whether the police officers were trespassers on the property at the time of the arrest
- HELD: HC held that the police officers had an implied licence to enter the premises
 - o If the path or driveway leading to the entrance is left open, unobstructed, unlocked, and with notice forbidding entry, the law will imply a licence in favour of any member of public to go upon the path or driveway to the entrance of a dwelling for the purpose of lawful communication with, or delivery to, any person in the house
 - o Not a trespass if, on passing an open driveway with no indication that entry is forbidden, he steps upon it either unintentionally or to avoid obstruction or if he goes upon the driveway to recover some item of his property which has fallen or blown upon it or to lead away an errant child
- NOTE: Implied license to enter can also be either expressly or impliedly revoked, but you must do/say something in order to do this successfully

- Express or implied refusal/withdrawal
- E.g. if you put up a locked gate or a sign

Coco v R

- FACTS: police had installed a listening device in Coco's home and had recorded 200 hours of private conversation as evidence to convict him of a bribery offence, authorised by an act → but the police hadn't told the magistrate where they were going to use it and did not get permission to enter private property to install a listening device → Coco argued the evidence was illegally obtained because planting the device constituted a trespass
- HELD: Whilst they had authority to use a listening device, they had not been given valid authority to enter private property to install it, therefore it was a trespass onto the property, thus conviction quashed since the evidence used to convict Coco had been obtained illegally
- PRINCIPLE: A police officer who enters or remains on private property without the leave or licence of the person in possession commits a trespass unless the entry or presence on the premises is authorised or excused by law.

TCN Channel Nine v Anning

- FACTS: A was the lessee of a motor cycle race track → A had approximately 70,000 old tyres stored on his property, so the Environmental Protection Authority (EPA) was interested in his property and conducted a raid of his property during an event → a journalist and camera crew from a Channel 9 investigative program entered the property with the EPA inspectors through an unlocked gate → Channel 9 filmed A and subsequently made it public
- ISSUE: Whether the acts of the journalist and camera crew was authorised or whether it constituted trespass
- HELD: Acts were unauthorised, journalist and camera crew enter the land for the purpose of filming was not part of any implied license that an ordinary persons has to enter the property
 - Thus, the implied license is for ordinary, day-to-day purposes
 - Authority to enter land does not extend to entry for any unauthorised conduct
 - For "special" purposes, you ought to ask for special permission

Element #3 land

- The surface of the earth is included, as is any fixtures attached to the surface e.g. buildings, garden
- Historically, *cuius est solum eius est usque ad coelum et ad inferos* [whoever has land also has the heavens above it and the depths beneath it]
 - Today with planes, drones, satellites, this archaic maxim that no longer applies
 - Otherwise everything would constitute a trespass

UNDERGROUND TRESPASS (depth below)

- The person in possession of land also is in possession of the sub-soil beneath it
- Query whether this subterranean possession extends only to a depth subject to the effective control of the possessor of the surface
- An occupier has the right to control to a depth that is necessary for the ordinary use and enjoyment of the land: *Di Napoli v New Beach Apartments*
- How deep into the land does trespass extends to: *Bocardo SA v Star Energy UK Onshore Ltd*
 - A conveyance of land includes the surface everything below it down to the centre of the earth
 - The owner of the surface is the owner of the strata beneath it, including the minerals to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else

Di Napoli v New Beach Apartments

- FACTS: in the course of constructing a building on its land, D drilled and placed rock anchors in the soil under neighbour P's land, which were visible → P sought an injunction in the equity division, having to show that damages would not be an adequate remedy and that he should thus be entitled to an injunction
- ARGUMENT: D argued the rock anchors were below the useable subterranean space of the P's land and too deep to be available to P for the ordinary use and enjoyment of her land
- HELD: mandatory injunction was given to remove the anchors which they had put in
- PRINCIPLE: Trespass to land may be committed beneath the surface. **A person has substantial control over land underneath his soil for a considerable depth.**

Bocado SA v Star Energy UK Onshore Ltd

- FACTS: D drilled under P's land and laid pipelines to extract petroleum from underground without permission → D drilled to a depth more than 800 feet underground, arguing that this was beyond the depth necessary for P's use and occupation of the land and thus not a trespass
- ISSUE: Whether the pipelines were too deep to constitute a trespass
- HELD: It constitute a trespass, the only owner is the registered owner in the land above
- REASONING: the mere fact that D could have reached the depth and make use of digging below the land showed that it was at a depth that P could also exploit
- NOTE: D is a private entity who drilled without statutory authorisation or permission of P, but if it had been a public entity doing work under statutory authority, there may be a potential defence for D in an action of trespass

AERIAL TRESPASS (airspace above)

- **Common Law**
 - o Overflight by aircraft: The rights of an owner in the airspace above his land extend to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it: *Bernstein v Skyviews*
 - o Intrusion into airspace by structures: There is no need for an incursion to interfere with P's actual use of the land, it only concerns the potential use of the land: *LJP Investments v Howard Chia Investments*
- **Statute Law**
 - o No action lies in respect of trespass or nuisance, by reason only of the flight of an aircraft over any property at a height above the ground that is reasonable so long as the Air Navigation Regulations are complied with: *Civil Liability Act 2002 (NSW) s 72*
 - o Air Navigation Regulations primarily regulate the safe conduct of aircraft in the airspace (i.e. regulating safety and passage of aircraft), not about regulating privacy

Bernstein v Skyviews Pty Ltd

- FACTS: B had a country estate, S is a business that takes aerial photography of grand estates and then offering these to the occupier's for purchase → S did this to B who then sued them, arguing they had committed a trespass when they flew plane above his land and took photographs of his property
- HELD: there was no trespass since it had been (1) a single flight of the aircraft (2) at a height above the height necessary for the ordinary use and enjoyment of the land
- REASONING: Need to balance the rights of an owner to enjoy the use of his lands vs the rights of the public in using the airspace, which is achieved by restricting the rights of the owner to such height as necessary for the ordinary use and enjoyment of the land and structures upon it, and give no greater rights in the airspace than any other members of the public
- PRINCIPLE: **An occupier's interest in possession thus only extends to the height necessary for the ordinary use and enjoyment of the land (question of fact).**

LJP Investments v Howard Chia Investments

- FACTS: D was developing its commercial property in Sydney, and asked P if it could erect scaffolding over P's land → P refused and would only grant permission in return for payment → D refused to pay and erected scaffolding at 4.5m above the ground and 1.5m into the airspace above P's property
- ISSUE: Whether the incursion of the scaffolding in to the airspace above P's property constitute trespass
- HELD: Yes, this was at a height relevant to the use of enjoyment of the land and P was entitled to an injunction ordering the scaffolding to be taken off the land
- PRINCIPLE: Broadened *Bernstei* where the relevant question is not whether the incursion actually interferes with the occupier's use of the land and the for their enjoyment or ordinary purpose at the time, but **whether it is of a nature and of a height which could potentially interfere with the uses and enjoyment of the land.**

SAMPLE

TRESPASS TO LAND PROBLEM QUESTION

Action in trespass

- Has there been a DIRECT UNAUTHORISED OR UNLAWFUL INTERFERENCE with P's LAND?
 - o Element #1 direct
 - o Element #2 unauthorised or unlawful interference
 - o Element #3 land
- Does P have TITLE TO SUE?
 - o Exclusive possession
- Was there FAULT on the part of D?
 - o Whether D's act was intentional or negligence
- If trespass made out, consider DEFENCES?
 - o Consent by occupier, statutory authority, necessity
 - o Overflight of aircraft CLA (NSW) s 72
- Consider REMEDIES?
 - o Injunction, damages (general, aggravated, exemplary)

Separate statutory action

- Does the DAMAGE BY AIRCRAFT LEGISLATION apply?
 - o Cth legislation or state legislation?

SAMPLE