

Torts and Contracts II NOTES

Trespass to Land	2
1) Does the person have title to sue?	2
2) Is it Land?	2
3) Was the interference direct?	3
4) Was the entry unlawful or unauthorised?	3
5) Was the entry wilful?	3
REMEDIES	4
DEFENCES	6
STATUTORY ACTION FOR DAMAGE BY AIRCRAFT	8
PRIVATE NUISANCE	10
What is private nuisance?	10
Step 1: Is there a title to sue?	10
Step 2: Has there been substantial and unreasonable interference?	11
Step 3: Who can be sued?	13
Step 4: Are there any defences?	14
Step 5: Remedies for private nuisance	14
Case summaries	15
TORT LIABILITY FOR INTERFERENCE WITH GOODS	23
STEP 1 Has there been wrongful interference with goods?	23
STEP 2: Does the plaintiff have title to sue at the date of the tort?	25
Extinction of title	26
IF Finding cases	26
FLAWED DEFENCES	27
Remedies	27
Pure Economic Loss: Negligent misstatement and professional liability	29
STEP 1 → Classify the loss as PEL or consequential	29
STEP 2 → Establish Duty of Care	29
VITIATING FACTORS	38
A. Mistake	38
B. Duress	41
C. Undue Influence	42
D. Unconscionable conduct under statute	45
E. Unconscionable conduct under general law	47
F. Unfair contract terms	49
G. Unjust contracts	50
RECISSION	53
MISREPRESENTATION AS A VITIATING FACTOR	55
DAMAGE IN CONTRACTS	63

Trespass to Land

Principle: In order for – to have an action for trespass to land, there must have been a direct intentional or negligent, unauthorized or unlawful interference with land in the possession of

1) Does the person have title to sue?

- Actual possession not ownership confers title to sue in trespass and the plaintiff must prove actual possession of the land at the date of the trespass
- The court affirmed the principle that possession can be prima facie evidence of ownership against anyone without a better title → **Newington v Windeyer (1985)**
 - *Elements considered: had been taking care of it for 50 years - mowing lawn, maintain/cut trees, used grove for common entertainment, blocked off people not to use it*
- NOTE: a legal co-tenant not in occupation remains entitled to enter → **Cf BA v The King [2023]**
- Exception to possession rule: where the owner's 'reversionary interest' (the state of the land when they get it back at the end of the lease) is being affected. → **Rodrigues v Ufton (1894)**
- No title for:
 - A lessor given out possession for period of the tenancy → **Rogers v Ufton, Macintosh v Lobel**
 - Mere licensee - patient in a hospital room → **Kaye v Robertson [1991]**
 - A guest in a hotel room or function → **Douglas v Hello! Ltd [2003]**

2) Is it Land?

Rule: Land includes anything fixed to the land- 'fixtures'- buildings, underground tanks → **XL v Caltex, 1985**

- **Airspace**
 - Aeroplane flying over the land was considered beyond the height *necessary for the use and enjoyment of the land* (this is the general test) → **Bernstein v Skyviews P/L**,
 - s72 of civil liability act protects the mere flight of an aircraft at a reasonable height
 - Structures intruding, eg cranes, scaffolding, awnings can comprise trespass (here 4.5m in air) → **LJP Investments, NSWCA**
 - Shooting bullet through air (at the cat on the road) considered trespass → **Davies v Bennison, [1927]**
- **Depth below**
 - A person has substantial control over and underneath his or her soil for a considerable depth → **Di Napoli v New Beach Apartments [2004]** (*intruding anchors into underground rocks*)
 - A landowner owns all substrata which lie beneath his property up to an undefined depth where the notion of ownership becomes absurd. → **Bocardo v Star Energy**

UK, 2011, UKSC (*mining wells intruded under P's land at 800-2800 feet below surface*)

3) Was the interference direct?

Rule: "In order to support an action for trespass to land the act done by the defendant must be a physical act done by him directly on to the plaintiff's land." → **Southport Corp v Esso Petroleum Co [1954] 2 QB 182 (Denning LJ)**

- Oil being moved by current onto land = indirect (note knowledge of current would have changed this to direct)

4) Was the entry unlawful or unauthorised?

Rule: If there is no consent then generally no authorisation

- **Implied licence:** Where there are no obstructions or signs implying otherwise, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house → **Halliday v Nevill, 1984**
- Persons conducting business on private land are entitled to do so without intruders for purposes unrelated to the business → **TCN Channel Nine v Anning, 2002**
 - Authority for entry beyond implied authority
- **Limits to statutory authority:**
 - If the legislature wishes to make it lawful for a person to enter private premises without the knowledge or consent of the owner, it can only do so by legislation which makes this unambiguously clear, either expressly or by necessary implication (principle of legality) → **Coco v The Queen (1994)**
 - Police officers, or anyone else, who enter a home under an implied licence (e.g., in response to a disturbance) must leave when that licence is revoked by the occupant. Once the occupant has clearly communicated that the licence is revoked, the police must comply immediately unless they have some other lawful authority to remain. → **Kuru v New South Wales (2008)**
- **Lawful entry followed by unauthorised conduct:**
 - '[A] person who is not a trespasser upon entry to land can become a trespasser if the purpose of their licence is exhausted, if the licence is revoked, or if the person performs acts that are beyond the scope of their licence. → **Roy v O'Neill [2020] HCA**
 - Enter with mixed purposes: position was unclear

5) Was the entry wilful?

Rule: Mistake of authority is no defence

- Someone collapsing into the land - i.e. unconscious, unwillingly, is not a trespass → **PTC NSW v Perry**
- The trespass may be intentional or negligent

REMEDIES

Trespass to land is actionable per se and therefore there is no need to show actual damage. Nominal damages will be awarded to acknowledge technical infringement of P's rights and vindicate interest in land

IF Actual damage

1. **Was the alleged damage a natural and probable consequence of the wrongful act? →**

TCN Channel Nine v Anning (2002)

- *E.g. claims for r anxiety and depressive illness failed as a result of trespass failed - not seen as probable for a person of normal fortitude.*

2. **IF harm suffered** to to trespass including discomfort, loss of use, or inconvenience = at the very least general damages

3. **Quantification of loss - often hard to determine**

- For damage of land (reinstatement or diminution?)
 - Although decrease in value of the property is generally the measure the plaintiff may be entitled to reinstatement of their property so long as it is not out of proportion (*in this case the whole home burned down*) → **Parramatta CC v Lutz, 1988**
 - There are cases where the nature of the plaintiffs' loss is such that there is only one mode of fairly repairing it. If that turns out to be more expensive than another, the wrongdoer has no one but himself to blame → **Evans v Balog [1976] 1 NSWLR 36**
 - In **Hansen v Gloucester Developments [1992]** held that cost of depreciation of land should be paid rather than restoration as it was an unreasonable difference
 - Test = in deciding between diminution in value and cost of reinstatement the appropriate test was the reasonableness of the plaintiffs desire to reinstate the property and remarked that the damages to be awarded were to be reasonable as between plaintiff and defendant → **C R Taylor (Wholesale) Ltd v Hepworths Ltd [1977]**
- For usage of land: court has considered the "assumed licence fee" or "market value" approach to damages. This approach assesses the amount the plaintiff might reasonably have charged the defendant for the use of property or other rights that were infringed upon, even if no formal agreement existed → **LJP Investments, 1989, 1990, NSWSC**
 - This approach helps ensure that plaintiffs are compensated for the value of what was taken or used by the defendant, even if no traditional economic loss can be easily measured.
- Emotional distress: Plaintiffs may receive compensation for emotional distress, but the claim must be substantiated by evidence showing the extent of the distress and its impact on the plaintiff's life. → **TCN Channel Nine v Anning (2002)**