

COMMON ELEMENTS OF TRESPASS:

(Apply to battery, assault, false imprisonment, trespass to goods and land)

Def: PVA + Directly + Intentionally/Negligently – Lawful Excuse = Trespass

A positive and voluntary act (PVA) that directly (D) and intentionally or negligently (I/N) causes interference, without lawful excuse (LE).

1. Actionable per se

- Do not need harm to prove trespass. Only bring up if there was no harm.

2. Positive & Voluntary Act

Positive:

- Must be a positive act. Mere omission or passivity not sufficient (*Innes v Wylie* – bouncer standing passively in doorway is not positive)
- NB: Minority in *Herd*: not pulling employee up (omission) was sufficient

Voluntary:

- Must be willed and performed whilst conscious. Absence of compulsion or self-preservation is not voluntary.
- Cannot be an involuntary reflex action (*Scott v Shepherd* – squib in marketplace, D still liable)

3. Directness

- Log on a road example → *Reynolds v Clarke*
- **Test:** *Interference must follow so immediately from the D's act that it is taken to be "part of the act", rather than just a mere consequence* (Herring CJ in *Hutchins v Maughan* – poisoned dog baits, knew they were there)
- Directness will be satisfied where D's act sets off a chain of events, in the absence of any "new and independent intervening cause" (*Scott v Shepherd* – marketplace squib)

Possible intervening acts:

- Natural forces:
 - Tide was an intervening act (*Southport v Esso* – oil dump onto beach)
 - Morris dissent:
 - "If D deliberately employs the use of moving water to cause a thing to go on to land the act will be sufficient to constitute a trespass"
- Voluntary human acts will break the chain of directness (*Myers v Soo* – P voluntarily went to police station when asked, this was the intervening act)
- Agency:
 - Actively promoting someone else to do something → also liable.
 - D's conduct must be such that it caused and procured the wrongful act (*Coles Myer v Webster* – manager told police, procured it)
 - What the intention was may be relevant here

4. Fault

Fault relates to the outcome/consequence of D's actions.

In UK:

- Must have intended to bring the action. No such thing as 'negligent trespass' (Lord Denning in *Letang v Cooper* – sunbathing in carpark, could not bring separate negligent claim to get around time limit)
 - o Cf in *League Against Cruel Sports v Scott* – D negligently let dogs go onto land

In AUS:

- If D acted negligently, can have both negligent trespass and negligence actions (*Williams v Milotin* – cyclist hit by truck)
- Three levels of fault (JUST PROVE ONE OF THEM):
 - o **Subjectively/actually intention**
 - o **Careless/deemed intention** – D was aware the consequences *might ensue* but continued anyway
 - o **Negligence** –
 - D acted with less care than what a reasonable person would have in the circumstances; or
 - It was reasonably foreseeable to a reasonable person in D's position would believe that their conduct may lead to harm (*Williams v Milotin*)

Who bears BOP? ** BONUS MARKS

In Aus:

- General rule: onus on D to disprove fault (Windeyer J in *McHale v Watson* – boy threw sharp rod into girl's eye)
- Exception: highway cases – onus on P to prove fault (per Bray CJ in *Venning v Chin* – pedestrian hit by car on the road):
 - o Collision between vehicles on highway
 - o Collision between vehicles and pedestrian on highway
 - o Vehicle runs off highway and damages property adjoining highway
 - o Contact between goods carried out of a property adjacent to highway, and a vehicle using the highway
- Criticism of this:
 - o Justice Kirby in *Platt v Nutt* – believes this general rule/exception is inappropriate and outdated. Should have system where P always bears onus of proof
 - o Bailey – argued that highway cases should actually make it easier for P, rather than harder

In UK:

- P always bears burden of establishing fault (per Diplock J in *Fowler v Lanning* – shooting party was accident; also confirmed in *Letang v Cooper*)
- P must show that D acted with intent (*Fowler v Lanning*)