

Full Topic List:

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Text in small font indicates content identified by lecturers, tutors, or course materials as non-examinable, unlikely to be on the exam, or simply unnecessary information that serves no practical use in assessments.

2.1- General Information About Trespass To The Person

1. What are the forms of trespass to the person?

The three forms of trespass to the person (torts) are battery, assault and false imprisonment.

2. What are the common elements across all three forms of trespass to the person?

1. Actionable per se

The plaintiff needs to be damaged by the defendant's action.

2. Positive act

There needs to be a positive act. A mere omission or passivity will not be sufficient for this element (*Innes v Wylie*).

3. Voluntary act

The act needs to be voluntary meaning the defendant must consciously bring about the bodily movement which results in contact with the plaintiff.

4. Fault and directness

These are complex and will be further described later. They are separate however and both need to be established.

2.2- Fault

1. What forms can the fault take?

In Australia, trespass can be intentional or negligent (*Williams v Milotin*) with the one exception of highway accidents.

Williams v Milotin:

- Plaintiff, cyclist, struck by defendant's truck.
- Brought an action in negligence 4 years later.
- Court held both causes of action (negligence & negligent trespass) exist in Australian law.
- Sometimes circumstances can warrant an action in both negligence and negligent trespass and is up to plaintiff which they decide to pursue.

In England there is no such cause of action as negligent trespass. In England there is no such cause of action as negligent trespass. Where the action against the defendant is not intentional, the plaintiff must rely on the specific tort of negligence, not trespass (*Letang v Cooper*).

2. What must the fault pertain to?

The question arises about whether the defendant needs to have only intended the act in question (or been careless in carrying out the act) or must they have intended, or been negligent as to the outcome of that act?

The current rule is that the defendant must have intended, or have been careless with regard to, the outcome of their actions not just the actions themselves. In battery, this would mean you have the intention to strike the other person (not just intention to swing your arm) or was careless as to striking them.

3. What constitutes intention or negligence in trespass?

1. Actionable Intention

Intended to carry out the outcome of their action. **Intention is to the act not the injury**. You intend to punch someone, not intend to give them a blood nose (*Williams v Milotin*).

2. Deemed Intention (no Aus authority so possibly ignore)

Where there is no intention to produce an outcome through certain conduct, a person still may be deemed to have intended the outcome in certain circumstances (textbook refers to these 2

situations) [No Australian authority for either circumstance because we already have negligence.]:

Doctrine of substantial certainty (only has USA authority):

If a defendant acts in a certain way, and a reasonable person in the defendant's position would believe that a particular result was substantially certain to follow, he will be deemed to have intended that result. **Recklessness (only has UK authority):**

A person will be reckless as to the outcome of his actions in circumstances where he knows that the outcome might ensue from particular actions, but he goes on and undertakes those actions anyway. ▪

3. Negligence

A person will have been negligent in a commission of the tort of trespass to the person if the person in undertaking the relevant actions, acted with less care with which a reasonable person would have acted in the circumstances (*Williams v Milotin*).

There is a lack of detail on this because typically, if the action is not brought under intention, it will be brought under the separate tort of negligence.

4. Who bears the burden with regard to fault?

In Australia, it is generally the case that the defendant must show that the trespassory act was neither intentional nor negligent (*McHale v Watson*). This effectively that **fault is presumed** unless the D can disprove it on the balance of probabilities. Note the exception to this general principle below.

However, in the case of highway accidents, the burden with regard to fault in on the plaintiff (*Venning v Chin*): A highway accident will have occurred where (these examples are all from the case):

- There is a collision between vehicles on the highway;
- There is a collision between a vehicle and a pedestrian on the highway;
- A vehicle runs off a highway and damages property adjoining the highway; or
- There is contact between goods being carried out of a property adjacent to a highway, and people using the highway.

McHale v Watson:

- Watson threw sharpened rod at post. Rod ended up in eye of McHale. McHale lost vision in eye.
- Sued for battery.
- Relying on *Weaver v Ward* (English case) Justice held it was up to defendant to show trespassory act had not been intentional or negligent.

2.3- Directness

1. What Is Necessary For Directness?

“An injury is direct when it (the outcome) follows so *immediately* upon the act of the defendant that it may be termed part of the act”. So, there is an element of time involved. There must not have been an intervening act, necessary for the occurrence of the tort (including the plaintiff's own action) (*Hutchins v Maugham*).

4.1- Trespass To Land

Private nuisance is usually a continuing interference whereas as trespass to land tends to be a singular once off event. Another primary difference is the absence of a directness requirement for private nuisance.

1. What Is Trespass To Land

A **voluntary and positive act** of the d that **directly** and **intentionally or negligently** **interferes** with the **p's exclusive possession of land**.

Just like trespass to the person, trespass to land is also actionable per se (no damage required).

Directly=has the defendant actually caused the interference or is there some type of intervening act. Does the entry/trespass follow immediately from the act.

2. Elements Of Trespass To Land

2. Positive and voluntary act
3. Directly
4. Fault (intention vs negligence)
5. Exclusive Possession Of Land
6. Interference Of Land
7. Defences
8. Remedies

3. What Is Land?

Land refers to the surface of the land, fixtures (something fixed to the land. Fixed means it is fully attached to the land. Things like chairs are not fixed, but carpet and trees are fixed), anything growing on the surface of the land, the ground beneath the land, and the airspace above the land.

Air Above- Land is 'restricted until such a height, which would allow an ordinary use and enjoyment of land'. Above this height, anyone can do what they want (*Bernstein v Skyviews and General Ltd*).

The test for is whether the intrusion interferes with any ordinary use of the land which the P may see fit to undertake (*LJP Investments v Howards Chia Investments*).

There is also legislation which deals with this in regard to airplanes. *Section 30 of the Wrongs Act 1958* does this: 'No action shall lie in respect of trespass or nuisance by reason only of the flight of an aircraft over any property at a height above the ground which having regard to the wind, the weather, and all circumstances is reasonable, or the ordinary incidents of such flight, as long as the Air Navigation Regulations are duly complied with'. *Section 31 RA* refers to things or people falling out of planes and stated that this would be trespass with strict liability.

Ground Below-Land is the 'strata beneath it' up to the point where it is not absurd (*Bocardo SA v Star Energy UK Onshore*).

Relevant Case Law:

LJP Investments v Howards Chia Investments:

- Defendant constructing building, sought permission of P to erect scaffolding over P's land. P said D could do this if they paid certain \$. D refused, proceeded to put up scaffolding.

- P sued in trespass to land.
- D argued no trespass to land as it had not interfered with the P's use of the land at that time.
- This argument rejected. The relevant test was not whether the incursion interfered with P's actual use of land at the time.
- The relevant test is whether the incursion was at such a height 'that it **may interfere** with any ordinary uses of the land which P **may see fit** to undertake'.

Bernstein v Skyviews and General Ltd:

- Skyviews taking photos of properties from air. Bernstein sued Skyviews for trespass to land after they took photos of his property from air.
- Held not trespass.
- The court held that the balance is best struck by limiting 'the rights of an owner in the airspace above his head to such heights as is necessary for the ordinary use and enjoyment of his land and the structures on it'.

Bocado SA v Star Energy UK Onshore:

- Star Energy drilled three holes diagonally which crossed over the border of P's land under the surface.
- Bocado sued in trespass to land.
- Held that the owner of the surface land will be the owner of the strata beneath it, including the minerals that are to be found there, unless the minerals have been alienated by a conveyance, at common law, or by statute.
- Court mentioned 'there must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody as so absurd as to be not worth arguing about'.

1. What Actions Will Constitute Trespass To Land?

- An act will be trespassory if the act involves the slightest physical crossing of the boundary/border of the land in question (*Lavender v Betts*).
- Objects (Davies) or animals can be trespass (*League Against Cruel Sports v Scott*) provided that they directly caused them to go onto property otherwise directness may be an issue.
- The actions may be done intentionally or carelessly (*League Against Cruel Sports v Scott*).
- The interference must occur as a direct result of the defendant's act:
 - The interference with the land may be regarded as the direct result of the defendant's act if the interference that occurs is capable of being characterized as being part of the defendant's act (*Southport Corporation*).
- A continuing trespass will arise in circumstances where, having committed the initial trespass, the person or object giving rise to the trespass continues to remain on the land (*Konskier v Goodman*).

League Against Cruel Sports v Scott:

- Scott and co-defendants responsible for dogs capturing deer. P bought parcels of land around where Scott and friends did deer killing, with intent that deer in these areas would be safe.
- P sued Scott and others in trespass to land.
- Held D liable in trespass where they intended foxhounds to enter P's land, but also if they were careless in exercising control over the hounds.
- Up to D to show their trespassory act was neither intentional or careless.

5.1- Introduction To Negligence & Duty Of Care

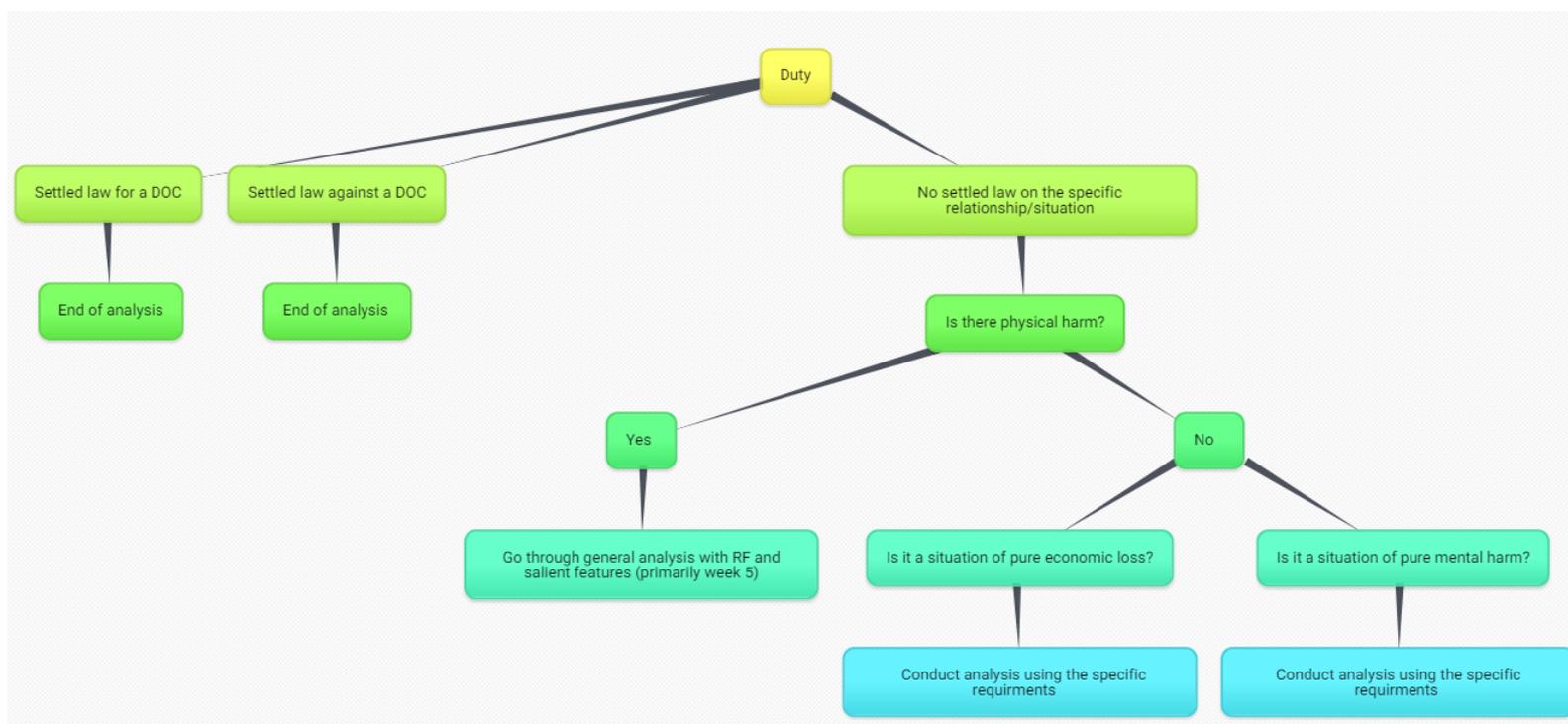
1. What Are The Elements Of Negligence?

1. The defendant must have owed a duty of care to the plaintiff;
2. The defendant must have breached the duty;
3. The defendant's breach of duty must have caused damage, of a legally recognised kind, to the plaintiff;
4. The damage must not have been too remote.
5. Does the defendant have a defence?

2. Categories Of Duty Of Care?

- Situations in respect of which it is settled law that a duty of care exists;
- Situations in respect of which it is settled law that no duty of care exists; and
- Situation in which there is no settled law telling us whether or not a duty of care exists.

3. How To Undergo Analysis In Assessment?



4. Established Categories Of Duty Of Care

If one of the below relationships exists, state that its recognised and move straight on. Only do the analysis if its not a settled DOC relationship,

- Doctor/patient (*Rogers v Whitaker*)
- Employer and Employee (*Hamilton v Nuroof (WA)*)
- Road users (car driver) to each other (*Chapman v Hearse*)
- Manufacturer/consumer (*Grant v Australian Knitting Mills; Donoghue v Stevenson*)