

TORTS AND CONTRACTS II

(a) TOPIC 1: Trespass to Land

1. Definitions

- a. A direct, intentional (or negligent), unauthorised or unlawful interference with land in the possession of another person
 - i. Trespass is actionable per se -> plaintiff may but need not prove any actual damage

2. Title to sue in trespass

- a. What **interest in the land** does the person have in the land in order to sue for such?
- b. **Newington v Windeyer 1985 NSWCA**
 - i. Newington put a gate on the other side of the grove that was cared for by people in Windeyer and was sued for trespass
 - ii. Windeyer proved in court that **they had true ownership and use of the grove over such a period of time**
 - iii. Title by adverse possession was applied later
 - iv. **MUST PROVE ACTUAL AND EXCLUSIVE POSSESSION**
- c. **A lessor does not have title** to sue for trespass **Rogers v Ufton, Macintosh v Label**
- d. **Not a mere licensee** -> **Kaye v Robertson [1991] FSR 62** (Patient in hospital, photographers came in took photos, though he couldn't raise trespass here)
 - i. **Douglas v Hello Ltd [2003] 3 All ER 996** -> photographers in hotel, couldn't sue for trespass

3. Elements of the action

- a. **A direct interference (cannot be consequential)** -> **Esso Petroleum v Southport Corp [1954] 2 QB 182** -> oil discharged on the ship and washed to the shore, not direct (only if knowledge of this being the case)
- b. **Entry unlawful/unauthorised**
 - i. Authority to enter may be express or implied (**Halliday v Nevill 1984**)
 - ii. Implied authority to enter:
 1. Can be made in law or fact
 2. Limits to such implied authority -> **TCN Channel 9 v Anning 2002**
- c. Trespass is with land
- d. **Fault** – The trespass may be intentional or negligent -> intrusion must be a voluntary act (**PTC NSW v Perry (1977) HCA**) -> falling on train tracks accidentally

4. ELEMENT 2: ENTRY without lawful authority/consent of occupier

- a. **Halliday v Nevill, 1984**
 - i. Explores the express and implied consent of entry and when it can be invoked
 - ii. Whether they lawfully obtained or unlawfully obtained evidence
 - iii. **Balance of implied consent (e.g. inviting people to come)** -> many cases is where people enter via implied consent

- iv. Two police officers were on patrol and knew the person didn't have a license as he was preparing to drive
- v. He ran back into his home and the two police barged in and question was whether this was a trespass of land
- vi. There exists an implied license to go onto someone's land if they go accidentally, go to pick up a child etc...
- vii. Held it was lawful

b. **Coco v R 1994 HCA**

- i. There exist limits of statutory authority based on the principle of legality in statutory interpretation
- ii. Does not extend to otherwise tortious conduct unless clearly authorised in unambiguous language
- iii. Warrant to install devices into the house was not giving authority to enter the property rather just to install them

5. ELEMENT 2: Implied authority to ENTER

a. **TCN Channel Nine v Anning 2002 NSWCA**

- i. Limits of implied authority
- ii. TV Camera crew entered P's business, not to watch his event but to record for critical program
- iii. Not a purpose within the implied permission
- iv. Sole purpose of the camera crew was the unauthorised purpose, therefore trespassers
- v. High Court is protective of people to prevent people from intruding
- vi. Concept of remoteness of damage in tort (Justice Spiegelman) -> Damage was not too remote; the test is the type of damage reasonably foreseeable at the time of the tort? (common law) -> in intentional tort, whether or not mental trauma is within the bounds of remoteness for intentional torts -> test of remoteness was whether it was a natural or probable consequence? -> depends on all circumstances -> here he did not get any damages for mental trauma

6. ELEMENT 2: Lawful entry followed by unauthorised conduct

- a. What if one enters with consent or for a lawful purpose but then breaches a condition of entry?

b. **Roy v O'Neill [2020] HCA 45**

- i. When does the person become a trespasser?
- ii. A person who is not a trespasser upon entry to land can become a trespasser if the purpose of their license is exhausted, if the licence is revoked or they commit an act
- iii. Keane and Edelman: At any point in time a person is either a trespasser or not a trespasser
- iv. Gageler and Bell: If entrant has any intention of exceeding the license, he/she is a trespasser on entry
- v. FORMALLY unresolved in whether a person can be a lawful entrant and a trespasser on entry at the same time

c. **Cowell v Rosehill RaceCourse Co Ltd**

- i. If a patron of a public amusement who pays for admission acquires a contractual right and licence to remain on property, but if the licence is withdrawn with good cause, they can become a trespasser

7. ELEMENT 3: Land

- a. Includes anything fixed to the land, fixtures – buildings, underground tanks -> **XL v Caltex**

b. **XL v Caltex 1985 HCA**

- i. Caltex had put some tanks into the site they owned
- ii. On the day XL was to take position and Caltex sent plumber to drill holes into the tanks to stop XL to use those tanks
- iii. Exemplary damages -> 150000 -> 1% of revenue of Caltex
- iv. Compensatory damages -> 5000

- c. Not moving things

d. **Airspace:**

- i. Whoever owns the surface also owns to the heavens and to the earth's inferno
- ii. UPDATED: Occupiers interest in airspace extends up to height necessary for the actual or potential ordinary use or enjoyment of their land

iii. Extended to:

1. Structure protruding: Cranes, scaffolding, awnings

a. **LJP Investments NSWCA**

- i. Two competing properties in Sydney, to save money, defendant allowed for the awnings to protrude into the other persons land and was able to recover it
- ii. Got injunctions and also damages (what would the airspace have cost)

2. Shooting a bullet through airspace

a. **Davies v Bennison [1927] Tas LR 52**

iv. Does not extend to:

1. Taking aerial photographs of grand estates and offering them for sale

2. **Bernstein v Skyviews P/L 1978 QB**

- a. Skyviews took aerial photographs of grand estates and offered them for sale
- b. P sued them for trespass and nuisance, No trespass at common law as it was beyond the height of the enjoyment of the ordinary use of land -> Griffiths J
- c. Single flight did not interfere with P's use and enjoyment of his land

e. **Depth of the land**

- i. Depth necessary that can be used by you -> or subsoil beneath its land
- ii. Extends to:

1. **Di Napoli v New Beach Apartments 2004 NSWCA**

- a. Intruding anchors into underground rocks

2. **Bocardo v Star Energy UK 2011**
 - a. Mining wells intruded under P's land at 800-2800 feet below surface
- iii. **Conveyancing Act (NSW) s88** allows the creation and registration of easements

8. Remedies for trespass

a. Damages

- i. Compensation for actual damage suffered
- ii. Note remoteness of damage test -> natural and probable consequence -> **TCN 9 v Anning 2002**
- iii. Loss is often hard to quantify ->
 1. **Parramatta CC v Lutz 1988 NSWCA**
 - a. Plaintiff is entitled to reinstatement as she had lost her home when her house burnt down
 - b. P may be entitled to cost of reinstatement if it is not disproportionate with the decrease in value
 2. **LJP Investments 1989**
 - a. P may be entitled to an assumed licence fee/market value approach
- iv. Damages can be given for emotional distress **TCN 9 v Anning 2002**

b. Damages where no actual damage to land done

- i. **Nominal damages** – to acknowledge technical infringements of P's rights and vindicate interest in land. Minor infringement
- ii. **Serious intrusion? Substantial general damages? Vindication? What interests are vindicated?**
 1. Key case: **Plenty v Dillon 1991 HCA**
 - a. Police officers trespassed on P's land, despite his objection, to serve a summons on daughter, no warrant
 - b. He succeeded in suing for trespass
 - c. No loss in terms of damage but rather the **loss of the right not to be trespassed on**
 2. **Lewis v ACT [2020] HCA 26**
 - a. A false imprisonment case where HCA unanimously upheld award of \$1 for nominal damages, but 4 different judgments. HCA confirmed that there is no separate head of vindictory damages, but judges do not deny vindictory purpose of general and other damages
 - b. Because his freedom was worth nothing here as he should have been in jail anyway
 3. **Smethurst v Comm Aust Fed Police 2020 HCA**
 - a. Police raided the home of plaintiff on the basis that she had some confidential information
 - b. She sought an injunction to get data back and not damages due to the provision in legislation
 - c. **Held:**

- i. In cases of trespass what may constitute injury is somewhat wider than in some other torts. Injury in the nature of an affront to a plaintiff's dignity **may qualify as damage for the purpose of an award of damages**
 - ii. A majority of the court decided that she was not entitled to the injunction
 - d. A caused of action based on the unlawful and clear invasion of her personal privacy and the seizure and retention of her private information -> they didn't sue for this as she was acting for a very large media company that didn't want a precedent for invasions of privacy as it was getting tighter
- c. **Aggravated damages and Exemplary damages**
 - i. Aggravated damages? -> **TCN Channel 9 v Anning**
 - 1. Special disturbance of occupier's family by trespassing police
 - 2. Awarded for humiliation, distress and affront to dignity
 - ii. Exemplary damages? -> making an example of the defendant
 - 1. **XL Petroleum v Caltex Oil 1985 HCA**
 - a. Read, provides guidance on how to assess such damages
 - b. Awarded for **contumelious disregard of the P's rights**
 - 2. **NSW v Ibbett**
 - a. State may be liable for exemplary damages after police trespass
- d. **Injunction**
 - i. Court may also award **'Lord Cairns Act' s68** damages in lieu of an injunction
 - ii. Only given where damages were an inadequate remedy and always discretionary
 - iii. Can P get an injunction to stop the trespasser enjoying the 'fruits of the trespass'?
 - 1. **Lincoln Hunt v Willisee 1986 NSWSC**
 - a. Equity would grant an injunction merely if it would be unconscionable for the D to publish the material obtained by the trespass
 - 2. **Smethurst v Commissioner of Police [2020] HCA 14**
 - a. Such a wide basis for injunction above was left open by a 4-person majority
 - b. Must be a bit more specific
 - c. Doubted but not discussed by HCA
- e. **Remedy: Ejection of a trespasser**
 - i. Must make a demand to leave if entry was lawful/without force and or license is being revoked
 - ii. May use reasonable force to evict after request/without request

- iii. Use of excessive force causing personal injury to trespasser – defendant now given a defence under **s54 of the Civil Liability Act 2002**

9. Defences to trespass

- a. Consent or lawful justification
- b. Necessity: To prevent a greater evil -> was there a situation of urgent peril
 - i. Limits of defence -> homelessness cannot claim peril -> **London Borough Southwark v Williams**
- c. Statutory or common law authority -> police powers but note limits of police powers to enter
- d. Statutory defence for an aircraft (**CLA s72**)
- e. Defendant might have been exercising self-help remedy