

2. See PRISONS [335-530].
3. *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58; [1991] 3 All ER 733; [1991] 3 WLR 340.

**[415-427] Statutory authority** An action for false imprisonment will not lie where there is statutory authority which, either expressly or by necessary implication, renders such imprisonment lawful.<sup>1</sup>

*Note*

1. *New South Wales v Riley* (2003) 57 NSWLR 496 at 504 per Sheller JA, at 520 per Hodgson JA; [2003] NSWCA 208; BC200304276; *Ruddock v Taylor* (2005) 222 CLR 612; 221 ALR 32 at [49]-[51] per Gleeson CJ, Gummow, Hayne and Heydon JJ, at [229]-[234] per Callinan J; [2005] HCA 48; BC200506594.

**[415-430] Judicial acts** No action in false imprisonment lies against a person exercising judicial functions in a court provided that, in the case of an inferior court, the action taken is within the jurisdiction of the court.<sup>1</sup>

*Note*

1. See COURTS AND JUDICIAL SYSTEM [125-350] (superior courts), [125-355] (inferior courts).

**[415-435] Parliamentary privilege** Each chamber of the Federal and State Parliaments has the power to imprison a person for contempt of Parliament<sup>1</sup> and the exercise of this power is therefore immune from liability for false imprisonment.

*Note*

1. As to the circumstances in which the power of imprisonment may be exercised see CONSTITUTIONAL LAW [90-500], [90-740]-[90-765].

**[415-440] Armed forces** An action will not lie for the detention of a member of the armed forces according to the defence forces legislation.<sup>1</sup> However, where an order of detention is made in excess of, or without, jurisdiction, an action will lie against the member of the armed forces responsible for the detention.<sup>2</sup>

*Notes*

1. See (CTH) Defence Force Discipline Act 1982 s 193(1).
2. *Warden v Bailey* (1814) 4 Taunt 67; 128 ER 253; *Heddon v Evans* (1919) 35 TLR 642.

## (c) TRESPASS TO GOODS

## (i) Liability

**[415-445] Interference with possession** Trespass to goods is an act of the defendant which directly<sup>1</sup> and either intentionally<sup>2</sup> or negligently<sup>3</sup> disturbs the plaintiff's possession<sup>4</sup> of a chattel.<sup>5</sup> Such a trespass may be constituted by taking goods out of the plaintiff's possession,<sup>6</sup> moving them from one place to another<sup>7</sup> or causing damage to them.<sup>8</sup> However, it is doubtful whether it is trespass merely to touch another's chattels without moving them or harming them.<sup>9</sup>

## Notes

1. For the meaning of 'directness' in this context see [415-330]. It is not trespass to goods to lock the door of the room in which those goods are stored: *Hartley v Moxham* (1842) 3 QB 701; 114 ER 675. Nor is it trespass if an animal, without direction by its owner, injures or removes another's chattel: *Manton v Brocklebank* [1923] 2 KB 212 at 229; [1923] All ER Rep 416 per Atkin LJ, CA.
2. The relevant intention is to make contact with, or otherwise affect, the goods; an honest but mistaken view by the defendant that he or she had the right to carry out the act complained of is no defence: *Colwill v Reeves* (1811) 2 Camp 575; 170 ER 1257; *Clissold v Cratchley* [1910] 2 KB 244; [1908-10] All ER Rep 739, CA; *Wilson v Lombank Ltd* [1963] 1 All ER 740; [1963] 1 WLR 1294; *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74. Compare *Beals v Hayward* [1960] NZLR 131 at 137 per McGregor J (citing Stable J in *Morris v Marsden* [1952] 1 All ER 925; [1952] 1 TLR 947; (1952) 96 Sol Jo 281) (sommnambulist would not be liable for damaging a chattel while sleepwalking).
3. *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861; [1951] 2 All ER 310, CA (need to show intention or lack of care on the part of the defendant) (applied *McHale v Watson* (1964) 111 CLR 384 at 388; [1965] ALR 788; BC6400440). As to the requirement to show intention or lack of care see [415-335]. It appears that the defendant bears the onus of proving an absence of intent or negligence: *Bell Canada v Bannermount Ltd* [1973] 2 OR 811; (1973) 35 DLR (3d) 367, CA(Ont); *Bell Canada v Cope (Sarnia) Ltd* (1980) 11 CCLT 170, SC(Ont) (affirmed *Bell Canada v Cope (Sarnia) Ltd* (1980) 119 DLR (3d) 254, CA(Ont)).
4. As to what constitutes possession for these purposes see [415-450].
5. The subject matter of an action may be any goods which are capable of lawful possession: *Buron v Denman* (1848) 2 Exch 167; 154 ER 450. See also PERSONAL PROPERTY [315-140]-[315-220]. An action in trespass lies for the wrongful removal of fixtures: *Pitt v Shew* (1821) 4 B & Ald 206; 106 ER 913; *Boydell v M'Michael* (1834) 1 Cr M & R 177 at 179; 149 ER 1043 at 1044 per Parke B. As to the removal of fixtures see further LEASES AND TENANCIES [245-1230]-[245-1275]. A dead human body may in some circumstances become property for these purposes: *Doodeward v Spence* (1908) 6 CLR 406; 9 SR (NSW) 107; 15 ALR 105; *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474; [1997] 1 WLR 596, CA; *R v Kelly* [1999] QB 621 at 631; [1998] 3 All ER 741; [1999] 2 WLR 384, CA; *AIV v CIV* (2002) 54 NSWLR 445 at 449; 191 ALR 392; [2002] NSWSC 301; BC200201730 per Barrett J. As to the circumstances in which a person may have property in an animal, whether tame or wild, see ANIMALS [20-5]-[20-35].
6. *Heyden v Smith* (1610) 2 Brownl 328; 123 ER 970; *Brewer v Dew* (1843) 11 M & W 625; 152 ER 955; *Richardson v Rix* (1989) 12 MVR 522 at 524 per Allen J, SC(NSW); *City Motors (1933) Pty Ltd v Southern Aerial Super Service Pty Ltd* (1961) 106 CLR 477 at 483; [1962] ALR 184; (1961) 35 ALJR 206 per Dixon CJ. It is also trespass to immobilise another's chattel without justification: *Vine v Waltham Forest London Borough Council* [2000] 4 All ER 169; [2000] 1 WLR 2383, CA.

7. *Kirk v Gregory* (1876) 1 Ex D 55; 45 LJQB 186; 34 LT 488; *GHK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376.
8. *Fouldes v Willoughby* (1841) 8 M & W 540 at 549; 151 ER 1153 at 1157 per Alderson B (scratching the bodywork of a carriage would be trespass); *Hamps v Darby* [1948] 2 KB 311; [1948] 2 All ER 474. CA.
9. *Wilson v Marshall* 1982 Tas R 287 at 299-300 per Cox J; *Everitt v Martin* [1953] NZLR 298 at 302 per Adams J.

**[415-450] Actual or constructive possession required** A plaintiff in an action for trespass to goods must generally<sup>1</sup> prove that at the time when the unlawful act was committed he or she had actual possession<sup>2</sup> or constructive possession<sup>3</sup> of the chattel in question. Thus, an action may be brought by a person who holds goods on sale or return<sup>4</sup> or one who has a lien over goods.<sup>5</sup> An action may be maintained by a bailee,<sup>6</sup> even one whose bailment is gratuitous.<sup>7</sup> It is no defence that the true title to the property lies with a third party.<sup>8</sup>

#### Notes

1. In certain circumstances neither actual nor constructive possession by the plaintiff at the time of the trespass is necessary and an action may be brought by:
  - (1) a personal representative for a trespass to chattels of a deceased person where the trespass is committed between the date of death and that of the grant of representation, on the basis that title relates back to the date of death — *Tharpe v Stallwood* (1843) 5 Man & G 760; 12 LJCP 241; 134 ER 766;
  - (2) a person who has no more than a right to possession when actual possession was held by his or her employee, agent or bailee at will — *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 227; 47 SR (NSW) 158; [1946] ALR 517 per Dixon J; and
  - (3) a trustee for trespass to goods in the hands of the beneficiary — *White v Morris* (1852) 11 CB 1015; 21 LJCP 185; 138 ER 778; *Barker v Furlong* [1891] 2 Ch 172; [1891-94] All ER Rep Ext 2030.
2. *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 221 per Starke J, at 224-6 per Dixon J, at 234 per McTiernan J, at 242 per Williams J; 47 SR (NSW) 158; [1946] ALR 517. It is not sufficient that the plaintiff has only the right to possession and therefore, where a bailment is properly terminated causing the right to possession to revert immediately to the bailor, the latter may sue in conversion but not in trespass: *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 227; 47 SR (NSW) 158; [1946] ALR 517 per Dixon J. One co-owner cannot sue another co-owner in trespass: *Parr v Ash* (1876) 14 SCR (NSW) 352, SC(NSW), Full Court.
3. *Hamps v Darby* [1948] 2 KB 311 at 322; [1948] 2 All ER 474, CA (owner of racing pigeons continues in possession while birds are in flight); *Wilson v Lombank Ltd* [1963] 1 All ER 740; [1963] 1 WLR 1294 (owner of motor car has possession while vehicle is at a garage being repaired). See also *Chairman, National Crime Authority v Flack* (1998) 86 FCR 16; 156 ALR 501. Fed C of A, Full Court (occupier of private home in possession of chattels found there).
4. *Colwill v Reeves* (1811) 2 Camp 575; 170 ER 1257.
5. *Standard Electronic Apparatus Laboratories Pty Ltd v Steiner* [1960] NSWLR 447 at 451; (1960) 77 WN (NSW) 833 per Walsh J.
6. *Hard v Macauley* (1791) 4 Term Rep 489; 100 ER 1135.
7. *The Winkfield* [1902] P 42; [1900-3] All ER Rep 346; (1901) 85 LT 668, CA.
8. *Carter v Johnson* (1839) 2 Mood & R 263; 174 ER 283; *Nelson v Cherrill* (1832) 8 Bing 316; 131 ER 415; *Standard Electronic Apparatus Laboratories Pty Ltd v Steiner* [1960] NSWLR 447; (1960) 77 WN (NSW) 833; *Henry Berry & Co Pty Ltd v Rushon*

[1937] St R Qd 109 at 119-20; (1935) 29 QJPR 169 per Henschman J, SC(QLD), Full Court. See also *Field v Sullivan* [1923] VLR 70, SC(VIC), Full Court; *Costello v Chief Constable of Derbyshire Constabulary* [2001] 3 All ER 150; [2001] 1 WLR 1437, CA (person in possession of goods believed to have been stolen has a title to them, good against anyone other than one setting up a better title).

## (ii) Defences

**[415-455] Consent** No action lies for trespass to goods if the defendant can prove<sup>1</sup> that the plaintiff consented, either expressly<sup>2</sup> or impliedly,<sup>3</sup> to the disturbance with his or her possession of those chattels.

### Notes

1. It may be presumed that the onus of proof of consent is the same for trespass to goods as it is for trespass to the person constituted by battery or assault: see [415-360]. In *Vine v Waltham Forest London Borough Council* [2000] 4 All ER 169; [2000] 1 WLR 2383, CA, the court accepted the plaintiff's evidence that she had not consented to the trespass.
2. *William Leitch and Co Ltd v Leydon* [1931] AC 90 at 108-9; [1930] All ER Rep 754; (1930) 144 LT 218 per Lord Blanesburgh.
3. *Lloyd v DPP* [1992] 1 All ER 982; [1992] RTR 215, Div Ct; *Arthur v Anker* [1997] QB 564; [1996] 3 All ER 783; [1996] 2 WLR 602, CA (in both cases the plaintiff, in wrongfully parking his car on another's property, was taken to have consented to the immobilisation of the vehicle by agents of the landowner, the latter having erected signs warning of this consequence).  
It may be presumed that contributory negligence, not being a defence to battery or assault (see [415-370] note 1), is equally not a defence to this form of trespass.

**[415-460] Necessity** A defendant may justify a disturbance of the plaintiff's possession of a chattel on proof<sup>1</sup> that the act was reasonably necessary<sup>2</sup> for the preservation or protection of:

- (1) life;<sup>3</sup>
  - (2) the plaintiff's chattel;<sup>4</sup> or
  - (3) the property of the defendant<sup>5</sup> or another person,<sup>6</sup>
- and was carried out with reasonable care.<sup>7</sup>

### Notes

1. The onus of proof lies with the defendant: *Cresswell v Sirl* [1948] 1 KB 241 at 249; [1947] 2 All ER 730 at 733 per Scott LJ, CA.
2. The act must be one which a reasonable person would undertake in the face of a real and imminent peril (see *Cope v Sharpe (No 2)* [1912] 1 KB 496; [1911-13] All ER Rep Ext 1212, CA) and to which there was no practicable alternative (*Cresswell v Sirl* [1948] 1 KB 241; [1947] 2 All ER 730; *Hamps v Darby* [1948] 2 KB 311; [1948] 2 All ER 474, CA; *Ramage v Evans* [1948] VLR 391; [1948] 2 ALR 525). See also *Goodway v Becher* [1951] 2 All ER 349; (1951) 115 JP 435, Div Ct; *Shaw v Hackshaw* [1983] 2 VR 65 at 100 per McInerney J (reversed on other grounds *Hackshaw v Shaw* (1984) 155 CLR 614; 56 ALR 417; BC8400458). The defendant's bona fide belief that the action was for the benefit of the plaintiff's goods is not sufficient (see *Kirk v Gregory* (1876) 1 Ex D 55; 45 LJQB 186; 34 LT 488), nor is the inability to find suitable accommodation for oneself sufficient: *Southwark London Borough Council v Williams* [1971] Ch 734; [1971] 2 All ER 175; [1971] 2 WLR 467, CA; *R v Bacon*



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415 — TORT

[1977] 2 NSWLR 507 at 511-12 per Street CJ, CCA(NSW). The plea of necessity is not available if the circumstances requiring the defendant to act were brought about by his or her own negligence (see *Beckingham v Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403 at 406; 74 WN (NSW) 338 per Street CJ, Sugerman and Kinsella JJ; *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985 at 994; [1985] 1 WLR 1242 at 1253 per Taylor J), the onus of proof of which is on the plaintiff: *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218; [1955] 3 All ER 864; [1956] 2 WLR 81.

3. *Mouse's Case* (1608) 12 Co Rep 63; 77 ER 1341; *Southport Corp v Esso Petroleum Co Ltd* [1956] AC 218 at 228; [1953] 2 All ER 1204 at 1209-10; [1953] 3 WLR 773 per Devlin J (affirmed *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 at 235; [1955] 3 All ER 864; [1956] 2 WLR 81 per Earl Jowitt).
4. *Proudman v Allen* [1954] SASR 336 (the fact that the defendant's intervention may well have resulted in greater damage being done to the plaintiff's property was regarded as irrelevant); *Beckingham v Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403 at 405; 74 WN (NSW) 338 per Street CJ, Sugerman and Kinsella JJ, SC(NSW), Full Court.
5. *Cresswell v Sirl* [1948] 1 KB 241; [1947] 2 All ER 730; *Beckingham v Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403; 74 WN (NSW) 338; *Norton v Hoare (No 1)* (1913) 17 CLR 310 at 322; [1913] VLR 516; (1913) 19 ALR 466 per Isaacs, Gavan Duffy and Rich JJ.
6. *Workman v Couper* [1961] 2 QB 143 at 150; [1961] 1 All ER 683 at 685 per Lord Parker CJ, Div Ct.
7. *Beckingham v Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403; 74 WN (NSW) 338.

[415-465] **Re-entry on land** At common law,<sup>1</sup> one who is entitled to the immediate possession of land incurs no liability for trespass by removing another's goods from that land.<sup>2</sup> This defence may be subject to the provisos that reasonable notice be given of the intention to remove the goods<sup>3</sup> and that no more damage is done by the removal than is necessary to curtail the continued encumbering of the land.<sup>4</sup>

Notes

1. It may be presumed that this defence is not available in those circumstances in which a landlord of residential premises is statutorily prohibited from enforcing a right of re-entry otherwise than by judicial proceedings:  
 (ACT) Residential Tenancies Act 1997 s 37  
 (NT) Residential Tenancies Act 1999 Pt 9  
 (NSW) Residential Tenancies Act 1987 s 72  
 (QLD) Residential Tenancies Act 1994 s 219  
 (SA) Residential Tenancies Act 1995 s 95  
 (WA) Residential Tenancies Act 1987 s 80.  
 See also:  
 (TAS) Residential Tenancy Act 1997 s 56  
 (VIC) Residential Tenancies Act 1997 Pt 2 Div 8.  
 As to the right to re-entry see further LEASES AND TENANCIES [245-4005]-[245-4080].
2. *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720; (1919) 122 LT 479. CA; *Haniotis v Dimitriou* [1983] 1 VR 498. See also *Aglionby v Cohen* [1955] 1 QB 558 at 562; [1955] 1 All ER 785 at 786 per Harman J; *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428 at 429; [1957] 1 WLR 813; (1957) 101 Sol Jo 534 per Wynn-Parry J.
3. *Haniotis v Dimitriou* [1983] 1 VR 498 at 501-2 per Brooking J.

4. *Haniotis v Dimitriou* [1983] 1 VR 498 at 502-3 per Brooking J. See also *Neville v Cooper* (1834) 2 Car & M 329; 149 ER 786.

**[415-470] Distress damage feasant** An occupier of land<sup>1</sup> may seize and detain<sup>2</sup> a chattel<sup>3</sup> which is unlawfully on the land<sup>4</sup> and not in its owner's possession and use,<sup>5</sup> until the occupier has been compensated for the damage<sup>6</sup> done.<sup>7</sup>

#### Notes

1. The occupier need only have an interest in the land which would be sufficient to permit him or her to sue for trespass to that land: *Burt v Moore* (1793) 5 Term Rep 329; 101 ER 184. As to the interests sufficient to support an action in trespass see [415-505]-[415-520].
2. Distress damage feasant operates as a justification for an action which might otherwise be a trespass to that chattel: see [415-445].
3. As to the right to seize and detain animals wrongfully on one's property see ANIMALS [20-565].
4. The seizure must be effected while the goods are on the land (see *Clement v Milner* (1800) 3 Esp 95; 170 ER 550), however, the goods may subsequently be moved and detained elsewhere (*Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144 at 149-50 per Quilliam J).
5. *Collins v Renison* (1754) 138; 96 ER 830; *Storey v Robinson* (1795) 6 Term Rep 138; 101 ER 476; *Field v Adames* (1840) 12 Ad & El 649; 113 ER 960; *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144.
6. The damage may consist of obstruction to others on the land (see *Arthur v Anker* [1997] QB 564 at 575 per Bingham MR, at 579-80 per Neill LJ; [1996] 3 All ER 783; [1996] 2 WLR 602, CA) and may possibly include the cost of detaining or removing the goods: *Christopher v Police* (unreported, SC(NZ), Cooke J, No M36/74, 22 April 1974); *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144 at 148-9 per Quilliam J. See also *Forhan v Hallett* (1959) 19 DLR (2d) 756 at 759 per Swencisky J, CC(BC). Compare *R v Houson* (1966) 55 DLR (2d) 582 at 596-7 per Laskin JA, CA(Ont); *Arthur v Anker* [1997] QB 564; [1996] 3 All ER 783; [1996] 2 WLR 602.
7. *Ambergate, Nottingham and Boston and Eastern Junction Railway Co v Midland Railway Co* (1853) 2 El & Bl 793; 118 ER 964. As to the right of a landlord to seize a tenant's chattels and distrain for outstanding rent see LEASES AND TENANCIES [245-4470].

**[415-475] Other defences** A police officer or other person acting within the authority of a search warrant may seize and detain goods in accordance with the warrant.<sup>1</sup> A person acting strictly within the authority of the judicial process is justified in seizing goods in execution of that process.<sup>2</sup>

#### Notes

1. See POLICE AND EMERGENCY SERVICES [320-375]-[320-390].
2. As to execution by sheriffs and marshalls see PRACTICE AND PROCEDURE [325-9905]-[325-9915]. As to execution generally see PRACTICE AND PROCEDURE [325-9850]-[325-10090].