(d) TRESPASS TO LAND

(i) Liability

(A) *Actions which Constitute Trespass*

[415-480] Unjustified entry Every unjustified[1] entry[2] directly[3] by a person[4] on land[5] in the possession[6] of another, which is carried out either intentionally[7] or negligently,[8] is an actionable trespass,[9] even though no damage is done thereby.[10] For example, a trespass occurs where a person wrongfully sets foot on[11] or causes soil to fall on another's property,[12] places a ladder against[13] or drives nails into[14] another's wall, breaks a fence on the property[15] or removes a door.[16]

Notes

1. That is, an entry effected otherwise than with the consent of the occupier or under lawful authority: *Entick v Carrington* (1765) 2 Wils 275 at 291; 19 State Tr 1030; 95 ER 807 at 817 per Lord Camden LCJ; *Morris v Beardmore* [1981] AC 446 at 464; [1980] 2 All ER 753 at 763; [1980] 3 WLR 283 per Lord Scarman; *Halliday v Nevill* (1984) 155 CLR 1 at 10; 57 ALR 331 at 335-6; 59 ALJR 124 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 647; 98 ALR 353 at 361; 65 ALJR 231 per Gaudron and McHugh JJ. As to the various grounds of justification see [415-525]-[415-550].
2. Physical intrusion on to the plaintiff's land is an essential aspect of the tort: *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 706; 55 LGRA 165 per Young J (photographing plaintiff's property from a public street not actionable). See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 494; 38 SR (NSW) 33; [1937] ALR 597; (1937) 11 ALJ 197 per Latham CJ.
3. As to the requirement of directness generally in actions in trespass see [415-330]. It would be trespass to turn a hose on to a neighbour's land, but not to discharge water onto a third person's property, from which it flows on to that of the plaintiff: *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84 at 86-7; [1931] All ER Rep 154 at 156 per Farwell J. The intrusion of the branches or roots of a tree into neighbouring property is consequential on the operation of natural forces, and is treated as nuisance, not trespass: *Lemmon v Webb* [1894] 3 Ch 1 at 24; (1894) 63 LJ Ch 570; 70 LT 712 per Kay LJ, CA (affirmed on other grounds *Lemmon v Webb* [1895] AC 1); *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479 at 485; [1977] 2 All ER 902; [1977] 3 WLR 136 per Griffiths J. As to liability in nuisance see [415-600]-[415-1090]. See also *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 195-6; [1954] 2 All ER 561 at 570; [1954] 3 WLR 200 per Denning LJ, CA (reversed on other grounds *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 at 242 per Lord Radcliffe, at 244 per Lord Tucker; [1955] 3 All ER 864; [1956] 2 WLR 81 (discharge of oil from ship at sea, carried by tide and wind on to plaintiff's foreshore, does not constitute trespass)).
4. As to liability for trespass by animals see ANIMALS [20-545].
5. Trespassory conduct may relate to the airspace above land (see [415-500]) or the subsoil (see [415-495]) as well as to the surface.
6. As to what constitutes possession for these purposes see [415-505].
7. The only relevant intention is to enter the land in question; it is of no avail for the defendant to plead a mistaken belief as to the ownership or right to possession of the land (see *Basely v Clarkson* (1681) 3 Lev 37; 83 ER 565) or a mistaken belief as to his or her right of entry (*Shattock v Devlin* [1990] 2 NZLR 88 at 113-14 per Wylie J).

8. *League Against Cruel Sports Ltd v Scott* [1986] 1 QB 240 at 251-2; [1985] 2 All ER 489 at 494 per Park J. It is not trespass if the entry is involuntary (see *Smith v Stone* (1647) Sty 65; 82 ER 533; *Public Transport Commission (NSW) v Perry* (1977) 137 CLR 107 at 132; 14 ALR 273 at 293-4; 51 ALJR 620 per Gibbs J) and occurred despite all reasonable care having been taken: *Nickells v Mayor, Aldermen, Councillors and Citizens of the City of Melbourne* (1938) 59 CLR 219 at 225; [1938] ALR 154 at 157; (1938) 11 ALJ 568 per Dixon J.
9. The plaintiff does not have to plead trespass to land specifically in the statement of claim: *Drane v Evangelou* [1978] 2 All ER 437; [1978] 1 WLR 455, CA.
10. Trespass to land, like the other forms of trespass, is actionable per se: *Entick v Carrington* (1765) 2 Wils 275; 19 State Tr 1030; 95 ER 807; *Dumont v Miller* (1873) 4 AJR 152; *Plenty v Dillon* (1991) 171 CLR 635 at 639; 98 ALR 353; 65 ALJR 231 per Mason CJ, Brennan and Toohey JJ. As to the lack of necessity to prove damage in actions for trespass generally see [415-10], [415-325].
11. *McPhail v Persons, Names Unknown* [1973] Ch 447; [1973] 3 All ER 393, CA. See also *Coco v R* (1994) 179 CLR 427 at 435; 120 ALR 415 at 417; 68 ALJR 401; 72 A Crim R 32 per Mason CJ, Brennan, Gaudron and McHugh JJ.
12. *Watson v Cowen* [1959] Tas SR 194, SC(TAS), Full Court.
13. *Westripp v Baldock* [1938] 2 All ER 779 (affirmed on other grounds *Westripp v Baldock* [1939] 1 All ER 279, CA).
14. *Simpson v Weber* (1925) 133 LT 46, Div Ct.
15. *Hogan v AG Wright Pty Ltd* [1963] Tas SR 44.
16. *Lavender v Betts* [1942] 2 All ER 72 at 73; (1942) 167 LT 70 per Atkinson J; *Pollack v Volpato* [1973] 1 NSWLR 653, CA(NSW).

[415-485] Exceeding licence A person may become a trespasser by exceeding the ambit of a lawful entry. So a person other than a tenant[1] who has lawfully entered land with the occupier's licence[2] becomes a trespasser by remaining for longer than a reasonable time[3] after the licence has been revoked.[4] A trespass also occurs where a person who is authorised to enter the premises acts beyond the terms of that lawful authority to enter.[5] A person who has been permitted to enter premises for one purpose becomes a trespasser if entry is effected for a different purpose.[6]

Notes

1. A tenant, even though holding over after the expiry of the term, is not liable in trespass: *Dougal v McCarthy* [1893] 1 QB 736; [1891-94] All ER Rep 1216; (1893) 68 LT 699, CA; *Falkingham v Fregon* (1899) 25 VLR 211 at 214-15; 5 ALR 265 at 266 per Hood J. However a mere tenant at sufferance may be sued in trespass: see LEASES AND TENANCIES [245-90]. For the definition of 'holding over' see LEASES AND TENANCIES [245-80].
2. The licence may be express or implied. As to the circumstances in which a licence will be implied see [415-525]. As to licences to enter and occupy land generally see LEASES AND TENANCIES [245-235]-[245-265].
3. *Robson v Hallett* [1967] 2 QB 939 at 952-3 per Lord Parker CJ, at 954 per Diplock LJ; [1967] 2 All ER 407, Div Ct. See also *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 630-1; [1937] ALR 273; (1937) 11 ALJ 32 per Dixon J; *Minister of Health v Bellotti* [1944] KB 298; [1944] 1 All ER 238, CA; *Dehn v A-G* [1988] 2 NZLR 564 at 573 per Tipping J (police officers who had entered premises by virtue of an implied licence held not to be trespassers as they did not 'tarry upon the property for more than a reasonable time when the licence was emphatically revoked')

(affirmed *Dehn v A-G* [1989] 1 NZLR 320); *Fletcher v Harris* (2005) 190 FLR 59; [2005] ACTSC 27; BC200502145 at [59]-[61] per Higgins CJ, SC(ACT).

4. *Hood v Leadbitter* (1845) 13 M & W 838; 153 ER 351; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; [1937] ALR 273; (1937) 11 ALJ 32; *Robinson v Kingsmill* (1954) 71 WN (NSW) 127 at 129-30 per Brereton J. See also *Mackay v Abrahams* [1916] VLR 681 at 684-5; (1916) 22 ALR 385; 38 ALT 78 per Hood J; *Davis v Lisle* [1936] 2 KB 434; [1936] 2 All ER 213, Div Ct; *Duffield v Police* [1971] NZLR 381 at 383-4 per Macarthur J. It matters not that the revocation of the licence constitutes a breach of contract by the occupier: *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 632; [1937] ALR 273; (1937) 11 ALJ 32 per Dixon J; *Robinson v Kingsmill* (1954) 71 WN (NSW) 127.

   A building contractor who seeks to continue building operations after the owner has repudiated the contract will be held a trespasser: *Porter v Hannah Builders Pty Ltd* [1969] VR 673 at 678 per Lush J; *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93 at 105-6 per Helsham J; *Chermar Productions Pty Ltd v Prestest Pty Ltd* (1989) 7 BCL 46 at 50 per Southwell J, SC(VIC). It is irrelevant that the owner's repudiation was not justified: *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 621; [1937] ALR 273; (1937) 11 ALJ 32 per Latham CJ.

5. *Waters v Maynard* (1924) 24 SR (NSW) 618; 41 WN (NSW) 166; *Watson v Murray & Co* [1955] 2 QB 1; [1955] 1 All ER 350 (court officer lawfully levying execution against plaintiff's goods held liable in trespass for excluding plaintiff from the premises); *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 612 per O'Bryan J, at 631 per McDonald J; (1990) Aust Torts Reports ¶81-077, App Div (police officers remaining on premises after expiry of search warrant held to have committed trespass); *Fletcher v Harris* (2005) 190 FLR 59; [2005] ACTSC 27; BC200502145 at [46]-[49] per Higgins CJ, SC(ACT).

6. *Barker v R* (1983) 153 CLR 338; 47 ALR 1; 57 ALJR 426 (entry of neighbour's house for purpose of stealing trespassory, as licence to enter was limited to caring for house during owner's absence); *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 460-1; 62 ALJR 216 per Young J (public's licence to enter plaintiff's premises for business purposes did not extend to justify television crew entering for purpose of interviewing and harassing occupants); *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 732 per Eichelbaum CJ; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333; (2002) Aust Torts Reports ¶81-649; [2002] NSWCA 82; BC200201185 (reporter and cameraman who were invited by Environment Protection Agency ('EPA') to accompany EPA on a search of respondent's property, did not have express or implied licence to enter respondent's land).

   For the view that, where the defendant's purpose in entry is both for the permitted reason and an unauthorised one, entry may be trespassory see *Bond v Kelly* (1873) 4 AJR 153; *Singh v Smithenbecker* (1923) 23 SR (NSW) 207 at 214; 40 WN (NSW) 11 per Cullen CJ; *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 69 SR (NSW) 311, SC(NSW), Full Court. Compare *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584 at 598-9 per Barwick CJ and Menzies J, at 606 per Kitto J; [1969] ALR 533; (1968) 42 ALJR 280 (affirming *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 69 SR (NSW) 311); *Barker v R* (1983) 153 CLR 338 at 347 per Mason J, at 365 per Brennan and Deane JJ; 47 ALR 1; 57 ALJR 426; *Barker v R* (1994) 54 FCR 451 at 474; 127 ALR 280 at 299 per Jenkinson and O'Loughlin JJ, Fed C of A, Full Court.

   A person who enters premises under authority of the law but while there commits an unauthorised act may no longer be regarded as a trespasser ab initio: *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 at 313 per Lord Denning MR, at 317 per Diplock LJ; [1968] 1 All ER 229, CA; *Barker v R* (1983) 153 CLR 338 at 344 per Mason J, at 363-4 per Brennan and Deane JJ; 47 ALR 1; 57 ALJR 426.

[415-490] Continuing trespass A continuing trespass is a trespass for which the cause of action is renewed[1] on each day that the wrong is not

remedied.[2] For example, a continuing trespass may be committed where a building is erected on another's land without permission,[3] objects attached to a building intrude into the airspace above neighbouring land,[4] or goods are allowed to remain on another's land without permission.[5]

Notes

1. *Holmes v Wilson* (1839) 10 Ad & El 503; 113 ER 190. The person currently in possession may sue, even though the trespass commenced prior to his or her acquiring possession: *Hudson v Nicholson* (1839) 5 M & W 437; 151 ER 185; *Konskier v B Goodman Ltd* [1928] 1 KB 421; [1927] All ER Rep 187; (1927) 138 LT 481.
2. Only an unjustified omission to act can be a continuing trespass: *Clegg v Dearden* (1848) 12 QB 576 at 601; 116 ER 986 at 995 per Lord Denman CJ; *Holmes v Wilson* (1839) 10 Ad & El 503; 113 ER 190. As to the commencement of the limitation period for such a trespass see LIMITATION OF ACTIONS [255-170], [255-225]-[255-270].
3. *Holmes v Wilson* (1839) 10 Ad & El 503; 113 ER 190.
4. As to airspace see [415-500].
5. A trespass occurs even if the goods were initially left with the occupier's licence, which has since expired: *Konskier v B Goodman Ltd* [1928] 1 KB 421; [1927] All ER Rep 187; (1927) 138 LT 481, CA.

(B) *Subject Matter*

[415-495] Land and subsoil Trespass may be committed not only by a direct intrusion on to the surface of land or into a building,[1] but also by a direct interference with rights relating to land which permit the plaintiff to exclude others,[2] such as the right to cut timber[3] or the right of fishing.[4] It is also trespass to intrude into the subsoil of the plaintiff's property, whether by excavation[5] or tunnelling.[6] The occupier of the surface of the land has substantial control over the subterranean space beneath the surface to a considerable depth.[7]

Notes

1. As to unjustified entry see [415-480].
2. Thus interference with an easement or licence is not trespass: *Hill v Tupper* (1863) 2 H & C 121; 159 ER 51; *Vaughan v Shire of Benalla* (1891) 17 VLR 129; 12 ALT 176; *Moore v MacMillan* [1977] 2 NZLR 81 at 91-2 per Chilwell J. See also *Moreland Timber Co Pty Ltd v Reid* [1946] VLR 237 at 249-50; [1946] ALR 299 per O'Bryan J. As to easements see REAL PROPERTY [355-12000]-[355-12250]. As to licences to enter and occupy land see LEASES AND TENANCIES [245-235]-[245-265].
3. Provided that a legal, and not merely an equitable, right is vested in the plaintiff: *Moreland Timber Co Pty Ltd v Reid* [1946] VLR 237; [1946] ALR 299.
4. *Holford v Bailey* (1850) 13 QB 426; 116 ER 1325, Exch. See also *Fitzgerald v Firbank* [1897] 2 Ch 96 at 101 per Lindley LJ, at 103-4 per Rigby LJ; [1895-99] All ER Rep 445, CA (damage to fishery was indirect, hence action lay in nuisance, not trespass).

   Other examples of interference with rights relating to land include: *Wellaway v Courtier* [1918] 1 KB 200; [1916-17] All ER Rep 340, Div Ct (trespass lies for interference with right to take crop of turnips); *Mason v Clarke* [1955] AC 778; [1955] 1 All ER 914 (trespass available for interference with right to take rabbits); *Richards v Davies* [1921] 1 Ch 90 at 94-5; [1920] All ER Rep 144 per Lawrence J (grantee can maintain an action in trespass in respect of right to take crop of grass); *Bradley*

v Wingnut Films Ltd [1993] 1 NZLR 415 at 428–9 per Gallen J (exclusive right of burial in particular plot may be one in respect of which holder can sue in trespass).

5. *Stoneman v Lyons* (1975) 133 CLR 550 at 561–2; 33 LGRA 156; 8 ALR 173 at 181–2; 50 ALJR 370 per Stephen J; *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493; (2004) Aust Torts Reports ¶81-728 at 65,400; [2004] NSWSC 52; BC200400267 per Young CJ in Eq, SC(NSW).
6. *Bulli Coal Mining Co v Osborne* [1899] AC 351; [1895–99] All ER Rep 506, PC.
7. *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493; (2004) Aust Torts Reports ¶81-728; [2004] NSWSC 52; BC200400267 per Young CJ in Eq, SC(NSW).

[415-500] Airspace It is trespass for a structure on land to intrude into the airspace above neighbouring land, whether the structure be fixed[1] or movable,[2] permanent[3] or temporary[4] and whether it intrudes to only a minor extent[5] or at a considerable height above the surface.[6] To cause a projectile to pass through airspace at such a height as would interfere with the occupier's ordinary use and enjoyment of the land is a trespass,[7] but there is authority that transient passage above that height is not.[8] Legislation in some jurisdictions excludes liability in trespass for the overflight of aircraft at a reasonable height.[9]

Notes

1. *Barker v Corporation of the City of Adelaide* (1900) SALR 29 (electric cable); *Laudor v Johnston* [1905] VLR 714 (ventilating pipes); *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334; [1957] 2 All ER 343; [1957] 2 WLR 1007 (advertising sign); *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490; 74 LGRA 282; (1989) Aust Torts Reports ¶80-269; 8 BCL 216 (scaffolding); *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464; 74 LGRA 406; 8 BCL 205 (protective mesh screens). See also *Prentice v Mercantile House Pty Ltd* (1991) 73 LGRA 1; 99 ALR 107 at 120–1 per Morling CJ, SC(Norfolk Is) (awnings over public road).
2. *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483; [1970] 1 WLR 411; *Graham v KD Morris & Sons Pty Ltd* [1974] Qd R 1; *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* (1987) 38 BLR 82; 284 EG 625 (each concerned with the jib of a tower crane).
3. *Barker v Corporation of the City of Adelaide* (1900) SALR 29; *Laudor v Johnston* [1905] VLR 714; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334; [1957] 2 All ER 343; [1957] 2 WLR 1007.
4. *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490; 74 LGRA 282; (1989) Aust Torts Reports ¶80-269; 8 BCL 216; *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464; 74 LGRA 406; 8 BCL 205. See also note 2 above.
5. *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334; [1957] 2 All ER 343; [1957] 2 WLR 1007 (20 cm); *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490; 74 LGRA 282; (1989) Aust Torts Reports ¶80-269; 8 BCL 216 (1.5 m); *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464; 74 LGRA 406; 8 BCL 205.
6. *Graham v KD Morris & Sons Pty Ltd* [1974] Qd R 1 (19 m); *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483; [1970] 1 WLR 411 (15 m); *Barker v Corporation of the City of Adelaide* (1900) SALR 29 (13.5 m).
7. *Davies v Bennison* (1927) 22 Tas LR 52; *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479 at 488; [1977] 2 All ER 902; [1977] 3 WLR 136 per Griffiths J. Compare *Pickering v Rudd* (1815) 4 Camp 219 at 220; 171 ER 70 at 70–1 per Lord Ellenborough.

8. *Clifton v Viscount Bury* (1887) 4 TLR 8 (bullets passing 75 feet above plaintiff's property); *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479; [1977] 2 All ER 902; [1977] 3 WLR 136 (aeroplane flying 'many hundreds of feet above the ground'); *Schleter t/as Cape Crawford Tourism v Brazakka Pty Ltd* (2002) 12 NTLR 76 at 83–4 per Thomas J. See also *Pickering v Rudd* (1815) 4 Camp 219 at 220–1; 171 ER 70 per Lord Ellenborough.

9. (NSW) Damage by Aircraft Act 1952 s 2(1)
(SA) Civil Liability Act 1936 s 62
(TAS) Damage by Aircraft Act 1963 s 3
(VIC) Wrongs Act 1958 s 30
(WA) Damage by Aircraft Act 1964 s 4.
There are no equivalent provisions in the other jurisdictions. See further AVIATION [35-725], [35-740].

(C) *Persons who may Sue*

[415-505] Person in possession Trespass is an injury to possession[1] and therefore the proper plaintiff in an action of trespass to land is the person who was, or who is deemed to have been,[2] in possession[3] at the time[4] of the trespass. It is not necessary that the possession should have been lawful,[5] and actual possession is good against all except those who can show a better right to possession in themselves.[6] However, a mere trespasser who goes into occupation cannot, by the very act of trespass and without acquiescence, take possession as against the person whom he or she has ejected.[7]

Notes

1. *Rodrigues v Ufton* (1894) 20 VLR 539 at 543–4 per Hodges J ('action of trespass is an action for the disturbance of possession').

2. As to trespass by relation see [415-510].

3. The determination of what constitutes possession is a question of fact (see *Bristow v Cormican* (1878) LR 3 App Cas 641) and varies with the type of land concerned: *Wuta-Ofei v Danquah* [1961] 3 All ER 596 at 600; [1961] 1 WLR 1238 per Lord Guest, PC. It requires proof of an intention to exclude all others, so far as that is practicable and legal: *Powell v McFarlane* (1979) 38 P & CR 452 at 471–2 per Slade J; *Newington v Windeyer* (1985) 3 NSWLR 555 at 564; 58 LGRA 289 per McHugh JA, CA(NSW); *Monsanto plc v Tilly* [2000] Env LR 313, CA. During the currency of a tenancy, it is the tenant who has the right to sue in trespass (see *Cooper v Crabtree* (1882) 20 Ch D 589 at 593; [1881–85] All ER Rep 1957; (1882) 47 LT 5 per Cotton LJ, CA; *Rodrigues v Ufton* (1894) 20 VLR 539 at 543–4 per Hodges J), even in certain circumstances as against the landlord (*Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334 at 342; [1957] 2 All ER 343; [1957] 2 WLR 1007 per McNair J). See further LEASES AND TENANCIES [245-3790]. A construction company has sufficient possession of a building site, as against members of an industrial union: *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Builders Labourers' Federation* (1988) 83 ALR 385 at 391; (1988) ATPR ¶49-680 per Morling J, Fed C of A. The director of the National Parks and Wildlife Service is entitled to sue in trespass an intruder into a National Park: *Whitehouse v Remme* (1988) 64 LGRA 375, Land & Env Ct(NSW). A lodger does not have sufficient possession of his or her room if the landlord retains a key: *Monks v Dykes* (1839) 4 M & W 567; 150 ER 1546. As to the contrast between the rights of lessees and licensees to sue for trespass to land see *Georgeski v Owners Corp SP49833* (2004) 62 NSWLR 534 at 559–60; [2004] NSWSC 1096; BC200408054 per Barrett J. However, see also

Manchester Airport plc v Dutton [2000] 1 QB 133; [1999] 2 All ER 675. See further LEASES AND TENANCIES [245-255]. As to when a person has sufficient possession of a right relating to land see [415-510].

4. Hence a purchaser cannot sue in respect of a trespass committed prior to the date of settlement: *Cousins v Wilson* [1994] 1 NZLR 463.
5. *Newington v Windeyer* (1985) 3 NSWLR 555; 58 LGRA 289. See also *Graham v Peat* (1801) 1 East 244; 102 ER 95; *Allen v Roughley* (1955) 94 CLR 98; [1955] ALR 1017; (1955) 29 ALJ 603; *R v Edwards* [1978] Crim LR 374, CA.
6. *Doe d Hughes v Dyeball* (1829) 3 C & P 610; Mood & M 346; 172 ER 567; *Davison v Gent* (1857) 1 H & N 744; 156 ER 1400; *Asher v Whitlock* (1865) LR 1 QB 1 at 5 per Cockburn CJ, CA; *Perry v Clissold* [1907] AC 73 at 79 per Lord Macnaghten, PC; *Newington v Windeyer* (1985) 3 NSWLR 555 at 563; 58 LGRA 289 per McHugh JA, CA. The defendant in such a case cannot claim jus tertii unless he or she claims under or with the authority of the true owner or of a person having a better right to possession than the plaintiff: *Graham v Peat* (1801) 1 East 244; 102 ER 95; *Jones v Chapman* (1849) 2 Exch 803; 154 ER 717, Exch; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 at 410; [1904-7] All ER Rep 203 per Lord Davey, PC; *Mount Bischoff Tin Mining Co Reg'd v Mount Bischoff Extended Tin Mining Co (NL)* (1913) 15 CLR 549 at 562 per Isaacs J; *Coles-Smith v Smith* [1965] Qd R 494 at 501 per Stable and Gibbs JJ.
7. *Browne v Dawson* (1840) 12 Ad & El 624; 113 ER 950; *Nowland v Humphrey* (1859) 2 Legge 1167 at 1169 per Dickinson J.

[415-510] Person with right to possession When one who has a right to enter land exercises that right, possession relates back to the time at which the right of entry accrued and action may be taken for a trespass committed before the entry, the wrongdoer becoming a trespasser by relation.[1] Thus a mortgagee who acquires the right to possession on default by the mortgagor may, on taking possession, recover for any trespass committed since that right to possession arose.[2]

Notes

1. *Barnett v Earl of Guildford* (1855) 11 Exch 19; 156 ER 728; *Anderson v Radcliffe* (1858) EB & E 806; 120 ER 710 (affirmed *Radcliffe v Anderson* (1860) EB & E 819; 120 ER 715, Exch); *Wynne v Green* (1901) 1 SR (NSW) 40; 18 WN (NSW) 41; *Ocean Accident and Guarantee Corp Ltd v Ilford Gas Co* [1905] 2 KB 493; (1905) 93 LT 381, CA; *Ebbels v Rewell* [1908] VLR 261; (1908) 14 ALR 21; 29 ALT 252. As to the right of a mortgagee in possession to sue for trespass see MORTGAGES AND SECURITIES [295-7265].
2. *Trustbank Canterbury Ltd v Lockwood Buildings Ltd* [1994] 1 NZLR 666 at 674-6 per Holland J (affirmed on other grounds *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22, CA). As to when a mortgagee acquires the right to possession see MORTGAGES AND SECURITIES [295-7270]-[295-7340]. It is presumed that a landlord entitled to resume possession after the expiry of the term of a lease may, upon re-entry, sue for any trespass committed since the lease came to an end: *Elliott v Boynton* [1924] 1 Ch 236; [1923] All ER Rep 174, CA. As to the expiry of leases see LEASES AND TENANCIES [245-4235].

[415-515] Employer and principal The occupation of land by an employee or agent in that capacity vests the possession in the employer or principal.[1] Where a trespass to land is committed, the action must be brought by the employer or principal rather than the employee or agent.[2]

Notes

1. See LEASES AND TENANCIES [245-245].
2. *Mayhew v Suttle* (1854) 4 El & Bl 347; 119 ER 133; *Allen v England* (1862) 3 F & F 49; 176 ER 22. See also *White v Bayley* (1861) 10 CBNS 227; 142 ER 438; *National Steam Car Co Ltd v Barham* (1919) 122 LT 315. It has been suggested that where a one-person company 'is nothing more than the alter ego of its director and principal employee, an invasion of the company's possession is also an invasion of that of such a director and employee': *MacIntosh v Lobel* (1993) 30 NSWLR 441 at 455 per Kirby P (compare at 477 per Cripps JA), CA(NSW). As to the liability of employers and employees see [415-165]. As to the liability of principal and agent see [415-170].

[415-520] Co-owners A joint tenant or tenant in common may only[1] maintain an action of trespass against a co-owner if the latter expels the former from the land[2] or destroys the subject matter of the co-ownership without consent.[3]

Notes

1. *Jacobs v Seward* (1872) LR 5 HL 464; *Ferguson v Miller* [1978] 1 NZLR 819; *Proprietors of the Centre Building Units Plan No 343 v Bourne* [1984] 1 Qd R 613; *New South Wales v Koumdjiev* (2005) 63 NSWLR 353 at 361; 155 A Crim R 186; [2005] NSWCA 247; BC200505187 per Hodgson JA. See also *Job v Potton* (1875) LR 20 Eq 84. Compare *Greig v Greig* [1966] VR 376 at 377; [1966] ALR 989 (the correctness of an interlocutory judgment between the parties was doubted, but they were estopped from disputing the issue).
2. *Murray v Hall* (1849) 7 CB 441; 137 ER 175.
3. *Wilkinson v Haygarth* (1847) 12 QB 837; [1843-60] All ER Rep 968; (1847) 116 ER 1085 (removal of soil); *Stedman v Smith* (1857) 8 El & Bl 1; 120 ER 1 (additions to party wall, which parties owned as tenants in common); *Watson v Gray* (1880) 14 Ch D 192 (additions to party wall, which was owned in common). Destruction of a party wall with the intention of rebuilding it to its former dimensions is not trespass: *Cubitt v Porter* (1828) 8 B & C 257; 108 ER 1039. As to joint tenants and tenants in common see REAL PROPERTY [355-11500]-[355-11545].

(ii) Defences

[415-525] Consent It is a defence to an action for trespass to land for the defendant to prove[1] that the entry on to the land was by the leave and licence of the person then in possession of the land.[2] Such a licence will be implied in favour of anyone[3] entering for a legitimate purpose[4] on to those parts of the land apparently[5] open to the public.[6]

An implied licence can apply equally to the common property of land subject to a strata titles scheme as to freehold land. Such an implied licence to enter the common property cannot be revoked by the unilateral conduct of one of the tenants in common,[7] so long as the licence is reasonable and incidental to the grantor's right to possession, use and enjoyment of the common property. However, a tenant in common cannot grant a licence to a third party to enter common property where the third party seeks to harass another tenant in common. In such circumstances, the second tenant in common has the right to revoke the licence initially given.[8]

Notes

1. The onus of proof of consent is on the defendant: *Plenty v Dillon* (1991) 171 CLR 635 at 647; 98 ALR 353 at 361; 65 ALJR 231 per Gaudron and McHugh JJ. Even though the initial entry is with the occupier's licence, if that licence is exceeded, either in duration or purpose, the entrant after that becomes a trespasser: see [415-485]. It is irrelevant that the occupier was mistaken as to the reason for giving consent, so long as no fraud or duress was employed: *Amess v Hanlon* (1873) 4 AJR 90. If the licence contains an implied condition that the licensee act in a reasonable manner, breach of that condition will render the licensee a trespasser: *Duffield v Police* [1971] NZLR 381 at 384 per Macarthur J.
2. If the licence is express, the question of whether it provides a good defence is essentially one of fact: *Halliday v Nevill* (1984) 155 CLR 1 at 6-7; 57 ALR 331 at 333; 59 ALJR 124 per Gibbs CJ, Mason, Wilson and Deane JJ.
3. An implied licence applies to police officers and private citizens alike. Police officers may also justify entry on to land without the occupier's consent on the basis of lawful authority: see [415-550].
4. Thus, the implied licence does not extend to those entering for the purpose of committing a crime or a tort (see *Farrington v Thomson* [1959] VR 286 at 292, 297; [1959] ALR 695 per Smith J, SC(VIC)), nor members of a television crew entering to harass those on the premises (see *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 460; 62 ALJR 216 per Young J; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333; (2002) Aust Torts Reports ¶81-649; [2002] NSWCA 82; BC200201185), or surreptitiously to film whatever encounter with the occupier might eventuate (*TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 732 per Eichelbaum CJ), nor to a police officer entering the driveway of a private home at 1 am to test the blood-alcohol level of a car driver whose driving had given no cause for suspicion (*Howden v Ministry of Transport* [1987] 2 NZLR 747 at 751 per Cooke P, CA; *Strang v Russell* (1905) 24 NZLR 916 at 921-2 per Cooper J). However, if one reason for the entry is within the scope of the occupier's implied invitation, it is irrelevant that there is an additional reason for that entry: *Byrne v Kinematograph Renters' Society Ltd* [1958] 2 All ER 579 at 593; [1958] 1 WLR 762 per Harman J, Ch D; *Barker v R* (1994) 54 FCR 451 at 474; 127 ALR 280 at 299 per Jenkinson and O'Loughlin JJ, Fed C of A, Full Court.
5. The occupier's subjective intentions whether to admit or refuse entry, in the absence of an overt expression of that, are irrelevant: *Halliday v Nevill* (1984) 155 CLR 1 at 7; 57 ALR 331; 59 ALJR 124 per Gibbs CJ, Mason, Wilson and Deane JJ; *Candy v Thompson* (2005) Aust Torts Reports ¶81-809 at 67,893-4; [2004] QCA 382; BC200567784 per Keane JA. Locking the front gate to a private home is a sufficient expression of a denial of an implied licence: *Amstad v Brisbane City Council (No 1)* [1968] Qd R 334; (1968) 16 LGRA 372. If an implied licence has been revoked, it is unlikely that it can be relied on to justify a second entry, only hours after the revocation: *Dehn v A-G* [1988] 2 NZLR 564 at 573 per Tipping J (affirmed *Dehn v A-G* [1989] 1 NZLR 320, CA).
6. *Robson v Hallett* [1967] 2 QB 939 at 950-1 per Lord Parker CJ, at 953-4 per Diplock LJ; [1967] 2 All ER 407, CA; *Dobie v Pinker* [1983] WAR 48, SC(WA), Full Court; *Halliday v Nevill* (1984) 155 CLR 1; 57 ALR 331; 59 ALJR 124. See also *Lipman v Clendinnen* (1932) 46 CLR 550 at 556-7 per Dixon J. It is doubtful whether there is an implied licence to go further than the front door of a private house: *Brimner v Williams* (1975) 73 LGR 266, Div Ct; *M v J* [1989] Tas R 212 at 218 per Neasey J.
7. *Pitt v Baxter* (2006) 159 A Crim R 293 at 299; [2006] WASC 4; BC200600115 per Hasluck J.
8. *New South Wales v Koumdjiev* (2005) 63 NSWLR 353 at 365; 155 A Crim R 186; [2005] NSWCA 247; BC200505187 per Hodgson JA.

[415-530] Necessity Acts which would otherwise be a trespass to land may be justified by showing[1] that they were reasonably necessary[2] for the

preservation or protection of life,[3] or for the preservation of the property of the defendant[4] or possibly of others,[5] and were carried out with reasonable care.[6]

Notes

1. It is presumed that the onus of proof is on the defendant, by analogy with the position in respect of trespass to goods: see [415-460]. See also *Wilcox v Police* [1995] 2 NZLR 160 at 163 per Eichelbaum CJ.
2. The act must be one which a reasonable person would undertake in the face of a real and imminent peril, that question being viewed at the time of the acts in question and not retrospectively: *Cope v Sharpe (No 2)* [1912] 1 KB 496; [1911-13] All ER Rep Ext 1212, CA. The defendant's bona fide belief that the trespass was necessary is not sufficient (see *Kirby v Chessum* (1914) 30 TLR 660, CA; *Mark v Henshaw* (1998) 85 FCR 555; 155 ALR 118, Fed C of A, Full Court; *Monsanto plc v Tilly* [2000] Env LR 313, CA) 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* [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 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. *Dewey v White* (1827) Mont & M 56; 173 ER 1079; *Dehn v A-G* [1988] 2 NZLR 564 at 580 per Tipping J (affirmed *Dehn v A-G* [1989] 1 NZLR 320, CA). See also *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. *Cope v Sharpe (No 2)* [1912] 1 KB 496; [1911-13] All ER Rep Ext 1212.
5. See *Maleverer v Spinke* (1538) Dyer 35a at 35b; 73 ER 79 at 81 ('a man may justify pulling down a house on fire for the safety of the neighbouring houses'); *Re King's Prerogative in Saltpetre* (1606) 12 Co Rep 12 at 13; 77 ER 1294 at 1295 ('for saving of a city or town, a house shall be plucked down if the next be on fire... [an act which] every man may do without being liable to an action'). Compare *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 165; [1964] 2 All ER 348 at 396; [1964] 2 WLR 1231 per Lord Upjohn ('[These] rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own: he would be told that he ought to have... summoned the local fire brigade'). As to the statutory protection against liability of fire services see POLICE AND EMERGENCY SERVICES [320-1410], [320-1415].
6. *Beckingham v Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403; 74 WN (NSW) 338.

[415-535] Ejection and re-entry on land A person who is in possession of land, or entitled to immediate possession of land,[1] may use reasonable force[2] to eject another from the land if the other has ceased to have a right to remain there.[3] In Queensland, Tasmania and Western Australia, it is lawful for a person in peaceable possession under a claim of right to defend his or her interest, even against the person entitled to possession, effectively overruling any conflicting privilege of the owner to repossess by force.[4]

Notes

1. *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720; (1919) 122 LT 479, CA. See also *Aglionby v Cohen* [1955] 1 QB 558 at 562; [1955] 1 All ER 785 per Harmen J. Note that a landlord's right of re-entry has been substantially reduced by statute:
   (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 ss 80, 81
   (TAS) Residential Tenancy Act 1997 s 56
   (VIC) Residential Tenancies Act 1997 Pt 2 Div 8
   (WA) Residential Tenancies Act 1987 s 80.
   See further LEASES AND TENANCIES [245-4005]-[245-4080].
2. *Green v Bartram* (1830) 4 C & P 308; 172 ER 717; *Moriarty v Brooks* (1834) 6 C & P 684; 172 ER 1419; *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720; (1919) 122 LT 479, CA. However, courts will not 'strain to confine too closely the conception of reasonable force': *Greenbury v Lyon* [1957] St R Qd 433 at 438 per Stanley J, SC(QLD), Full Court.
3. *Tullay v Reed* (1823) 1 C & P 6; 171 ER 1078; *Haddrick v Lloyd* [1945] SASR 40 at 44 per Reed J.
4. See:
   (QLD) Criminal Code ss 275, 278 (applied to civil proceedings in *Lotz v Bullock* [1912] St R Qd 36)
   (TAS) Criminal Code ss 42, 44
   (WA) Criminal Code ss 252, 255.

[415-540] Entry to retake goods If a person's goods are on the land of another, the owner of the goods is justified in entering the land peaceably[1] to retake the goods only[2] if they were taken there[3] or wrongfully detained by the owner of the land,[4] or had been stolen[5] and placed on the land with the consent of the owner of the land.[6] However, in order to rely upon this defence, the alleged interference with possession giving rise to this right must have been wrongful from its inception.[7] A person is only entitled to rely upon this defence if the otherwise trespassory entry was the only reasonable method available for effecting the repossession of the goods.[8]

Notes

1. *Devoe v Long* [1951] 1 DLR 203 at 222 per Harrison J, App Div (NB) (one reason for denying that defendant's entry on to the plaintiff's premises was justified was that the entry was forcible and provoked a breach of the peace).
2. *Zimmler v Manning* (1863) 2 SCR (NSW) L 235; *Wilson v Matthews* [1913] VLR 224; (1913) 34 ALT 180. See also *Kearry v Pattinson* [1939] 1 KB 471 at 481; [1939] 1 All ER 65 per Goddard LJ, CA (no right to go on to another's land to recapture an escaped animal); *Fitzgerald v Kellion Estates Pty Ltd* (1977) 2 BPR 9181 at 9183 per Hutley JA, CA(NSW).
3. *Patrick v Colerick* (1838) 3 M & W 483; 7 LJ Ex 135; 150 ER 1235; *Austin v Dowling* (1870) LR 5 CP 534 at 539; 22 LT 721; 18 WR 1003 per Willes J. See also *Huet v Lawrence* [1948] St R Qd 168; (1948) 43 QJPR 19 (owner of the land had so actively participated in bringing the goods on to his land as to be liable, with another, in trover to the owner of the goods).
4. *Cox v Bath* (1893) 14 LR (NSW) L 263; 9 WN (NSW) 171. See also *Devoe v Long* [1951] 1 DLR 203 at 222 per Harrison J (recaption by the defendant justified 'if the plaintiff's possession [of the goods] was originally lawful but has been terminated by

a request from the defendant'). As to when the occupier of the land might be regarded as wrongfully detaining the goods see *British Economical Lamp Co Ltd v Empire Mile End Ltd* (1913) 29 TLR 386 at 387 per Lush J, Div Ct; *Fitzgerald v Kellion Estates Pty Ltd* (1977) 2 BPR 9181, CA(NSW). See further PERSONAL PROPERTY [315-545].

5. It is immaterial by whom the goods were stolen: *Cunningham v Yeomans* (1868) 7 SCR (NSW) L 149. It is said that the goods must have been 'feloniously stolen' (see *Anthony v Haney* (1832) 8 Bing 186 at 192; 131 ER 372 at 374 per Tindal CJ; *Cunningham v Yeomans* (1868) 7 SCR (NSW) L 149) and it is not clear whether the abolition of the distinction between felonies and misdemeanours in all jurisdictions (see CRIMINAL LAW [130-10], [130-13000]) has affected the principle stated in those cases.
6. *Anthony v Haney* (1832) 8 Bing 186 at 192; 131 ER 372 at 374 per Tindal CJ; *Cunningham v Yeomans* (1868) 7 SCR (NSW) L 149. The only consent needed is to the placing of the goods on the land; it is immaterial that the occupier did not know that the goods had been stolen: *Cunningham v Yeomans* (1868) 7 SCR (NSW) L 149 at 152 per Stephen CJ.
7. *Toyota Finance Australia Ltd v Dennis* (2002) 58 NSWLR 101 at 102 per Meagher JA, at 132-3 per Sheller JA; [2002] NSWCA 369; BC200206940.
8. *R v Josifovski* [2006] ACTSC 30; BC200602195 at [188] per Higgins CJ.

[415-545] Abatement of nuisance The occupier of land may[1] be justified[2] in going on to neighbouring property,[3] after giving due notice,[4] to abate[5] a nuisance emanating from that property.[6]

Notes

1. It has been said that abatement, as a self-help remedy, is not favoured by the law (see *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 244 per Lord Atkinson; *R v Chief Constable of Devon and Cornwall; Ex parte Central Electricity Generating Board* [1982] QB 458 at 473; [1981] 3 All ER 826 at 834 per Lawton LJ, CA) and consequently that strong reasons are required to justify the trespass: *Traian v Ware* [1957] VR 200 at 207; [1957] ALR 703 per Martin J.
2. The onus of proving that the trespass is justified is on the abator: *Randwick Municipal Council v Cmr for Government Transport* [1967] 1 NSWR 428 at 441; (1966) 13 LGRA 126; 85 WN (Pt 1) (NSW) 351 per Street J.
3. *Roberts v Rose* (1865) LR 1 Ex 82, Exch.
4. Notice requesting removal of the nuisance is necessary if the occupier of the premises from which the nuisance comes did not create or continue the nuisance (see *Jones v Williams* (1843) 11 M & W 176 at 181; 152 ER 764 at 766 per Parke B; *Traian v Ware* [1957] VR 200 at 207-8; [1957] ALR 703 per Martin J) but may be dispensed with if there is such immediate danger to life and health as to render it unsafe to wait (*Jones v Williams* (1843) 11 M & W 176 at 182; 152 ER 764 per Lord Abinger CB). As to nuisance generally see [415-600]-[415-1090].
5. If there are two ways in which the abatement could be effected, that which causes the lesser damage should generally be followed: *Roberts v Rose* (1865) LR 1 Ex 82 at 89 per Blackburn J; *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 245 per Lord Atkinson.
6. As to what may constitute a nuisance see [415-600]-[415-1090]. It has been suggested that the privilege of abatement may be used as a remedy against wrongs other than nuisance: *R v Chief Constable of Devon and Cornwall; Ex parte Central Electricity Generating Board* [1982] QB 458 at 473; [1981] 3 All ER 826 per Lawton LJ.

[415-550] Lawful authority At common law,[1] any person is justified in entering another's land to prevent the commission of murder,[2] and a police

officer is entitled to enter private premises[3] to prevent a breach of the peace.[4] In all jurisdictions except Victoria,[5] a police officer is generally[6] justified in entering private property in the exercise of a statutory power of arrest without warrant,[7] or when in immediate pursuit of a person who has committed a breach of the peace.[8] In New South Wales, a police officer is justified in entering private premises in order to effect an arrest.[9]

In each of these cases, the entry may be by force[10] only if permission to enter has been sought from the occupier and refused.[11]

Notes

1. There are numerous statutory provisions which expressly authorise entry on to land against the occupier's wishes, for example, those relating to police powers of entry (see POLICE AND EMERGENCY SERVICES [320-340]-[320-495]) and the power to enter land to carry out public works (see LOCAL GOVERNMENT [265-6285]). As to the right of a police officer to enter premises under the authority of a warrant of arrest see POLICE AND EMERGENCY SERVICES [320-395]-[320-410].
2. *Handcock v Baker* (1800) 2 Bos & P 260; 126 ER 1270. See also *Plenty v Dillon* (1991) 171 CLR 635 at 647; 98 ALR 353 at 361; 65 ALJR 231.
3. If the premises appear to be open to the public, a person's entry may be justified by the occupier's implied consent: see [415-525].
4. *Thomas v Sawkins* [1935] 2 KB 249, Div Ct; *Dowling v Higgins* [1944] Tas SR 32 at 34 per Morris CJ; *Todd v O'Sullivan* (1985) 122 LSJS 403 at 409 per Legoe J, SC(SA); *Panos v Hayes* (1987) 44 SASR 148 at 154-5 per Legoe J; *Nicholson v Avon* [1991] 1 VR 212 at 222 per Marks J.
5. In Victoria, the powers of police officers at common law to enter property in order to effect an arrest have been replaced by (VIC) Crimes Act 1958 ss 457-463B: *Halliday v Nevill* (1984) 155 CLR 1 at 17; 57 ALR 331; 59 ALJR 124 per Brennan J. However, if police officers are lawfully on private premises in pursuance of their common law duty to prevent a breach of the peace, they may then lawfully exercise the power of arrest provided by (VIC) Crimes Act 1958 s 458: *Nicholson v Avon* [1991] 1 VR 212 at 223 per Marks J.
6. Except in Western Australia, where the power of arrest in (WA) Police Act 1892 s 43 does not carry with it an implied power of entry on to private property by force: *Letts v King* [1988] WAR 76.
7. *Dinan v Brereton* [1960] SASR 101; *Kennedy v Paguna* [1977] 2 NSWLR 810; *McDowell v Newchurch* (1981) 9 NTR 15; 53 FLR 55. The police officer must believe on reasonable and probable grounds that the alleged offender is on the premises: *Lippl v Haines* (1989) 18 NSWLR 620; 47 A Crim R 148, CA(NSW); *Eccles v Bourque* (1974) 50 DLR (3d) 753, SC(Canada); *R v Landry* (1986) 26 DLR (4th) 368, SC(Canada). As to the statutory power of police to arrest without warrant see POLICE AND EMERGENCY SERVICES [320-400].
8. *Plenty v Dillon* (1991) 171 CLR 635 at 647; 98 ALR 353; 65 ALJR 231 per Gaudron and McHugh JJ. See also *Swales v Cox* [1981] QB 849 at 853; [1981] 1 All ER 1115 at 1118 per Donaldson LJ, Div Ct. Compare *R v Marsden* (1868) LR 1 CCR 131 (police officer's entry on to private premises held not to be justified as the pursuit of the alleged offender was not sufficiently immediate).
9. (NSW) Law Enforcement (Powers and Responsibilities) Act 2002 s 10. At common law, a police officer is entitled to arrest without a warrant anyone found committing, attempting to commit or reasonably suspected of having committed, a felony: *Beckwith v Philby* (1827) 6 B & C 635; 108 ER 585. See also *Nolan v Clifford* (1904) 1 CLR 429 at 444-5 per Griffith CJ. Note, however, that the common law distinction between felonies and misdemeanours no longer applies in Australia: see CRIMINAL LAW [130-10], [130-13000]. As to the common law position see also *Semayne's Case* (1604) 5 Co Rep 91a at 91b; 77 ER 194 at 195; *Halliday v Nevill* (1984) 155 CLR

1 at 11-12; 57 ALR 331; 59 ALJR 124 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 647; 98 ALR 353; 65 ALJR 231 per Gaudron and McHugh JJ; *Eccles v Bourque* (1974) 50 DLR (3d) 753 at 756-7 per Dickson J, SC(Canada).

10. That is, a door may be broken down in order to effect the entry: *Semayne's Case* (1604) 5 Co Rep 91a at 91b; 77 ER 194; *Halliday v Nevill* (1984) 155 CLR 1 at 11-12; 57 ALR 331; 59 ALJR 124 per Brennan J.

11. *Re Curtis* (1756) Fost 135; 168 ER 67; *Eccles v Bourque* (1974) 50 DLR (3d) 753 at 758-9 per Dickson J, SC(Canada); *R v Landry* (1986) 26 DLR (4th) 368; *Halliday v Nevill* (1984) 155 CLR 1 at 11-12; 57 ALR 331; 59 ALJR 124 per Brennan J; *Lippl v Haines* (1989) 18 NSWLR 620 at 635; 47 A Crim R 148 per Hope AJA, CA(NSW). No person has the power at common law to enter private premises merely because he or she thinks that something is wrong (see *Great Central Railway Co v Bates* [1921] 3 KB 578 at 581-2 per Atkin LJ, Div Ct), to search a house to see whether an alleged offender is there (see *Lippl v Haines* (1989) 18 NSWLR 620 at 631; 47 A Crim R 148 per Hope AJA, CA(NSW); *Mackay v Abrahams* [1916] VLR 681 at 683-4; (1916) 22 ALR 385; 38 ALT 78 per Hood J) nor to serve process relating to summary proceedings (*Plenty v Dillon* (1991) 171 CLR 635; 98 ALR 353; 65 ALJR 231). Any entitlement to enter private premises in such circumstances must be based on statutory authority, which must be clearly expressed if it is to authorise what would otherwise be tortious conduct: *Coco v R* (1994) 179 CLR 427 at 436; 120 ALR 415 at 418; 68 ALJR 401; 72 A Crim R 32 per Mason CJ, Brennan, Gaudron and McHugh JJ.