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TORT LAW AND PRACTICE IN HONG KONG

FOURTH EDITION

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TABLE OF CONTENTS

CHAPTER 5 PRODUCT LIABILITY — *Christopher Tung*

CHAPTER 6 CAUSATION — *Wilson Lui*

CHAPTER 7 DEFENCES — *Fergus Chan*

CHAPTER 8 VICARIOUS LIABILITY *Thomas Ycon*

CHAPTER 9 TRESPASS TO THE PERSON *Normann Witzleb*

CHAPTER 10 TRESPASS TO LAND *Martin Lau*

CHAPTER 11 WRONGFUL INTERFERENCE WITH GOODS

Charu Sharma with contributions by Wilson Lui

CHAPTER 26 PASSING OFF

Alice Lee and Kenny Wong

CHAPTER 27 DAMAGES

PY Lo

CHAPTER 28 INJUNCTIONS

Shrina Daswani

CHAPTER 29 LIMITATION

Jeff Chan and Thomas Wong

the action and the effect of judgment. The Department of Justice has established a cross-sector Working Group on Class Actions to study and consider the Law Reform Commission's proposals. The Working Group has commissioned a consultancy study on the economic and other related impacts of a class action regime to Hong Kong in August 2021.[273] The current status of this work is unclear.

[273] Department of Justice, Announcement: Award of consultancy contract (Aug 2021) https://www.doj.gov.hk/en/community_engagement/announcements/20210826_an1.html.

CHAPTER 6

CAUSATION

By Wilson Lui[*]

[*] Alexandra Norton was the author of this chapter until the third edition.

1. INTRODUCTION

(a) General principles

The function of causation. Causation is concerned with the connection between the defendant's wrongful conduct and the plaintiff's harm. It is a means of establishing liability of a wrongdoer for a particular damage. Therefore, the question of causation only falls to be considered when other elements of the tort (or other wrong) are established. In an action in negligence, after it has been found that the defendant owed a duty of care which they breached, a plaintiff in tort must go on to prove that the breach caused their loss and that the damage suffered is not too remote a consequence of the defendant's breach of duty. A causal connection must be established whether the alleged breach is the common law duty of care or a statutory duty.[1] **6.001**

The notion of causation. The notion of causation is difficult to define with any certainty. In its everyday usage, the term "causation" may import ideas of responsibility and moral blameworthiness into issues of scientific and factual causation. In many cases, the damage suffered by a plaintiff has only one legal cause, such as when the accident occurred entirely due to the defendant's fault. In more complex factual scenarios, such as when there are multiple tortfeasors, different causes may have contributed together, in equal or unequal proportions, to the final result. There are also cases where there are gaps or uncertainties in the evidential chain. Different factual permutations will have immense consequences in the analysis of causation and the courts must be cautious when grappling with the notion of causation. **6.002**

Assessing causation. In assessing whether causation has been established, the courts have consistently rejected philosophical and scientific explanations of causation, preferring instead to apply common sense.[2] However, "common sense" is a vague concept. After all, what may appear common sense to one judge may appear nonsensical to another.[3] **6.003**

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1 See *Tsang Kwun Chiu v Yuen Hoi Sang* [1990] HKLY 522; *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295, 299 (Viscount Kilmuir LC).

2 *World Wide Stationery Manufacturing Co Ltd v Fong Chi Leung* [1994] 2 HKC 449, 454H, quoting with approval the comments of Lord Reid in *Stapley v Gypsum Mines Ltd* [1953] AC 663, 681: "[T]o determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. ... The question must be determined by applying common sense to the facts of each particular case". See also *Lai Ping Wah v China Insurance Co Ltd* (HCPI 874/1997, [1999] HKEC 708), where Seagroatt J applied a common sense approach to overcome the lack of medical evidence in finding that the accident was a cause of the plaintiff's Devic's syndrome; *Chan Yik Kwan v Yuen Chak Man* [2000] 1 HKLRD A19, [2000] 2 HKLRD G15, [2000] HKLRD (Yrbk) 607 (appeal dismissed in [2000] 2 HKLRD G15, [2000] HKLRD (Yrbk) 607); *Yip Mau Leung v University of Hong Kong* [2000] 3 HKLRD 198; *Chan Kun v Tsuen Wan New Cambridge Nursing Home Ltd* [2006] 2 HKLRD 623; *McGhee v National Coal Board* [1973] 1 WLR 1 (HL).

3 See the comments of Lord Hope in *Chester v Afshar* [2005] 1 AC 134, [2004] UKHL 41, [83]: "On its own common sense, and without more guidance, is no more reliable as a guide to the right answer in this case than an appeal to the views of the traveller on the London Underground. ... As I survey my fellow passengers ... — such a variety in age, race, nationality and languages — I find it increasingly hard to persuade myself that any one view on anything other than the most basic issues can be said to be typical of all of them". See also H Litton, "*Dogged by Dogma: Will Common Sense Ever Prevail in the Law?*" (2001) 31 HKLJ 35, J Plunkett, "Causation in the High Court of Australia: A Matter of Common Sense?" (2019) 153 Precedent 10.

6.004 The causation enquiry is a fact-sensitive exercise. Even though expert evidence may well be relevant in determining causation, the question of causation is ultimately one for the judge.[4] The tests of causation in law and those in other disciplines, such as medicine, are not the same. As Hunter JA said in *Lee Kin Kai v Ocean Tramping Co Ltd*:[5]

> "[I]t is important to bear in mind that that the law and medicine here … apply quite different standards. In law there is a sufficient causal connection if it is shown on the balance of probabilities that the accident was a substantially contributing cause of the injury. A cause is sufficient; it need not be shown to be the sole cause. The doctors' practice, what is known as the science of aetiology. … They are looking for … 'an irrefragable chain of causation'".[6]

6.005 In some cases where the evidence is finely balanced, the determination may turn on the credibility, demeanour and expertise of the expert witness giving evidence. However, in cases where the area of science is a developing one or where there are substantial differences of opinion between experts, the causative link may be uncertain. This may be particularly problematic where no one has previously suffered similar injuries resulting from a like breach of duty.[7] Moreover, medical experts may have divided opinions, or perhaps the plaintiff has a pre-existing condition which has made an uncertain contribution to their current disability.[8] Furthermore, the reality is that many complex personal injury claims take years to litigate so that memories may have become blurred with the passage of time or evidential documents critical to establishing the causal link misplaced.[9]

6.006 **Structure of the tort of negligence and its relationship with causation.** In *Meadows v Khan*, the majority of the UK Supreme Court ("UKSC") suggested six questions to be considered in determining a claimant's entitlement to damages in negligence:[10]

[4] *Lee Kin Kai v Ocean Tramping Co Ltd* [1991] 2 HKLR 232, 235J: "[C]ausation is essentially a matter for the judge not for the doctors. It is a matter upon which the judge will no doubt be assisted by the medical evidence but he is not dictated to by it". See also *Chan Kun v Tsuen Wan New Cambridge Nursing Home Ltd* [2006] 2 HKLRD 623; *Lam Tam Luen v Asia Television Ltd* [2008] 5 HKLRD 5 and *Hung Sau Fung v Lau Ping Wah* [2016] 1 HKLRD 106.

[5] [1991] 2 HKLR 232, 235J–236B. Although this was a case under the Employee's Compensation Ordinance (Cap.282), the same test applies in negligence: *Lam Tam Luen v Asia Television Ltd* [2008] 5 HKLRD 5.

[6] See also *Lai Ping Wah v China Insurance Co Ltd* (HCPI 874/1997, [1999] HKEC 708) and *Wood v Ministry of Defence* [2011] EWCA Civ 792 (causal connection between heavy solvent exposure and neurological damage made out even though it could not be established to a degree of medical certainty).

[7] *Kay's Tutor v Ayrshire and Arran Health Board* [1987] 2 All ER 417. *Cf Lai Ping Wah v China Insurance Co Ltd* (HCPI 874/1997, [1999] HKEC 708). The latter case must surely stand on its own facts.

[8] See the leading case of *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958, dealing with the assessment of damages where the plaintiff was suffering from a pre-existing condition at the time of the accident. Where the pre-existing condition would have resulted in harm in any event, damages should be reduced to reflect this.

[9] Note that the Civil Justice Reforms, which came into effect in Hong Kong on 2 April 2009 (in particular Practice Direction 18.1, which applies to the Personal Injuries List), now mean that much of the plaintiff's case must be disclosed to the defendant in advance of or at an early stage of any litigation and that alternative means of resolving the claim be attempted. This means that weaknesses in the causal link will be identified at the outset and, where such weaknesses exist, claims may be abandoned or settled before trial.

[10] [2022] AC 852, [2021] UKSC 21, [28] (Lord Hodge and Lord Sales, with whom Lord Reed, Lady Black and Lord Kitchin agreed).

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (The actionability question)

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (The scope of duty question)

(3) Did the defendant breach their duty by their act or omission? (The breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (The factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (The duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote or because there is a different effective cause (including *novus actus interveniens*) in relation to it or because the claimant has mitigated their loss or has failed to avoid loss which they could reasonably have been expected to avoid? (The legal responsibility question)

6.007 On the other hand, Lord Burrows, in the minority of *Meadows v Khan*, favoured a relatively conventional approach to the tort of negligence, which involves seven main questions:[11]

(1) Was there a duty of care owed by the defendant to the claimant? (The duty of care question)

(2) Was there a breach of the duty of care? (The breach, or standard of care, question)

(3) Was the damage or loss factually caused by the breach? (The factual causation question)

(4) Was the damage or loss too remote from the breach of duty? (The remoteness question)

(5) Was the damage or loss legally caused by the breach of duty? (The legal causation, or intervening cause, question)

(6) Was the damage or loss within the scope of the duty of care? (The scope of duty question)

(7) Are there any defences? (The defences question)

This chapter proceeds on the basis that Lord Burrows's more conventional structure will more likely be adhered to in the future. In *Armstead v Royal & Sun Alliance Insurance Company Ltd*, the UKSC further stated that:[12]

[11] *Ibid.*, [79] (Lord Burrows).

[12] [2024] 2 WLR 632, [2024] UKSC 6, [23] (Lord Leggatt and Lord Burrows, with whom Lord Richards and Lady Simler agreed; Lord Briggs concurred on this point).

> "Where it is shown that loss has (factually) been caused by the defendant's breach of a duty of care, five principles are capable of limiting the damages recoverable by the claimant. They are: (i) the scope of the duty; (ii) remoteness; (iii) intervening cause; (iv) failure to mitigate; and (v) contributory negligence."

6.008 Regardless of which of the approaches in *Meadows v Khan* is to be adopted, it is clear that the modern structure of the tort of negligence suggests that there are two parts to the causation enquiry, namely factual causation and legal causation. These concepts are further introduced below. The requirements of factual causation are and should be seen as separate to, and preceding, the enquiry into legal causation.

(b) The structure of the causation enquiry

6.009 **General application of causation and remoteness.** For the majority of torts, proof of causation of damage or loss is required if the plaintiff wants to recover more than nominal damages.[13] The plaintiff must establish that the defendant's conduct did in fact and in law cause the damage, and that the damage is not too remote a consequence of the defendant's wrongdoing. The exceptions are in respect of torts of strict liability and torts which are actionable per se. For example, the tort of conversion is a tort of strict liability where "the causal questions are answered by reference to the nature of the liability".[14] The tort is committed so long as there was an act inconsistent with the proprietary or possessory rights in property.

6.010 **Factual causation.** A plaintiff in tort must establish that the defendant's breach of duty caused plaintiff's damage. The factual causation question asks whether the plaintiff's damage was in fact the consequence of the defendant's wrong.

6.011 **The "but for" test.** The "but for" test to be discussed below sets out the usual test for factual causation. The plaintiff must establish that *but for* the tort or breach they would not have suffered the loss. However, at times, it may be difficult to establish "but for" causation, and the court has relied on other approaches to prove factual causation. For example, the courts may be able to draw an inference that there must have been a causal connection between the defendant's wrong and the plaintiff's damage, as in some cases of industrial diseases. It may also sometimes be sufficient if the defendant's wrong may have made a material contribution to the damage, even if the contribution is not the sole or even the main cause of the harm.[15] In some cases, the evidence only points to a material increase in the *risk of harm* to the plaintiff, but for policy reasons, the court concludes that causation has been established.[16] Alternatively, a probabilistic analysis is adopted in order to reduce compensation to reflect the chance that the plaintiff had of avoiding the harm; such an approach of 'loss of chance' seems to be more readily applicable to cases involving pure financial loss but less so for claims for personal injury.[17]

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13 *Tsang Kwun Chiu v Yuen Hoi Sang* [1990] HKLY 522; *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295, 299.

14 *Kuwait Airways Corp v Iraqi Airways Co (No. 6)* [2002] 2 AC 883, [2002] UKHL 19, [129] (Lord Hoffmann).

15 See eg *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (HL) and the discussion in [6.037]–[6.043] below.

16 See eg *McGhee v National Coal Board* [1973] 1 WLR 1 (HL) and the discussion in [6.053]–[6.074] below.

17 See eg *Gregg v Scott* [2005] 2 AC 176 and the discussion in [6.099]–[6.112] below.

Legal causation. It is sometimes said that the defendant's wrongdoing must be more than merely the occasion or opportunity for the plaintiff's loss; it must be the effective or operative cause.[18] The question of legal causation asks whether the chain of causation was broken by an intervening event or action. These could include the supervening conduct of the defendant, a third party or the plaintiff or even nature itself. When there are multiple causes which have played their part in the eventual outcome, the question is: which of the causes can be said to be the effective or operative cause?[19] Do any of the subsequent intervening acts or events constitute a *novus actus interveniens* which operates to break the causal link from the defendant's original wrongdoing? If a *novus actus interveniens* is established, then that subsequent intervening act or event is regarded in law as the cause of the plaintiff's injuries. In other words, to prove legal causation, the chain of causation must remain intact notwithstanding an intervening act. An intervening act does not always break the chain of causation, such as when it is the natural and probable consequence of the breach of duty. 6.012

Remoteness of damage. Even if both factual causation and legal causation have been established (that is, the defendant's breach of duty factually and legally caused the plaintiff's damage), a plaintiff's recovery may be limited on the basis that part or all of the particular damage suffered is too remote. A plaintiff in tort must also show that the damage for which compensation is claimed is not too remote a consequence of the defendant's breach of duty.[20] 6.013

It is now accepted that the question of remoteness of damage is different from the question of causation.[21] When considering the question of remoteness of damage, a distinction is drawn between fault-based torts and intentional torts. For fault-based torts, such as negligence and nuisance, the question is whether the damage is of a kind that could have been reasonably foreseen or anticipated.[22] Policy reasons may also be relevant in determining the scope of what may be reasonably foreseeable and the notion of "reasonable foreseeability" may be defined differently in different circumstances. On the other hand, for intentional torts, the question of remoteness is more often framed as whether the consequences were the direct result of the defendant's wrong.[23] 6.014

The issue of remoteness is also linked with the question of the "scope of duty", and their interactions have been considered in a line of cases starting with *South Australia Asset Management Corp v York Montague Ltd* ("*SAAMCO*").[24] The general principle developed in *SAAMCO* is that a defendant should only be liable for the kind of loss which fell within the scope of its duty of care. While the House of Lords in *SAAMCO* 6.015

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18 *Guang Xin Enterprises Ltd v Kwan Wong Tan & Fong* [2002] 2 HKLRD 319 (upheld by the Court of Appeal in [2003] 3 HKLRD 527, save in respect of the questions of defalcation and the remoteness of the sales losses); *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360.

19 *Tsang Kwun Chiu v Yuen Hoi Sang* [1990] HKLY 522.

20 [2024] 2 WLR 632, [2024] UKSC 6, [19]–[23].

21 This distinction is accepted in *Meadows v Khan* [2022] AC 852, [2021] UKSC 21, regardless of whether the structure adopted by the majority or the minority of the UKSC is adopted. See [6.006] and [6.007] above.

22 See eg *The Wagon Mound (No 1)* [1961] AC 388.

23 *Ibid.*

24 [1997] AC 191 (HL).

adopted a distinction between "advice" and "information" cases, such distinction was subsequently discarded in the recent UKSC case of *Manchester Building Society v Grant Thornton LLP*.[25] This principle is generally regarded as imposing another limit on the losses recoverable, which is different from the restrictions of remoteness and legal causation, although whether that is so may depend on what one regards as determining remoteness and legal causation.[26] The developments which considered the correct application and scope of the *SAAMCO* principle are discussed towards the end of this chapter.

(c) Burden of proof

6.016 In most cases, the burden of proving factual causation lies on the plaintiff. The plaintiff need not establish the causal link with certainty, but only to the normal civil standard of "on the balance of probabilities". This means that a plaintiff must prove that it is more likely than not that the defendant's wrongdoing caused their damage.[27] The plaintiff also has the burden of proof in relation to the scope of the defendant's duty under the *SAAMCO* principle.[28] However, once the plaintiff has proved that a tort has been committed and that the loss claimed was in fact caused by the defendant's breach of duty, it is for the defendant to assert and prove that one or more of the principles (including remoteness, intervening cause, failure to mitigate loss and contributory negligence) applies to limit the damages recoverable by the claimant.[29] While the defendant's burden of proof is well-established for the issues of mitigation and contributory negligence, the UKSC noted in the recent decision of *Armstead v Royal & Sun Alliance Insurance Company Ltd* a "surprising absence of authority on the question of who has the legal burden of proof in relation to remoteness".[30] The UKSC has reasoned that the burden for all the limiting factors identified above should generally lie in accordance with the principle that the person who asserts (not the person who denies) must prove.[31] When a defendant has committed a wrong which has caused loss to the plaintiff, it is far more efficient and just to place the burden on the defendant to show a good reason why the defendant should not be liable to compensate the plaintiff for the full extent of the loss caused. It would be unduly burdensome to require a plaintiff to anticipate ways in which it might nevertheless be said that the defendant should not be held legally responsible for the loss and rebut them.[32]

[25] [2022] AC 783, [2021] UKSC 20.

[26] *Ibid.*, [71(ii)] (Lord Burrows).

[27] See *Wu Shu Bun v Secretary for Justice* (HCPI 1348/2000, [2008] HKEC 854), where the plaintiff who was already in the prodomal stage of schizophrenia at the time of his arrest failed to establish that the alleged assaults by the police triggered his full-blown schizophrenia. The court held that his schizophrenia was triggered by stress consequent on his arrest and questioning and that in any event, the plaintiff failed to establish that the alleged assaults actually occurred.

[28] *Hughes-Holland v BPE Solicitors* [2018] AC 599, [2017] UKSC 21, [53].

[29] *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] 2 WLR 632, [2024] UKSC 6, [59]–[62], [64].

[30] *Ibid.*, [62].

[31] *Ibid.*, [64].

[32] *Ibid.*, [63].

2. Causation in Fact

(a) The "but for" test

6.017 The "but for" test is not a definitive causal test but merely a filtering process which discards irrelevant causes and focuses on relevant possible causes. Thus, the "but for" test asks: Would the plaintiff have suffered the harm, on the balance of probabilities, "but for" the defendant's wrongdoing? If yes, then the defendant's wrongdoing is not a "but for" cause of the plaintiff's harm, and causation has not been established. In other words, if the harm to the plaintiff would have resulted in any event even without the defendant's wrongdoing, then the plaintiff's action must fail for lack of causation.[33] The fact that the defendant's conduct has been found to be *a* cause of the plaintiff's damage does not necessarily mean that it should be found to be *the* cause. Thus, the "but for" test is confined merely to discarding irrelevant causes and, where more than one cause exists, a consideration of the effective cause of the plaintiff's damage is required.

6.018 **Applications of the "but for" test.** The English case of *Barnett v Chelsea and Kensington Hospital Management Committee* serves as the classic illustration of the application of the "but for" test.[34] The plaintiff's husband and two colleagues attended the defendant's casualty department complaining of vomiting after drinking tea. The casualty officer did not see the men and they were told to go home. A few hours later, the plaintiff's husband died from arsenic poisoning. The defendants argued that even if the duty officer had done all that was possible, the deceased would have died anyway. Nield J found that a duty of care was owed and that the duty officer was negligent in failing to examine the plaintiff's husband or to admit and treat him. However, on the question of causation, Nield J accepted the defendants' arguments that even if the officer had treated the plaintiff's husband, he would have died anyway, and thus the plaintiff had failed to establish that the defendants' negligence caused her husband's death. In other words, the plaintiff's damage did not arise "but for" the defendants' negligence and their negligence had no causative effect on the plaintiff's loss.

6.019 An illustration from Hong Kong is *Cheng Kin Ping v Woo Cho Wing John*.[35] Here, the two plaintiffs and a third party were involved in a collision (the "First Collision") on a flyover leading to the Cross Harbour Tunnel. Following the First Collision, they moved their cars to the side of the flyover where they alighted to inspect the damage. As the defendant sped around the bend of the flyover, he saw the cars and braked, causing him to skid and lose control of his car. As a result, the defendant hit the first plaintiff's car and the two plaintiffs standing on the side of the road (the "Second Collision"). The case between the plaintiffs and defendant having settled, the main issue between the defendant and the third party was whether by leaving his car on the side of the flyover,

[33] See also *Robinson v Post Office* [1974] 1 WLR 1176; *McWilliams v Sir William Arrol & Co* [1962] 1 WLR 295; *Davies v Bridgend County Borough Council* [2024] 2 WLR 1237, [2024] UKSC 15. However, see *Kennedy v London Ambulance Service NHS Trust* [2016] All ER (D) 61 (Dec), [2016] EWHC 3145, which held that "but for" carbon monoxide poisoning at work, it was unlikely the claimant would have suffered a major psychological disorder.

[34] [1969] 1 QB 428.

[35] (2000) 3 HKCFAR 333.

the third party's act was a contributory cause of the Second Collision. At first instance, liability was apportioned at 80 per cent for the defendant and 20 per cent for the third party, the trial judge holding that the third party's failure to move his car a sufficient distance away from the bend was an effective cause of the Second Collision. The Court of Appeal, however, reversed the trial judge's finding, holding that the third party did not contribute towards the Second Collision. In a judgment delivered by Sir Denys Roberts NPJ, the Court of Final Appeal upheld the Court of Appeal's ruling. The mere fact that the third party had been negligent did not mean that he must be held liable for the Second Collision along with the defendant:

> "The question is whether the presence of his car, in the place where it was, was also an effective causation of what happened to the plaintiffs, ie that but for the presence of the third party's car at the place where it was, the defendant would not have hit the plaintiffs. It was for the defendant to prove on the balance of probabilities that this was the case".[36]

6.020 The evidence showed that the defendant saw the third party's car and the plaintiffs at almost the same time, and there was nothing to suggest that the presence of the third party's car made any difference to the outcome. As such, factual causation was not established on the balance of probabilities.

(b) The "but for" test in cases of a failure to act or advise

(i) *Plaintiff's conduct*

6.021 **Defendant's failure to provide safety equipment.** In cases involving a negligent failure to provide safety equipment, the question is: What would the plaintiff have done if the defendant had not breached his duty? In such instances, a plaintiff must show that if the defendant's breach of duty had not occurred, then he would have acted in such a way that some or all of the injuries suffered would have been prevented.

6.022 This is illustrated by the Scottish case of *McWilliams v Sir Williams Arrol & Co*,[37] in which the plaintiff's husband fell to his death. Even though the defendants were in breach of their common law and statutory duties to provide him with a safety belt, the evidence showed "to a high degree of probability"[38] or a "natural … inevitable inference"[39] that even if one had been provided, the deceased would not have worn it. In fact, the evidence showed both (1) it was the general practice of workers like the deceased not to wear such belts and (2) the deceased did not usually wear one. On this basis, the defendant's breach of duty was not causative of the deceased's death, as the defendant was not held to be under a duty to encourage the use of safety belts.

6.023 It is submitted that such an inference will not be drawn too readily. Lord Reid expressly recognised that people do sometimes change their minds unexpectedly, but

[36] *Ibid.*, [22].
[37] [1962] 1 WLR 295.
[38] *Ibid.*, 299 (Viscount Kilmuir LC).
[39] *Ibid.*, 304 (Lord Reid).

the evidence in *McWilliams v Sir Williams Arrol & Co* was said to be "overwhelming".[40] Other cases have suggested that the defendant may have difficulty establishing such a lack of self-care on the part of the plaintiff. For example, in *Lam Fong v So Hoo Yuen t/a Wui Loong Scaffold & Matched Builders*,[41] the plaintiff fell to his death when working at height without a safety belt. The defendants had provided an insufficient number of safety belts for their workers and the evidence allowed the inference that the plaintiff would have worn a safety belt if one had been provided. It was held that the defendants were in breach of duty in failing to provide a safety belt and to instruct the plaintiff to wear it, which caused the deceased to fall, although the deceased was 15 per cent contributorily negligent. Furthermore, where the scope of the duty owed by a defendant is wider than merely the provision of protective equipment, then the "but for" test may still be satisfied despite proof of the plaintiff's disregard for his own safety. For example, where a defendant is under an additional statutory obligation to ensure the use of protective equipment either by insisting on its use or by implementing a system of supervision of use,[42] then the defendant's failure to do so may be causative of the plaintiff's injuries unless the defendant can show that despite the use of all reasonable care and skill, the plaintiff would not have complied anyway.

6.024 **Defendant's failure to advice of medical risks.** In an action for medical negligence, where a plaintiff alleges that the defendant has negligently failed to inform them of the risks of a medical procedure or treatment, the plaintiff must normally establish that, had such information been given, then the plaintiff would have declined the procedure or treatment and the risk or loss would not have materialised.[43] This is essentially a subjective test, for the question is: What would this plaintiff (not a hypothetical reasonable plaintiff) have done?[44] However, a bare assertion by the plaintiff that they would have acted differently is not enough. The plaintiff must provide evidence to support their claim,[45] the weight of which is then analysed by applying objective

[40] *Ibid.*, 305 (Lord Reid). See *Saunders v Chief Constable of Sussex Police* [2012] EWCA Civ 1197 (defendants were negligent in failing to provide a point of contact on the plaintiff's return to work, given his history of mental illness, but the plaintiff's action failed for lack of causation since he could not prove that he would have acted differently and sought help if the point of contact had been provided). See also *Nyang v G4S Care & Justice Services Ltd* [2013] EWHC 3946 (various defendants were negligent in failing to carry out a mental health assessment and in failing to implement safety procedures following a detainee's threats to end his life but such failures were not causative of the injuries sustained, as, even if appropriate steps had been taken, they would not have prevented his self-harm).
[41] [1990] HKLY 1209 (Bokhary J).
[42] Subsidiary legislation made under the Factories and Industrial Undertakings Ordinance (Cap.59) imposes such a burden. For example, according to reg.38C of the Construction Sites (Safety) Regulations (Cap.59I, Sub.Leg.), a contractor has a duty to provide certain safe means of support for workmen working at heights and to ensure their use; however, under reg.38H(1)(c), it is a defence for a contractor to prove that all reasonably practicable steps were taken to ensure usage of safety belts. Likewise, under reg.48, a contractor must provide safety helmets and take all reasonable steps to ensure that no workman remains on site without a safety helmet.
[43] See *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285; *McAllister v Lewisham and North Southwark Health Authority* [1994] 5 Med LR 343. See also *Chappel v Hart* (1998) 295 CLR 232 (High Court of Australia) and Cane (1999) 115 LQR 21 for a commentary on this case.
[44] *Cf* the Canadian approach in *Reibl v Hughes* [1980] 2 SCR 880, where the Supreme Court of Canada applied a "modified" objective test and asked what a reasonable patient in the plaintiff's circumstances would have done if faced with the same situation. See also *Arndt v Smith* [1997] 2 SCR 539 (Supreme Court of Canada).
[45] There is no rule of law that a patient must give evidence personally about what would or would not have happened if she had been properly informed of the facts before making a decision: *Webb v Barclays Bank Plc and Portsmouth Hospitals NHS Trust* [2002] PIQR P8, [2001] EWCA Civ 1141.

tests.[46] Thus, it appears that both objective and subjective considerations are applied to a consideration of what the plaintiff would have done "but for" the defendant's failure to advise of the risks of the medical procedure. If the plaintiff can show that, if the appropriate warning had been given, they would not have proceeded, then causation will be satisfied. This may be difficult for a plaintiff to establish and may come down to whether they are believed by the judge. Most plaintiffs are unlikely to have proof of what they would have done if something had happened (which did not actually happen). If, though, the evidence shows that the plaintiff would have still undergone the treatment even with the defendant's warning (perhaps because the risk was extremely small or because the benefits of the procedure outweighed the risks),[47] then the failure to warn cannot be said to be causative of the plaintiff's injury; the plaintiff's injury did not occur "but for" the defendant's failure to advise. The defendant's failure to warn has not changed the outcome for the plaintiff in the latter scenario.[48]

6.025 A causal link is more difficult to establish if the plaintiff, having heard about the risks of a medical treatment, would have postponed the decision, but was uncertain what their ultimate decision would have been. This situation was considered by the House of Lords in *Chester v Afshar*.[49] In *Chester*, the claimant had a history of lower-back problems and consulted the defendant neurosurgeon, who advised her to undergo surgery on her back but breached his duty in failing to warn the claimant of a 1 to 2 per cent risk of developing a serious neurological disorder known as cauda equina syndrome ("CES").[50] After the surgery, the claimant developed CES, leaving her with

[46] For example, in *Montgomery v Lanarkshire Health Board* [2015] AC 1430, [2015] UKSC 11, the UKSC found that had the claimant been told of the risks of shoulder dystocia in delivery (assessed at between 9 and 10 per cent), she would have elected for a caesarean section and so the doctor's failure to advise her of the risks was a cause of that harm. The personal and social considerations particular to the claimant may be taken into account: *Diamond v Royal Devon & Exeter NHS Foundation Trust* [2019] PIQR P12, [2019] EWCA Civ 585, [21].

[47] This was the situation in *Pearce v United Bristol Healthcare National Health Service Trust* [1999] PIQR P53, [1998] EWCA 865, where the plaintiff alleged negligence by her obstetrician for advising her of the risk of her baby being stillborn if she opted to have a natural birth. The English Court of Appeal found that it had been negligent not to advise the plaintiff of the risks of stillbirth, which on the facts of the case had been less than 1 per cent. Moreover, even if he had so advised her, the inference from the evidence was that this would not have altered the plaintiff's decision to follow the advice to have a natural birth. Note that in *Pearce*, the English Court of Appeal was of the view that if there was a "significant risk" attached to a particular course of treatment which would affect the judgment of a reasonable patient, then in the ordinary course, the doctor was responsible for informing the patient of this risk.

[48] See *Less v Hussain* (2013) 130 BMLR 51, [2012] EWHC 3512. The defendant gynaecologist was in breach of duty in (i) failing to adequately inform the claimant of the need to attend a second appointment to discuss her ultrasound scan and the risks of another pregnancy and (ii) failing to have in place a "fail-safe" mechanism to ensure she attended a second appointment. Causation, however, was not established because even if the risks involved in another pregnancy had been explained, the claimant would still have tried for a baby, given her strong desire. See also *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] PIQR P18, [2018] EWCA Civ 1307 (even if the claimant had been warned of the risk of sustaining nerve damage, she would not have postponed the operation).

[49] [2005] 1 AC 134, [2004] UKHL 41. For a commentary, see R Stevens, "*An Opportunity to Reflect*" (2005) 121 LQR 189.

[50] The defendant's claim that he did discuss such a risk with the claimant was not accepted by the trial judge. In *Pearce v United Bristol Healthcare National Health Service Trust* [1999] PIQR P53, [1998] EWCA 865, the risk of stillbirth was also extremely small at less than 1 per cent; however, the doctor in *Pearce* was not in breach of his duty of care in failing to advise of the risks.

significant nerve damage and partial paralysis.[51] The trial judge found that, had the claimant received such a warning, she would not have consented to the surgery when she did but would have postponed the decision to a later date and taken further medical advice. The claimant was, however, unable to say whether, ultimately, she would have gone ahead with the surgery despite the risks. At first instance, the trial judge held that there was a sufficient casual connection between the failure to warn and the claimant's injury; the possibility that the claimant may have undergone the surgery in the future did not break the chain of causation. The Court of Appeal upheld the trial judge's ruling and the defendant further appealed. The House of Lords, by a bare majority of 3–2, dismissed the appeal. The majority's approach appeared to suggest that the case could have been simply decided on the ground that "but for" causation was met.[52] Nonetheless, they decided the case on further policy grounds.[53] The minority (Lord Hoffmann and Lord Bingham) were of the view that the "but for" test had not been satisfied.

6.026 The majority of the House of Lords in *Chester v Afshar* found that if the claimant had agreed to surgery at a later date, the risk of developing the syndrome would have been "improbable".[54] On this basis, the majority's view was that the risk which the claimant sustained was due to the particular time and circumstances in which the operation took place and that had the operation been postponed, the likelihood was that that risk would not have arisen *on that occasion*.[55] Lord Steyn was of the view that the patient's "right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles"[56] in line with *Fairchild v Glenhaven Funeral Services Ltd*.[57] In *Chester*, the scope of the defendant's duty of care was to give the claimant the necessary information about the procedure to enable her to exercise informed consent. On this basis, their Lordships held that the law would fail to fulfil its function if it did not provide an appropriate remedy where the duty owed was

[51] Note that the risk of sustaining CES would have been the same for the claimant if she had undergone the operation at any point in the future since the risk was inherent in the operation itself and would have been the same had the operation been performed by another surgeon.

[52] However, Lord Hope noted that the defendant's breach of duty had done nothing to increase the risk of injury to the plaintiff since she would have been exposed to this risk in any event: *Chester v Afshar* [2005] 1 AC 134, [2004] UKHL 41, [84]. Note that the possibility of a claimant succeeding where damage was not sustained was rejected by Lord Hoffmann: *ibid.*, [32]–[35]. It is clear, following *Barker v Corus UK Ltd* [2006] 2 AC 572, [2006] UKHL 20, that damage must be sustained by the plaintiff in order for the *Fairchild* exception to apply: *ibid.*, [48] (Lord Hoffmann), [61] (Lord Scott).

[53] See the comments of Lord Walker in *Chester v Afshar*, *Ibid.*, [94] that "[B]are 'but for' causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn". See also the comments of Lord Steyn: [19]. Lord Hope, on the other hand, held that while the "but for" test was satisfied in the sense that the claimant would not have had the operation at that particular time had she been warned of the risks: "[I]t is difficult to say that his [the defendant's] failure was the effective cause of the injury": [61]. See also Lord Hope's comments that the "but for" test is easily satisfied but that the risk was not created by the failure to warn but was inherent in the operation itself: [81]. On this basis, Lord Hope preferred to find causation had been established on policy grounds: [87].

[54] See *Chester v Afshar* [2005] 1 AC 134, [2004] UKHL 41, [11] (Lord Steyn).

[55] *Ibid.*, [19], [62] (Lord Hope), but *cf* the comments of Lord Walker at [99]. Note that in the Australian case of *Chappel v Hart* (1998) 195 CLR 232, which was considered by the House of Lords, the evidence was that, had the plaintiff been warned, she would have sought treatment with a more experienced surgeon. In *Chester*, there was no such evidence.

[56] *Chester v Afshar* [2005] 1 AC 134, [2004] UKHL 41, [24].

[57] [2003] 1 AC 32, [2002] UKHL 22. See [6.069]–[6.074] below.

breached and the very risk which the duty was meant to warn about occurred.[58] It is clear, however, that the majority were also guided by fairness and policy considerations,[59] with Lord Hope stating: "[T]he issue of causation cannot be separated from issues about policy".[60]

6.027 In his dissenting judgment, Lord Bingham held that the "but for" test was not established since all that the claimant had proved was that she would not have undergone the operation on that particular date. The injury would have been as likely to have occurred whenever the surgery was performed, and the doctor's breach of duty had not increased the risk. As the claimant could not say she would never have had the operation, she had failed to establish causation. Lord Hoffmann agreed with Lord Bingham that "but for" causation had not been established. The claimant must prove that she "would have taken the opportunity to avoid and reduce the risk", that is, "she would not have had the operation".[61]

6.028 **The position following *Chester v Afshar*.** *Chester* has only been briefly considered by the Court of Final Appeal in *Kong Wai Tsang v Hospital Authority*,[62] where Bokhary PJ commented that negligent failure to warn is "very much a developing area of the law".[63] It also appears from subsequent case law that *Chester* represents an exception to the traditional rules of causation that should be narrowly applied.[64] The English Court of Appeal has declined to extend *Chester* to cases of negligence by non-medical professionals who have failed to render complete and accurate advice,[65] noting that *Chester* did not establish a new general rule on causation but showed that, in exceptional circumstances, traditional rules of causation may be modified on policy grounds. Thus, it appears that, for the time being, it will be confined to cases involving a negligent failure to warn of the risks of medical treatment.

6.029 **Defendant's failure to give proper financial advice.** Hypothetical questions of what the plaintiff would have done absent the defendant's negligent advice (or lack of advice) can also concern financial matters. The plaintiff must prove that had the

[58] See the comments of Lord Hope: [2005] 1 AC 134, [2004] UKHL 41, [24], [56] and [87]. Lord Walker also held that causation was established: [101]. See also *Reeves v Commissioner of Police of the Metropolis* [1999] 3 WLR 363, 367H (Lord Hoffmann).

[59] The minority were also guided by policy considerations: see *Chester v Afshar* [2005] 1 AC 134, [2004] UKHL 41, [9] (Lord Bingham).

[60] *Ibid.*, [85].

[61] *Ibid.*, [29].

[62] FACV 16/2005, [2006] HKEC 528.

[63] *Ibid.*, [5]. See also *Dr Chan Po Sum v The Medical Council of Hong Kong* [2015] 1 HKLRD 330, which considered *Chester* in the context of a claim of professional negligence.

[64] See the comments of Baroness Hale in *Gregg v Scott* [2005] 2 AC 176, [2005] UKHL 2, [192]–[193]. The English Court of Appeal in *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356 held that, to be able to rely on *Chester*, the claimant must prove that if warned of the risk, the claimant would have deferred the operation.

[65] See *White v Paul Davidson & Taylor* [2005] PNLR 15, [2004] EWCA Civ 1511, [40] (Arden LJ), in which the English Court of Appeal declined to extend *Chester* to a case involving a solicitor's failure to properly advise on the merits of a course of action. The principle of informed consent to medical treatment has special importance in the law but no such policy considerations applied to the negligence of a solicitor. The action ultimately failed for lack of causation because the appellant was unable to prove that he would have acted differently with the correct advice: *ibid.*, [40]–[42]. See also *Beary v Pall Mall Investments* [2005] PNLR 35, [2005] EWCA Civ 415, in which Dyson LJ declined to hold that the principles in *Chester* should be applied generally to claims for negligent financial advice: *ibid.*, [38].

financial information been provided with care they would not have proceeded with the subsequent actions.[66] In *Extramoney Ltd v Chan Lai Pang & Co*,[67] the plaintiffs alleged that their auditor's negligent failure to detect an inflated statement of profits in the audited accounts had caused the plaintiffs to overpay profits tax and to pay a dividend that would not otherwise have been paid. The defendants denied, inter alia, causation on the basis that these voluntary acts of the plaintiffs were not caused by any negligence of the defendants. The court found that the defendants were negligent and in breach of their contractual and statutory duties but that the action failed for lack of causation:

> "[T]he Plaintiffs' case on loss and damage rests on the dubious foundation of speculation as to what Mr Tan would or would not have done had the auditors told him that which he already knew".[68]

6.030 Given that the plaintiffs were wholly owned and controlled by a single individual, Mr Tan, he was not misled by the defendants' conduct as he had known the true state of affairs in any event. On this basis, there was no reason to expect that the outcome would have been any different had the defendants performed their duty.

(ii) *Defendant's conduct*

6.031 In some cases, proof of causation depends on the hypothetical conduct of the defendant: if the defendant had not been negligent, what would he have done?

6.032 This question was considered by the House of Lords in *Bolitho v City and Hackney Health Authority*,[69] where the infant plaintiff suffered cardiac arrest due to breathing difficulties and as a result was left with severe brain damage. The defendant admitted negligence. The evidence clearly showed that if the doctor had attended and intubated, the plaintiff's brain damage would have been avoided. However, the doctor argued that had she attended, it would not have been her practice to intubate because of the risks involved and that the damage would have resulted in any event. The evidence of the medical experts went both ways: some agreed with the doctor that they would not have intubated, while others would have intubated. The House of Lords held that there were two questions to be asked: (i) if the doctor had attended would she have intubated? If the answer to the question was yes, then the plaintiffs succeeded. The *Bolam v Friern Hospital Management Committee*[70] test could play no part in the determination for it was essentially a question of what an individual doctor would have done. However, a defendant cannot escape liability by saying that the damage would have occurred in any event because she would have committed some other breach of duty thereafter,[71] and so a second question was necessary: (ii) If she had not have intubated would that

[66] See *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583.

[67] [1994] HKLY 223.

[68] *Ibid.*, [86].

[69] [1998] AC 232 (HL).

[70] [1957] 1 WLR 582. This test measures standards of professional negligence so that a doctor acting in accordance with a practice accepted as proper by a responsible body of medical opinion is not negligent, merely because another body might have adopted a different technique.

[71] *Bolitho v City and Hackney Health Authority* [1998] AC 232, 240C (Lord Browne-Wilkinson).

The decision on whether aggravated damages should be awarded, and in what amount, always depends on all the circumstances.[174]

9.068 **Exemplary damages.** Where the award of compensatory damages, including any aggravated damages, is an insufficient deterrent for the wrongdoing, the court may also award exemplary damages. Exemplary damages are punitive. Following *Rookes v Barnard*,[175] they can be awarded in cases not governed by statute where there was oppressive, arbitrary or unconstitutional conduct by government servants or where the defendant has calculated that the profits to be made from committing a tort may exceed any amount of compensation payable to the plaintiff. Yet the fact that the detention was unconstitutional per se does not suffice to bring it under the first category. Outrageous conduct disclosing malice, fraud, cruelty and the like would normally be expected for an award of such damages.[176]

9.069 **Examples.** The following examples illustrate the two categories of aggravated and exemplary damages:

(1) In *Chan Kwok Wai v Secretary of Justice*,[177] the plaintiff was violently assaulted by a number of police officers during his arrest, causing him painful injuries to his chest and a perforated ear drum. In addition to $50,000 for pain, suffering and loss of amenities, the judge awarded aggravated damages of $100,000 "to compensate the plaintiff for his injured feelings and loss of dignity". An award of exemplary damages in the amount of $200,000 was also made, for which the court took into account not only the wrongful assault but also the fact that the police officers sought to cover up the assault and that the charges against the plaintiff were pursued until the plaintiff's acquittal.

(2) In *Wong Kwai Fun v Li Fung*,[178] the plaintiff used threats, intimidation and disturbances to obtain a residential property and demand exorbitant amounts of interest from the defendant. It was held that the plaintiff's actions constituted the actionable wrongs of intimidation and trespass to the person. In a counterclaim, the defendant, who suffered fear and depression from the threats of violence and attempted to take his own life, was awarded HK$200,000 for physical and psychiatric injuries. He also received a further HK$200,000 exemplary damages under the second category in *Rookes v Barnard* to demonstrate that tort does not pay.

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174 *Lee Chun Fat v Chan Kin Wo* (HCPI 1306/2000, [2002] HKLRD (Yrbk) 403).
175 *Rookes v Barnard* [1964] AC 1129 (HL).
176 *'A' v Director of Immigration* [2009] 3 HKLRD 44, [53(10)–53(12)].
177 *Chan Kwok Wai v Secretary for Justice* (HCPI 134/1999, [2000] HKEC 727).
178 [1994] 1 HKC 549, 580–581.

CHAPTER 10

TRESPASS TO LAND

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1. Who May Sue?

Person in possession. Trespass to land is a tort which arises from the unjustifiable intrusion by one person upon land of another. The person in possession of the land can bring a suit against the intruding person.[1] The right to sue for trespass depends on possession, not ownership, and hence an adverse possessor who is not the owner and does not derive title from the owner can sue. **10.001**

Relativity of title. A common law title is relative. Where questions of title to land arise in litigation, the court is only concerned with the relative strengths of the titles proved by the rival claimants.[2] The plaintiff may have only a precarious title vis-à-vis a third party which would not enable the plaintiff to resist an ejectment by this third party. Yet a third party's better title does not constitute a defence to the trespassing defendant.[3] **10.002**

Possession. To establish possession, the plaintiff must show that they have been in factual possession of the land with the requisite intention to possess it. Possession is a question of fact usually proved by occupation or physical control over the land in question. Ownership is not the same as possession. This is because an owner of land may part with possession of it by, for example, leasing it out to another person. In the absence of any evidence of possession by another person, the owner is prima facie in possession.[4] **10.003**

In other circumstances, actual occupation or possession of keys (or other means of entry) will suffice.[5] "Possession" means "possession of that character of which the thing is capable".[6] The degree of physical control and the type of conduct constituting possession depends very much on the type of land. In this regard, the authorities on adverse possession (a constituting element of which is a sufficient degree of physical possession over the disputed land) are noteworthy. **10.004**

Legal requirements. The possession required to bring an action for trespass must be clear,[7] exclusive[8] and exercised with the intention to possess. Where the acts of the person who claims possession are equivocal and capable of more than one interpretation, the intention to possess is not established.[9] However, where a squatter has exercised such control of the land as an owner would have done, that would be evidence from **10.005**

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1 *Billion Star Development Ltd v Wong Tak Chuen* [2012] 2 HKLRD 85, [38] (affirmed on appeal: see [2013] 2 HKLRD 714).

2 *Chan Wai Hung v Tung Lo Court (IO)* [2023] 5 HKLRD 1, [2023] HKDC 983, [52]–[55]; *Chan Hau Ling v* [illegible] (HCA 1286/2012, [2015] HKEC 1095), [55].

3 Unless the defendant is acting upon the authority of the real owner: *Nicholls v Ely Beet Sugar Factory (No 1)* (1931) 2 Ch 84.

4 *Herbert v Thomas* (1835) 1 Cr M & R 861, 864, 149 ER 1329.

5 *Jewish Maternity Home Trustees v Garfinkle* (1926) 24 LGR 543, (1926) 95 LJKB 766. See also *Lambert London Borough Council v Blackburn* [2001] All ER (D) 127, [2001] EWCA Civ 668.

6 *Lord Advocate v Young* (1887) 12 App Cas 544.

7 *Thompson v Ward* [1953] 2 QB 153 (CA).

8 *Street v Mountford* [1985] AC 809; *AG Securities v Vaughan* [1990] 1 AC 417; *Aslan v Murphy (Nos 1 and 2)* [1990] 1 WLR 766 (CA); *Westminster City Council v Clarke* [1992] 2 AC 288; *Bruton v London & Quadrant Housing Trust* [1998] QB 834 (CA); *Hill v Tupper* (1863) 2 Hurl & C 121, 159 ER 51.

9 *Tsang Foo Keung v Chu Jim Mi Jimmy* [2017] 3 HKC 527 (CA).

which one may, and often can, conclude that the squatter has established the requisite intention to possess.[10]

10.006 Possession need not be lawful.[11] It has been held that illegality whether in the act of possession or the manner of possession is generally irrelevant.[12] There is no rule of law that factual possession and intention to possess cannot be established for a person who mistakenly believes that they have good title or that they are a lawful tenant and does not realise they are trespassing on another's land.[13] It further appears that the fact that the possession is carried out by unlawful means is immaterial as "possession is possession".[14]

10.007 Moreover, *de facto* possession is good against all except those who have a superior right of possession.[15] A person in *de facto* possession may sue for trespass anyone who disturbs their possession. If so sued, *jus tertii*, that is, the (better) right of a third party, offers no defence to the defendant and will not be a ground for mitigation of damages.[16] Once possession is acquired, the person in *de facto* possession will have the right to sue for trespass no matter how recently the possession is acquired.

10.008 However, trespassers without any title to land cannot rely on their very act of trespass to establish possession against the person they have ejected.[17] The person ejected may, within a reasonable time, take steps to recover possession; such steps include the use of reasonable force to gain entry. Until the reasonable time has elapsed, the bare trespasser has not gained the possession as required by law against the person ejected. In *Browne v The Rev John Dawson*, it was held that a delay of ten days was not too long for the purposes of making a complaint.[18] In determining what the reasonable time should be, the whole of the circumstances have to be looked at.

10.009 **Examples.** Activities which have been accepted by the court as indicative of possession of open land include: building a wall on the land;[19] shooting over it;[20] taking grass from it;[21] enclosing it;[22] cultivating it;[23] letting

[10] *Wu Yim Chung v Lo Wai Ching* [2022] HKCA 100, [2022] HKEC 279, [23].
[11] *Monat Investment Ltd v All Person(s) in Occupation of Part No 16 Ma Po Tsuen* [2020] 4 HKLRD 530, [2020] HKCFI 1970, [66]–[68], citing *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273; *Chan Kwok Chi v Tai Fung Enterprises Co Ltd* (HCA 915/2011, [2015] HKEC 1436); *Graham v Peat* (1801) 1 East 244, 102 ER 95; *Chambers v Donaldson* (1809) 11 East 65, 103 ER 929; *Asher v Whitlock* (1865–66) LR 1 QB 1; *Allen v Roughley* (1955) 94 CLR 98; *Delaney v T P Smith Ltd* [1946] KB 393 (CA).
[12] *Monat Investment Ltd v All Person(s) in Occupation of Part of No 16 Ma Po Tsuen*, *ibid* [79].
[13] *Cheung Kwong Yuen v Sun Hui Fang* [2016] 1 HKLRD 464, [11] (CA).
[14] *Monat Investment Ltd v All Person(s) in Occupation of Part of No 16 Ma Po Tsuen* [2020] 4 HKLRD 530, [2020] HKCFI 1970., [66]–[68], citing *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273; *Chan Kwok Chi v Tai Fung Enterprises Co Ltd* (HCA 915/2011, [2015] HKEC 1436).
[15] *Lam Wing Ching v Chow Kum Wing* [1985] 1 HKC 189; *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618 (CA); *Doe, on the demise of Mary Carter v Barnard* (1849) 13 QB 945, 116 ER 1524; *Asher v Whitlock* (1865–66) LR 1 QB 1; *Nagle v Shea* (1874) 8 IR 224; *Allen v Roughley* (1955) 94 CLR 98; *Perry v Clissold* [1907] AC 73 (PC); *Doe dem Hughes v Dyeball* (1829) Mood & M 346, 173 ER 1184.
[16] Although the possessor may have to account to the true owner for the damages recovered. *Eastern Construction Co Ltd v National Trust Co Ltd* [1914] AC 197; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405. *Thompson v Ward* [1953] 2 QB 153 (CA).
[17] *Browne v Dawson* (1840) 12 Ad & El 624, 113 ER 950; *Stanford v Hurlstone* (1873–74) LR 9 Ch App 116.
[18] *Ibid.*
[19] *Every v Smith* (1857) 26 LJ Ex 344.
[20] *Harper v Charlesworth* (1825) 4 B & C 574, 107 ER 1174.
[21] *Ibid.*
[22] *Matson v Cook* (1838) 4 Bing NC 392, 132 ER 838.
[23] *Ibid.*

it;[24] mowing it;[25] and paying regular visits to it.[26] Invariably, the question is whether "acts of enjoyment of the land itself" are shown.[27] Even assertion of title over a long period of time, without actual proof of title, was said to be significant "in that it attaches to the activities of those claiming under it a quality of acts of possession".[28] Evidence of possession of part of the land may be sufficient evidence to infer possession of the entire land.

On the other hand, the drying of clothes, blankets and quilts were insufficient acts of possession. By their very nature, these were temporary activities and only trivial acts of trespass of individuals.[29] **10.010**

Possession by relation. A person who is not in actual possession of land but has the right of possession may take lawful possession by entry. Upon entry, their right of possession relates back to the date their entitlement to possession has accrued, thereby enabling them to sue for a trespass committed before the actual entry but after the entitlement has arisen.[30] **10.011**

Entry may be effected by actual entry or by bringing an action claiming possession. Making a formal claim is equivalent to actual entry.[31] Conduct amounting to actual entry needs to be little more than symbolic. Entry into part of the land will be treated as entry upon the entire land. The mere putting of one's foot or part of the body across the boundary of the land[32] or claiming right to land in the neighbourhood will be sufficient. Entry by agent is as good an entry by the principal. **10.012**

Entry by the person entitled to possession vests possession in that person and immediately puts an end to the precarious possession a trespasser may have had, notwithstanding that the trespasser remains in occupation after the entry.[33] The law does not treat those entitled of possession as if they were in possession unless there is some form of entry. In order to sue for trespass and claim *mesne* profits, those entitled must first gain possession by entering upon land. However, the requirement may be dispensed with if recovery of land and *mesne* profits is claimed in the same action.[34] **10.013**

Possession by landlords or reversioners. A landlord cannot sue for trespass, because by creation of a tenancy the landlord parts with possession or the right to possess the land until the tenancy comes to an end. The landlord's interest is in the reversion. As a reversioner, the landlord has no immediate right to possession. However, leases may end before their full term in a number of ways, such as by forfeiture, surrender, exercise of a right to early determination or re-entry and issuance of notice to quit to **10.014**

[24] *Ibid.*
[25] *Catteris v Cowper* (1812) 4 Taunt 547, 128 ER 444.
[26] *Chan Chi Ming v Brilliant Rise Container Depot Ltd* (HCA 1110/2003, [2007] HKEC 827).
[27] *Lau Kwai Ping Joyce v Fulland International Ltd* [2020] HKCFI 1501; *Weymont v Place* [2015] EWCA Civ 289, [15], referring to *Jones v Williams* (1837) 2 M & W 325, 150 ER 781.
[28] *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618 (CA).
[29] *Incorporated Owners of San Po Kong Mansion v Shine Empire Ltd* (2007) 10 HKCFAR 588, [17].
[30] *Barnett v Earl of Guildford* (1855) 11 Exch 19, 156 ER 728.
[31] *Ocean Accident and Guarantee Corp Ltd v Ilford Gas Co* [1905] 2 KB 493 (CA), and *Wuta-Ofei v Danquah* [1961] 1 WLR 1238.
[32] *Ocean Estates Ltd v Pinder (Norman)* [1969] 2 AC 19; *Citibank Trust Ltd v Ayivor* [1987] 1 WLR 1157.
[33] *Jones v Chapman* (1849) 2 Exch 803, 154 ER 717; and *Lows v Telford* (1876) 1 App Cas 414.
[34] *Southport Tramways Co v Gandy* [1897] 2 QB 66 (CA).

a tenant of a periodic tenancy. In all cases of termination, the landlord will be entitled to possession once the tenant's interest comes to an end. Upon entry, the landlord will have the right to sue for trespass. If the reversion has been assigned by the original landlord, only the assignee, and not the original landlord, can sue for injury to the reversion.[35] It should be noted that the letting of land to a tenant does not stop the running of a limitation period which had started to run against the landlord, the paper owner, prior to the letting.[36]

10.015 A landlord who has the right to forfeit a lease upon specified breach may re-enter upon judgment for possession of land. Such proceedings are as good as actual entry. However, forfeiture does not take place at the time of the issuance of the writ. The landlord has to pursue judgment and when judgment in their favour is granted, forfeiture takes place upon service of the proceedings.[37] Following forfeiture, the tenant has no right to occupy the premises. A tenant's use of the premises from that point onwards is one of a trespasser and they will be liable to a claim of delivery of possession and *mesne* profits relating back to the date of forfeiture.[38] The termination of the head lease also puts an end to all the inferior interests created out of it.[39]

10.016 **Protecting the reversionary interest.** During the currency of a tenancy, a landlord has a cause of action for unlawful injury to reversion.[40] The injury, however, must have a permanent impact on the landlord's interest in reversion.[41] The proceedings may be instituted without joining the tenant as a co-plaintiff.[42] Examples of injury to reversion are: structural injury to a house;[43] cutting down trees;[44] digging holes and spoiling the surface of land for quarrying or mining;[45] placing the foundation of a wall on the plaintiff's land;[46] building a house with eaves which discharged water onto the plaintiff's land;[47] pulling down the eaves of the plaintiff's house and preventing the rainwater from flowing onto adjoining land; removing a dam placed for the purpose of diverting a stream so as to irrigate the plaintiff's land;[48] polluting a river by pouring

35 *Elegant Profit Ltd v Chung Lai Sang* [2006] 1 HKLRD 156.

36 *Kan Kam Cho v Kan Chiu Nam* (FACV 33/2007, [2008] HKEC 1807) (CFA).

37 *Elliott v Boynton* [1924] 1 Ch 236 (CA); *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433 (CA); *Hill and Redman's Law of Landlord and Tenant*, looseleaf (LexisNexis, 2024), [4882]; *Wong Wan Leung v Secretary for Transport* (2001) 4 HKCFAR 69.

38 Although, strictly speaking, the landlord's entitlement to possession begins from the time of the breach, their right of possession or *mesne* profits relates back to the date of forfeiture. This is because the tenant may obtain relief against forfeiture, in which case the forfeited lease will be reinstated.

39 *Great Western Railway Co v Smith* (1876) 2 Ch D 235 (CA); *Official Custodian for Charities v Mackey* [1985] Ch 168.

40 *Jackson v Pesked* (1815) 1 M & S 234, 105 ER 88; *Hosking v Phillips* (1848) 3 Ex 168, 154 ER 801; *Kidgell v Moor, Clerk* (1850) 9 CB 364, 137 ER 934; *The Metropolitan Association for Improving the Dwellings of the Industrious Classes v Petch* (1858) 5 CB NS 504, 141 ER 204.

41 *Battishill v Reed* (1856) 18 CB 696, 139 ER 1544; *Rust v Victoria Graving Dock Co* (1887) 36 Ch D 113 (CA); *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393. See further *Ehmler v Hall* [1993] 1 EGLR 137 (CA), where damages were apparently recovered in negligence and assessed by reference to loss of rent.

42 *Jones v Llanrwst Urban District Council, ibid.*

43 *Shelfer v City of London Electric Lighting Co* (1895) 1 Ch 287 (CA).

44 *Cotterill v Hobby* (1825) 4 B & C 465, 107 ER 1133.

45 *Rogers v Taylor* (1857) 1 Hurl & N 706, 156 ER 1385.

46 *Mayfair Property Co v Johnston* [1894] 1 Ch 508.

47 *Tucker v Newman* (1839) 11 Ad & El 40, 113 ER 327; *Battishill v Reed* (1856) 18 CB 696, 139 ER 1544.

48 *Greenslade v Halliday* (1830) 6 Bing 379, 130 ER 1326.

sewage into it;[49] and flooding land and houses with water.[50] A structure of a temporary nature, such as a hoarding, does not give the landlord the right to sue while the tenant is in possession.[51] Neither will an ordinary continuing trespass, even under the claim of a right of way.[52] If acquiescence will result in the loss or the gain of an easement, then the landlord can sue for trespass without being in possession of the land.[53]

10.017 **Possession by tenants.** The tenant in possession of a demised property is the proper plaintiff to evict trespassers. Tenants may sue for trespass no matter how precarious their tenancies are. A tenant at sufferance,[54] for example, has the right to sue although the tenancy may be terminated by the landlord at any time without notice.[55] Since standing in trespass depends on relative title to possession, the tenant in possession may sue their landlord for unlawful entry if the landlord enters the demised property without authority of the lease or the tenant or when the landlord wrongfully exercises the right to forfeit. Upon termination of tenancy, the tenant's right of possession ceases, so does their right to maintain an action for trespass. If the tenant stays on without authority, the tenant, having become a trespasser, will be subject to proceedings in trespass by whoever is entitled to immediate possession. A tenant who has demised their leasehold to a sub-tenant is a leasehold reversioner. The tenant has no immediate right of possession and, like a freehold reversioner, has no right to sue for trespass. The right is in their sub-tenant who is in possession of the demised land.[56]

10.018 **Possession by lodgers / licensees.** Unlike a tenant, a lodger does not have exclusive possession of the room they use, although they may have exclusive use. Possession remains with the landlord and so a lodger may not sue for trespass.

10.019 A licensee who does not enjoy exclusive possession from the landowner may nonetheless have acquired sufficient control over the land to enable him to sue intruders in trespass. Megarry J, in *Hounslow London Borough Council v Twickenham Garden Developments Ltd*, stated:

> "It would seem that exclusive possession against the landlord as a test for the nature of the occupant's interest is not conclusive as to the occupant's possessory interest *vis-a-vis* third parties. The terms of an occupational licence may give the licensee such a degree of control over access as to entitle him to the protection of the law of trespass against intruders".

49 *Jones v Llanrust Urban District Council* [1911] 1 Ch 393.

50 *Rust v Victoria Graving Dock Co* (1887) 36 Ch D 113 (CA).

51 *Cooper v Crabtree* (1882) 20 Ch D 589.

52 *Baxter v Taylor* (1832) 4 B & Ad 72, 110 ER 382.

53 *Clerk & Lindsell on Torts*, 24th edn (Sweet & Maxwell, 2023), [18-27].

54 That is a tenant who, having entered under a lawful demise or title, wrongfully continues in possession after it has ended.

55 *Graham v Peat* (1801) 1 East 244, 102 ER 95; *Asher v Whitlock* (1865–66) LR 1 QB 1; *Perry v Clissold* [1907] AC 73 (PC).

56 *Lane v Dixon* (1847) 3 CB 776, 136 ER 331; *Allan v Liverpool Overseers* (1873–74) LR 9 QB 180, 191; see also *Smith v St Michael Cambridge Overseers* (1860) 3 El & El 383, 121 ER 486; *Elizabeth Wright v Stavert* (1860) 2 El & El 721, 121 ER 270; *Monks v Dykes* (1839) 4 M & W 567, 150 ER 1546; *R v St George's Union Assessment Committee* (1871-72) LR 7 QB 90; *Appah v Parncliffe Investments Ltd* [1964] 1 WLR 1064 (CA).

10.020 In *National Provincial Bank Ltd v Ainsworth*,[57] Lord Upjohn held that a deserted wife who was in exclusive occupation of the home had the right to bring action against trespassers although her husband could return any moment and assume the role of sole occupier. But "until her husband returned she had dominion over the house and she could clearly bring proceedings against trespassers".[58]

10.021 The Court of Appeal in England confirmed in *Manchester Airport Plc v Dutton*[59] that a licensee in *de facto* possession has the right to institute proceedings to evict trespassers. The decision went further to say that a licensee may institute such proceedings even before he was in occupation:

> "In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations."[60]

10.022 The licensee's remedy, however, is restricted to only what is required to make good their legal right.[61] A licensee has no right to exclude their licensor or any occupier who has a claim to possession equal or superior to their own. A licensee also cannot bring proceedings against bare trespassers if their licence is granted for the purpose of access which does not provide for effective control over the land.[62]

10.023 An invitee who enters on land on a merely temporary permission for certain purposes, such as to deliver goods, to carry out work or as a guest[63] has no possession, or the kind of control a licensee has, to enable the invitee to sue for trespass.

10.024 **Possession by employees.** Servants or employees may enter into a tenancy agreement for the use of the employers' premises. Without a tenancy agreement or an intention that the employee be treated as a tenant, an occupation by an employee is that of their employer. The court will not construe a tenancy from an occupation by an employee of a particular premise which is required for "the better performance of his duties".[64] Service tenancy, however, may be shown in circumstances where the occupation by an employee is merely a matter of convenience rather than requirement; or where their occupation is a fringe benefit or merely an inducement to encourage the employee to work better, provided that the employee paid the rent for an exclusive possession of

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57 [1965] AC 1175, 1232.

58 *Ibid.*

59 [2000] QB 133 (CA), 147 (Laws LJ) and 151 (Kennedy LJ); applied by Peter Ng J in *Chan Hau Ling v* 劉巧 (HCA 1286/2012, [2015] HKEC 1095), [36] and *Walton Family Estates Ltd v GJD Services Ltd* [2021] EWHC 88 (Comm).

60 *Manchester Airport Plc v Dutton*, *ibid.*, 150 (Laws LJ).

61 *Ibid.*

62 *Countryside Residential (North Thames) Ltd v A child, persons unknown* (2001) 81 P & CR 2.

63 *Smith v The Overseers of St Michael Cambridge* (1860) 3 El & El 383, 121 ER 486.

64 *Fox v Dalby* (1874) LR 10 CP 285; *Hughes v Greenwich London Borough Council* [1994] 1 AC 770; *Hertfordshire County Council v Bryn Colin Davies* [2017] EWHC 1488 (QB).

the premises.[65] In each case, it is a question of factual *nexus* between the employment and the occupation. A licence to occupy is not affected by the fact that the employee took up the employment after they moved into the employer's accommodation, as long as they took up the employment within a reasonable time and that it was within the anticipation of the parties.[66]

The employee not in possession cannot maintain a claim for trespass against the employer or those claiming under them.[67] The termination of the employment automatically puts an end to the employee's right to occupy without the need for a notice to quit.[68] **10.025**

Co-owners. There are two principles at play in relation to co-ownerships. **10.026**

As against the world, one co-owner alone may bring an action for possession against licensees in occupation even though there was no consent from the other joint owners.[69] It seems, therefore, that any one of the co-owners, having taken possession, may bring an action for trespass against a third party. **10.027**

However, vis-a-vis the co-owners themselves, co-owners are jointly entitled to possession of the whole of the land and so neither of them can turn the other out.[70] A co-owner may bring an action for trespass against another co-owner when they find themselves unlawfully excluded from the use of the co-owned property; or when a co-owner destroys or removes the co-owned property or part of it in a way inconsistent with its normal use.[71] Where a co-owner uses the land in the ordinary and natural way and derives profits from such use, they may be liable for occupation rent.[72] Destroying part of a property for the purpose of rebuilding it is not a trespass.[73] **10.028**

2. Definition of "Land"

The property right of a landowner extends both above and beneath the physical surface of the land. As Sir WM James VC stated in *Corbett v Hill*:[74] **10.029**

> "Now the ordinary rule of law is, that whoever has got the *solum* — whoever has got the site — is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted,

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65 *Smith v The Overseers of Seghill* (1874–75) LR 10 QB 422; *AG Securities v Vaughan* [1990] 1 AC 417, 459 (Lord Templeman); *Glasgow Corp v Johnstone* [1965] AC 609; *Norris v Checksfield* [1991] 1 WLR 1241 (CA).

66 *Norris v Checksfield*, ibid.

67 *White v Bayley* (1861) 10 CB NS 227, 142 ER 438; *Hemmings v The Stoke Poges Golf Club Ltd* [1920] 1 KB 720 (CA).

68 *Norris v Checksfield* [1991] 1 WLR 1241 (CA).

69 *Annen v Rattee* (1985) 17 HLR 323 (CA); *Hammersmith & Fulham London Borough Council v Monk* [1992] 1 AC 478 (HL). See, however, *Hounslow London Borough Council v Pilling* [1993] 1 WLR 1242 (CA).

70 *Bull v Bull* [1955] 1 QB 234 (CA), cited, in the context of multi-storey buildings, in *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, [57]; *Kung Ming Tak Tong Co Ltd v Pork Solid Enterprises Ltd* (2008) 11 HKCFAR 403, [19].

71 *Dewdney Stedman and Smith Stedman v Henry Attwell Smith* (1857) 8 El & Bl 1, 120 ER 1.

72 *French v Barcham* [2009] 1 WLR 1124, [2008] EWHC 1505 (Ch), [35].

73 *Cubitt v Porter* (1828) 108 ER 1039; *Standard Bank of British South America v Stokes* (1878) 9 Ch D 68.

74 (1869–70) LR 9 Eq 671, 673.

particularly with regard to property in towns, by the fact that other adjoining tenements, either from there having been once a joint ownership, or from other circumstances protrude themselves over the site."

10.030 In *Bocardo SA v Star Energy UK Onshore Ltd*,[75] it was held that that the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else.

10.031 **Land and fixtures.** Structures affixed to land such as buildings are generally regarded as part of the land.[76] Normally, items permanently attached to land will not cause any problems. However, where items are less firmly affixed to land, the question arises as to whether they become part of the land. Two factors will then have to be looked at: a) the extent and nature of the attachment and b) the object and purpose of the annexation.

10.032 Prima facie, chattels merely placed or laid on the surface of the land do not form part of the land. They remain chattels even though their weight or use causes them to sink into the soil of the land.[77] Machines standing on land but operated by electricity supplied by some driving apparatus fixed to the land is not part of the land if the removal of the machines does not involve unbolting the driving apparatus.[78] Chattels screwed, nailed or bolted to land are generally regarded as annexed to land even if they can be removed with ease. On the other hand, items like keys or handles of water pumps have been held as part of the land, as they are essential to the enjoyment of the land.[79]

10.033 The degree and manner of annexation are only some of the factors to be considered. Intention has been regarded as a more crucial factor. A clear intention to benefit the land has to be shown in order for a chattel affixed to land to be treated as part of the land. If the intention is to enjoy the chattel as a chattel *per se*, it is not part of the land.[80] A collection of statutes, tapestries, panelled pictures, figures and garden seats was held to be annexed to the land since they form part of the architectural design of the house or grounds.[81] Tapestries tacked on to frames before being nailed to the wall and statutes placed on a plinth, however, were held not to be annexed to the land.[82] Stones piled up to form a drystone wall were held to be part of the land,[83] whereas stones discarded in the yard by builders for convenience were probably not.[84] In Hong Kong, air conditioners fastened to iron frames bolted to the exterior wall of a ballroom were

[75] [2011] 1 AC 380, [2010] UKSC 35, [27].

[76] *Minshall v Lloyd* (1837) 2 M & W 450, 150 ER 834; *Orient Leasing (Hong Kong) Ltd v NP Etches* [1985] HKLR 292, [9].

[77] *Duke of Beaufort v Bates* (1831) 3 De GF & J 381, 45 ER 926.

[78] *Hulme v Brigham* [1943] KB 152.

[79] *Metropolitan Counties Society v Brown* (1859) 26 Beav 454, 53 ER 973. See also *Liford's Case* (1614) 11 Co Rep 46b, 50a, 50b.

[80] *Holland v Hodgson* (1871–72) LR 7 CP 328, 335; *Berkley v Poulett* (1977) 241 EG 911 (CA); *Hellawell v Eastwood* (1851) 6 Ex 295, 155 ER 554.

[81] *D'Eyncourt v Gregory* (1866–67) LR 3 Eq 382. See also *Re Whaley* [1908] 1 Ch 615; and *In Re Lord Chesterfield's Settled Estates* [1911] 1 Ch 237.

[82] *Leigh v Taylor* [1902] AC 157; and *Berkley v Poulett* (1977) 241 EG 911 (CA).

[83] *Holland v Hodgson* (1871–72) LR 7 CP 328.

[84] D Elvin & J Karas, *Unlawful Interference with Land*, 2nd edn (Sweet & Maxwell, 2002), 23.

held to be fixtures,[85] whereas those resting by their weight on the floor of a garage next to a restaurant were held to be chattels.[86]

10.034 **Sub-soil.** At common law, a landowner owns the sub-soil and minerals beneath their land.[87] The same principle applies to Hong Kong, with some statutory exceptions:

(1) Minerals and mineral oils in, under or upon land or water belong to the Hong Kong Government, save when their ownership and control is limited by express Government grant.

(2) Relics within the definition in s.2 of the Antiquities and Monuments Ordinance (Cap.53) belong to the Hong Kong Government.

(3) Gold or silver coins and bullions, the owner of which is unknown and which was not abandoned or lost but was hidden in the land, belong to the Hong Kong Government.

10.035 Unauthorised mining and working of minerals under the land surface are actionable for being an unlawful interference with land. No limit can yet be set on the depth beneath which trespass is not actionable.

10.036 **Airspace.** The airspace above land may be intruded by objects flying over the land or by overhanging objects projecting from neighbouring land. A landowner does not own an unlimited height of air space above their land because the public has the general right to take advantage of the air space too. An intrusion into air space at a relatively low height amounts to trespass,[88] but the property right of an owner of land extends only to such height of their land as is necessary for the ordinary use and enjoyment of their land and the structures upon it.[89]

10.037 The same height limit does not apply to intrusive overhanging objects. As Scott J stated in *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd*:[90]

> "The difficulties posed by overflying aircraft or balloons, bullets or missiles seem to me to be wholly separate from the problem which arises where there is an invasion of air space by a structure placed or standing upon the land of a neighbour. One of the characteristics of the common law of trespass is, or ought to be, certainty. The extent of proprietary interests enjoyed by land-owners ought to be clear. It may be that, where aircraft or overflying missiles are concerned, certainty cannot be achieved … but certainty is capable of being

[85] *Irene Loong v Far East Import & Expert Ltd* (1959) HKDCLR 192; *Orient Leasing (Hong Kong) Ltd v NP Etches* (1985) HKLR 292.

[86] *Penta Continental Land Investment Co Ltd v Chung Kwok Restaurant Ltd* (1967) HKDCLR 22. See, however, *Orient Leasing (Hong Kong) Ltd v NP Etches* (1985), *ibid.*, in which a free-standing air conditioning unit was found to be annexed to the building.

[87] *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380, [2010] UKSC 35, [27].

[88] *Laiqat v Majid* [2005] EWHC 1305 (QB).

[89] *Lord Bernstein v Skyways & General Ltd* [1978] QB 479; *Westlands Estates Ltd v Swilynn (HK) Ltd* (HCA 8748/1984, [1985] HKLY 1005), [22].

[90] (1987) 284 EG 625. See also *Gifford v Dent* [1926] WN 336.

whole period of detention has been awarded. In an Australian case, the claimant was awarded loss of rental damages, even though the claimant did not suffer any loss because, despite the conversion, the claimant had at all times sufficient goods available to satisfy demand for hire.[440] Where the goods have been sold or disposed of by the converter, the hiring charge will cease to apply and the owner may recover additional damages for the loss incurred because of conversion, which is usually the value of the chattel at the time of conversion.[441] Even if the claimant never intended to hire out the chattel, sums have been awarded for a reasonable hire charge.[442]

[440] *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420, [2011] NWSCA 342.

[441] *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (CA), cited in *Advance Equipment Services (Hong Kong) Ltd v Tonge (Hong Kong) Ltd* (HCCT 56/2003, [2009] HKEC 110). See also *China Rising Development Ltd v Pepe (UK) Ltd* (CACV 105/1996, [1996] HKEC 316).

[442] See *Clerk & Lindsell on Torts*, 24th edn (Sweet & Maxwell, 2023), [16-114].

Chapter 12

NUISANCE

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1. Introduction

Two types of nuisance. Nuisance can be generally divided into two types: private nuisance and public nuisance. **12.001**

Private nuisance. Private nuisance is a condition or activity which unduly interferes with the ordinary use or enjoyment of another's land. Through the tort of private nuisance, the common law gives landowners and others with a proprietary interest in land, protection against unreasonable interference with their possession, use and enjoyment of the land. **12.002**

Things such as noise, smoke and smell may amount to a nuisance, but whether or not they give rise to a sustainable cause of action depends upon a balancing of competing interests. Thus, a private nuisance may involve an activity which is not otherwise unlawful, but which may become a nuisance because it unduly interferes with a neighbour's convenient enjoyment of their land. **12.003**

Public nuisance. Public nuisance does not depend on the interference with any interests in or relationship with land or buildings.[1] What must be established is, first, a state of affairs which constitutes a public nuisance (nuisance hazard), namely one which endangers the lives, safety, health, property or comfort of the public or obstructs the public in the exercise or enjoyment of any right common to members of the public.[2] Hence, acts of 'doxxing', a form of cyberbullying, against a targeted group of persons (such as police officers and judicial officers) may constitute a public nuisance, and the Secretary for Justice may bring proceedings to restrain such wrongdoings.[3] Likewise, the obstruction of the use and operation of the MTR may also constitute public nuisance.[4] Second, the nuisance hazard (by act or omission) must be causative of particular injury to a member of the public. Third, the defendant must know or ought reasonably to have known that their act or omission would result in a nuisance hazard presenting a real risk of harm to the public. Creating a public nuisance is a common law crime. To be an actionable tort, the plaintiff would need to show that they suffer more harm than the general public.[5] **12.004**

While there is an overlap between the elements of private and public nuisances, they are causes of action which are different in kind. As noted above, private nuisance seeks to protect a person's interest in land, while public nuisance is not dependent on a property interest. **12.005**

The common law of nuisance has been supplemented or replaced by statutory powers designed to regulate activities which may be harmful or intrusive to public enjoyment **12.006**

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1 *Leung Tsang Hung v Incorporated Owners of Kwok Wing House* [2007] 4 HKLRD 654, (2007) 10 HKCFAR 480; *Secretary for Justice v Persons Unlawfully and Wilfully Conducting Etc* [2019] 5 HKLRD 500, [20]–[21].

2 *Ibid.*

3 *Secretary for Justice v Persons Unlawfully and Wilfully Conducting Etc ibid.*, [20]–[21], [25]–[30], [39]–[40]; *Secretary for Justice v Persons Unlawfully and Wilfully Conducting Etc* [2020] 5 HKLRD 638, [2020] HKCFI 2785, [8], [15]–[18], [26]–[28]; *Secretary for Justice v The Internet Society of Hong Kong Ltd* [2019] HKCFI 2809, [2019] HKEC 3694, [20]–[21].

4 *MTR Corp Ltd v Unknown Persons* [2019] 4 HKLRD 446, [2019] HKCFI 2160, [19].

5 *R v Rimmington* [2006] 1 AC 459, 468; see also *Leung Tsang Hung v Incorporated Owners of Kwok Wing House* (2007) 10 HKCFAR 480, [12].

of land and the environment. To that extent, nuisance interacts with, and may be affected by, principles of public law.

12.007 In Hong Kong, flats in multi-storey buildings are governed by the terms of the Deed of Mutual Covenant and the Building Management Ordinance (Cap.344). Apart from nuisance, an owner of a flat can also pursue contractual remedies by enforcing the terms in the Deed of Mutual Covenant or under the Ordinance.

2. Private Nuisance

(a) Definition and scope

12.008 Private nuisance is a condition or activity which substantially interferes with the ordinary use or enjoyment of land, and it may overlap with some other torts such as negligence.[6]

12.009 In *Leung Tsang Hung v Incorporated Owners of Kwok Wing House*,[7] the Court of Final Appeal held that private nuisance is concerned with the activities of an owner or occupier of property within the boundaries of their own land which may harm the interests of the owner or occupier of other land.

12.010 In *Ng Hoi Sze v Yuen Sha Sha*,[8] Rogers J emphasised that "the action is not one for causing discomfort to the person but is one which arises because the utility of the land has been diminished by reason of the existence of the nuisance".

12.011 In *Hunter v Canary Wharf Ltd*,[9] it was held that private nuisances consist of two main types, namely:

(1) nuisances which produces material injury to the property; and

(2) nuisances that is productive of sensible personal discomfort.[10]

(b) The core principles

12.012 **Compromise between neighbours**. Private nuisance can be a continuing or a current act of interference which affects the rights over and/or the use and enjoyment of land by owners or occupiers. In everyday life, especially in an urban setting, quiet and comfortable enjoyment of one's property is to a certain extent affected by surrounding activities, such as noise and air pollution emitted from traffic on the road, cooking smells and other indoor or outdoor activities of the neighbours. The court takes the view that one must endure some degree of nuisance from other people. The critical issue is when this nuisance becomes intolerable and/or unlawful.

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6 *Clerk & Lindsell on Torts*, 24th edn (Sweet & Maxwell, 2023), [19.01].
7 [2007] 4 HKLRD 654, (2007) 10 HKCFAR 480, 491.
8 [1999] 3 HKLRD 890, 895.
9 [1997] AC 655, 706.
10 This distinction was first proposed by Lord Westbury LC in *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, 650, 11 ER 1483, 1486.

The importance of ordinary use. In *Fearn v Board of Trustees of the Tate Gallery*,[11] the majority of the Supreme Court identified a number of core principles of the law of nuisance. In the course of doing so, Lord Leggatt stated that the court must first ask "whether the defendant's use of land has caused a *substantial* interference with the *ordinary* use of the claimant's land".[12] Another aspect of that core principle was that "even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's own land".[13] **12.013**

Rule of "give and take, live and let live". The rule of "give and take, live and let live" originates from *Bamford v Turnley*,[14] where Bramwell B considered that: **12.014**

> "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action . . . for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live".[15]

Reciprocity and equal justice. The rule of "give and take, live and let live" between neighbouring occupiers of land, as set out by Bramwell B in *Bamford v Turnley*,[16] has been consistently identified as the guiding concern. It was endorsed in *Cambridge Water Co Ltd v Eastern Counties Leather Plc*[17] and *Southwark London Borough Council v Tanner*,[18] where Lord Millett said that "[t]he governing principle is good neighbourliness". In *Fearn v Board of Trustees of the Tate Gallery*,[19] the Supreme Court also endorsed the rule and highlighted the importance of the "values of reciprocity and equal justice".[20] **12.015**

Reasonable user. In *Cambridge Water Co Ltd v Eastern Counties Leather Plc*,[21] Lord Goff described the rule of give and take as the principle of "reasonable user" and explained its relationship with negligence liability in the following way: **12.016**

> "The effect [of *Bamford v Turnley*] is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land;

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11 [2024] AC 1, [2023] UKSC 4, [9]–[47] (Lord Leggatt).
12 *Ibid.*, [21] (emphasis in original).
13 *Ibid.*, [27].
14 (1862) 3 B & S 66, 122 ER 27.
15 See also *Century Way Investment Ltd v Willbert Ltd* [2019] HKCA 739, [2019] HKEC 2061, [4.2]–[4.3]. As pointed out by Cheung JA, citing *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "[i]t is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more precisely in a particular society".
16 (1862) 3 B & S 66, 122 ER 27.
17 [1994] 2 AC 264.
18 *Southwark London Borough Council v Tanner* [2001] 1 AC 1, 20.
19 *Ibid.*, [2024] AC 1, [2023] UKSC 4, [35].
20 *Ibid.*, [20] (Lord Leggatt).
21 [1994] 2 AC 264.