



An Introduction to Tort Law (2nd edn)

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9. Trespass

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter discusses the tort of trespass, which protects and vindicates the basic rights of the citizen against deliberate, even well-meaning, invasion, whether or not any damage is caused. Every positive act which directly invades one of those basic rights is trespassory, and leads to liability unless it is justified in law. The chapter distinguishes between the tort of negligence and the tort of trespass. It then describes the rights protected by the tort of trespass: freedom of movement, bodily integrity, and property in one's possession. It also explains the right to trespass and the rights of trespassers.

Keywords: tort law, tort of trespass, freedom of movement, bodily integrity, property

Trespass and Negligence

The tort of negligence tells us when a person has to pay compensation for harm he has caused without meaning to. The role of the tort of trespass is quite different. Its very important function is to protect and vindicate the basic rights of the citizen against deliberate, even well-meaning, invasion, whether or not any damage is caused: every positive act which directly invades one of those basic rights is trespassory, and leads to liability unless it is justified in law. It is to the tort of trespass one must look if one wants to learn whether a doctor may sterilise an adult patient of very feeble intellect,¹ whether the police may stop or arrest a person in the street or enter a private house or garden,² whether people may peacefully gather on the highway without

obstructing it³ and so on. The questions raised and answered in this chapter are a good deal more interesting than the question whether one insurance company has to pay another for accidental damage to property: we are here concerned with rights and liberties. When are you entitled to strike another? When may you seize something in his possession? If negligence law says (after the event) what you should not have done, trespass law lets you know (in advance) what you may do by way of—to use a phrase—direct action.

The Difference in Functions

The functions of the two torts being so different, it is not surprising that their rules are fundamentally divergent. In negligence it must be shown that the defendant owed the claimant a legal duty to take care, whereas trespass is not, according to the House of Lords, a breach of duty at all.⁴ In negligence the defendant must have behaved unreasonably whereas this is not a requirement in trespass. In negligence, but not in trespass, the defendant may be liable for an omission. In negligence the defendant is liable for the foreseeable consequences of his conduct, even if indirect, but not for direct consequences which were not foreseeable; in trespass the defendant is liable only for the direct consequences of his act, whether foreseeable or not. In negligence actual damage must always be shown, and there may be liability where the damage is merely financial, whereas in trespass there is no need to show any damage, only the invasion of a protected right, all those rights being physical in nature. This seems like legal schizophrenia, but the difference in rules is explicable by the difference in roles. To try to effect a synthesis is just a waste of time, but awareness of the difference is vital if negligence is not to take over completely, with unfortunate effects on the rights of the citizen.

This great difference between the requirements of claims in negligence and in trespass makes it desirable to try to delimit their respective areas of operation. One attempt emerges from a decision of 1959 in which the plaintiff asserted simply that the defendant had shot him, without indicating whether the shooting was deliberate or careless. As an allegation of a positive act directly invading the plaintiff's person, this looked like a good claim in trespass, but the judge held that the pleadings were insufficient: the plaintiff must allege and prove either that the defendant meant to hit him or was negligent, that is, should have realised that he might well hit him.⁵ This dichotomy of intention/negligence is not really satisfactory, however, since in trespass the intention need relate only to the invasion, whereas negligence relates to the damage.

More illuminating, though less explicit, is a later case in the Court of Appeal. Peter Wilson and Ian Pringle, both 13 years old, were walking away from a mathematics class when Ian decided to pounce on Peter. He pulled on the bag slung over Peter's shoulder, and in falling to the ground Peter broke his leg. When Peter sued him (!) Ian pleaded that this was just normal horseplay, but the judge accepted Peter's objection that this was no answer to his claim, which explicitly alleged a trespass, and ordered an inquiry into damages. On Ian's appeal, the Court of Appeal sent the case back for a finding whether the pouncing was 'hostile', on the view that no unconsented touching could constitute the trespass of battery unless it were 'hostile'.⁶ Now since it is certainly not the law that an unconsented touching is trespassory only if it is 'hostile' (think of the unwelcome kiss!), one must ask why the Court of Appeal said it was. Surely it was because this was a 'broken leg' case, a claim for compensation for actual harm, not a claim for vindication of his rights by a schoolboy with a grievance. The courts know about broken leg cases, for they hear such claims every day, at least in the county

courts, and know what law applies to them: no liability unless the defendant behaved unreasonably and the harm was foreseeable. Here, by contrast, the defendant alleged that his conduct was perfectly normal, and there had been no finding that the harm was a foreseeable consequence of what he did. One can conclude that the distinction between negligence as a tort and trespass should be in functional, not formal terms: are we compensating for harm or vindicating rights? This is important, for when rights are to be vindicated, neither damage to the claimant nor fault in the defendant is relevant to the claim, though the first may affect the remedy and the second the defence.

The Protected Rights

The rights protected by the tort of trespass are few in number: freedom of movement, bodily integrity, and property in one's possession. The names given to the invasions of these rights are respectively 'false imprisonment', 'assault' and 'battery', and trespass to land and goods. Note that it is the physical aspect which dominates: freedom of *movement*, not belief or expression; *corporeal* integrity, not mental tranquillity; *possession*, that is, the physical relation between person and thing, not *ownership*, which is an economic relationship. Much more numerous are the rights conferred by the European Convention and protected by the Human Rights Act 1998. They include, for example, the right to respect for private and family life, freedom of expression, marriage and, very importantly, procedural rights to a fair trial as well as to an inquiry into every violent death, especially in Ulster or custody—an invention of the Strasbourg court not reflected in the common law.⁷ The structure of the Convention is very like that of trespass law—the rights are specified first, followed by a list of the possible justifications for invading them. As in trespass it is easier for the claimant to establish the invasion of his rights than it is for the defendant—in Strasbourg always the State, in Britain a public authority—to justify it; and just as a justification for a trespass will fail if it is exercised in an unreasonable manner, so in Strasbourg the justification will fail if its exercise is disproportionate or discriminatory. But there are important differences, too. Whereas the victim of an unjustified trespass has an automatic right to damages, damages are by no means always available under the Act—a fact which led Lord Bingham to state with less than his usual caution that 'the 1998 Act is not a tort statute'⁸; whereas trespass law binds private citizens as well as officials and public bodies, only the latter are directly required by the Act to act compatibly with the rights conferred; and whereas trespass requires a positive act which directly invades the protected right, Strasbourg is increasingly imposing duties on public authorities (which includes the courts) to prevent such invasions by private third parties.

False Imprisonment

Liberty is very strongly protected by the common law, as the remedy of *habeas corpus* indicates. Whenever a person is confined, whether by physical means or the threat of them, so that he cannot move outside an area prescribed by the defendant, this is in law an 'imprisonment', presumptively trespassory. It seems therefore that the victim of rape could complain of imprisonment as well as battery, as could the victim of a knock-out blow, since the claimant need not even be aware of his confinement. It is true that both these victims could sue for battery, but a claim for imprisonment is better, since it entitles one to trial by jury.⁹

Battery and Assault

Corporal integrity is protected against direct physical invasion by the tort of battery. Physical impact is traditionally required, and this requirement should not be weakened, as was done when it was suggested that it might be a battery to take a flashlight photograph of a person.¹⁰ It is quite unnecessary to extend the scope of trespass because if any actual harm is done, a claim in negligence will surely lie, and if the act is repeated, a claim for harassment, including an injunction. The requisite physical impact need not be by a fist: it is a battery if I throw something at you (and hit you) or get my dog to bite you. Rather eccentrically, however, it is said to be a trespass to the person, called ‘assault’, to cause a person to fear an immediate attack, and in criminal cases this has been extended very far so as to include heavy breathing on the telephone.¹¹ Again, negligence or harassment is available here, and there is no need to extend the tort of trespass. Indeed, assault is really just a justification for battery. In a famous seventeenth-century case, just after the Restoration, one bravo poked another in the eye with his sword after the latter had said, in response to some disobliging words, ‘If it were not assize-time I would not take such language’ and the answer to the question whether the defendant was liable for what was manifestly a battery depended on whether the plaintiff was guilty of an assault.¹² It was held that although the plaintiff had put his hand on the hilt of his sword, he was not an assailant, since what he said neutralised the aggressive nature of what he did. Note the roles of the parties: it was not, as is often suggested, the *plaintiff* who was complaining of assault—it would have been very unmanly of a Restoration stud to complain of *not* being hit; the plaintiff was complaining of an actual battery—he had been blinded—and the assault point was raised by the defendant, for if the plaintiff were an assailant, the defendant could justify his battery as being in self-defence.

Trespass to Property

A distinct problem is raised by the protection of *property*, whether goods or land, land being what laymen think of whenever they hear the word ‘trespass’ (‘Trespassers will...’). Whereas it is clear that only the person confined or battered can claim for false imprisonment or battery, several different parties, such as the owner, the possessor, and others, may have an interest in a piece of property. There is therefore a problem about ‘title to sue’. The aspect of property which is protected by the law of trespass is its possession, the physical aspect. Here again the courts have tended to extend the scope of the tort by allowing a suit in trespass by those not actually in possession at the time of the alleged act, but having only a right to obtain or resume possession. The incantation is muttered: ‘As against a wrongdoer, title is as good as possession’. This is absurd because one cannot tell whether the defendant was a wrongdoer until one has ascertained that the claimant, as the person wronged, is an appropriate person to sue. This development, unfortunate as it is, was doubtless necessitated by procedural difficulties regarding the repossession of land, but it was extended much further when the Court of Appeal very dubiously held that demonstrators who were determined to stop the construction of a new runway at Manchester Airport could be evicted as trespassers by a construction firm which had never been on the property and had only a contractual right to enter it.¹³

With regard to moveable property there is no reason to let anyone sue in trespass except the person in actual physical possession at the time of the act impugned: the tort of conversion is available to those who are entitled to possession, whether or not they actually have it. Like battery to the person, trespass to property requires physical contact: it is a trespass to affix a clamp to a car, but not to lock one’s gate so as to prevent its

exit (needless to say, there is no false imprisonment of chattels). Again one need not actually go on another's land in order to be a trespasser: it is a trespass to dig under the land of another or to construct anything on one's land which protrudes into the airspace over that of one's neighbour.¹⁴ The fact that it is a trespass to put, throw, or build anything on another's land makes trespass a suitable forum for the resolution of boundary disputes between neighbours.¹⁵ But surely it was an improper extension of the law when a judge held that the master of staghounds was liable in trespass whenever 'by his failure to exercise proper control over them he caused them to enter' the tiny 'sanctuaries' sporadically established on Exmoor by the League Against Cruel Sports?¹⁶

Defences

All the claimant has to do to make a claim in trespass is to allege 'You touched me', 'You came on my land', or 'You clamped my car'. But such conduct is very often justifiable: the defendant may be entitled, authorised, empowered, or whatever to do what he did. If he can prove it, he will escape liability. Such entitlements (we can call them 'rights' if we like, and irritate the jurisprudges) may arise either at common law or under statute, and they are of great interest, since they tell us when we may invade the basic rights of others. Rights, after all, are not inviolable; it is rather that violations must be justified. As one would expect, the range of situations in which one is entitled to invade the rights of others depends on the strength of the right being invaded. A transitory trespass to land can be paid off by the tender of a tiny sum, but that could hardly apply where the trespass was an infringement of liberty. The primacy of liberty of movement is indicated by the existence of *habeas corpus* proceedings (if we may still use the term), by the provision in the European Convention (art 5(5)) that damages *must* be awarded when a person has been unlawfully arrested or detained, and by the fact that the claimant for false imprisonment (including arrest) is entitled to trial by jury, whereas the claimant for assault and battery is not. This must not be taken too far, however. Parents must not beat their children, but need not let them roam the streets, and convicts may be imprisoned, but not bastinadoed.

False Imprisonment

Apart from children, those most commonly confined are suspects, convicts, and the mentally ill. Arrest of a suspect by warrant is justified by the order of a judicial officer, as is the detention on remand of a person charged or the imprisonment of a person convicted. A warrant is not, however, always required for an arrest. The powers of the police are carefully laid down in the Police and Criminal Evidence Act 1984, as extended by the Serious Organised Crime and Police Act 2005, ss 110 ff, and it is for them to show that the conditions have been satisfied. At common law arrest is simply an instance of imprisonment, specific only that it is a constraint imposed in connection with a criminal investigation, and though the Convention on Human Rights treats arrest and detention alike, our courts have recently drawn a distinction between them.

In one case a person sentenced to two years' imprisonment was due, according to a statute as then interpreted, to be released on 18 November. On 15 November a court held that the previous interpretation of the statute was erroneous, with the result that she should have been released on 17 September. The claimant now claimed damages for her detention from 17 September until 15 November, when she was actually set free. The Court of

Appeal's award of £5,000 by way of damages was upheld by a unanimous House of Lords: given that her detention was now recognized not to have been lawful, it was irrelevant that the prison governor could not be blamed at all.¹⁷ Nor could the police be blamed when they arrested Ms Percy for the umpteenth time for breach of a bye-law whose validity they had no reason to doubt. The bye-law was later held invalid, yet her claim for false arrest (= imprisonment) was dismissed by the Court of Appeal.¹⁸ Worse still, the House of Lords has recently held that the police may justify arresting the wrong person provided he is the person named in the warrant.¹⁹ These decisions illustrate how the salutary rules of trespass are being invaded by negligence-type thinking: the police were excused because what they did was perfectly reasonable, they were not at fault. But rights must be protected even against reasonable conduct which infringes them, the citizen should not have his liberty restrained for doing what was not an offence or under a warrant intended for someone else, and in any case the constables were not going to pay out of their own pocket, for the money comes out of public funds, as it should when a public body has invaded the citizen's rights.

Battery

When may you lay hands on a person without his consent? In self-defence, obviously, and obviously not in retaliation: the distinction is drawn, as we have seen, in terms of whether the party battered was an assailant, so you cannot thump someone just for being unforgivably rude. In order to regain your liberty you may use quite serious force, but you have to be actually (and improperly) confined, not just obstructed: you must, if possible, go round a person who is in your way, and not push past, unless there is no reasonable alternative.

This emerges from a very instructive Victorian case.²⁰ An entrepreneur had set up seats within an enclosure on one side of Hammersmith Bridge, with a view to charging spectators to sit there and watch the regatta impending on the Thames below. This was clearly a public nuisance, since the entrepreneur had no authority to block the highway, and it irritated Bird, whose fixed habit it was always to use the pavement on that side of the bridge, so he climbed over the fence into the enclosure with a view to climbing out the other end. Jones, an employee of the entrepreneur, blocked his way, and invited him to use the other sidewalk. After a period of stasis Bird tried to push past Jones, who promptly gave him in charge to a policeman for breach of the peace. Bird was locked up in a police cage for the night. On the (correct) assumption that Bird had been arrested by Jones, the question was whether the arrest was justified, as it would be if Bird was guilty of a breach of the peace in unjustifiably battering him in trying to push past. Bird argued that his battery was justified, on the basis that Jones was imprisoning him by blocking his passage and he was entitled to use force to regain his liberty. He would indeed have been so entitled had he been imprisoned, but the court held that he had not been imprisoned at all, only prevented from going in the direction he wanted. In other words, you can use force to get out but not to get past. Note that Bird would not be liable for trespassing to the fence he climbed over: it was a nuisance, and you are entitled to abate nuisances, if they are things; not if they are people. Very sensible, too. However, there was a furious dissent by a judge who clearly thought that the citizen was entitled to enforce his right of passage: his fury would know no bounds if he knew of the appallingly negative attitude of our present courts towards self-help, for, as the reader will appreciate, self-help is exactly what the defences to trespass are about, and the courts, which fancy that they are there to help people, are very unhappy when people try to help themselves.

That we are concerned with rights and not faults emerges from another illuminating case. Sir John Townley had been behaving so oddly that it looked as if he should be locked up. At that time a person could be lawfully locked up only if two doctors had signed the relevant form, and so two doctors, one of whom had signed and the other had not, went with a constable to Sir John's house. When he withdrew upstairs to his bedroom, the policeman gently approached him to calm him down and was struck a severe blow for his pains.²¹ Leaving aside the question of the reasonableness of the blow (struck in defence of his liberty by a person at home with his back to the wall), the question whether the suspected madman was guilty of battery or not depended exclusively on whether the second signature was on the form or not, a matter of which neither party knew anything. If the second signature was there, the policeman was entitled to lay hands on the suspected lunatic and the latter was not entitled to defend himself; if it was not, the positions were reversed.

Force may be used to prevent or stop a breach of the peace.²² This is quite distinct from arrest: breach of the peace is not a serious offence, merely something that should be put an end to. In a public place such force may, and perhaps should, be used by any citizen, not just a constable.²³ It used to be the law that a constable might enter private premises if he reasonably believed that a breach of the peace was imminent there, but now, in deference to Strasbourg, if the premises are a home the constable's action must in addition be 'proportionate' to the risk of disorder.²⁴

Force may also be used to protect property. Trespassers may be evicted. This, indeed, is surely why trespass to land is independent of fault: if you have no right to be on another's land, whatever you may think, you are liable to be evicted, and since you can only be evicted if you are a trespasser, a trespasser is defined as anyone who cannot justify his presence on the land. It is perhaps a pity that the burglar, the mischievous child, and the bemused wayfarer are all classed as trespassers, for they should surely be treated differently, at any rate as regards their safety. All of them are liable to be shown off the land, however. Eviction must be carried out with the minimum necessary force and damage: you must ask the trespasser to leave before pushing him out, and you must push him out the door not the window. You cannot, of course, detain him, because it is only in order to disencumber your land of the unentitled intruder that you are entitled to use force at all, and justifications for trespasses must be in line with their purpose.

If one may extrude a trespasser, may one scare him away? That is what the aged occupier tried to do in *Revill v Newbery* when thugs were approaching the hut in which he was crouching.²⁵ He fired a shotgun through a hole in the door, not aiming at anyone, and hit one of the burglars. He was held liable, to popular indignation and the approval of the Law Commission. These are cases where force is used by a person in actual occupation of premises on which the trespasser intrudes. In the interests of avoiding public disorder there are restrictions on the use of force to evict an established trespasser or squatter. Force may be used to enter premises in order to evict a trespasser only by a person who previously resided or is entitled to reside there. The police may act if called by such a person, but all others, and legal persons in particular, must seek a court order.²⁶ Note that here the legislature draws distinctions according to the nature of the premises being occupied—home or office?— something that the common law is incapable of doing, just as it seems incapable of overtly distinguishing between the different classes of persons trespassing there.

One cannot be evicted as a trespasser if one has a right to be on the premises, though of course when one is lawfully on another's premises one must respect 'No Entry' or 'Private' notices on particular parts of them, and equivalent implicit restrictions. Many persons are entitled to walk or drive over the land of another even

without his consent. Such a ‘right of way’ may be either private, an easement, or public. There are frequent disputes over what is permitted under a private right of way. Then there are public rights of way. The public’s right to enter private land has been greatly extended by the Countryside and Rights of Way Act 2000: ‘Any person is entitled ... to enter and remain on any access land for the purposes of open-air recreation, if and so long as (a) he does so without breaking any wall, fence, hedge, stile or gate, and (b) he observes the general restrictions in Schedule 2 ...’. Note that the right is limited by the purpose for which it is granted—recreation in this case. A like limitation used to attach to the exercise of those public rights of way which we know as highways: they could be used only for the purpose for which they were (taken to have been) granted, namely passage, moving along it to one’s destination, or crossing it to get to the other side. In a recent decision, however, the House of Lords held by a bare majority that people were entitled to use the highway for any reasonable purpose, such as meeting and gathering there, provided no obstruction was caused to the passage of others.²⁷

Property

We have seen that the occupier of premises may evict an unlawful intruder, by force, if need be. He can also evict a thing, for he is entitled to have his land free of intrusions. But may he clamp a trespassing car? The question is difficult because far from removing a car, clamping it keeps it there. But there were automotive chattels long before the motor car was invented, and at common law if cattle trespassed the occupier could not only shoo them away, but might, if he preferred, detain them. This common law remedy of *distress damage feasant* was judicially extended to inanimate objects (such as a railway engine) and though it was abolished by statute in 1971, it was abolished only as to animals. In principle, therefore, *distress damage feasant* was available as a defence by the occupier who clamped a car. Indeed, one member of the Court of Appeal so held in *Arthur v Anker* in 1996, but the majority decided that detention was licit under this remedy only where the vehicle was causing damage other than merely occupying space.²⁸ They held instead that the trespasser would be deemed to consent to the risk of clamping (thereby providing a defence) if a prohibitory sign were visible, the charge reasonable, and release swift (conditions which could not be applied to *distress damage feasant*). This was a clever fiction. A later Court of Appeal, however, failed to understand that the consent in such cases is deemed to have been given—no one *in fact* agrees to being clamped—and held in *Vine v Waltham Forest LBC* that if the trespasser did not see the sign he could not really have consented to being clamped²⁹—as if the reality of his consent were of any interest whatever, as if any enraged driver will admit to having seen a sign, and as if the courts were as competent lie-detectors as they claim. The courts having thus gutted the clever remedy they themselves had invented, Parliament intervened, providing originally that it was unlawful for anyone to clamp or permit the clamping of a trespassing car unless the clamer had a licence to do so.³⁰ Now, thankfully, such conduct is unlawful only if a charge is to be made for the release³¹, so it is to be hoped that the common law as laid down by *Arthur v Anker* will be applied: clamping being a trespass to the car with a defence of deemed consent if release is facilitated. *Vine* is ripe for overruling.

Power is often abused, alas, and that is true also of the occupier’s power to exclude others and their property from his premises. The dog in the manger is a familiar and unadmired figure. Suppose your neighbour needs to come on to your land to do necessary repairs to his adjoining house? Can you prevent him, and evict him if he insists? The common law said you could.³² Now we have a statute which permits your neighbour to enter

your land for that purpose provided that he has gone through rather a cumbrous procedure.³³ Likewise an occupier might make unnecessary difficulties about party walls; again there is a recent statutory provision.³⁴ Suppose a kid's cricket ball gets knocked into the neighbour's garden yet again; may he go in and fetch it? Certainly not. Nor need the neighbour be at the trouble of coming to the front gate and handing over the cricket ball, though he must not use it as if it were his own (that would be a 'conversion'). Here, as in the clamping situation, we see a standoff between the rights of possessors of chattels and occupiers of land.

Consent

An act to which one has consented cannot be treated as invading one's rights (unless those rights are inalienable). This seems self-evident: to use a language now forbidden, *volenti non fit injuria*. If the person affected is incapable of giving valid consent, there may be a question whose consent is relevant. And there may be a question whether apparent consent is actual or whether consent given by a person apparently, but not actually, authorised to give it on behalf of another is sufficient. There may be problems about the withdrawal of consent.

It is clear that the use of a scalpel by a surgeon or a hypodermic needle by an anaesthetist constitutes a direct positive invasion of the patient's bodily integrity. The patient has usually consented to the invasive treatment, but if it goes wrong without any negligence in the operation itself, the patient may want to argue that his consent was invalid because he didn't know what he was consenting to. Some jurisdictions hold that respect for the autonomy of the patient requires that the doctor fully explain the implications of the proposed line of treatment, or face the prospect that the court may hold the operation trespassory for want of 'informed consent'. The English courts have not followed this line, and have been criticised for doing what common lawyers usually do, treating it as a question of the defendant's duty rather than the plaintiff's right, as a matter of negligence rather than trespass.³⁵ Accordingly, while the doctor must answer any questions put to him, he need not volunteer information unless that is required by approved medical practice, subject to marginal control by the courts. Furthermore, it must appear that the patient would not, if properly informed, have proceeded with the operation—to which we must add 'there and then', in order to accommodate the correct decision in *Chester v Afshar* (above p 89), where the tension between the claimant's right and the defendant's duty was particularly prominent.

Not everyone has land to occupy, but those who do should be encouraged by the law to permit others to cross it, and not act like the dog in the manger. To an extent the law actually discourages such sociable generosity, since the occupier of business premises who permits people to enter them lays himself open to suit if they are injured, and he cannot exclude personal or vicarious liability unless they are permitted to be there simply for recreational or educational purposes independent of the business and the injury results from the dangerous state of the premises.³⁶ It would be an even greater discouragement if the occupier were not allowed to withdraw his consent. This he may do, on reasonable notice, if the permission was just a favour, but if it was part of a deal the matter is more complex. In 1915 the Court of Appeal held, by a majority, that the patron of a cinema who, having paid for his ticket, refused to leave during the show and was physically evicted could

claim substantial damages for trespass to his person: the cinema operator could not turn the patron into a trespasser by withdrawing his consent in breach of contract.³⁷ In this respect one's home would, one hopes, be treated differently from a cinema.

Necessity

Sometimes people are unable to consent to an invasion which would be in their interests, perhaps because they are unconscious or unaware of a pressing danger or too feeble-minded to be able to consent or dissent. Trespassory invasions under such circumstances may well be justified under the heading of necessity. This was the case where the doctors wanted to sterilise a mental patient who would have been quite incapable of dealing with pregnancy, parturition, or maternity; even in such a case the intervention is lawful, one member of the House of Lords saying that it would be intolerable if the doctors could be sued in trespass if they acted and in negligence if they failed to do so.³⁸ The defence of necessity was used again by the House of Lords in a case where a mental patient had been informally admitted to a hospital and arguably detained there,³⁹ but the Strasbourg Court, noting that the concept of 'deprivation of liberty' in the Convention was wider than that of 'false imprisonment' at common law, held that the common law defence of necessity did not contain adequate safeguards and that the decision of the House of Lords therefore put the United Kingdom in breach of its treaty obligations.⁴⁰ Necessity certainly does not justify force-feeding a sane person, for a sane person is entitled to refuse medical treatment even if it is necessary to keep him alive. This is required by respect for the autonomy of the individual, though the courts do not always resist the temptation to treat as insane those who in their view have acted very unreasonably.

The Right to Trespass

If there is a threat that a trespass will be repeated or continued, the claimant may well seek an injunction to stop it. The court need not grant it, since the remedy is discretionary. If the court could grant an injunction and declines to do so, it may award a sum of damages instead. This effectively legitimates future trespasses of the sort. It amounts to judicial expropriation of the victim. The courts deny this, and proceed to imprison for contempt the property-owner who continues to take a sledge-hammer to a building which admittedly encroaches on his property.⁴¹

The Rights of Trespassers

Trespassers do not lose their rights to personal safety. As we have seen, the occupier may not deliberately harm the trespasser; as to unintended harm the occupier was not liable at common law unless his negligence was so extreme as to show an inhumane disregard for the trespasser's safety. This was modified by the House of Lords when an infant trespassed on to an electrified railway line,⁴² and a statute intended to clarify the law

was passed in 1984.⁴³ The trespasser can now sue if he suffers personal injury from a danger against which the occupier failed to offer the appropriate protection, supposing that the occupier knew or had reason to know of the danger and the fact that the trespasser would probably be exposed to it.

Determined squatters even got to own the premises on which they trespassed long enough,⁴⁴ until the Strasbourg Court held, by a bare majority, that the Act of Parliament which permitted this was incompatible with the protection afforded to possessions (sic) by the First Protocol to the European Convention.⁴⁵ It is still, however, the law that by continued crossing of another's land one can acquire a right to do so (easement), provided that the occupier is aware of what one is doing and neither consents nor objects.⁴⁶ These provisos may seem odd, but they are quite rational, for their effect is to encourage people to be generous with their permission (which can always be withdrawn) and prejudices only those who know their rights are being infringed and do nothing about it.

Notes

1 *Re F, F v West Berkshire Health Authority* 1989] 2 All ER 545.

2 Police and Criminal Evidence Act 184.

3 *DPP v Jones* [1999] 2 All ER 257.

4 *Stubbings v Webb* [1993] 1 All ER 322.

5 *Fowler v Lanning* [1959] 1 All ER 290.

6 *Wilson v Pringle* [1986] 2 All ER 440.

7 *Re McKerr* [2004] UKHL 12.

8 *R (Greenfield) v Secretary of State* [2005] UKHL 14.

9 Supreme Court Act 1981, s 69.

10 *Kaye v Robertson* [1991] FSR 62.

11 *R v Ireland* [1997] 4 All ER 225.

12 *Tuberville v Savage* (1669) 86 ER 284.

13 *Dutton v Manchester Airport* [1999] 2 All ER 675.

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