

ABOLITION OR REFORM: THE FUTURE FOR DIRECTNESS AS A REQUIREMENT OF TRESPASS IN AUSTRALIA

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*The requirement of directness in torts of trespass to the person is crucial for distinguishing cases of trespass from case. Yet, while it is a formal requirement in all forms of trespass, there is surprisingly little consideration given to it in the majority of cases, to the extent that it is near impossible to formulate a consistent test. This article attempts to do just that, considering cases as they pertain to battery, assault and false imprisonment, with a view to examining the possibilities of either abolition or reform. Ultimately, despite the examples set by Britain, the United States and Canada, an unwillingness on the part of the High Court to overturn the seminal case of *McHale v Watson* may see reform—here a possibility—become a reality.*

I INTRODUCTION

Directness is a crucial requirement of the torts of trespass to the person, as it historically provided a distinction between actions which may give rise to trespass, and those which are indirect and consequential, and give rise to case.¹ But as Trindade notes, this requirement is seldom acknowledged today with sufficient clarity or precision, in either case law or textbooks.² I shall aim here to briefly discuss the key decisions in this area, setting out their inconsistencies and the problems they pose for all three forms of trespass to the person, while also attempting to put together a decisive ‘test’ for directness. I argue, however, that any test which can be derived from the main cases is arbitrary at best, as no consistent principle can be drawn from such disparate and diametrically opposed authorities. Following, I shall consider the possibility of reform of directness, a discussion which is necessitated by the impediments to outright abolition which persist in Australian law.

II THE ORIGINS OF DIRECTNESS

The history of the requirement of directness perhaps best explains its somewhat anomalous position in civil wrongs. Ibbetson usefully charts how the combination of two factors led to the development of a tort of trespass to the person as we now

* Student of Law, Monash University. The author gratefully acknowledges the advice and support of Dr Dale Smith, some early inspiration provided by Professor Dimity Kingsford-Smith and the insightful comments of the anonymous referee. All mistakes remain the author’s alone.

1 David Gardiner and Frances McGlone, *Outline of Torts* (2nd ed, 1997) 45.

2 F A Trindade, ‘Intentional Torts: Some Thoughts on Assault and Battery’ (1982) 2 *Oxford Journal of Legal Studies* 211, 211. See also Harry Street, *Street on Torts* (7th ed, 1983) 20.

know it.³ First, the combination of the separate actions of breach of the peace and trespass *vi et armis* ‘extend[ed] a strong gravitational force on the way in which it [trespass] developed’.⁴ Second, with defamation developing exclusively in the Ecclesiastical Courts and the remedy for breach of contract confined to the action for covenant, Ibbetson concludes that ‘the action of trespass could easily be identified by its core feature, the wrongful use of a minimum degree of force’.⁵

Trespass to the person was originally a narrow writ, restricted to allegations of *vi et armis* or breach of the peace. Plaintiffs who alleged loss but could not point to any particular act(s) of the defendant were therefore forced to plead either trespass, with little prospect of success, or simply recount their story in the form of an ‘undefined writ’, and hope that damages would follow. By the mid 14th century plaintiffs had begun to succeed in cases of the latter.⁶ In the unreported 1363 case of *Broadmeadow v Rushenden*,⁷ the plaintiff alleged neither *vi et armis* nor breach of the peace, yet a jury found for her and upheld her cause of action against a doctor who ‘so carelessly, negligently, or maliciously [treated her arm] that her hand had been lost’.⁸ Shortly thereafter, in *The Miller’s Case*,⁹ a writ bearing the name ‘Trespass *sur le case*’ was first brought, but it did not succeed since, as Fifoot recounts, the “‘common writ of Trespass” was available’.¹⁰ Finally in 1369, *The Innkeeper’s Case*¹¹ formally recognised the propriety of the action, and a series of cases thereafter have cemented its place in the common law of tort.¹²

It was the parallel development of action on the case, or allegations of loss or injury pertaining to neither *vi et armis* nor breach of peace, which necessitated the development of a legal criterion to distinguish between it and trespass; ‘once plaintiffs began to explore and exploit the boundary between trespass and case it was incumbent on the courts to say what that boundary was’.¹³ The distinction ultimately settled upon was first clearly articulated in *Reynolds v Clarke*.¹⁴ In that case the plaintiff occupied a mansion, the roof of which leaked rainwater onto the defendant’s land. When the defendant came onto the land and erected pipes which channelled the water such that it fell upon other buildings and caused damage, the question arose as to whether the action should be one of trespass or case. The Court held:

3 David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 41–2.

4 Ibid 41.

5 Ibid 42.

6 Ibid 55.

7 See *ibid* 54–5.

8 Ibid 54.

9 (1367) YB Mich 41, Ed 3, f 24, pl 17; see C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949) 80.

10 Fifoot, *above n* 9, 75.

11 (1369) YB Easter 42, Ed 3, f 11, pl 13; see Fifoot, *above n* 9, 80.

12 Fifoot, *above n* 9, 75.

13 Ibbetson, *above n* 3, 159.

14 (1725) 2 Ld Raym 1399; 92 ER 410.

[T]he plaintiff could not maintain an action of trespass *vi et armis* for the damage he sustained by the rain water flowing out of this spout, but ought to have brought an action on the case. ... The distinction in law is, where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c. and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, &c in the first case trespass *vi et armis* will lie; in the last it will not ...¹⁵

However, as the 1382 case of *Berden v Burton*¹⁶ illustrates, it was unclear whether the directness requirement hinged on an interpretation of causation or fault.¹⁷ In that case trespass was brought alleging that the defendant had burned down the plaintiff's house. However, when the plaintiff expanded his story to argue that the fire was caused by the defendant's men threatening the plaintiff's servants, who then left a fireplace unattended, the defendant argued action on the case was the only proper action. Belknap CJ agreed and allowed the plaintiff to amend his story to allege that it was sparks from the intruders' torches, rather than his servants' desertion, which caused the fire. While his Honour accepted that that this was 'consistent with a general allegation that the defendant had forcibly burnt down the plaintiff's house',¹⁸ it is not exactly clear why. The evolution of directness into its present-day incarnation, spawning a series of irregular permutations and irreconcilable inconsistencies, has only further served to muddy its jurisprudential waters.

III DIRECTNESS TODAY: DELINEATING A TEST

It is traditional to begin any examination of contemporary directness with the English case of *Scott v Shepherd*,¹⁹ in which it was held that directness is satisfied by any injury²⁰ which follows immediately upon an action.²¹ In that case, the defendant threw a lit squib into a crowded marketplace, where it fell first upon W's stall. W, wanting to prevent any damage to her goods and injury to herself, picked it up and threw it away, and it fell onto R who did the same and threw it again. Finally the squib landed near or on the plaintiff and exploded, causing blindness. The question whether the defendant's original action could be regarded as the direct cause of the interference was answered in the affirmative by the majority,

15 Ibid 1402; 413.

16 (1382) YB T 6 Ric II (AF) 19.

17 See Ibbetson, above n 3, 55.

18 Ibid.

19 1773) 2 Wm Bl 892; 96 ER 525 ('*Scott*').

20 The term 'injury' is referred to frequently throughout the literature, though I should prefer the term 'interference' from now on, since injury implies an examination of results more appropriate to an action on the case, and serves only to confuse matters.

21 See also discussion in *Hutchins v Maughan* [1947] VLR 131, 133–4 (Herring CJ).

who held that the actions of W and R could be characterised as necessary in self-preservation and therefore did not break the 'chain of directness', as it were.²²

In a similar vein are the decisions of *Leame v Bray*²³ and *Reynolds v Clarke*,²⁴ which conclude that for an interference to be direct it must result 'immediately' from the act which occasioned it. Salmond and Heuston suggest that in this respect, the doctrine of directness acts not only to link the interference and the act, but so as to make the result a *part of the act* in the eyes of the law.²⁵ This much is not tested by the decision in *Scott*, it is the more controversial extension of directness to cover acts deemed necessary in self-preservation which complicates the matter. It then becomes necessary to examine the state of mind, at least superficially, of the intervening parties to determine whether they were indeed acting in self-preservation; a function which could equally be served by the doctrine of transferred malice.²⁶

The test for directness, then, is that an interference must follow *immediately* from an act, so that the result is apt to be considered not consequential but part of the act; with the exception that intervening acts necessary in self-preservation will not negate directness being made out. Such an exception seems all the more arbitrary when the decisions of *Dodwell v Burford*²⁷ and *Southport Corporation v Esso Petroleum*²⁸ are considered.

In the former, it was held that where A struck B's horse which ran off and threw B, who was trampled on by another horse, B could not recover damages from A in trespass.²⁹ Thus, even though the trampling of B could be considered inevitable, as A and B travelled at speed in a party of horses, directness could not be made out. I would suggest that this is at odds with the exception in *Scott*, unless self-preservation can be grounded in some logic other than inevitability. Furthermore, in *Southport*, it was held that where D discharged oil from a heavily laden tanker in danger of sinking, and the tide carried that oil onto P's foreshore and caused

22 De Grey CJ, Nares and Gould JJ in the majority all referred to the inevitability of W and R throwing the squib onwards, and held that they neither remove the defendant of his liability nor add concurrent sources of liability; see *Scott* (1773) 2 Wm Bl 892, 894; 96 ER 525, 526 (Nares J), 898; 528 (Gould J), 899; 529 (De Grey CJ).

23 (1803) 3 East 593; 102 ER 724. The defendant was alleged to have driven his carriage with such force upon the plaintiff's carriage that it caused the plaintiff's servant to be dislodged and his own horses to bolt, such that he had to jump to safety, causing injury. Le Blanc J found trespass, since 'here, where the personal force is immediately applied to the horse and carriage, the things acted upon and causing the damage, like a finger to the trigger of a gun, the injury is immediate from the act of driving, and trespass is the proper remedy ...' at 693, 728. See also *Scott* (1773) 2 Wm Bl 892, 900; 96 ER 525, 529 fn (o) (De Grey CJ).

24 (1725) 2 Ld Raym 1399; 92 ER 410.

25 Sir John William Salmond, *Salmond and Heuston on Torts* (20th ed, 1992) 6.

26 Or transferred intent, as it is known in the United States where the directness requirement no longer exists. See F A Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999) 29.

27 (1669) 1 Mod Rep 24; 86 ER 703 ('*Dodwell*').

28 [1954] 2 QB 182 ('*Southport*').

29 *Dodwell* (1669) 1 Mod Rep 24, 24; 86 ER 703, 703; '[i]n trespass, the Court will not increase the damages if the injury was consequential'. See R P Balkin and J L R Davis, *Law of Torts* (2nd ed, 1996) 43.

damage, trespass could not be made out.³⁰ If the inevitable actions of frightened horses trampling individuals knowingly sent to the ground, and the tide shifting oil knowingly discharged, cannot establish directness, it seems an exception for self-preservation is inappropriate, and an unnecessary complexity to the test of directness.

Even more perplexing is the decision in *Hutchins v Maughan*.³¹ The outcome itself is not entirely troubling; it was held that where D left poisoned meat on his land and told P not to cross his land because of it, but P did so anyway resulting in the death of his dogs who ate the meat, trespass would not be made out. Herring CJ maintained this on the basis that the meats were laid before P arrived on the land, and P had the benefit of D's admonitions to this effect. Yet he chose to bring his dogs and sheep onto the land anyway: 'it was necessary for the complainant himself to bring his dogs with him to the baits in order that the injurious consequences ... should result from the defendant's act'.³² What is troubling, however, is the analogue proposed by his Honour that '[h]ad the baits been thrown by the defendant to the complainant's dogs, then no doubt the injury could properly have been regarded as directly occasioned by the act of the defendant ...'.³³ Thus it would seem the inevitability of the dogs eating the poisoned meat, no matter the situation, was not at issue; and in the theoretical situation, the inevitability of the dogs eating the meat *could* support directness. This is opposed to the conclusion reached above in *Dodwell* and *Southport*, where it was held that the inevitability of a result could not support directness.³⁴ It is difficult to see how such inconsistencies can be maintained by the test of directness; where on the one hand the inevitable actions of dogs may give rise to directness, while the inevitable action of the tide will not.

Perhaps the comparison of *Hutchins* and *Southport* is not a fair one in this sense, since the actions of dogs with regard to pieces of poisoned meat cannot properly be compared to the tide. Indeed a better comparison is between the dogs and the third party acting in self-preservation. Thus we are left with a test that maintains that directness will follow from action of a defendant which *immediately* brings about interference with the plaintiff, unless there is an intervening cause which breaks the chain of causation; with the exception that actions necessary in self-preservation will not break directness. In *Hutchins*, it was the plaintiff's actions

30 [1954] 2 QB 182, 196 (Denning LJ). Singleton LJ did not comment on directness, as he felt that any trespass claim would be defeated by the defence of necessity, at 194. Denning LJ held that the actions of the tide made the resulting damage consequential and not direct, however inevitable, at 196. This certainly makes *Southport* an ambiguous authority on the issue of inevitability and directness, but I shall proceed on the basis of Denning LJ's judgements here and the ultimate conclusion of the court, before returning to Morris LJ later, and the implications of his Lordship's judgement for any proposed test.

31 [1947] VLR 131 ('*Hutchins*').

32 *Ibid* 134 (Herring CJ).

33 *Ibid*.

34 It is also opposed to the views of at least one justice in the *Scott* who found trespass due to the 'inevitability' of self-preservation; (1773) 2 Wm Bl 892, 898; 96 ER 525, 528 (Gould J): '[t]he terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act.'

of bringing the dogs onto the land, regardless of the defendant's warnings, which broke the chain. In *Southport*, there was a breach, however inevitable it was, when the tide carried the oil to the plaintiff's land. Without the tide there could have been no liability for the defendants. No doubt the court's decision in that case was informed by the circumstances, of a ship stranded with a heavily laden hull in dangerous waters—the defence of necessity could well have been led, had the defendants not been liable for other torts and statutory offences as well.

It is interesting to note the judgement of Morris LJ in *Southport*, who would have found Esso liable had there been a deliberate use of the tide as an *instrument* to bring about the interference with the plaintiff's land.³⁵ His Honour refers to the authority of *Jones v Llanrwst Urban Council*,³⁶ to conclude that '[t]here may be trespass if something is thrown on land or if the force of the wind or of moving water is employed to cause a thing to go on to land ...'³⁷ The question of 'employing' the tide, or *intentionally* using it to bring about interference, is an interesting one; given the traditional burden on the defendant to disprove intention in trespass cases. To further complicate matters, Morris LJ regards the case as a 'highway case', since it took place at sea, and therefore the reverse burden as to fault applies.³⁸ The suggestion of deliberateness is therefore intended to show that the discharge of oil falls outside what persons holding land adjacent to the sea can be thought to subject themselves to as 'a risk of injury from inevitable danger', since it is not at all inevitable.³⁹ The result of all this is to show how directness, especially in highway cases but also in traditional scenarios, is very much bound up with intention; particularly where the use of an instrument is alleged.

This requires a further reformulation of the test of directness. First, the test requires that the interference be caused so intrinsically or immediately by an act that it can be considered a part of that act; and no other acts constituting an intervening cause have occurred. Acts of self-preservation will not be considered intervening causes. Second, where one party uses an instrument to bring about the interference, it must be by deliberate use of it; such that the result of using the instrument in such a way may be characterised as part of that act. Thus it would appear that in some complex cases of trespass, the plaintiff will have to fulfil a burden of directness which includes examining the intention of the defendant, even though the burden of the intention component itself lies with the defence.

The tendency of directness to inquire into the intention of the defendant in this way has seen UK courts reject the old distinction between highway and non-highway trespass,⁴⁰ and move towards a view that intention is the only distinction between actions for trespass and case.⁴¹ Such a move amounts to a wholesale reform of the

35 [1954] 2 QB 182, 204.

36 [1911] 1 Ch 393.

37 [1954] 2 QB 182, 204.

38 *Ibid*, referring to *Fletcher v Rylands* (1866) LR 1 Ex 286, 286 (Blackburn J).

39 Referring here to the discharge of oil as not inevitable, as opposed to the tide.

40 *Fowler v Lanning* [1959] 1 QB 426, 439 (Diplock J).

41 *Letang v Cooper* [1965] 1 QB 232 ('*Letang*').

torts of trespass and case, and arguably drastically simplifies them both. With directness abolished, the only logical distinction between trespass and case is whether the action was intentional or not. Thus in *Letang v Cooper* the English Court of Appeal held decisively that where an injury is inflicted unintentionally, whether directly or indirectly, the only cause of action is negligence.⁴² The possibility and advantages of adopting such an approach in Australia remains to be discussed.

So far directness has only been discussed as it pertains to battery,⁴³ but in *Hutchins* it was noted that directness as a requirement applies to all forms of trespass.⁴⁴ Yet each of the torts of assault and false imprisonment throw up different challenges to the test as formulated above. I shall consider first directness in the context of assault. Trindade and Cane propose a simple adaptation of the test above to the tort of assault, which asks: 'if the threat was carried out, would D's actions alone have been enough to cause an imminent application of force?'⁴⁵ This form transposes the test into terms of a hypothetical battery, requiring courts to imagine the results if threats in cases of assault were carried into completed actions, and examine the likely consequences.

The case of *Rozsa v Samuels*⁴⁶ supports such an approach. In that case, the appellant taxi driver parked his car at the head of a queue of taxis, which prompted another driver, Drummond, to get out and remonstrate with him. Once Drummond learned that the appellant was not about to move his car, he threatened to punch him, to which the driver replied, while reaching under the dashboard for a knife, 'if you try it I'll cut you to bits'. It was only by Drummond's act of slamming the door on the driver that this case was an assault and not a battery. Putting aside the implications of the decision pertaining to conditional threats, it was held that the appellant had committed assault. Applying Trindade and Cane's test, if the appellant had stepped out of the taxi, his use of the knife alone would most likely have constituted a battery to Drummond, and directness would have been made out; therefore directness for the purpose of assault is likewise established.

Such an approach, however, encounters problems when it is applied to more complex cases. As with directness in battery, it is these 'problem cases' which reveal the arbitrariness of the test. In *Zanker v Vartzokas*⁴⁷ it was held that the

42 Ibid 239 (Lord Denning MR), with whom Danckwerts LJ agreed, at 242. Diplock LJ agreed on the basis that the names, either negligence or unintentional trespass, were irrelevant and that it was factual situations and procedures which were primary to decisions: *ibid* 243.

43 Though the cases drawn as examples have concerned a wide range of trespasses to the person, goods and land.

44 [1947] VLR 131, 133 (Herring CJ).

45 Trindade and Cane, above n 26, 44 and fn 178: '[I]t is submitted that the only threats which can be classified as *direct threats* for the purposes of assault are, first, those threats which by some act alone or by some act coupled by words place the plaintiff in reasonable apprehension of an imminent and direct bodily contact [the same bodily contact required for the tort of battery], and second, those threats by words alone which lead the plaintiff reasonably to apprehend an imminent and direct contact to his or her person by the defendant ...' I have paraphrased the first section of this definition somewhat, though the link between assault and establishing the requirements of a potential battery is shown.

46 [1969] SASR 205 ('*Rozsa*').

47 (1988) 34 A Crim R 11 ('*Zanker*').

actions of the defendant who picked up the complainant in his van, attempted to procure sexual favours and then threatened to take her to his friend's home where he would 'fix her up', constituted an assault capable of supporting statutory assault occasioning actual bodily harm when the complainant jumped from the van and injured herself. Again ignoring the complex details of the case and focussing on the assault in question,⁴⁸ it would appear the test proposed by Trindade and Cane fails to establish directness. For, if the threat *was* carried out, the actions of the defendant alone would *still not* have been enough to cause an imminent application of force; the actions of the friend as well would have been needed. The only possible means of maintaining this test, in light of the decision in *Zanker*, is by positing that a doctrine of 'acting in concert' applied, such that the actions of the friend can be attributed to the defendant for the purposes of directness. This returns us to the familiar problems above, whereby directness requires subjective examination of fault elements which are traditionally a burden to be borne solely by the defendant in trespass cases. Additionally, since the conclusion was reached in the judgement without discussing any such possibility—indeed directness was not discussed at all—it does nothing to alleviate the arbitrariness of the test.

In the alternative, the test could be reformulated to appease both *Rosza* and *Zanker*, to a form which does not require imagining the assaults in question were brought to fruition as batteries; ie 'the defendant's conduct must directly bring about the plaintiff's apprehension of imminent unlawful force'.⁴⁹ This again is problematic, for while it is deceptively simple and straightforward, it avails itself to satisfaction by almost *any* conduct. Given that the foremost concern of the directness test is to limit the ambit of trespass only to interference which results *immediately* from the offending conduct, it is neither desirable nor efficient to have a test which is overly inclusive. The fact that none of the cases considered deal with either of these formulations expressly, but instead seem to apply some sort of inherent directness test, further contributes to the arbitrariness of maintaining such a requirement, particularly in assault cases.

Finally, it remains to consider directness in the context of false imprisonment. In the typical case of false imprisonment, it will be enough to simply ask whether D's actions alone were enough to bring about total restraint. Like *Zanker* above, however, in cases involving multiple parties, such a test runs into problems. In *Dickenson v Waters Ltd*⁵⁰ it was held that, where an arrest was carried out by a police officer at the behest of another, alleging (in that case) theft, it would be open to the court to examine whether the arrest was at the policeperson's discretion or otherwise.⁵¹ Such a distinction was necessitated by evidence that, if left to their own authority, the policeperson would not have arrested the plaintiff and therefore did so at the defendant's request. In the case of *Cubillo v Commonwealth of Australia*⁵² the court went further, when they summarised

48 And ignoring the fact that the court did not explicitly consider directness.

49 Dale Smith, 'The Elements of Assault' (Lecture), Monash University, Clayton, 10 April 2006.

50 (1931) 31 SR NSW 593. ('*Dickenson*').

51 *Ibid* 596 (Ferguson J).

52 (2001) 112 FCR 455.

the findings in *Dickenson and Myer Stores Ltd v Soo*,⁵³ saying '[a] person who is active in promoting and causing the imprisonment is jointly and severally liable with the person who effects the imprisonment, ordinarily because their acts are done in furtherance of a common design'.⁵⁴ This again evinces the confusion that can arise in determining directness, as it seems to require subjective inquiry into the state of mind of defendants beyond the ambit of the requirement, which seeks only to establish if the acts of the defendant entail *immediately* and inherently the interference incurred.

It is easy to pick holes and inconsistencies in the test of directness, however, without acknowledging that it suffers from a rather high deficiency in terms of case law. In many cases, such as *Zanker*, the requirement is simply not referred to, and in others such as *Hutchins*, confusing and inconsistent analogues have to be drawn for this very reason. As alluded to earlier, the response in many jurisdictions, including the United States⁵⁵ and the United Kingdom⁵⁶ has been to allow the directness requirement to fall out of use altogether, or to legislatively remove it. Without a strong body of precedent to support it and with these guiding examples, it is very tempting to hope that the same will occur in Australia.⁵⁷ In the case of *Hackshaw v Shaw*,⁵⁸ Gibbs CJ expressed approval for the view in *Letang*, and in *Platt v Nutt*⁵⁹ Kirby J attempted to 'give preference'⁶⁰ to English developments in the area over *McHale v Watson*.⁶¹ *McHale* is the obvious impediment to adopting such a view in Australia, and until it is overruled by the High Court, the proposition that a plaintiff may sue in both trespass and case for direct but unintentional interferences still stands.

IV IMPEDIMENTS TO ABOLITION

The advantages of abolition need little discussion. As Lord Denning MR indicated in *Letang*,⁶² the confusion above can be simply and conclusively avoided by restricting trespass to only intentional interferences and case to those resulting from negligence. However there are at least two obstacles in Australian law which impede the full and immediate adoption of the English position. First, Australia needs a distinction between trespass and case, since the High Court has insisted on preserving both intentional and negligent trespass.⁶³ If directness were abolished and no alternative distinction was supplied it would require the reversal of decades

53 [1991] 2 VR 597 ('Myer').

54 (2001) 112 FCR 455, 519–20 (Sackville, Weinberg and Hely JJ).

55 See W L Prosser, *Handbook of the Law of Tort* (4th ed, 1971) 30.

56 See *Letang* [1965] 1 QB 232.

57 And some commentators also feel it is very likely: see Gardiner and McGlone, above n 1, 45.

58 (1984) 155 CLR 614, 618–9 ('Hackshaw').

59 (1988) 12 NSWLR 231.

60 *Ibid* 242–3, with whom Clarke and Hope JJA agreed. See Gardiner and McGlone, above n 1, 51.

61 (1964) 111 CLR 384 ('McHale').

62 [1965] 1 QB 232, 240.

63 *Williams v Mlotin* (1957) 97 CLR 465.

of jurisprudence to remove negligent trespass from our tortious landscape. Second, the abolition of directness in the United Kingdom was accompanied by the removal of the old distinction between ‘highway’ and ‘non-highway’ trespass and the corresponding ‘illogical’⁶⁴ difference in the onus of proof as to fault.⁶⁵ Australian courts have proven equally reticent to follow this move, which seems to be inextricably linked to the abolition of directness.⁶⁶

In *Williams v Milotin*⁶⁷ the High Court was presented with an ideal opportunity to reconsider the applicability of trespass and case where direct but unintentional interference was alleged. Instead the Court confirmed that both causes of action were available:

[A]s only the negligence of the defendant is relied upon, while the cause of action might have been laid as trespass to the person, the action might also have been brought as an action on the case to recover special or particular damage caused by the defendant’s negligence.⁶⁸

Additionally, the Court recognised that in the case where both causes of action were available the plaintiff was entitled to choose between them,⁶⁹ but it would be for the court to determine, applying the distinguishing features of trespass and case, which applied to the facts at hand.⁷⁰ This approach was confirmed in *McHale* and, despite minority disapproval in a handful of cases,⁷¹ has not been overturned. Until it is, negligent trespass and directness will remain a part of Australian law.

A further impediment, or perhaps complication, is that the English abolition of directness was accompanied by a simplification of the onus of proof as to fault in trespass cases. In *Fowler v Lanning*⁷² Diplock LJ rejected the old distinction between ‘highway’ and ‘non-highway’ cases, holding that in both the burden lay upon the plaintiff to establish the defendant’s fault. In Australia, however, a stricter reading of the principle in *Weaver v Ward*⁷³—requiring that ‘[no] man shall be excused of a trespass except it be adjudged utterly without his fault’⁷⁴—has been upheld. In ‘off highway’ cases the defendant therefore bears the burden of disproving fault. It is not within the scope of this article to fully explore the anomalies of this inconsistent approach to fault in the trespass context.⁷⁵ Suffice

64 David Baker, Sam Blay, Lillian Corbin and Andy Gibson, *Torts Law in Principle* (3rd ed, 2002) Chapter 3.

65 *Fowler v Lanning* [1959] 1 QB 426.

66 See above n 40 and accompanying text.

67 (1957) 97 CLR 465.

68 *Ibid* 470.

69 *Ibid* 474.

70 *Ibid*; the Court referred to the ‘essential ingredients in an action’ such as ‘special or particular damage ... and the want of due care’ in the case of negligence.

71 See above n 58–60 and accompanying text.

72 [1959] 1 QB 426, 428.

73 (1616) Hob 134; 80 ER 284.

74 *McHale* (1964) 111 CLR 384, 388 (citation omitted).

75 See Baker et al, above n 64, Chapter 3.

to say, it highlights the vast gap which has opened up between Australia's and England's approaches to trespass and case, and for that reason, presents a further impediment to the abolition of directness.

V ALTERNATIVES FOR DIRECTNESS OTHER THAN ABOLITION

The alternative to abolition is the possibility of reform. To consider the possibility of reformulating the test of directness into a more concrete, predictable and useable form, I shall attempt to isolate the criticisms and problems identified above into two distinct categories. First, the test has problems dealing with intervening or contributory *causes*, such as the tide in *Southport*. Second, the test encounters difficulty attempting to deal with intervening or contributory *acts*, such as those in *Zanker* or *Dickenson*. From the outset I shall point out that these distinctions are academic only, designed to serve as a thematic guide for what is to follow; they are supported nowhere in commentary or cases.

By intervening or contributory *causes*, I am referring to inevitable and reasonably foreseeable events such as the forces of wind, tide or gravity,⁷⁶ the behaviour of a mad ox when set loose in a crowd,⁷⁷ dogs when meat is thrown to them,⁷⁸ or the actions of persons who are acting in self-preservation;⁷⁹ but not discretionary occurrences such as police under order.⁸⁰ Let us assume that all of these are reasonably foreseeable, and that occurrences which are not foreseeable or inevitable, such as a freak tidal wave or gust of wind, are excluded. I would argue all of the above ought to be considered as *instruments*—just as a baseball bat or a gun have been considered instruments in trespass to the person—not capable of breaching directness simply by use of them by a defendant. Considered such, when used by competent and reasonable persons, these instruments should all be subject to a 'presumption of deliberate and intentional use' whenever they are concerned in a tortious situation. Rather than inquiring into deliberateness, directness could presume the use of instruments subject to the defences already a part of trespass to persons.

Thus in *Southport*, the presumption would operate such that D would be liable until exculpated by a defence, such as necessity or inevitable accident. In *Hutchins* the same could be said of the theoretical scenario where D throws the meat directly to the dogs. The dogs' hunger is being used as an instrument to damage the plaintiff's property⁸¹ and D is presumed to have known and intended this; therefore, unless a defence can be raised D is liable. This solution not only dramatically simplifies directness, and enhances its predictability, but also has none of the unintended

76 See *Trindade and Cane*, above n 26, 111.

77 See *Scott* (1773) 2 Wm Bl 892, 894; 96 ER 525, 526 (Nares J).

78 See *Hutchins* [1947] VLR 131.

79 See *Scott* (1773) 2 Wm Bl 892; 96 ER 525.

80 See *Dickenson* (1931) 31 SR NSW 593.

81 To the extent that they will certainly and inevitably eat the poisoned meat.

consequences that the current approach of inconsistency has yielded. For since the burden of disproving the fault element already lies with the defendant in Australian ‘off highway’ cases, the defence most frequently raised in ‘instrument cases’ would be that which, arguably, would have been raised anyway: inevitable accident.

In the alternative, where an intervening or contributory event is neither inevitable nor reasonably foreseeable,⁸² but is an *additional act* by another individual, I would argue that the solution is already inherent in the test of directness. The acts of individuals can contribute to or vitiate directness in one of three ways: (1) a third party or the plaintiff may commit a *novus actus interveniens*, which exculpates the defendant from liability and is the true direct cause of the interference; (2) a third party may be acting in concert with the defendant, in which case they are both jointly and severally liable for any interference; or, (3) a third party may act as an agent of the defendant, such that the defendant alone is liable for their conduct.

Hutchins is an example of the first; there the plaintiff was warned of the presence of poisoned meat but nonetheless took his dogs onto the land, and it was held accordingly that the defendant was not liable. To use the language of negligence, the plaintiff voluntarily assumed the risk that the defendant might be telling the truth, and as such, must be considered solely responsible for the interference suffered. *Zanker* and *Myer* are examples of defendants acting in concert. In *Zanker*, it was only by the threat of imminent force being applied by a third party that the defendant was held liable; in *Myer* it was the false imprisonment of a store detective acting for Myer which gave rise to the interference. In both cases the courts, either implicitly or explicitly, found the parties to have been acting in concert. Acting in concert is distinct from cases of agency, however, since in the latter there is not a common purpose present. Rather, the agent has no purpose of their own and acts under the instruction of their principal. In *Dickenson* the policeman testified that he would not have arrested the plaintiff had he not been ordered by the defendant to do so;⁸³ thus liability should rest with principals alone in such cases.

With the modifications proposed above in mind, I would argue that the test of directness could be simplified somewhat. It would give rise to fewer inconsistencies, but the problem at the core of the test remains: its arbitrariness. In so many cases, directness is simply not discussed, it is ‘presumed’ or ‘obvious’, and is not argued. When it is discussed, it is in complex and ambiguous circumstances, and inevitably the decision reached is based more on common sense and intuition than on established and predictable principles of law; simply because there are none. There is no substitute for an established body of law, and in the case of directness, without England or the United States, Australia faces the decision to either struggle on alone or follow suit.

82 At least in the sense identified above, because arguably the acts of police under order detaining a suspect and committing false imprisonment are entirely predictable and inevitable, given that they were told to do so.

83 (1931) 31 SR NSW 593, 596 (Ferguson J).

VI CONCLUSION

There is every reason to believe, as many commentators do,⁸⁴ that the Australian High Court is only one case away from following the English authority of *Letang* and relegating directness to the jurisprudential waste-paper basket. In *Northern Territory of Australia v Mengel*,⁸⁵ all five sitting members of the High Court agreed that the chief distinction between trespass and case was 'either the intentional or the negligent infliction of harm';⁸⁶ confirming the English approach, but declining to formally remove directness. In this respect, due to the lack of a clear reconciliation of authorities, directness is not only an arbitrary test but also an impediment to precedent being fully adopted. For despite the ruling in *Mengel*,⁸⁷ so long as directness exists, it will continue to demand the attention of judges in inferior jurisdictions, particularly in 'problem cases'. This duality in Australian law takes the advancements of English law up until 1891,⁸⁸ but does not acknowledge or accept the full benefit of the developments occurring after then. Despite this, however, the option of reform over abolition has some appeal, as the full ramifications of overturning *McHale* would be far greater than simply removing directness; it would require a wholesale reorganisation of trespass and case. The unwillingness of the current High Court to go down such a route, inasmuch as it requires reversing a case which forms the cornerstone of modern tort law, provides the impetus for articles such as this, and compounds the need for comprehensive restatements of the test of directness.

84 See Gardiner and McGlone, above n 1, 45.

85 (1995) 185 CLR 307 (*'Mengel'*).

86 Ibid 341 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

87 Which principally related to the issue of unlawful conduct inevitably causing harm to the plaintiff and misfeasance in public office; see Graham Hiley QC and Alan Lindsay, 'Tort Liability Clarified: *Northern Territory of Australia v Mengel*' (1995) 18 *University of Queensland Law Journal* 334.

88 See Gardiner and McGlone, above n 1, 49.