20. Trespass to Land

“As I went walking I saw a sign there
And on the sign it said ‘No Trespassing.’
But on the other side it didn’t say nothing,
That side was made for you and me.”

– Woody Guthrie, “This Land is Your Land,” 1944

Introduction

Trespass to land is one of the most ancient torts – and one of the most basic. It’s also fundamental. It sits at the root of our capitalist economy. While we might be able to imagine a world without the torts of assault or intentional infliction of emotional distress, it is hard to imagine American society without a private right to take others to court for coming and going as they please on your land.

Just because trespass to land is old, and just because respect for private property is thoroughly ingrained in our culture, do not make the mistake of thinking trespass to land has little relevance to modern practice. Unauthorized incursions on land happen all the time. And trespass to land is a powerful tort, working against seemingly blameless defendants in ways that would make negligence doctrine blanch.

Consent is, of course, a defense. Many if not most trespass-to-land cases involve a consent defense and a question of whether the consent was exceeded.

The Elements of Trespass to Land

The pleading requirements for the tort of trespass to land can be summed up as follows:

A plaintiff can establish a prima facie case for trespass to land by showing: the defendant (1) intentionally (2) caused an intrusion, either by entry onto or failure to leave or remove from, (3) plaintiff’s real property.
Trespass to Land: Plaintiff's Real Property

Instead of taking the elements in order, as we’ve done with other torts, it is necessary to talk first about the last element – what constitutes the plaintiff’s real property. Understanding this is a prerequisite to understanding anything else about the tort.

To begin with, it is important to understand that the plaintiff does not need to be the owner of the land in question. The plaintiff needs only be the possessor of the land. A couple renting a house can sue for trespass to land, even though they only have a lease and no title. In fact, the landlord of leased property might not have standing to sue for trespass – at least where there is no damage to the landlord’s interest.

Moreover, you need to think of the word “land” broadly. What we are talking about here is not soil, but realty, or real property. Real property is the land and everything affixed to it, including improvements, buildings, and all fixtures. Because real property can be divided vertically as well as horizontally, an individual apartment on an upper story can be “land” for the purposes of trespass to land. As an example, imagine a multi-story warehouse converted into full-floor loft apartments. Suppose Jackie is the tenant-lessee of the third-floor loft, and Dominga is the tenant of the fourth-floor loft. If Jackie ventures up to the fourth-floor loft without Dominga’s permission, Jackie has committed a trespass, even though her GPS coordinates have never taken her outside the latitudes and longitudes of her own apartment.

Assuming it’s not divided up vertically (as with a multi-story building), the property interest in a plot of land extends down into the subsurface of the Earth and upward into the sky. Thus, an undivided square lot defines a 3-D real property interest having the shape of an inverted four-sided pyramid, with the point at the center of the Earth, and the outward sloping sides extending into the heavens. If some good-hearted kids are playing a game of catch with a baseball, and if they throw the ball over a corner of the lot of a neighbor, they are liable to that neighbor for trespass to land – that is assuming there was no implied license for the to use the neighbor’s
airspace in this way. (And further assuming the neighbor is cranky enough to sue.)

**Trespass to Land: Intent**

You may find that the intent requirement for trespass to land is unintuitive. So you’ll have to pay careful attention to the doctrine here.

As with the other intentional torts the intent required is the intent to act with the purpose or with the substantial certainty of bringing about some consequence. But that consequence is quite different from other intentional torts. The intent for trespass to land needs only to be to cause the movement that intrudes on the plaintiff’s land. Put another way, there does not need to be an intent to trespass, just an intent to effect the action that constitutes the trespass.

Let’s consider an example: Suppose the defendant intends to place a small wire-and-plastic marking flag in the defendant’s own ground. But, because of the defendant’s innocent misunderstanding of property boundaries, the piece of ground into which the defendant plants the flag happens to be on the plaintiff’s property. That’s a trespass to land. The intent requirement is satisfied. It does not matter that the defendant was mistaken. Further, it does not matter if the defendant is non-negligent in entering the plaintiff’s land. In fact, the defendant could have consulted all the documents in the county hall of records and used state-of-the-art GPS to map out a route. All that is required for intent is that the defendant intended to place the object where it was actually placed. If that happens to be a corner of land belonging to the plaintiff, then the defendant has committed trespass to land.

It is helpful to contrast this with the intent required for battery. Unless some doctrine of transferred intent applied, the intent required for battery is the intent to effect a battery. If the defendant intends to kick a box – but does not know a small child is inside, there is no battery. But if the defendant intends to kick a fencepost – not knowing that the fence post is on someone else’s land – then the defendant is liable for trespass to land. The defendant does not have
to intend to trespass, just intend the action that constitutes the trespass.

The intent required for trespass to land is a low bar. But it’s not non-existent. Even under the doctrine’s expansive view of intent, not every entry will actionable. Suppose the defendant is pushed by someone else on to the plaintiff’s land. There’s no intent for a trespass action. Similarly, suppose the defendant stumbles and falls onto the plaintiff’s land. There is no trespass to land here either, since the defendant did not intent the action that constitute the trespass. Or let’s try a tweaked version of our hypothetical of kids playing catch with a baseball. Suppose the kids are trying to come as close as possible without invading the defendant’s airspace. Unless their aim was bad enough that they were substantially certain they would miss and pierce the invisible plane of the property boundary, then there is no intent sufficient for a trespass-to-land action.

Finally, we need to note the applicability of the transferred intent doctrine. Under the older, more traditional view of transferred intent, trespass to land is eligible for the application of transferred intent doctrine among the torts of battery, assault, false imprisonment, and trespass to chattels.

**Trespass to Land: Entry**

An actionable entry on land may be made by the defendant personally. Alternatively, the defendant can be liable by inducing a third person to enter or by causing an object to enter.

According to some authorities, entry can be accomplished even by minute particles. In *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959), a farmer sued over an aluminum plant whose fluoride particulate emissions caused his land to be unfit for raising cattle. The court upheld the cause of action, writing:

> If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another’s land we prefer to emphasize the object’s energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the
possessor’s protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

An “entry” does not need to be a transit of the border of the plaintiff’s property. Suppose the defendant is on the plaintiff’s property with the plaintiff’s permission. There is no trespass to land at this point. However, the defendant could accomplish a trespass by interacting with the land or fixtures in a way that is beyond the scope of that permission. Sneaking into a party host’s off-limits bathroom to rummage through the medicine cabinet is an example. Or even in the great room, where the defendant is authorized to be, a trespass could be accomplished by jumping on to a table and swinging from the chandelier.

**Trespass to Land: Failure to Leave or Remove**

The trespass need not be an affirmative act. It can be an omission as well. A guest who refuses to leave when asked commits a trespass by remaining. And some friends who have parked a boat in your driveway commit a trespass if, once their welcome is worn out, they do not return to drive the boat trailer away.

**Trespass to Land: Damages and Scope of Recovery**

If the trespasser does no damage, the plaintiff can still recover nominal damages. If the trespasser does cause damage – personal injury, property damage, or even mental distress – the plaintiff can recover compensatory damages on that basis.

The scope of recoverable damages in a trespass to land case can be breathtaking. Any damages caused by the trespasser – even if highly unpredictable and even if the trespasser was exercising due care – can be recovered. This is quite extraordinary when compared to the negligence cause of action. In negligence, the requirement of a breach of the duty of care and the application of proximate causation doctrine would foreclose many damages claims that are perfectly viable in a trespass-to-land case.
Suppose an innocent trespasser – with a reasonable belief she or he is not trespassing – consistently undertakes every reasonable precaution while on the plaintiff's land, but nonetheless causes some damage in an utterly unforeseeable manner. The trespass-to-land tort can be used to make the defendant liable for the full extent of the damage. An example is Cleveland Park Club v. Perry, 165 A.2d 485 (D.C. App. 1960), in which a nine-year-old, frolicking in the club's pool, raised a metal drain cover and inserted a tennis ball. When the boy came back to get his ball, it had vanished. It turns out the ball was sucked into the pool's drain, where it lodged in a critical place. The pool had to be closed down for extensive repairs. Club management was not amused, and it sued for the cost of the repairs. Handing a victory to the club, the court noted that under negligence, the child's age would be a mitigating factor, since a minor's age adjusts the standard of care in the child's favor. But no such amelioration was available with the trespass-to-land action: “[S]ince recovery under [trespass to land] is based on force and resultant damage regardless of the intent to injure, a child of the most tender years is absolutely liable to the full extent of the injuries inflicted.”

Reading: Trespass by Airplane

As you have probably gathered by now, trespass to land is a doctrine that is both powerful and inflexible. With roots going back many centuries, it anticipated little about our modern world. The following law review article from long ago shows how legal doctrine can be put under pressure by unanticipated new technologies – in this case, the airplane. Published in 1919, this article came out 16 years after the first Wright Brothers flight. It was also in the immediate aftermath of World War I, which spurred colossal advances in aviation technology.

Trespass by Airplane

Harvard Law Review
March 1919

32 HARV. L. REV. 569.

NOTE:
The rapid approach of the airplane as an instrumentality of commerce presents the occasion for defining more precisely the doctrine of the ownership of the air space, as embodied in Coke's maxim, cujus est solum, ejus usque ad coelum. Examining first the cases which involve interferences with the column of air by encroachments from adjoining lands, we find that not only is the subjacent landowner permitted to cut away as nuisances overhanging shrubbery and projecting cornices, but in some states he may resort to an action in ejectment. That the encroaching landowner is liable also for all foreseeable damage is settled; but whether there is a cause of action for the mere entry into the air space resulting in no real injury is not so clear. In England there are, in addition to conflicting dicta on the exact case of a balloon, irreconcilable statements concerning the encroachment cases. *Fay v. Prentice*, 1 C. B. 828 (1845) (damage presumed); *Smith v. Giddy*, [1904] 2 K. B. 448, 451 (if no damage, the plaintiff’s only right is to cut back trees). *Cf. Ellis v. Loftus Iron Co.*, 10 C. P. 10 (1874) (trespass for a horse thrusting his head over a fence); *Clifton v. Bury*, 4 T. L. R. 8 (1887) (firing bullets over land not a technical trespass).” In this country, however, actual damage from the encroachment does not seem to be requisite for a cause of action. *Smith v. Smith*, 110 Mass. 302 (1872) (projecting eaves are “a wrongful occupation of the plaintiff’s land for which he may maintain an action in trespass”); *Hannabulson v. Sessions*, 116 Iowa, 457, 90 N. W. 93 (1902) (leaning on a fence so that an arm extends over is a trespass); *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 491, 79 N. E. 716 (1906) (“the law regards the empty space as if it were a solid inseparable from the soil and protects it from hostile occupation accordingly.”) The owner has “the right to the exclusive possession of that space which is not personal property but a part of the land”).” The air space, at least near the ground, is almost as inviolable as the soil itself.

On the reasoning of these cases, the aviator would be held a wrongdoer and, therefore, would be liable for all foreseeable damage to the land. *Cf. Guille v. Swan*, 19 Johns. (N. Y.) 381 (1822) (descending balloonist liable for trespasses by a crowd that gathered to aid him).” This financial responsibility for all
the natural consequences of the flight over the land, regardless
of the care exercised, may prove so great a burden that it will
retard considerably the flow of capital into the airplane service
and hamper materially its development. Yet states adopting the
doctrine of absolute liability in the conduct of dangerous
undertakings might impose that burden at any rate on the
aviator. Massachusetts, however, has already provided against
such a difficulty by enacting that there be liability only for failure
to take every reasonable precaution; and the statute is probably
constitutional. The consequences of the trespass, other than
liability for actual damage, need concern the aviator but little. A
litigious owner will find it expensive seeking nominal damages,
especially where statutes make costs at law discretionary.
Further, he will be an ingenious landowner who can keep the
trespassing airplane off without seriously endangering the
aviator’s life; whatever means he employs will be far from
reasonable. Then, too, there will be practically no basis for an
injunction to prevent the repeated trespasses, since the sum total
of the damage would be nominal and the danger of an
easement’s arising the slightest, when we consider the difficulty
of establishing twenty years’ adverse user of a particular lane at a
fixed height as well as within a certain width.

If we rigorously apply Coke’s maxim, the result is that the law
will frown upon the aviator, but unless he causes actual damage
it will connive at the formal wrong. This branding of the
inoffensive aviator as a tortfeasor, even if only in form, may be
an embarrassing annoyance to one who acclaims the elasticity of
the common law. Fortunately there are no binding decisions
which stamp the aviator a trespasser; and of the cases adopting
Coke’s maxim unqualifiedly it may be said that the particular
situation of a passage by an airplane was not considered. They
have, then, only an inferential bearing on our problem, so that
the courts may feel free to invoke general principles and
practical considerations in balancing the interest of the aviator in
the unrestrained development of a beneficial enterprise and that
of the landowner in the free use of his superincumbent air
space.
During the past decade foresighted lawyers have been discussing the problem, and several have ventured a theory upon which the balance should be struck. It has been suggested that although, according to the maxim, the landowner does own the air space up to the heavens, there is also a right of public passage, as long as the enjoyment of the land-owner is not interrupted; a situation similar to the right of passage over navigable rivers privately owned. The similarity, however, is slightly incomplete, for on rivers it is the navigator who is not to be interfered with by the bed-owner; here, the owner is to be left undisturbed.

Another theory construes Coke’s maxim as securing to the landowner only a right of user, and maintains that the aviator is within the circle of law-abiding citizens, until he causes actual damage. This doctrine, however, imposes absolute liability for any interference with the landowner’s use.

A third doctrine asserts that “the scope of possible trespass is limited by that of effective possession,” just as possession is at the basis of proprietary rights in land, so is it the basis of any proprietary right in the air space. The passage at a high altitude is, then, not a trespass. But there is liability for all interferences with the air effectively possessed.

Although the flight of an airplane will very likely not be held a tort, the common law seems to afford no basis for holding the aviator liable only for negligence. If the burden of absolute liability for injuries to the land tends to check the growth of the airplane industry, we must look to the legislatures for relief. It is to be observed, however, that a duty of due care under the circumstances surrounding travel by airplane is practically as burdensome as absolute liability.

**Case: Boring v. Google**

Having gotten some historical context with the legal quandaries presented by the new-fangled aeroplane, we now go back to the future, where roaming dot-com camera cars come up against private property rights.
Boring v. Google Inc.

United States Court of Appeals for the Third Circuit
January 25, 2010

AARON C. BORING; CHRISTINE BORING, husband and wife respectively, Appellants, v. GOOGLE INC. No. 09-2350.

Before: RENDELL and JORDAN, Circuit Judges, and PADOVA, Senior District Judge. Marked as “NOT PRECEDENTIAL.”

Circuit Judge KENT A. JORDAN:

Aaron C. Boring and Christine Boring appeal from an order of the United States District Court for the Western District of Pennsylvania dismissing their complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, we affirm in part and reverse in part.

On April 2, 2008, the Borings commenced an action in the Court of Common Pleas of Allegheny County, Pennsylvania against Google, Inc., asserting claims for invasion of privacy, trespass, injunctive relief, negligence, and conversion. The Borings sought compensatory, incidental, and consequential damages in excess of $25,000 for each claim, plus punitive damages and attorney’s fees.

The Borings’ claims arise from Google’s “Street View” program, a feature on Google Maps that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street. According to Google, “[t]he scope of Street View is public roads.” Google allows individuals to report and request the removal of inappropriate images that they find on Street View.

The Borings, who live on a private road in Pittsburgh, discovered that Google had taken “colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy
waiver or authorization.” They allege that their road is clearly marked with a “Private Road, No Trespassing” sign, and they contend that, in driving up their road to take photographs for Street View and in making those photographs available to the public, Google “disregarded [their] privacy interest.”

On May 21, 2008, Google invoked diversity jurisdiction, removed the action to the United States District Court for the Western District of Pennsylvania, and filed a motion to dismiss.

On February 17, 2009, the District Court granted Google’s motion to dismiss as to all of the Borings’ claims. In dismissing the trespass claim, the Court held that “the Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass.”

The Borings filed a timely notice of appeal from both the District Court’s order granting the motion to dismiss and the subsequent denial of their motion for reconsideration.

The District Court dismissed the Borings’ trespass claim, holding that trespass was not the proximate cause of any compensatory damages sought in the complaint and that, while nominal damages are generally available in a trespass claim, the Borings did not seek nominal damages in their complaint. While the District Court’s evident skepticism about the claim may be understandable, its decision to dismiss it under Rule 12(b)(6) was erroneous.

Trespass is a strict liability tort, “both exceptionally simple and exceptionally rigorous.” Prosser on Torts at 63 (West, 4th ed. 1971). Under Pennsylvania law, it is defined as an “unprivileged, intentional intrusion upon land in possession of another.” Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing Kopka v. Bell Tel. Co., 91 A.2d 232, 235 (Pa. 1952)). Though claiming not to have done so, it appears that the District Court effectively made damages an element of the claim, and that is problematic, since “[o]ne who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land
causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest.” RESTATEMENT (SECOND) TORTS § 163.

Here, the Borings have alleged that Google entered upon their property without permission. If proven, that is a trespass, pure and simple. There is no requirement in Pennsylvania law that damages be pled, either nominal or consequential. It was thus improper for the District Court to dismiss the trespass claim for failure to state a claim. Of course, it may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day. For now, it is enough to note that they “bear the burden of proving that the trespass was the legal cause, i.e., a substantial factor in bringing about actual harm or damage” C&K Coal Co. v. United Mine Workers of Am., 537 F. Supp. 480, 511 (W.D. Pa. 1982), if they want more than a dollar.

We reverse with respect to the trespass claim, and remand with instructions that the District Court permit that claim to go forward.

**Historical Note About Boring v. Google**

On remand, Google accepted a consent judgment whereby they agreed to pay $1. As part of the deal, Google admitted that it trespassed. While that might sound like a loss for Google, the company claimed victory. In a statement, Google said, “We are pleased that this lawsuit has finally ended with plaintiffs’ acknowledgment that they are entitled to only $1.”

The Borings issued their own statement, saying, “This is one sweet dollar of vindication. Google could have just sent us an apology letter in the very beginning, but chose to try to prove they had a legal right to be on our land. We are glad they finally gave up.”

**Questions to Ponder About Boring v. Google**

A. Who won? Can either side really call this a win? Can both?
B. Did the strictness of trespass to land and the availability of nominal damages serve their purpose in this case?

C. Do you think Google is likely to change any of their practices because of this litigation and its outcome?

D. New technologies are often fraught with potential legal liabilities. At one time, it was an open question as to whether a search engine like Google would violate copyright by caching copies of websites and linking to them with a snippet of representative text. Instead of seeking permission from relevant parties or lobbying for a change in the law, many technology companies follow an unwritten motto of, “Innovate first, beg for forgiveness later.” Did that work here? What do you think would have happened if, prior to launching its Street View service, Google had lobbied Congress for a statute specifically providing for the service’s lawfulness? What if Google had sent letters out to municipalities and residents letting them know that the Street View imaging vehicle was coming, and asking them to flag potential issues for them?

E. Do you think the last name of the plaintiffs in this action matters at all? When this case surfaced in the media, poking fun at the name Boring was one of the first things that pundits and bloggers did. Could it have an effect on the margins of how one frames the case mentally before getting into the facts – at least among the news-browsing public, if not the courts?

F. Cases usually become known by the names of the first listed plaintiff and the first listed defendant. Suppose Aaron and Christine Boring had different last names – say one was Davis and the other was Boring. If you were their attorney, whose name would you list first in the caption? Consider the other side of the caption as well: Suppose you were suing Google Inc. and a subsidiary named Map Data Services LLC. Which defendant would you want to list first?

Problem: Champagne Whooshes

Suppose you are an attorney for the Wang family, which owns a spacious ranch in the high desert of the Southwest. Lately, hot-air ballooning has become a major tourist attraction in the area, with
romantic champagne breakfasts being a particular favorite. But they are becoming a major pain for the Wangs.

Hot-air balloons cannot be directly steered in any direction. The only control the pilot has is whether to ascend or descend by firing the propane burner or pulling a cord that lets hot air out the top. The unsteerability of the balloons is a particular problem for the Wangs. The prevailing winds and the happenstance of some hilly topography conspires to lead balloons right over the Wang’s ranch house several days a week.

On a typical morning, when the Wangs are still fast asleep, and as the first rays of dawn are gently kissing the high desert sagebrush, a balloon will glide in absolute silence until it comes within 20 or 30 feet of the Wangs’ bedroom patio, and RFRFRFRRFRPPPPHHHHT!! The sudden roar of the propane burner has the Wangs bolting straight up in bed – disoriented with racing hearts. Sometimes the Wangs are lucky and the balloons pass over at a higher altitude – maybe 100 feet. But even at that distance, the whoosh of the burning gas still can wake up the baby and terrorize the two-year-old. On the other hand, some balloons have been even lower – close enough to the ground that a standing person could touch the basket. On one occasion, a balloon touched the ground lightly before bouncing back into the air.

1. What do you recommend the Wangs do about their problem? Do they have a viable lawsuit against anyone?

2. Suppose Air Adventures, Buoyant Breakfasts, and Champagne Celebrations are the three companies that operate balloon charters that frequently end up over the Wangs’ house. Imagine that Buoyant Breakfasts offers to stop flying Mondays through Wednesday and to pay the Wangs a token license fee for all other days. What should the Wangs do with the offer?