

# TRESPASS TO PRIVATE LAND – PART II

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This is the second in a series of articles about access to deeded land. In the previous column, we looked at the Trespass Act. In this column, we will look at the wrong (“tort”) of trespass, and compare it with the wrong (“offence”) created by the Trespass Act.

Trespass is a civil wrong, or tort. It means any direct and forcible injury to persons, chattels or land. Here we are using it in the sense of an injury or interference with the right to possess land.

## **What Sort of Acts Constitute Trespass?**

For success in a trespass claim, the act of trespass must be voluntary – but it need not be intentional. Trespass may be committed either intentionally or negligently. If a trespasser does not know that the land he or she is on is deeded land, but with inquiry can find out, the trespass is negligent.

Trespass requires some form of physical entry onto or contact with the claimant’s (plaintiff’s) land. That entry could be the defendant going onto the plaintiff’s land, or putting or throwing an object or a third person onto the plaintiff’s land, or discharging some substance onto the plaintiff’s land.

A trespass can also take place by failing to leave another’s property after permission to enter has been first given, then revoked or ended; or after the purpose for which permission to enter was given, has ended. For example, a movie patron who stays on in the theatre after his movie ends, is in trespass.

The wrongful entry or trespass may be on, under or over the plaintiff’s land. A claim for trespass over land would be for some sort of permanent structure affecting the plaintiff’s actual or potential use or enjoyment of his or her land.

As an interesting side-note, a 1991 B.C. Supreme Court case decided that where there is a tree on the boundary line between adjoining owners, it is the common property of both owners. One owner can sue the other in trespass where the other has cut and destroyed the tree without the consent of the first owner. In *Anderson v. Skender*, one property owner cut down one of two trunks of a tree and damaged half of the root system. The adjacent owner succeeded in a trespass action against him.

One can succeed in a trespass action without proving that any damage occurred.

## **Trespass Involves an Interference with Possession**

The plaintiff has to prove that he is in possession of the land at the time of the trespass. The decided cases say that possession must have “an element of publicity”. If one owns land which

is vacant, unenclosed and uncultivated, like unenclosed grazing land, grazing livestock on it may be enough to demonstrate possession. The adequacy of an act of possession is decided on the facts of each individual situation. Posting "No Trespass" signs is an unequivocal act of possession. It is likely that an act of possession short of posting the land will also suffice.

An owner or other person with an interest in land that includes a right of exclusive possession, such as a tenant under a lease, can make a trespass claim. Someone with a licence, a non-exclusive interest in land, like a person who has the use of a hotel room for a night, cannot make a trespass claim.

### **Defending a Trespass Claim**

In a trial of a trespass claim, once the plaintiff shows that the defendant has trespassed, it is up to the defendant to show that his interference took place without negligence or intent.

The only intention required is that the defendant intended to enter on the land in question. Where the defendant has done so, it is not a defence to show that he entered the land with a mistaken belief that it was his or that he had a right of entry over it.

Of course a defendant is not a trespasser if he enters the land with the permission of the owner/possessor. Consent can be express or implied.

One can legally enter another's land when reasonably necessary to preserve the property which is being entered, or to preserve life. If the owner knows of the danger and decided to do nothing about it, one should not second-guess him. It is the defendant's responsibility to show that his entry was legally justifiable.

### **Financial Compensation (Damages)**

Where one sues for trespass without proving that damage has occurred, only nominal compensation or damages will be awarded. This is especially so where the trespass was technical, unintentional, reasonably likely to be legal, or undertaken to avoid danger to someone or something.

Where damage to land has occurred, the proper amount of compensation is the amount by which the value of the land has been reduced by the trespass. It may be equal to the cost of repair, but figuring out the cost of repair alone is not the correct way to calculate damages for trespass.

Damages may include the value of lost profits where there is a trespass to land used in a business.

### **Punitive or Exemplary Damages**

Where the defendant's actions were fraudulent, willful or so wholly disrespectful of the property owner's rights as to be an affront to the reasonable person, the court can award punitive damages. The cases talk about "wanton and defiant conduct and insults", "action going beyond inadvertence, mistake, oversight, or misunderstanding", "arrogance and unconcern", "acting

callously". Punitive damages can be significant compared with the usual amount of damages available in a case of trespass.

Nominal damages could be as little as one dollar. Compensatory damages will reflect the actual loss in value of the land as proved by the plaintiff. Punitive damages can be \$1,000; \$5,000 or in one case \$25,000—a figure that in the mind of the judge is a sufficient punishment for the callousness of the trespasser.

Punitive or exemplary damages are often claimed and awarded in situations where one land owner cuts down trees on the property of another, having been warned not to do so.

### **Injunctions**

A court may also grant an injunction to order the defendant to stop trespassing, although it will not do so where the injury is small and can be sufficiently compensated with payment of damages. An injunction is more likely where the trespass is continuing or likely to be repeated.

### **Limitation Act (B.C.)**

In British Columbia, an action for trespass to land must be started within two years from the date that the plaintiff can first make his claim.

### **Differences between the Trespass Act and the Tort of Trespass Posting.**

The Trespass Act requires that property be posted according to the Act. The tort of trespass does not require posting, although it does require some act of possession sufficient to alert the trespasser that he might be on land in someone else's exclusive possession or ownership.

Penalty or Remedy. The Trespass Act penalty is a fine or imprisonment imposed by the provincial government through the courts. Any fine is paid to the government. If one sues another in trespass, the remedies available are financial compensation for the damage suffered, and possibly punitive damages and an injunction.

Procedure. The Trespass Act is a criminal-like procedure where the Crown Prosecutors or police pursue the case against a person accused of trespass. An individual claims against another for the tort of trespass by starting a lawsuit, with all its inherent frustrations, delays, formal proof requirements, and cost.

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