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Charles Gromley
University of Kentucky

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TORTS — REMEDY FOR TRESPASS WHERE NO INJURY IS SHOWN

At common law, every unauthorized entry upon another's property was deemed a trespass, the theory being that "the law bounds every man's property, and is his fence."¹ A number of strict rules which marked the common law action of trespass are still evident in our modern law and the severity of them results primarily from the fact that the action had a criminal origin. It was available as a remedy for forcible breaches of the king's peace, and the royal courts were concerned chiefly with punishment of the crime so that when found guilty, the trespasser usually was fined and refusal to pay led to imprisonment. The award of damages to the plaintiff was incidental to the criminal proceeding.²

The criminal character which marked the action at its origin was gradually discarded and as trespass emerged into its modern status, two distinct theories underlying liability were developed. First, by retaining the primary function of its criminal origin, the action continued to be directed at the vindication of the possessor's legal right. Invasion, the unwarranted interference with another's possession, was the basis for liability and the injury was the infringement of the right to exclusive possession. Thus an undamaged plaintiff merely meant one who had suffered no material loss. Second, another basis of liability was added in the field of torts. In this status, trespass came to have a normal use as a tort remedy and material injury, implied by law to result from every trespass, formed the basis of liability. Reference to an undamaged plaintiff merely meant that the harm to his possession was too slight to permit recovery of actual damages, but not so insignificant as to bar nominal relief based on an inference of damage resulting from the trespass. It must be recognized that both theories referred to are clearly "tort" theories; however, for the purpose of making a discernible distinction, it is appropriate to think of the first as a protection of property *rights* theory and the second as a vindication of property *damage* theory.

The majority of American courts have permitted recovery in cases of harmless trespass, but the decisions have failed to distinguish clearly the two functions of the remedy and much confusion has resulted. In *Mahle v. Grerson*,³ the defendants, while hunting, drove across the plaintiff's land without permit but caused no apparent harm to the property. The court held that the injury was so slight that no civil action could be maintained. In contrast, a recent Oregon case⁴ illustrates how far the courts have gone to permit recovery. In this case, the court stated that a person cannot justify a trespass upon another's property by showing that such trespass resulted in benefit to the owner of the property. Such a discrepancy can best be explained by analyzing the theory upon which each decision is based.

A study of the cases involving a trespass from which no pecuniary loss has resulted, indicates that the courts generally have allowed recovery in three types of situations, but these cases fail to indicate whether the theory of liability is based upon an invasion of the plaintiff's possessory interest or upon implied damage. In one group of cases, liability is imposed for the purpose of settling boundary

¹ *Star v. Rookesby*, 91 Eng. Rep. 295 (1711).

² Woodbine, *The Origin of the Action of Trespass*, 33 YALE L. J. 799 (1924), 34 YALE L. J. 343 (1925).

³ 2 WILLSON CIV. CAS. CT. APP., sec. 764 (Texas, 1885).

⁴ *Laurance v. Tucker*, 160 Ore. 474, 85 Pac. 2d 374 (1938).

disputes. *Pfeiffer v. Grossman*⁶ is a good example. In that case the defendant owned a fence which he mistakenly believed was on his property. A survey showed otherwise and the plaintiff was given nominal damages in order to settle the dispute and establish a permanent boundary. Apparently the plaintiff based his action upon the property damage theory rather than upon his right to exclusive possession. The court found no basis for granting actual tort damages but since a judgment favorable to the plaintiff would prevent further litigation and settle the boundary dispute, nominal damages were awarded.⁶ There was no indication that the decision was based on the theory of implied damage issuing from the trespass. Thus it may be presumed that the court established liability on the plaintiff's right to exclusive possession, although such fact was not stated in the opinion. This would seem to be the theory upon which such cases are decided even though the courts look for a policy served by imposing liability rather than setting forth the basic concept upon which recovery is granted.

A second group of cases are those in which the plaintiff is awarded nominal damages so as to prevent the creation of an easement by the running of the statute of limitations, although the defendant is not considered by the court to be at fault and there is no material injury. Such a situation would arise where the defendant drives over a portion of the plaintiff's land repeatedly for a long period of time, which trespassing, if allowed to continue, would result in a right of way by prescription. To prevent such a result and in order to have a record of the judgment, the land owner is given nominal damages. Few cases can be found which present the above situation, probably because such suits are seldom appealed. However, nominal damages have been awarded in a few cases where the defendant is without fault and no reason for permitting recovery is given. Although the opinions do not expressly state that nominal damages are awarded to prevent the defendant from acquiring an easement by prescription, apparently that is the policy served by imposing liability. An example of the type under consideration is *Smith v. New England Aircraft Corp.* where airplanes of the defendants were continually flying at low altitudes over a portion of the plaintiff's land while taking off and landing at a nearby airport. The court held this to be a

⁶ 15 Ill. 53 (1853). *Accord*, *McWilliams v. Morgan*, 75 Ill. 473 (1874); *Fincannon v. Sudderth*, 144 N.C. 587, 57 S.E. 337 (1907); *Bragg v. Laraway*, 65 Vt. 673, 27 Atl. 402 (1893).

⁷ Case is cited as an example of the group under consideration; however it is difficult to actually determine the theory upon which the court granted recovery, the following excerpts from opinion (p. 54) being typical of the confusion found in such cases: "Such acts are a violation of the owner's right of possession, to redress which the law gives him an action. And the action is maintainable, although the owner is not substantially injured. He is entitled to nominal damages for the intrusion upon his possession."

"The law implies damage to the owner, and in the absence of proof as to the extent of the injury, he is entitled to recover nominal damages."

⁸ 270 Mass. 511, 170 N.E. 385 (1930). *Accord*, *Swetland v. Curtiss Airports Corp.*, 41 F. 2d 929 (N.D. Ohio, 1930); *Anderton v. Watkins*, 122 Me. 346, 120 Atl. 175 (1923) (continued parking of airplane by defendant on plaintiff's land, by mistake, held to constitute trespass); *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328 (1925) (damages allowed for walking along banks of plaintiff's stream, fishing in it, and shooting over plaintiff's land); *Kraus v. Birnbaum*, 200 N.Y. 130, 93 N.E. 474 (1910); *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 79 N.E. 716 (1906) (erection of telephone lines overhanging plaintiff's land at height of thirty feet held to constitute trespass); *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935).

trespass and the plaintiff was given nominal damages. Thus in this group of cases, as in the previous one, liability fundamentally rests upon the right of the plaintiff to exclusive possession rather than upon implied damage.

Another group of cases involves liability based on fault. The motive for permitting recovery in such situations apparently is to discourage and prevent such conduct in the future. In *Keesecker v. G. M. McKelvey Co.*⁸ it was held that one who intentionally and without consent enters land in possession of another "is liable as a trespasser, irrespective of whether harm is thereby caused to any of his legally protected interests." In *Dixon v. Clow*,⁹ where a party had an easement in the land of another (the right to cut a watercourse), it was held that the owner had the right to erect fences across such watercourse and if the other unnecessarily or wantonly removed them he was liable in damage though no actual harm was proved. The North Carolina court in the case of *Dougherty v. Stepp*¹⁰ set out the underlying basis of liability in such cases when it ruled that from every direct entry upon the soil of another, "the law infers some damage; if nothing more, the treading down the grass or the herbage" This is the theory which establishes liability on implied damage. The decisions in this group make no effort to permit recovery for the purpose of vindicating the possessor's legal right to enjoy his property without unwarranted interference. It seems that if the plaintiff brings his action in tort in cases where the trespasser is at fault, the courts adhere strictly to the concept of implied damage.

There is a last group of cases which defies classification. They involve neither a boundary line nor an easement and the courts refuse to impose liability where the defendant is without fault. These are the situations where the plaintiff brings his action in tort and the courts (adhering to the property damage theory alone), being unable to discover a policy upon which to permit recovery, have granted none. In the classic English decision known as the *Thorn Case*¹¹ the defendant, while clipping his hedge, accidentally allowed some of the thorns to fall on the plaintiff's land and relief was granted although no damage was found. The trend of the more recent decisions seems to be away from such a holding. In the *Nitro-glycerine Case*¹² a quantity of dynamite in the defendant's possession exploded and damaged the plaintiff's building. The defendant was without fault and recovery for even actual damages was refused. In the case of *Losee v. Buchanan*¹³ no relief was granted where the defendant's boiler exploded (through no fault of the defendant) and damaged the plaintiff's building. It is such cases as the above which have caused much confusion and uncertainty in the action of trespass. In no way do they explain the fact that there has been an invasion of a

⁸ 64 Ohio App. 29, 27 N.E. 2d 787 (1940). *Accord*, *Harvey v. Mason City & Ft. D. R. Co.*, 129 Iowa 322, 105 N.W. 958 (1906) *semble*; *Hoyt v. Smith*, 187 So. 87 (La., 1939); *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315 (1887); *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263, 19 N.E. 800 (1899); *Moore v. New York El. R. Co.*, 23 N. Y. Supp. 863, 4 Misc. Rep. 132 (1893). *See*, *Lee v. Stewart*, 218 N.C. 287, 10 S.E. 2d 804, 805 (1940).

⁹ 24 Wend. 188 (N.Y., 1840).

¹⁰ 18 N.C. 371 (1835).

¹¹ Anonymous, Y.B. Ed. IV f. 7, pl. 18 (1466).

¹² *Parrott v. Wells Fargo & Co.*, 15 Wall. 524, 21 L. ed. 206 (1872). *Accord*, *Actiesselskabet Ingrid v. Central R. Co. of N.J.*, 216 F. 72 (C.C.A. 2d 1914); *Brown v. Collins*, 53 N.H. 442, 16 Am. Rep. 372 (1873). Notes, 48 HARV. L. REV. 218 (1934), 15 B.U.L. REV. 81 (1935).

¹³ 51 N. Y. 476, 10 Am. Rep. 623 (1873).

possessory interest upon which liability may readily be established. Such decisions indicate that even in certain situations of trespass resulting in actual damage there can be no recovery. These decisions emphasize that in its modern application the property damage theory may well be developing into a "fault" theory but there is no such trend insofar as the theory of unwarranted interference is concerned. It is difficult to understand the reason for refusing a plaintiff nominal damages where the defendant is faultless, yet granting relief on the basis of implied damage where the defendant is at fault. Implied damages are granted on the theory that every direct entry results in some material injury and therefore it would seem that the relative fault of the defendant is irrelevant. Thus, from the standpoint of the property damage theory, nominal damages should be awarded in every action of trespass. Liability can be based upon the invasion of a possessory interest or upon the theory of implied damage, which, if strictly adhered to, applies to all entries with or without fault.

From the foregoing discussion it may be concluded that the plaintiff has two grounds upon which to bring an action for trespass where no material loss has been suffered, and that his choice may determine whether or not he will be awarded nominal damages. If he is seeking actual damages in a tort action, as is usually the case, the plaintiff runs the risk that even nominal damages may be refused where the court finds that the defendant is faultless and that no policy is served by imposing liability. Where, however, the plaintiff chooses to base his action on his right to exclusive possession there is little chance that nominal damages will be refused. Until the courts come to consider the problem under both theories in any given situation, it would seem that the latter approach is the better one.

CHARLES GROMLEY