

Calculating Damages for a Trespass to Land, Actionable Per Se

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Case Commented On: *Corlis v Blue Grass Sod Farms Ltd.*, [2016 ABPC 55 \(CanLII\)](#)

Frank Corlis, the plaintiff in this action, was awarded the precise sum of \$5,500.80 in damages for Blue Grass Sod Farms' trespass to his land. As an old-fashioned trespass to land case, this decision's most interesting points are about the calculation of damages. Cases explaining damages for these torts that are "actionable *per se*" are not that common.

The facts were a little unusual. Glen Armitage owned a quarter section of land that produced sod and he sold a portion of it in 2005 to Corlis. Corlis' land was undeveloped, except for its production of sod. Although Corlis planned to build a home on the land, he never took any steps to do so.

Blue Grass Sod Farms leased the Armitage land for \$85 per acre in 2009. The company had some discussions with Corlis about looking after his land and harvesting the sod, but the two never reached an agreement then. By 2009, Corlis had stopped visiting his land very often. He did not look after it himself and he had not hired anyone to do so either. He apparently thought that Blue Grass was caring for his land as "the neighborly thing to do" (at para 10), but Judge James Glass, sitting in Red Deer, found that there was no agreement about harvesting sod between Blue Grass and Corlis.

When Blue Grass harvested the Armitage land in 2013, they also harvested sod from Corlis' land, sold that sod and made a profit from that sale. When Corlis visited his land in 2013 with a prospective purchaser, he noticed that his sod was gone. When he phoned Blue Grass, he was told that if they were cutting the sod, then they were taking the sod. The company admitted that it harvested the sod from about 80,000 square feet of Corlis' land.

When he sued, Corlis did not provide any evidence about his losses or damage. He relied entirely on his pleadings. Paragraph 12 of his claim provided:

The market rate for which Blue Grass sells sod is \$0.46 per square foot. Based on the area of sod removed from the Lands, the amount owing to [Corlis] for the sale of his sod is \$60,313.36, or such further amount as proven at a trial of this action.

The controller for Blue Grass did testify. He had calculated the costs of production and Blue Grass' net profits from sod in 2013. He concluded that the net profit that Blue Grass would have received from the sod sold from the Corlis land would have been \$5,500.80.

The tort of trespass to land is committed simply by entering upon, remaining upon or placing or projecting any object upon land that is in the possession of another without lawful justification: *Salmond and Heuston on the Law of Torts*, 19th ed (London: Sweet & Maxwell, 1987) 46 (quoted at para 21). Without an agreement between Blue Grass and Corlis, Blue Grass had no

lawful justification to be on Corlis' land, let alone to remove the sod on that land. Therefore, Judge Glass concluded that Blue Grass did trespass (at para 24).

A plaintiff is not required to prove actual damage in order to recover damages for trespass to land. As Judge Glass stated, liability flows from the mere act of trespass (at para 25). He cites G.H.L. Fridman, Q.C.'s explanation of this principle in *The Law of Torts in Canada*, vol 1 at 7 (Toronto: Carswell, 1989):

Trespass in all its forms is actionable *per se*, i.e., without the need for the plaintiff to prove he has sustained actual damage...[t]he absence of any requirement that damage must be shown before an action will lie is an important hallmark of trespass as contrasted with other torts.

But without proof of actual loss or damage, how does a court determine how much to award as damages?

One might think damages in such circumstances would be only nominal damages. However, as Judge Glass noted (at para 25), the Alberta Court of Appeal in *Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd.*, 1991 ABCA 351 at paras 60-61 [emphasis added], held that a court may decide that damages flowing from a trespass can be more than nominal:

There is no rule of law that restricts an award of damages for trespass to a nominal amount only. . . . Therefore, depending on the circumstances of a given case, a court may determine that an award of damages for trespass should be more than a nominal sum. As explained by A.I. Ogus in *The Law of Damages* (London: Butterworths, 1973) at 23:

Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

When does a court award more than a nominal sum for trespass to land when there is no proof of loss or actual damage? In *Webb v Attewell*, 1993 CanLII 6873 (BCCA), Southin J.A. relied upon *Halsbury's*, 4th ed, vol 45, at para 1403 [emphasis added] for an explanation of five different levels of damages. That explanation is as follows (quoted at para 26):

In an action of trespass:

1. If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
2. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
3. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
4. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful

- conduct, exemplary damages may be awarded.
5. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

The defendant's conduct is thus key to the amount of the damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between — the result of the defendant's negligence or indifference — then the damages are in-between as well (at para 26).

Judge Glass found Blue Grass' conduct to be in the in-between area: more than accidental or inadvertent but less than arbitrary (at para 32). As such, he awarded Corlis the precise amount of Blue Grass' net profit of \$5,500.80.

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