

## Trespass

### (a) Liability for Trespass

PLF claims that DFT trespassed upon his/her/its land at LCN [location name]. To prove this claim, PLF must show, more likely than not, that three [four] things are true:

1. PLF [owned] [possessed] LCN.
2. DFT intentionally [entered] [caused TP {describe third party} to enter] upon LCN.
3. PLF did not give permission to DFT [TP] to enter upon LCN.<sup>1</sup>
- [4. The entry caused PLF to suffer harm.]<sup>2</sup>

I will now explain each item in more detail.

**First**, PLF must prove that DFT [owned] [possessed] LCN.<sup>3</sup>

< *if PLF owned the property* > This is self-explanatory.

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<sup>1</sup> The judge may make slight changes, where appropriate, to address the various ways that a trespass may occur. *Gage v. Westfield*, 26 Mass. App. Ct. 681, 695 n.8 (1988) (trespasser is one "who enters or remains upon land in the possession of another without a privilege to do so"), quoting from Restatement (Second) of Torts § 329 (1965); *id.* at § 158 ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or [b] remains on the land, or [c] fails to remove from the land a thing which he is under a duty to remove"). See also *New England Box Co. v. C & R Constr. Co.*, 313 Mass. 696, 707 (1943) (plaintiff must prove she is in possession of property); *Amaral v. Cappelis*, 64 Mass. App. Ct. 85, 90 (2005). *Amaral v. Cappelis*, 64 Mass. App. Ct. 85, 90 (2005).

<sup>2</sup> Ordinarily, a trespass entitles the plaintiff to at least nominal damages. *Isbell v. Greylock Mills*, 231 Mass. 233, 236–237 (1918); See Nolan and Santorio, *Tort Law*, 37 Mass. Prac. Series, § 4.3 pp. 70–71, citing *Old Colony Donuts, Inc. v. American Broadcasting Companies, Inc.* 368 F.Supp. 785, 789 (D. Mass. 1974), and cases cited. However, "[t]he Restatement would limit recovery for a reckless or negligent entry ... to cases in which the plaintiff can prove harm...." Nolan and Santorio, *Tort Law*, 37 Mass. Prac. Series, § 4.3 p. 71 and n. 4.

<sup>3</sup> See *Attorney General v. Dime Savings Bank*, 413 Mass. 284, 289–290 (1992).

< *if PLF was not the owner* > A person [company] possesses land if s/he/it has the right to exclude others from the property. For instance, a tenant living in an apartment does not own the apartment but does have the right to exclude other people from entering the apartment. That means the tenant possesses the the apartment as long as the tenant is living in the apartment.<sup>4</sup>

**Second**, PLF must prove that DFT intentionally [entered] [caused TP to enter] upon LCN. This requires PLF to show two things: that DFT entered upon LCN and that DFT acted intentionally.

< *if "entry" needs explanation* ><sup>5</sup> Entry means violating PLF's right to exclude other people from her/his/its land. Walking across someone else's lawn or putting your trash barrels on someone else's land are obvious direct examples of entry. Entry can occur also indirectly. This means that entry can occur even if DFT did not personally put anything on PLF's property. For instance, you enter onto someone else's property if you cut down a tree that falls onto that person's property or if you put trash in a place where you know, with substantial certainty, that the wind or water will carry the trash onto that property.<sup>6</sup> But, holding a loud party without going onto someone else's property is not entry because no person or thing physically went onto that property.

That brings me to the question of DFT's intent.

< *Intentional intrusion by defendant* > A person acts "intentionally" when s/he/it does an act on purpose and voluntarily. But s/he/it does not have to intend the consequences as long as those consequences will occur in the ordinary course of events. In other words, it doesn't matter whether DFT

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<sup>4</sup> *Dickinson v. Goodspeed*, 8 Cush. , 62 Mass. 119 (1851).

<sup>5</sup> *Amaral v. Cappels*, 64 Mass. App. Ct. 85, 90–91 (2005), citing authorities.

<sup>6</sup> See *Krasnecky v. Meffen*, 56 Mass. App. Ct. 418, 424 (2002), quoting *Sheppard Envelope Co. v. Arcade Malleable Iron Co.*, 335 Mass. 180, 187 (1956) ("A landowner who sets in motion a force which, in the usual course of events, will damage the property of another is guilty of a trespass on such property.").

intended to enter onto LCN. For instance, if I let my dog run free and, in the usual course of events, the dog will run onto your property, I have trespassed on your property.<sup>7</sup> So, you should ask whether DFT meant to [describe alleged act] [perform the act]. An act is not intentional if it occurred by accident or by carelessness.

< ***If defendant caused a third person to intrude***> A person acts “intentionally” when s/he/it purposely and voluntarily causes someone else to act. But, DFT did not have to intend the consequences. In other words, it doesn’t matter whether DFT intended for TP to intrude onto LCN. So, you should ask whether DFT meant to cause TP to [describe the third party’s alleged act]. Also, DFT did not act intentionally if it s/he/it did something by accident or by carelessness.

**Third**, PLF must prove that s/he/it did not give permission to DFT [TP] to enter upon LCN. Permission does not have to be in writing. A person may give permission by written or spoken words or by actions [inaction], if a reasonable person who saw PLF’s actions would interpret those actions [the lack of action] as giving permission to enter on the land.

< ***entry to save person***> Sometimes, the law gives permission to enter onto property. If [name of person] is in danger and DFT entered LCN to save [name person] from harm, the law gives DFT permission to enter onto the property, and DFT’s entry is not a trespass.<sup>8</sup>

< ***entry to save property***> Sometimes, the law gives permission to enter onto property. If [describe item] [property] was in danger of being lost or destroyed and DFT entered LCN for the purpose of saving [item] [property], then the law gave DFT permission to enter, and DFT’s entry was not a trespass.<sup>9</sup>

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<sup>7</sup> *Krasnecky*, 56 Mass. App. Ct. at 424.

<sup>8</sup> *Rossi v. DelDuca*, 344 Mass. 66, 69–70 (entry to protect a child endangered by a dog).

<sup>9</sup> See *Proctor v. Adams*, 113 Mass. 376 Mass. 376, 377–378 (1873) (“it is a very ancient rule of the common law, that an entry upon land to save goods which are in jeopardy of being lost

[Fourth, PLF must prove that entry caused PLF to suffer harm, or what we call “damages”. If the harm would have occurred anyway, then PLF did not suffer harm.]<sup>10</sup>

## (b) Damages

### (1) Calculating Appropriate Compensation.

If PLF has proven all three things I mentioned, then you should award money damages to PLF. By instructing you on damages, I am not suggesting anything about your answers to questions x or y.

DFT must pay money damages for all the harm that flowed from her/his/its entry onto LCN. The purpose of damages is to compensate PLF for the harm that the trespass caused. You may not award damages for the purpose of rewarding PLF or punishing DFT.

As with the other elements of her/his/its claim, PLF must prove that the defendant’s conduct more likely than not caused the damages. You should not award damages for any harm that PLF or someone other than DFT caused.

< *lost market value* > If the trespass caused permanent harm, you should award damages for the loss in the market value of LCN. Fair market value is the highest price that a willing buyer would pay to a willing seller in a free and open market. You should determine the fair market value of LCN before the trespass. You should subtract the fair market value of LCN after the trespass. The difference in those two values is the amount of PLF’s damages s/he/it is entitled to recover.

< *cost to cure* > PLF seeks damages for the cost of repairing [replacing, reconstructing] LCN. You may award damages for this cost only if the repair

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or destroyed ... is not a trespass ....”) (no trespass occurred when defendants entered upon the plaintiff’s beach property to return a beached boat to its true owner).

<sup>10</sup> The judge will mention this element only rarely, as harm to the plaintiff’s property interest is usually enough to warrant at least nominal damages. See above, n. 2 (discussing Restatement regarding reckless or negligent intrusions).

[replacement, reconstruction] was reasonably necessary because of DFT's trespass. You should decide what costs were reasonable and necessary to accomplish that repair [replacement, reconstruction].

< *if appropriate* > You may award the cost of repairing [replacing, reconstructing] LCN only if that cost is less than the reduction in LCN's fair market value because of the trespass. Fair market value is the highest price that a willing buyer would pay to a willing seller in a free and open market. You should determine the fair market value of LCN before the trespass. You should subtract the fair market value of LCN after the trespass. The difference in those two values is the amount of lost market value. Then, you should award damages for the lower amount – either the cost of repairs or the lost market value.<sup>11</sup>

< *removal of earth, trees, etc.* > You should award damages to compensate PLF for any [trees, gravel, soil, etc.] that DFT removed from LCN without permission. You should award damages equal to the dollar value of the [trees, gravel, soil, etc.] on the open market.<sup>12</sup>

You should also award damages for any additional damage that DFT caused to LCN in removing the [trees, gravel, soil, sand etc.]. By "additional

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<sup>11</sup> *Belkus v. Brockton*, 282 Mass. 285, 287–288 (1933). "Replacement or restoration costs are also appropriate 'where diminution in market value is unavailable or unsatisfactory as a measure of damages.'" *Ritter v. Bergmann*, 72 Mass. App. Ct. 296, 307 (2008), quoting *Glavin v. Eckman*, 71 Mass. App. Ct. 313, 318 (2008), quoting from *Trinity Church v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 48 (1987). Accordingly, there may be some flexibility in this test where damage in addition to lost market value occurs. See *Ritter*, 72 Mass. App. Ct. at 305–306 (because the harm from tree removal "was not only the potential loss in the value of the land that they hoped to sell, but the loss of their own privacy," the court approved restoration cost for removed trees, instead of value of timber or diminution in land's market value).

<sup>12</sup> *Rockwood v. Robinson*, 159 Mass. 406, 407–408 (1893). G.L. c. 242, § 7 (treble damages for trespass to trees).

This instruction asks the jury to calculate single damages, to avoid possible confusion. Alternatively, the court may inform the jury of this remedy ask the jury to calculate treble damages. That may be necessary if there is an issue whether defendant reasonably believed he was authorized to cut down the trees. See "Defendant's reasonable belief regarding trees," below.

damage," I mean damage that goes beyond the value of the [trees, gravel, sand soil, etc.] themselves/itself. But, be careful not to duplicate damages.<sup>13</sup> For instance, if you award PLF the market value of the [trees, gravel, soil, etc.], you may not also award damages for reduced market value resulting from the absence of the [trees, gravel, soil, sand, etc.]. [insert "lost market value" or "curable harm", as appropriate]<sup>14</sup>

< *temporary trespass* > If DFT temporarily possessed all [part] of LCN, you should award money damages for the fair rental value of LCN [portion of LCN] during the time when DFT possessed LCN.<sup>15</sup> Fair rental value is the highest price that a willing tenant would pay a willing landlord for LCN [that part of LCN] in a free and open market.

< *lost profits* > PLF may also recover damages for the profits s/he/it suffered because of DFT's trespass.<sup>16</sup> To determine lost profits you first ask: how much money or property would PLF have received if DFT had not trespassed upon LCN? Then you subtract the direct expenses that PLF would have had to spend to receive that money or property. The result is lost profits. Please note that you do not deduct the costs of overhead or fixed expenses [unless the trespass caused those expenses to change].<sup>17</sup>

You should award PLF an amount equal to any profits that PLF would have made if DFT had not trespassed. You may consider PLF's past earnings,

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<sup>13</sup> In *Larabee v. Potvin*, 390 Mass. 636, 643 (1981) (trespass to trees under G.L. c. 242, § 7), the court noted that the plaintiff may "opt for either measure," namely "value of the timber which has been wrongfully cut" or "the diminution in the value of the property as a result of the cutting." See also *Glavin v. Eckman*, 71 Mass. App. Ct. 313, rev. den. 451 Mass. 1105 (2008).

<sup>14</sup> *Crystal Concrete Corp. v. Town of Braintree*, 309 Mass. 463, 469–471 (1941); *Providence & Worcester R.R. Co. v. Worcester*, 155 Mass. 35, 38–40 (1891) (fair market value of gravel removed).

<sup>15</sup> *Fenton v. Quaboag Country Club, Inc.*, 353 Mass. 534, 539 (1968).

<sup>16</sup> *Flower v. Town of Billerica*, 320 Mass. 193, 196–197 (1946).

<sup>17</sup> *Ricky Smith Pontiac, Inc. v. Subaru of New Eng.*, 14 Mass. App. Ct. 396, 426 (1982) (intentional interference case). Note that, in some cases, the jury may need to consider "semi-fixed" expenses, i.e. expenses that reflect the need to increase overhead to handle the amount of increased future business allegedly lost. *Id.* at 429.

general economic conditions, and the competitive conditions in the business at the time. You may also consider any other circumstances that help you determine, with reasonable certainty, how much profit PLF lost because of the trespass. It is enough if the evidence shows the amount of lost profits in general terms, because the law recognizes that precise calculation of lost profits is often impossible to quantify.

< ***emotional distress***> You may also award money damages for any emotional distress that the trespass caused PLF to suffer.<sup>18</sup> When considering emotional distress, you may consider, among other things, the following factors:

- The nature and type of the alleged harm;
- The severity or extent of the harm;
- The length of time PLF has suffered and reasonably expects to suffer; and
- Whether PLF has attempted to reduce the harm, for instance by counseling or by taking medication.

< ***future damages***> If PLF has proven that, more likely than not, s/he/it will suffer emotional distress in the future because of the trespass, you should award damages for that future harm. [If you find that PLF will suffer damages throughout his/her lifetime, you may consider life expectancy tables in evidence to determine how long s/he/it will live.] There will be no future trial to consider any future damages that PLF may suffer. You must keep in mind that any damages you award in this case may be paid in a lump sum and may be invested and earn money. Therefore, if you award future damages, you must reduce that portion of the damages to its present value as of [year], when PLF filed this case.

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<sup>18</sup> *Meagher v. Driscoll*, 99 Mass. 281, 295 (1869).

< *out of pocket damages* > In addition, if the trespass caused PLF to incur any reasonably foreseeable expenses, you should compensate PLF by awarding money damages for those expenses.

< *nominal damages* > Finally, in a trespass case, the amount of damages cannot be zero. Even if PLF has not proven any actual loss of money, property value or emotional distress, you must award at least some small amount of money as damages.

## (2) Mitigation / Defenses<sup>19</sup>

< *Mitigation of Damages* > DFT claims that PLF failed to take reasonable steps to reduce the amount of damages that s/he/it suffered. Unlike the issues I have discussed earlier, it is DFT, not PLF, who has the burden to prove that, more likely than not, PLF failed to take reasonable steps to reduce or eliminate his/her/its damages. If DFT has proven this, you must eliminate from the amount you award damages for any potential harm that PLF reasonably could have avoided.

< *statute of limitations – continuing violation* > DFT claims that PLF brought this lawsuit too late. The law requires PLF to bring file the lawsuit within three years of the trespass. PLF filed the lawsuit on time if you find that DFT trespassed on LCN at any time after [date that is three years before plaintiff commenced suit]. However, PLF can only recover damages for any harm resulting from a trespass after [that date]. If there was no trespass at all after [that date], then you must rule for DFT.

< *Trespass to Trees—Defendant’s reasonable belief* > DFT claims that s/he/it had good reason to believe that [trees that s/he/it cut down {destroyed} were on her/his/its own land] [s/he/it had lawful authority to cut down

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<sup>19</sup> Statutory licenses, upon conditions, exist for entry by surveyors making a survey (G.L. c. 266, § 120C) and by abutters who must enter to perform maintenance or repairs necessary to prevent waste to their own property (G.L. c. 266, § 120B). Presumably, establishing the conditions to exercise these licenses are defenses upon which the defendant has the burden of proof.

{destroy} the trees in question]. Unlike the issues I have discussed earlier, it is DFT, not PLF, who has the burden to prove that, more likely than not, that [trees that s/he/it cut down {destroyed} were on his/her/its own land] [s/he/it had lawful authority to cut down {destroy} the trees in question]. Your determination on DFT's claim will help me prepare the final judgment in this case.<sup>20</sup>

### (3) Conclusion as to Damages

I'll conclude with a few general instructions about all types of damages that I have mentioned in this case.

First, sometimes there is an element of uncertainty in proving one or more area of damage. That does not necessarily prevent you from awarding full and fair compensation. It is true that the evidence must make it possible for you to determine damages in a reasonable manner. However, we leave the amount of damages to your judgment, as members of the jury, sometimes with little evidence. You may not determine the plaintiff's damages by guessing. But it is enough if the evidence allows you to draw fair and reasonable conclusions about the amount of the damages.

[Second, the law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand that any suggestions the lawyers make are not evidence and do not set any sort of standard or floor or ceiling for the amount of damages – it is up to you to evaluate the damages, based on the evidence and your own judgment.]

Finally, once you have calculated damages for each area of damages that I described, you should add together the amounts in each of these areas of damages to arrive at a total award. You should write down an amount both

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<sup>20</sup> Note that G.L. c. 242, § 7 allows treble damages for trespass to trees, unless "the defendant reasonably thought he was authorized to cut the trees" in which case he is "liable for single damages only." See *Larabee v. Potvin*, 390 Mass. 636, 643 n.6 (1981) (cutting down more trees than allowed by contract with the landowner); *Evans v. Mayer Tree Service, Inc.*, 89 Mass. App. Ct. 137, rev. denied, 474 Mass. 1105 (2016).

in numbers and in words on the verdict slip. The total sum must not exceed fair compensation for the entire economic loss. You must avoid duplication or double counting of any elements of damages.

You must not consider any interest upon your damages award. The court will calculate interest on any award. In addition, you may not consider federal or state income taxes, because any damages in this case may or may not be subject to taxation. Someone else will have to address any tax considerations depending upon what you decide. In other words, just follow my instructions on what issues to consider. If you go beyond what I have outlined, your verdict may well have consequences that you did not intend.