

MEMORANDUM

TO: Uniform Law Commission Tort Law for Drones Committee

FROM: Gregory S. McNeal, Reporter

DATE: April 10, 2018

RE: April 20, 2018 Conference Call Meeting Draft

Dear Committee,

Our draft is scheduled for discussion on April 20, 2018. This memorandum is a brief overview of the changes you directed the reporter to make to the draft after our March 2018 meeting. At the March 2018 meeting the committee and observers discussed in detail the first draft, which reflected the preliminary conclusions of the committee flowing from the December 2017 meeting. I made a significant number of changes to the draft per your direction and decisions.

At the March 2018 meeting you directed me to make specific changes to the draft, and in accordance with those directives I have made changes, some important changes to note are:

- 1) Sections were renumbered, explanatory commentary was added, and unresolved policy questions to be resolved by the committee noted in **bold yellow**.
- 2) The committee decided to remove the products liability section. As a result of the removal of the products liability section, definitions related to products liability were also removed.
- 3) The committee decided to make changes to the section (now numbered 301) governing trespass by unmanned aircraft. The draft document discussed at the March 2018 meeting included a specific altitude line intended to define the immediate reaches of airspace into which the intrusion of an unmanned aircraft would be treated as akin to a trespass upon the land.

The March 2018 discussion draft included an altitude line of 100 feet, defining that altitude as “immediate reaches.” At the March 2018 meeting, the committee and observers engaged in a lengthy discussion regarding the concept of “immediate reaches” and whether using that term as the central point for the statutory language was appropriate. It was determined that the term did not add clarity and might lead to confusion. At the March meeting, the altitude of 100 feet in the draft document was discussed. This 100 foot altitude was offered at the suggestion of the reporter but was lower than the 200 foot altitude that the committee had discussed and tentatively agreed upon at their December 2017 meeting.

A discussion was held as to whether an altitude of 100 feet was appropriate, and if not, whether the altitude should be higher or lower or should vary based on factors like those reflected in the existing aerial trespass doctrine. An approach that would vary based on proof of factors akin to those in the existing aerial trespass doctrine was deemed unworkable and lacking in clarity. The committee decided a bright line approach was necessary, as such an approach would minimize litigation by creating clear lines for unmanned aircraft operators and landowners/lessees.

Input was sought from members of the committee and observers regarding at what altitude a low altitude flight would trigger a trespass. The discussion focused upon balancing the rights of landowners and lessees and the rights of unmanned aircraft operators. The discussion took note of the number and nature of unmanned aircraft operations today, and the projections for increased numbers, varied sizes, and different operations in the future. The committee heard from observers regarding the typical and anticipated usage of unmanned aircraft today, the size of the aircraft, and future plans regarding the use of unmanned aircraft for activities such as package delivery, inspections, fleets and swarms of aircraft that could be used to gather information, and the wide range of aircraft that are presently permitted to fly at low altitudes and may fly at low altitudes in the future.

The committee and observers discussed the ease of accessibility of unmanned aircraft technology and the fact that these aircraft, which now number in the millions, operate in places where manned aircraft have rarely if ever flown, and operate in airspace which manned aircraft may be physically incapable of accessing or are precluded by regulations from accessing. The committee and observers discussed present FAA regulations regarding unmanned aircraft which allow those aircraft to operate at any distance horizontally or vertically from structures and people, whereas manned aircraft regulations (with exceptions for helicopters and take-off and landing) have traditionally ensured that manned aircraft remained 500-2000 feet away from the ground, people, and structures. After the discussion the committee decided that the altitude line should be set at 200 feet, not the 100 feet suggested in the draft. The committee based its decision upon future anticipated uses of unmanned aircraft, the volume of unmanned aircraft expected to operate over private property in the future, existing FAA regulations, an executive order, pending legislation, equitable division of the low altitude airspace between landowners/lessees and unmanned aircraft operators, and enacted legislation in the states.

- 4) The section, (now numbered 301) was renamed as Per Se Aerial Trespass to better distinguish it from the existing aerial trespass doctrine. The commentary accompanying Section 301 was expanded to include materials from the original background document, explaining the rationale for Section 301. The commentary explains why this new tort is necessary and why the existing aerial trespass doctrine does not provide clarity for landowners/lessees or unmanned aircraft operators.
- 5) In light of Section 301's intent to reflect the traditional trespass to land doctrine, protections were added for conduct protected by the First Amendment, conduct that conforms to the requirements of the Fourth Amendment or other laws requiring a court order, and conduct by parties traditionally permitted to traverse private property.

- 6) Language from UETA was included as a discussion point for the committee, which may serve as an alternative to the consent language used in Section 301 (c).
- 7) Section 302 was created, consolidating the two provisions from the March 2018 draft. At the March 2018 meeting, committee members and observers discussed the need to narrowly tailor the tort to clarify what conduct would subject an individual to liability, to protect First Amendment rights, to protect from liability for inadvertent collection of images, recordings, or impressions, to protect images, recordings, or impressions gathered for navigational purposes, and to make clear that a person who trespasses to gather images, recordings, or electronic impressions should be treated differently than a person who does not.

Section 302 reflects these discussions between the committee and observers, in section (a) it creates multiple and clear elements of required proof. It protects against inadvertent collection by requiring intent, it protects against overbreadth by adding a “highly offensive to a reasonable person” limitation, it clarifies that it covers trade secrets and thus covers a gap in trade secrets law and it adds First Amendment protections. To ensure the section treats trespassers differently it adds a rebuttable presumption of intent to be applied to trespassers. To protect information gathered solely for navigational and safety purposes it adds an exemption for such information, and it also includes a safe harbor defense in (d) allowing the acquirer of protected information to delete such information.

- 8) Section 303 was added to make clear that one drone or many drones may be instrumentalities of a nuisance. Commentary may need to be added to clarify what factual circumstances might trigger such a tort.
- 9) Section 305 was added to make clear that one drone or many drones may be instrumentalities of a trespass to chattels. Commentary may need to be added to clarify what factual circumstances might trigger such a tort.
- 10) Section 306 was added to make clear that the Act does not alter the scope or applicability of products liability law.
- 11) Section 307 was added to make clear that landowners and lessees do not owe any duties to per se aerial trespassers under 301, but creates an exception when the landowner or lessee engages in willful or wanton acts of gross negligence, or acts with malicious intent or in bad faith. The committee has not yet resolved what to do about licensees and invitees.
- 12) A new Section 309 regarding remedies was added per the request of the committee, this section has not yet been discussed.

Sincerely,

Gregory S. McNeal
Reporter