

May 14, 2019

RE: Uniform Tort Law Relating to Drones Act

Colleagues,

I try again to get our committee to refocus and leave the tie we have to takings law which I believe leads us to an Act that will not get any support for enactment.

Since my last efforts I spent some time reviewing what the ALI is doing with its Restatement of Property IV. Among other things it takes back the lead from the Restatement of Torts rendition of trespass to land and offers what is set out below. The quotes come from Professor Henry E. Smith, one of the reporters.

After some discussion of “elements” and “gist” definitions for trespass he offers two kinds of definitions, a gist definition and elements definition, that come from the drafters work. The gist definition:

Sec 1. Trespass to Land

A trespass to land is an intentional physical intrusion upon land of another possessed of another that interferes with the other’s interest in exclusive possession. (citation is to Restatement of the Law Fourth, Property (Preliminary Draft No. 3, September 15, 2017), at 23.

This does not resolve a main point I continue to raise about the immediate reaches of the airspace as part of the land but do note it is inconsistent with our treatment of an unintended landing for an intended overflight and right to reclaim. And note how it protects from “interference” with the interest in exclusive possession. That is not use and enjoyment and it is not substantial interference.

The other definition offered is what he calls an elements definition:

Sec 2 Trespass to Land: Prima Facie Case

An actor is subject to liability to another for trespass to land if the actor intentionally:
(a) enters or causes entry of a person or thing onto land in the other’s possession, or
(b) remains on land in the other’s possession, or fails to remove a thing that the actor is duty-bound to remove from land in the other’s possession. (citation is to Restatement of the Law Fourth, Property (Preliminary Draft No. 3, September 15, 2017) at 26-27.

Professor Smith argues for using both definitions.

I could not get to the citations he gives but perhaps our reporter can. The table of contents for the upcoming product lists airspace but nothing I could find has been published there so far.

For those that argue one can fly a drone across my front line one millimeter above the grass, or the dirt in event there is not grass left, I can only encourage them to re-read Causby again in its entirety and the Restatement of Torts that preserves a landowners protections for firing a missile across ones land but never touching the dirt.

At the risk of repeating too often I do say. Causby continued treating the immediate reaches of air space as land. The substantial interference in that space resulted in a taking of property requiring

payment of just compensation and a decree that conveyed to the United States what was a navigation easement for that use.

Our draft as now written provides no relief to a landowner for drone overflights by a governmental actor short of a taking requiring payment of just compensation. Ask yourself how you would draft a judgment conveying the right to the government. What happens next month as the interference increases? Another taking, more compensation? Pulling takings law into our act in my opinion cannot be justified.

I ask that Lucy copy and attach here for me ORS 837.380 in full. My scanner doesn't work properly and it would save me a lot of time trying to copy it. I played no part in its drafting (which is a problematic admission) but note how it treats the claim of preemption at sub 3 and contains no height limits in Sec 1 but follow what I think of as "every dog gets one free bite rule" If you fly across my lawn and I tell you not to do again and you do I sue you in trespass and win. Oregon even confirms the incentive for recovery of attorney's fees for claims under \$1,000. That last part is a more general rule in Oregon.

This has to my mind a commonsense rule of you can do it until I say no more and then you stop. Not an elegant resolution for property or tort purists but apparently acceptable to at least one legislature.

I look forward on our continued work.

Joe Willis