

Builder, surveyor, and municipality liable for encroachment of dwelling built on neighbour's land (Armstrong v. Penny)

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In *Armstrong v Penny*, 2023 ONSC 2843 (CanLII), the Ontario Superior Court of Justice addressed a homeowners' nightmare scenario arising from the discovery that their residence had been constructed over the property line onto their neighbour's land.

In 1998, the Pennys hired a builder to construct a custom-built home on their vacant waterfront property in Sturgeon Lake, what is now the City of Kawartha Lakes. The builder hired a surveyor to determine the boundary line for construction. The municipality issued a building permit allowing construction to commence.

After construction of the home was completed, the Pennys moved into the property and lived for several years without incident.

In 2002, the Armstrongs purchased the adjacent property to the north of the Pennys. In 2003, the Armstrongs obtained a survey of the southern line of their property and discovered that most of the Pennys' garage and a corner of the house extended onto their property.

The Armstrongs eventually pursued legal action against the Pennys, focusing on their ongoing trespass. In turn, the Pennys brought third party claims against the builder, the surveyor, and the municipality, alleging that those parties were negligent for allowing the home to be constructed over the boundary line.

The litigation progressed at a glacial pace and eventually went to trial in 2022. The trial judge commented that the reasons for the "astounding" amount of time it took to get the dispute to trial were not fully known to the court.

At trial, the trespass of the Pennys' property onto the Armstrongs' property was admitted since it was evident from the true location of the boundary line. The difficult task for the court was what to do about it.

The Armstrongs argued that the most equitable, fair, and balanced solution was to order the demolition and removal of the Pennys' garage, with a smaller encroachment of the corner of the house to remain, and to allow the Pennys to purchase the land required to rebuild the garage.

The court noted the hardship of making innocent homeowners demolish part of their structure. The Pennys weren't at fault—they hired an experienced builder and believed their house was entirely on their land. Forcing blameless parties to demolish part of their residence would be oppressive.

The court considered [section 99](#) of the *Courts of Justice Act*, which provides the court with jurisdiction to award damages in lieu of an order requiring specific remediation, as well as [section 37](#) of the *Conveyancing and Law of Property Act*, which provides that a person may be entitled to retain land on which they have made lasting improvements under the belief that the land is the person's own. The court considered these two sections in determining what would be a just result for

the parties based upon where the garage had been located for many years.

The court's analysis focused on the importance of prior knowledge at the time of purchase and the parties' expectations. Although they may not have known of the encroachment, the Armstrongs purchased their property after the Pennys' dwelling had been constructed, so they had no expectation that they would ever be able to use the land upon which the house and garage encroached. As a way to balance the interests at stake, the court ordered that the Pennys' home and garage could remain as is but they were required to pay the Armstrongs for the land retained in the amount of \$9.10 per square foot, as well as costs associated with the land transfer.

The Armstrongs also argued that the facts underlying an unjust enrichment claim had been admitted. The Pennys had, without legal justification, occupied and used the land under the garage since the Armstrongs purchased it, and the Armstrongs had been deprived of using that land. While this was evident based on the location of the property line, the court awarded only nominal general damages of \$1,000.

With respect to the third party claim against the builder, the Pennys argued that there was a breach of contract in addition to negligence. The trial judge agreed that there was no question that the builder did not build the home entirely within the property's boundaries, which clearly breached the contract. Further, the builder failed to accurately complete the building permit application form and failed to review a reporting letter received for work conducted prior to paying an invoice for that work. The builder failed to meet the required standard of care in the circumstances. If the builder had not been negligent, the house would have been constructed in the correct location, and the Pennys' liability to the Armstrongs would not have occurred.

As for the surveyor, establishing a correct boundary line was crucial for the entire construction process. While the builder gave poor instructions to the surveyor, the trial judge noted that surveyors ought to ensure they receive and record clear instructions for the benefit of the field workers, and if there was any lack of clarity in the instructions, the standard of care required the surveyor to clarify instructions before proceeding with the work. There were no documents showing that anyone at the surveyor's office made any inquiries to obtain clarification of the instructions they had. Instead, they made arbitrary choices, which led to errors in locating the home. The trial judge held that the surveyor was negligent in proceeding with their role without clear instructions, which contributed to the construction of the home in the wrong location when combined with the actions of others.

Lastly, concerning the municipality, the trial judge held that it was one of the rare cases where the plain facts were enough to meet the test of common sense of how the municipality breached the standard of care. The municipality's Chief Building Inspector had a duty to seek out further information before issuing a building permit, and to examine all the documents filed in support of the application for the building permit for uncertainties, inconsistencies, or missing documents. While municipalities are not insurers against all possible risks that may occur when a building permit is issued, ensuring that a structure is built within the correct property boundaries is one of the basic required functions of the municipality.

The court concluded that all three third parties were liable for contributory negligence, but that the fault lay most heavily on the builder. The builder signed the construction contract with the Pennys and took on the responsibility to build their home and garage where they directed it to be built. The role that the builder took on then required the engagement of the surveyor and the municipality. While the negligence of the surveyor and the municipality contributed to the loss, it was not to the same degree of fault as the builder.

Having considered the entirety of the circumstances, the court apportioned liability to the builder of 70% and 15% to each of the surveyor and the municipality. The court ordered that all compensation awarded against the Pennys in the main action, including the costs of purchasing the severed parcel, general damages for trespass, and associated costs related to the transfer are payable by the third parties to the Pennys.

A key takeaway from the decision is the potential liability of all the parties involved in the construction of a new dwelling, from the municipality through the builder to the owner. The case establishes how builders, surveyors, and municipalities are to be held accountable for their roles in ensuring construction within correct boundaries. Additionally, the case demonstrates the importance of property rights, and illustrates how the court will attempt to balance the equities and rights between the parties involved. A PDF version is available for download [here](#).

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