

Legislative Analysis



TRESPASS LIABILITY ACT

Mary Ann Cleary, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5335 (Reported from committee as Substitute H-1)

Sponsor: Rep. Bradford C. Jacobsen

Committee: Judiciary

(Enacted as PA 226 of 2014)

First Analysis (4-30-14)

BRIEF SUMMARY: The bill would create the Trespass Liability Act to specify that a landowner would owe no duty of care to a trespasser, and, except for some limited circumstances, would not be liable to the trespasser for physical harm caused by the landowner's failure to exercise reasonable care to put the land in a reasonably safe condition.

FISCAL IMPACT: The bill would have no direct fiscal impact on state or local units of government.

THE APPARENT PROBLEM:

Premises liability is established in common law, meaning it is derived from the decisions handed down in court cases. It has to do with a duty to make premises safe that a landowner owes to a person who enters upon the property so that the person does not suffer an injury. Historically, a higher duty of care has been required of a landowner toward those with permission to enter the premises; for example, stores should make the premises safe for shoppers and a homeowner inviting friends over for dinner should repair the porch steps. But what happens when a trespasser, who is uninvited and unwanted, sustains a physical injury or dies?

State statute makes it a crime to enter on another person's property without permission, whereas civil liability for injuries to trespassers, like other premises liability claims, are governed by common, or case, law. Currently, under Michigan case law, a landowner owes little duty of care in maintaining the land in such a condition as to protect a trespasser from injury. However, there are exceptions. In general, a landowner is not responsible for injuries to a trespasser from naturally occurring conditions on the land (like tripping over a downed tree) but may be liable for conditions created by the landowner, such as leaving a large hole after excavating a boulder or failing to cover a well. Or, if the landowner becomes aware that a trespasser is on his or her land, or that trespassers appear to be intruding on certain portions of the land, then the landowner is expected to use ordinary care while engaging in activities involving a risk of death or serious bodily harm. This also applies if the landowner should know in the exercise of ordinary care that a trespasser was present or frequenting a portion of the land. For example, engaging in archery or target practice in an area of the land on which the landowner knows (or should know) a trespasser is present or may be present could open the landowner to a lawsuit if a trespasser was inadvertently injured or killed.

There also are exceptions that create liability for landowners if the trespasser is a child. For instance, under the "attractive nuisance" doctrine, failing to make safe conditions that could attract children can open a landowner to lawsuits. A pool is an example of an attractive nuisance. Children often do not recognize the danger a pool of any size can hold, or don't know that a pool cover cannot hold their weight and so poses a particular danger. A landowner can make such a condition safer by installing a fence around the perimeter of the pool and using a rigid pool cover rather than a soft one to reduce the chance a child could drown by falling into the pool or falling through a flexible pool cover and becoming trapped.

Some feel that the current case law regarding civil liability towards trespassers should, like the criminal prohibitions and penalties, be codified (placed in statute). This is driven, at least in part, by the treatment of premises liability in the latest edition of the Restatement of Torts (3rd), a treatise or guide published by the well-respected American Law Institute that courts rely on in deciding cases. Released in 2012, the Third Edition departs from the 1965 Restatement (2nd) by expanding the duty of landowners to exercise reasonable care in making the premises safe to all persons entering upon the land, even trespassers. The duty would apply not just to the landowner's conduct or activities on the land, but also to both artificial and natural conditions – basically, anything that could pose a risk to someone entering upon the premises.

Though an exception is provided for an injury to a "flagrant" trespasser, the term is not defined and so is unclear as to which situations the exception would apply. The concern is that if Michigan courts adopt the standards in the Restatement (3rd), businesses and property owners would be subjected to greater liability and higher insurance premiums, or may be forced to make changes to their property to deter trespassers from entering or being injured if they do enter, even though by definition a trespasser is on the premises illegally.

Though the Restatement (3rd) does not set precedent for courts to follow, courts around the country often adopt its standards when deciding lawsuits. For example, the Nevada State Supreme Court overturned a summary judgment of a lower court in a premises liability suit against a big-box store by an injured customer and ordered, on remand, that the store's alleged negligence be determined in light of the Third Restatement. *Foster v Costco Wholesale Corporation*, 128 Nev. Adv. Op. 71 (December 27, 2012)

At least 13 states have passed legislation, and several others have legislation pending, to prevent their state courts from adopting the expanded philosophy of the Restatement (3rd) by codifying their existing trespasser liability case law. Legislation has been offered to do the same in Michigan.

THE CONTENT OF THE BILL:

Under the bill, generally speaking, a landowner or lawful tenant would not owe a duty of care to a trespasser and would not be liable for injuries to the trespasser caused by the

condition of the premises trespassed upon. Under certain circumstances, however, the landowner/tenant would be liable.

House Bill 5335 would create the Trespass Liability Act to specify that a possessor of a fee, reversionary, or easement interest in land, including an owner, lessee, or other lawful occupant, owes no duty of care to a trespasser and is *not* liable to a trespasser for physical harm caused by the possessor's failure to exercise reasonable care to put the land in a condition reasonably safe for the trespasser or to carry on activities on the property so as not to endanger trespassers.

The bill would not increase the liability of a possessor of land and would not affect any immunity from or defenses to civil liability established by or available under Michigan statutes or common law to which the possessor is entitled.

However, if any of the following apply, a possessor of land may be liable for physical injury or death to a trespasser:

- The possessor injured the trespasser by willful and wanton misconduct.
- The possessor was aware of the trespasser's presence on the land (or should have known in the exercise of ordinary care) and failed to use ordinary care to prevent injury arising from active negligence.
- The possessor knew (or should have known from facts within his or her knowledge) that trespassers constantly intrude on a limited area of the land and the trespasser was harmed because the possessor failed to use reasonable care for the trespasser's safety when engaging in an activity involving a risk of death or serious bodily harm.
- The trespasser is a child injured by an artificial condition on the land and all of the following apply:
 - The possessor knew or had reason to know that a child would be likely to trespass on the place where the condition existed.
 - The possessor knew or had reason to know of the condition and realized (or should have realized) that the condition would involve an unreasonable risk of death or serious bodily harm to a child.
 - Because of the child's youth, the child did not discover the condition or realize the risk involved in trespassing in the area of that dangerous condition.
 - The utility (or benefit) to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child.
 - The possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the child.

ARGUMENTS:

For:

The apparent expansion of the duty of care owed to persons entering the premises of another as recommended by the Restatement (3rd) has caused concern to businesses and property owners alike, especially regarding how it could be applied to trespassers. The major concern is that landowners could be sued more easily by unwanted trespassers. The new Restatement does provide an exception for "flagrant" trespassers, but since that term is not defined, it is likely to spur much litigation as parties argue over the meaning.

Further, if the adoption of the newer standards would apply even to natural conditions on the land, would a person with a wooded lot have to monitor every tree and quickly remove any dangling limb just in case it should fall on a trespasser who may enter the property on a windy day? The point is that without the bill, say proponents, there would be tremendous uncertainty as to the measures that every property owner, commercial, industrial, or residential, would have to take to make sure that an uninvited person did not get hurt if they came, albeit illegally, unto the property.

The bill simply preserves the status quo, say its advocates. It only applies to situations involving trespassers, and would not create additional protections for landowners. A landowner who could be sued today could still be sued under the bill. Basically, the bill takes today's "rules" so to speak and puts them into statute. Thus, the bill would give property owners more certainty about what would be expected of them in maintaining their properties in relation to trespassers.

Against:

Laws are always evolving to fit the circumstances of a changing society. The bill would force courts to be static, unchanging, say opponents of the legislation. It would freeze case law that fits today and force courts to still apply it in years to come. The recommendations in the Restatements reflect current trends, and so it is natural that the Third edition would have some differences. Premises liability law as practiced before the Restatement (2nd) could seem almost barbaric now to some, say critics, as injured persons had little recourse for recompense as compared to now. Thus, it is natural that the latest Restatement would reflect trends in mitigating unnecessary injuries or death by expanding the duty of reasonable care of property owners. Moreover, Michigan courts may never adopt the standards in the Restatement (3rd). However, courts should retain the flexibility to adapt to changing trends that future circumstances may require.

Response:

Just because current case law would be placed in statute doesn't mean it couldn't be revised if future societal changes warranted. It just changes HOW revisions would be made. Once codified, changes would be done legislatively, with public input, not by a single judge or panel of justices.

POSITIONS:

The following entities testified or submitted written testimony in support of the bill, or indicated support for the bill on 3-20-14 and/or 4-17-14:

National Federation of Independent Business (NFIB)
Michigan Association of Insurance Agents
Plum Creek
Consumers Energy
Michigan Electric & Gas (MEGA)
Michigan Railroads Association
Michigan Association of Realtors
Indiana Michigan Power
Michigan Chamber
Shook, Hardy & Bacon LLP
Michigan Manufacturers Association
DTE Energy
Apartments Association of Michigan
Michigan Aggregates Association
Potato Growers of Michigan
Associated Petroleum Industries of Michigan
International Council of Shopping Centers
Michigan Forest Products Council
SteelPro
Michigan Concrete Association
Michigan Agri Business Association
Michigan Farm Bureau
Insurance Institute of Michigan

The Michigan Association for Justice (formerly the trial lawyers association) indicated a neutral position on the bill.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: William E. Hamilton

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