

2011 Se1 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB22)

Received: 10/20/2011

Received By: phurley

Wanted: As time permits

Companion to LRB:

For: Mike Kuglitsch (608) 267-5158

By/Representing:

May Contact:

Drafter: phurley

Subject: Courts - miscellaneous
Courts - torts

Addl. Drafters:

Extra Copies:

Submit via email: YES

Requester's email: Rep.Kuglitsch@legis.wi.gov

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Duty of care toward trespassers

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 10/21/2011	csicilia 10/21/2011		_____			
/1	phurley 10/25/2011	csicilia 10/25/2011	jfrantze 10/21/2011	_____	sbasford 10/21/2011	sbasford 10/21/2011	
/2			jfrantze 10/25/2011	_____	mbarman 10/25/2011	mbarman 10/25/2011	

FE Sent For:

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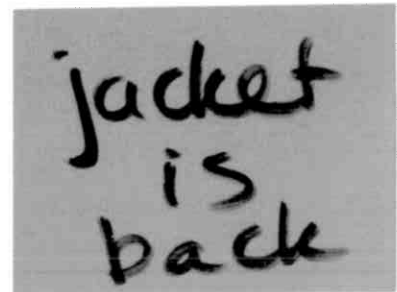
See attached

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<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 10/21/2011	csicilia 10/21/2011		_____			
/1			jfrantze 10/21/2011	_____	sbasford 10/21/2011	sbasford 10/21/2011	

FE Sent For:

<END>



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is
back

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/?	phurley	1 cjs	10/21 11	Jo 10/21			
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FE Sent For:

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State of Wisconsin
2011 - 2012 LEGISLATURE



LRB-2939/2
PJH&TKK:cjs:jf

2011 BILL

1 AN ACT *to create* 895.529 of the statutes; **relating to:** the duty of care owed to
2 trespassers.

Analysis by the Legislative Reference Bureau

This bill sets forth limits on the civil liability of private property owners to trespassers. Under the bill, a private property owner, including a lawful tenant or other occupant of private property, owes no duty of care to a trespasser on his or her property and may not be found liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser, except under certain circumstances. The bill defines a trespasser as anyone who enters onto private property without the express or implied consent of the property owner and sets forth criteria for determining whether the owner gave implied consent to enter onto the property.

Under the bill, a private property owner may be liable for injuries that he or she intentionally causes to a trespasser, unless the private property owner was acting reasonably in self-defense or in the defense of another.

Under the bill, a private property owner may, under certain circumstances, be liable for injuries to a trespasser who is a child. Liability may attach if the child was injured because of an artificial condition on the property that the owner knew or should have known was unreasonably dangerous and knew or should have known

BILL

a child was likely to trespass near and if other factors indicate that the owner acted unreasonably in failing to prevent harm to the child.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.529 of the statutes is created to read:

895.529 Civil liability limitation; duty of care owed to trespassers. (1)

In this section:

possessor of real property

(a) ~~"Private property owner" means an owner, other than a governmental body or nonprofit organization, of property, and includes a lessee, tenant, or other lawful occupant~~ *x of real property.*

(b) ~~"Property" means real property and buildings, structures, and improvements thereon.~~

or remains upon

Possession of (b) ~~"Trespasser" means a natural person who enters another without the express or implied consent of the private property owner.~~ *↑ onto the property or in*

(2) Except as provided in sub. (3), a ~~private property owner~~ *possessor of real property* owes no duty of care to a trespasser ~~on his or her property and may not be found liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser.~~

(3) A ~~private property owner~~ *possessor of real property* may be liable ~~for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser under any of the following circumstances:~~ *for*

(a) The ~~private property owner~~ *possessor of real property* ~~intentionally~~ *willfully, wantonly, or recklessly* caused the injury or death. This paragraph does not apply if the ~~private property owner~~ *Possessor* used reasonable and necessary force for the purpose of self-defense or the defense of others under s.

BILL

1 939.48 or used reasonable and necessary force for the protection of property under
2 s. 939.49.

Replace
with
Insert
A

- 3 (b) The person injured or killed was a child and all of the following apply:
- 4 1. The injury or death was a result of an artificial condition on the property.
- 5 2. The private property owner knew or should have known that the artificial
- 6 condition presented an unreasonable risk of death or serious bodily harm to children.
- 7 3. The private property owner knew or should have known that a child or
- 8 children were likely to trespass at the location of the artificial condition.
- 9 4. The child injured or killed did not discover the artificial condition or realize
- 10 the risk involved with the artificial condition until after the child came within the
- 11 area made dangerous by the artificial condition.
- 12 5. The utility to the private property owner of maintaining the artificial
- 13 condition and the burden of eliminating the danger were slight as compared to the
- 14 risk to the injured or killed child.
- 15 6. The private property owner failed to exercise reasonable care to eliminate
- 16 the danger or otherwise protect the injured or killed child.

17 ~~(4) In determining whether a person has implied consent to enter onto the~~
18 ~~property of a private property owner, a trier of fact shall consider all of the~~
19 ~~circumstances existing at the time the person entered onto the property, including~~
20 ~~all of the following:~~

- 21 ~~(a) Whether the private property owner acquiesced to previous entries by the~~
- 22 ~~person or by other persons under similar circumstances.~~
- 23 ~~(b) The customary use, if any, of the property by other persons.~~
- 24 ~~(c) Whether the private property owner represented to the public that the land~~
- 25 ~~may be entered for particular purposes.~~

BILL

SECTION 1

1 ~~(d) The general arrangement or design of any buildings, structures, or~~
2 ~~improvements on the property.~~

3 (4) (5) This section does not create or increase any liability on the part of a private
4 property owner for circumstances not specified under this section and does not affect
5 any immunity from or defenses to liability available to a private property owner
6 under common law or another statute.

7 **SECTION 2. Initial applicability.**

8 (1) This act first applies to actions that are filed on the effective date of this
9 subsection:

10 (END)

INSERT A

1. the possessor maintained, or allowed to exist, an artificial condition on the property which was inherently dangerous to children being upon on the premises;

2. the possessor know or should have know that children trespassed upon the property;

3. the possessor ~~realized~~^{know} or should have ~~realized~~^{known} that the structure erected or artificial condition maintained by the possessor was inherently dangerous to children and involved an unreasonable risk or serious bodily injury or death to such children;

4. the injured child, because of the child's youth or tender age, did not discover the condition or realize the risk involved in going within the area, or in playing in close proximity to the inherently dangerous artificial condition; and

5. safeguards could reasonably have been provided by the possessor which would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained.

SOURCES FOR LANGUAGE IN INSERT A

Minnesota Fire & Cas. Ins. Co. v. Paper Recycling of La Crosse, 627 N.W.2d 527, 537 (Wis. 2001) (“A plaintiff claiming a cause of action for attractive nuisance must establish the following elements: (1) that the [possessor of real estate] maintained, or allowed to exist, upon his land, an artificial condition which was inherently dangerous to children being upon his premises; (2) that he knew or should have known that children trespassed or were likely to trespass upon his premises; (3) that he realized or should have realized that the structure erected or the artificial condition maintained by him was inherently dangerous to children and involved an unreasonable risk of serious bodily injury or death to them; (4) that the injured child, because of his youth or tender age, did not discover the condition or realize the risk involved in going within the area, or playing in close proximity to the inherently dangerous condition; [and] (5) that safeguards could reasonably have been provided which would have obviated the inherent danger without materially interfering with the purpose for which the artificial condition was maintained.”) (quoting *Christians v. Homestake Enterprises, Ltd.*, 303 N.W.2d 608, 616 n.12 (Wis. 1981)); *McWilliams v. Guzinski*, 237 N.W.2d 437, 438-39 (Wis. 1976) (same); *Gonzales v. Wilkinson*, 227 N.W.2d 907, 909-910 (Wis. 1975) (“The doctrine assumes the presence on the premises of an artificial condition which (is) inherently dangerous to children.”); *Schilz v. Walter Kassuba, Inc.*, 134 N.W.2d 453, 455 (Wis. 1965) (stating elements of attractive nuisance action); *Angelier v. Red Star Yeast & Prods. Co.*, 254 N.W. 351, 353 (Wis. 1934) (same); *Brady v. Chicago & N. W. R. Co.*, 62 N.W.2d 415, 417 (Wis. 1954) (same).



State of Wisconsin
2011 - 2012 LEGISLATURE

September 2011 Special Session



LRB-3129/1
PJH&TKK:cjs:jf

ASSEMBLY BILL 22

50223/1
rnr

10-21-11 today

October 18, 2011 - Introduced by COMMITTEE ON ASSEMBLY ORGANIZATION, by request of Governor Scott Walker, Representative Kuglitsch, and Senator Galloway. Referred to Committee on Judiciary and Ethics.

Colr Cat

1 AN ACT to create 895.529 of the statutes; relating to: the duty of care owed to
2 trespassers.

Analysis by the Legislative Reference Bureau

This bill sets forth limits on the civil liability of private property owners to trespassers. Under the bill, a private property owner, including a lawful tenant or other occupant of private property, owes no duty of care to a trespasser on his or her property and may not be found liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser, except under certain circumstances. The bill defines a trespasser as anyone who enters onto private property without the express or implied consent of the property owner and sets forth criteria for determining whether the owner gave implied consent to enter onto the property.

Under the bill, a private property owner may be liable for injuries that he or she intentionally causes to a trespasser, unless the private property owner was acting reasonably in self-defense or in the defense of another.

Under the bill, a private property owner may, under certain circumstances, be liable for injuries to a trespasser who is a child. Liability may attach if the child was injured because of an artificial condition on the property that the owner knew or should have known was unreasonably dangerous and knew or should have known

a child was likely to trespass near and if other factors indicate that the owner acted unreasonably in failing to prevent harm to the child.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.529 of the statutes is created to read:

895.529 Civil liability limitation; duty of care owed to trespassers. (1)

In this section:

(a) ~~Private property owner~~ means an owner other than a governmental body or nonprofit organization, of property, and includes a lessee, tenant, or other lawful occupant.

(b) "Property" means real property and buildings, structures, and improvements thereon.

(b) "Trespasser" means a natural person who enters onto the property of another without the express or implied consent of the private property owner.

(2) Except as provided in sub. (3), a private property owner owes no duty of care to a trespasser on his or her property and may not be found liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser.

(3) A private property owner may be liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser under any of the following circumstances:

(a) The private property owner intentionally caused the injury or death. This paragraph does not apply if the private property owner used reasonable and necessary force for the purpose of self-defense or the defense of others under s.

|| Possessor of real property ||

of real property

or remains upon

(b)

possessor of real property

possessor of real property

possessor of real property willfully, wantonly or recklessly

possessor

1 939.48 or used reasonable and necessary force for the protection of property under
2 s. 939.49.

3 (b) The person injured or killed was a child and all of the following apply:

- 4 1. The injury or death was a result of an artificial condition on the property.
5 2. The private property owner knew or should have known that the artificial
6 condition presented an unreasonable risk of death or serious bodily harm to children.
7 3. The private property owner knew or should have known that a child or
8 children were likely to trespass at the location of the artificial condition.
9 4. The child injured or killed did not discover the artificial condition or realize
10 the risk involved with the artificial condition until after the child came within the
11 area made dangerous by the artificial condition.
12 5. The utility to the private property owner of maintaining the artificial
13 condition and the burden of eliminating the danger were slight as compared to the
14 risk to the injured or killed child.
15 6. The private property owner failed to exercise reasonable care to eliminate
16 the danger or otherwise ~~protect the injured or killed child.~~

17 (4) In determining whether a person has implied consent to enter onto the
18 property of a private property owner, a trier of fact shall consider all of the
19 circumstances existing at the time the person entered onto the property, including
20 all of the following:

- 21 (a) Whether the private property owner acquiesced to previous entries by the
22 person or by other persons under similar circumstances.
23 (b) The customary use, if any, of the property by other persons.
24 (c) Whether the private property owner represented to the public that the land
25 may be entered for particular purposes.

1 (d) The general arrangement or design of any buildings, structures, or
2 improvements on the property.

(4) B 3 (5) This section does not create or increase any liability on the part of a private
4 property owner for circumstances not specified under this section and does not affect
5 any immunity from or defenses to liability available to a private property owner
6 under common law or another statute.

7 **SECTION 2. Initial applicability.**

8 (1) This act first applies to actions that are filed on the effective date of this
9 subsection.

10 (END)

Insert 4.2

<use 2x>
possessor of
real property

2011-2012 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0223/?ins
PJH:.....

INSERT 4.2:

1. The possessor of real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous to children (on the property).
2. The possessor of real property knew or should have known that children trespassed on the property.
3. The possessor of real property knew or should have known that the artificial condition he or she maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children.
4. The injured or killed child, because of his or her youth or tender age, did not discover the condition or realize the risk involved in entering onto the property or in playing in close proximity to the inherently dangerous artificial condition. *Keep comma*
5. The possessor of real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist.

1. Wis. Stat. § 895.52 applies to certain trespassers.

The Wisconsin Supreme Court has made clear that the state's recreational immunity law will apply to trespassers engaged in recreational activities as well as permitted users. In *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 636, 547 N.W.2d 602 (Wis. 1996), the court stated that "the applicability of Wis. Stat. § 895.52 does not hinge on the injured party's status as a non-trespasser, but rather on his or her use of the property for recreational purposes." This interpretation avoids the absurd result that § 895.52 "could expose a property owner to greater liability to one engaging in prohibited activity than to a member of the public utilizing the property as intended." *Id.* at 636-37.

According to the *Verdoljak* court, the legislative intent of the recreation immunity law also strengthens this interpretation. The prior landowner immunity statute, § 29.68 (repealed by 1983 Wis. Act 418), as originally enacted and subsequently amended, contained protection for landowners who "open private lands", "give[] another permission", and "allow their land to be used". Wis. Stat. § 895.52 does not condition immunity upon a grant of permission, overruling prior Wisconsin Supreme Court decisions implying such a requirement. *Verdoljak* at 633-34, citing 1983 Wis. Act 418. Additionally, applying § 895.52 to trespassers engaged in recreational activity follows the legislative directive to liberally construe the statute to protect property owners from liability. *Id.* at 638.

2. Potential Conflict between § 895.52 and LRB-2939.

A. Proposed § 895.529(3)(a) arguably extends greater protection to landowners than § 895.52 in certain circumstances by requiring intentional conduct on the part of the landowner in order to extend liability. Under §§ 895.52(6)(b) and (c), liability can extend where the landowner maliciously fails to warn of a known unsafe condition, or where the injury is caused by a malicious act of the landowner. Interpreting identical language in § 895.52(4)(b), the Wisconsin Supreme Court defined "malicious" as the result of hatred, ill will, or revenge, or is inflicted under circumstances where insult or injury is the intended result. See *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 484, 464 N.W. 2d 654 (Wis. 1991). The structure of that definition can arguably be bifurcated into separate and distinct acts: 1) Those which are the result of hatred, ill will, or revenge, and 2) those which are intentional. In situations where §895.52 and the bill apply (i.e., those where a trespasser is engaging in recreational activity), there may be a conflict as to what acts trigger liability. If the intent of the legislature is to extend liability ~~only where the~~ landowner has acted intentionally, an amendment to §§ 895.52(6)(b) and (c) seems appropriate. Otherwise, it may be advisable to add language to the effect of "Except as provided in s. 895.52" to § 895.529(3)(a) of the bill.

B. Proposed § 895.529(3)(b) essentially codifies the common law attractive nuisance doctrine. The elements of the doctrine, as recognized in Wisconsin are:

- (1) Owner maintains or allows to exist, upon his land, an artificial condition which is inherently dangerous to children being upon his premises.
- (2) Owner knew or should have known that children trespassed or were likely to trespass upon his premises.
- (3) Owner realized or should have realized that the structure erected or the artificial condition maintained by him was inherently dangerous to children and involved an unreasonable risk of serious bodily injury or death to them.
- (4) The injured child, because of his youth or tender age, did not discover the condition or realize the risk involved in going within the area, or in playing in close proximity to the inherently dangerous condition.
- (5) Safeguards could reasonably have been provided which would have obviated the inherent danger without materially interfering with the purpose for which the artificial condition was maintained. *See Schilz v. Walter Kassuba, Inc.*, 27 Wis.2d 390 (Wis. 1965), *citing Nechodomu v. Lindstrom*, 269 Wis. 455, 456, 457, 69 N. W. (2d) 608.

Under the recreational immunity law, “[e]xcept as expressly provided in this section, nothing in this section or s. 101.11 nor the common law attractive nuisance doctrine creates any duty of care or ground of liability toward any person who uses another’s property for recreational activity.” Wis. Stat. § 895.52(7) (emphasis added). The creation of § 895.529, by codifying the doctrine, would effectively eliminate some of the protection for landowners contemplated by § 895.52(7).

attractive
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apply if done
recreational
use

For example, under the recreational immunity law, a landowner is arguably not liable and is under no duty, absent extenuating circumstances, when a trespassing child is injured while swimming in an unguarded pool. However, proposed § 895.529(3)(b) creates a duty and imposes liability nearly (if not) identically to the attractive nuisance doctrine, under which a swimming pool may qualify. *See See McWilliams v. Guzinski*, 71 Wis.2d 57, 62, 237 N.W. 2d 437, 439 (1976) (holding that an insufficiently guarded swimming pool in a residential area is an attractive nuisance to a four year old child). The same argument can be made for many other artificial conditions that both constitute an attractive nuisance and are used for recreational activities. [This incongruity can be remedied to maintain the existing protections of the recreational immunity statute by the addition of “s. 895.529” in § 895.52(7), or by the addition of language to the effect of “Except as provided in s. 895.52” in the introduced bill.

C. Proposed § 895.529(3)(c) and (d) may also conflict with § 895.52, and could serve to eliminate some protections afforded landowners. The proposed sections concerns habitual trespass areas and known trespassers. Under the bill, landowners owe duties of reasonable care in these areas and to these people under certain circumstances. However, § 895.52 would apply in these areas and to these people if they are engaged in recreational activities. Recreational immunity also arguably applies when a trespasser

crosses land to get to a location off the property where they will engage in recreational activity. See *Urban v. Grasser*, 2001 WI 63, 243 Wis. 2d 673, 627 N.W.2d 511 (holding that walking across property, though not in itself recreational, did not render the landowner exempt from liability as the walk was “inextricably connected” to recreational activity).

As previously noted, a landowner’s duty under § 895.52 is to refrain from malicious acts or failure to warn against unsafe conditions. Proposed § 895.529(3)(c) and (d) change, and arguably impose stricter duties upon landowners than currently exist under § 895.52. The duty under the proposed bill is one of “reasonable care”, a distinctly more affirmative duty than contemplated under § 895.52. It could then fall to a court to decide which statute applies, with the conceivable result that the new duty imposed under the bill controls. This potential tension can be remedied in the same manner described above.



Now
State of Wisconsin
2011 - 2012 LEGISLATURE

September 2011 Special Session



LRBs0223/1
PJH&TKK:cjs:jf

2
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ASSEMBLY SUBSTITUTE AMENDMENT,
TO ASSEMBLY BILL 22

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Gen Cat

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11

AN ACT *to create* 895.529 of the statutes; relating to: the duty of care owed to trespassers.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

~~SECTION 1~~ 895.529 of the statutes is created to read:

895.529 Civil liability limitation; duty of care owed to trespassers. (1)

In this section:

(a) "Possessor of real property" means an owner, lessee, tenant, or other lawful occupant of real property.

(b) "Trespasser" means a natural person who enters or remains upon property in possession of another without express or implied consent.

(2) Except as provided in sub. (3), a possessor of real property owes no duty of care to a trespasser.

1 (3) A possessor of real property may be liable for injury or death to a trespasser
2 under the following circumstances:

3 (a) The possessor of real property willfully, wantonly, or recklessly caused the
4 injury or death. This paragraph does not apply if the possessor used reasonable and
5 necessary force for the purpose of self-defense or the defense of others under s.
6 939.48 or used reasonable and necessary force for the protection of property under
7 s. 939.49.

8 (b) The person injured or killed was a child and all of the following apply:

9 1. The possessor of real property maintained, or allowed to exist, an artificial
10 condition on the property that was inherently dangerous to children.

11 2. The possessor of real property knew or should have known that children
12 trespassed on the property.

13 3. The possessor of real property knew or should have known that the artificial
14 condition he or she maintained or allowed to exist was inherently dangerous to
15 children and involved an unreasonable risk of serious bodily harm or death to
16 children.

17 4. The injured or killed child, because of his or her youth or tender age, did not
18 discover the condition or realize the risk involved in entering onto the property, or
19 in playing in close proximity to the inherently dangerous artificial condition.

20 5. The possessor of real property could have reasonably provided safeguards
21 that would have obviated the inherent danger without interfering with the purpose
22 for which the artificial condition was maintained or allowed to exist.

23 (4) This section does not create or increase any liability on the part of a
24 possessor of real property for circumstances not specified under this section and does

1 not affect any immunity from or defenses to liability available to a possessor of real
2 property under common law or another statute.

3 **SECTION ~~2~~ Initial applicability.**

4 (1) This act first applies to actions that are filed on the effective date of this
5 subsection.

6 (END)

2011-2012 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0223/lins
PJH&TKK:cjs:jf



1 INSERT:

2 SECTION 1. 895.52 (7) of the statutes is amended to read:

3 895.52 (7) NO DUTY OR LIABILITY CREATED. Except as expressly provided in this
4 section, nothing in this section or , s. 101.11 , or s. 895.529 nor the common law
5 attractive nuisance doctrine creates any duty of care or ground of liability toward any
6 person who uses another's property for a recreational activity.

History: 1983 a. 418; 1985 a. 29; 1989 a. 31; 1995 a. 27, 223, 227; 1997 a. 242.