



Attorney Addresses the Trespass Liability Act - Episode #109

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John Czuba: Welcome to "The Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Renee Townsend. Renee is a partner in the Troy, Michigan office of [Secrest Wardle](#). She's a member of the firm's motor litigation, premises liability, insurance coverage, and general negligence practice groups.

Renee has also developed legal compliance programs for business and property owners in all 50 states and internationally.

Renee, we're very pleased to have you with us today.

Renee Townsend: Thank you for having me, John.

John: Today's discussion is the Trespass Liability Act. Renee, can you tell us what the Trespass Liability Act is, and why it was enacted?

Renee: The Trespass Liability Act is a statute that can be found at MCL 554.583. Basically, in a premises liability lawsuit there's a duty of care owed by the property owner or possessor, but the duty of care is dependent on the plaintiff's status on the land.

Historically, Michigan has recognized three common law categories for person to enter upon the land of another, and each of these categories corresponds to a different standard of care.

For example, there's the highest level of care, which is owed to invitees. You owe a duty of ordinary care to keep the premises in a reasonably safe condition.

You also have to warn the invitee of any known dangers, but also the additional obligation to make the premises safe. You have to inspect the premises.

You then go down to the next level of legal statuses known as licensees. A land owner owes a licensee a duty to use ordinary care to prevent injury arising from the landowner's active negligence.

That includes a duty to warn of any hidden dangers that you have reason to know about or you actually do know about.

That's when we get into the lowest level of the trespasser. Under the common law there's generally no duty by a landowner to trespassers unless...basically, you have to make sure that you aren't conducting anything that's willful or wanton misconduct.

Under most circumstances landowners don't have a duty to keep the premises safe, meaning there's no duty to make the premises safe or warn of any dangers, even if you know of any dangers.

There is the duty not to actively harm the trespasser. You can't set a trap on your property and sit back and watch while somebody wanders into it.

That brings us to the Trespass Liability Act. All of those statutes and corresponding duties arise from the common law. Effective June 26th, 2014 the Michigan Legislature codified the property owner's tort duties with respect to trespassers in MCL 554.581.

The statute states the property owner or possessor, and I'm going to quote here, "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 land so as to not to endanger the trespasser."

John: Renee, does the statute define the term "trespasser"?

Renee: No, it does not. The Trespass Liability Act does not define the term "trespasser" so it's presumed to rely upon the common law definition, which again in Michigan is a person who goes upon the premises of another without their express or implied permission for his own purposes and not in the performance of any duty.

John: Under what circumstances will a landowner be liable to a trespasser under the Trespass Liability Act?

Renee: The statute states that a property owner or possessor, "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 land so as not to endanger the trespasser."

As with most statutes, though, if you discuss the rule you have to discuss the exceptions to the rule. That's where we come into the circumstances where somebody could be held liable.

MCL 554.583 sets forth four specific exceptions under which a possessor of land may be subject to liability for physical injury to a trespasser.

The first one's going to be if the property owner engages in willful or wanton misconduct.

The second is going to be if the property owner is both aware of the trespasser's presence and is actively negligent.

The third is if the property owner knew or should have known that trespassers constantly intrude on a limited area of the land and the trespasser was harmed as a result of the possessor's failure to carry on that activity in that limited area involving a risk of death or harm with reasonable care for the trespasser's safety.

Finally, the fourth is in certain situations where a child is injured by an artificial condition on the land. That last one comes with its own set of requirements. All of those requirements have to apply for a landowner to be liable to a child injured by an artificial condition on the land.

When children are involved, a special rule imposing a higher degree of care may apply. I like to call this "The Dumb Kids Rule." That's not the official name, obviously, but it's easy to remember. You've got to be a little bit more careful when there's a "dumb kid" involved.

What the "Dumb Kids Rule" basically says is that a landowner is required to take into consideration that a child's ability to appreciate the full extent of the risk is different from that of an adult. This may be familiar to some people as part of the Attractive Nuisance Doctrine, but under the Trespass Liability Act a landowner may be liable for a child injured by an artificial condition on the land if all of the following apply:

Number one, the possessor knew or had reason to know that a child would be likely to trespass on the place where the condition existed.

Number two, 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.

Number three, the injured child, because of her youth, did not discover the condition or realize the risk involved in intermeddling with it or in coming into the area.

Number four, the utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight compared with the risk to the child.

Finally, that the possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

The example that I like to give, and if you can picture it in your mind's eye, would be an old, rusty slide going directly into a dumpster. Let's say this slide is in an area known to be used by neighborhood kids to walk to a local elementary school.

This would be an example of a situation in which a landowner would likely find themselves liable if a child was hurt under MCL 554.583, because you would fit all of those conditions I just listed.

John: Renee, does the Trespass Liability Act increase the liability of a possessor of land or affect any immunities or defenses to civil liability available to landowners in Michigan?

Renee: The statute does not increase the liability of a possessor of land and does not affect any immunity from or defenses to civil liability established by the statutes of the common law to which a possessor of land is normally entitled.

It simply codifies protections for landowners but does not alter the general rules regarding trespassers under the common law in any significant way.

John: How has the Trespass Liability Act changed the law in Michigan?

Renee: The short answer is that it really hasn't changed the law. Trespassers have always had a very limited ability to make premises claims against landowners. This statute had codified those limitations.

The statute was passed partly in response to a 2013 decision titled, "*Bailey v. Schaafl*" in which the Michigan Supreme Court rules that landowners have a duty to make reasonable efforts to contact police when they know about criminal acts occurring in common areas of rental properties which may cause harm to a tenant or other person on the property.

The, "or other person on the property," language made people nervous. With the passage of the Trespass Liability Act, the Michigan Legislature reaffirmed that trespassers are limited in establishing personal injury claims against landowners.



The statute has simply codified the duty of care owed by possessors of land to trespassers with some exceptions. Within those exceptions it defines those special considerations for trespassing children like we discussed.

John: What do insurers potentially need to be concerned about this new statute?

Renee: Insurers, as always, should be mindful of a couple of things when these claims involving trespassers come in. First, the Trespass Liability Act is effective as of June 26th, 2014.

The statute does not specifically state that it applies retroactively. It's assumed to apply prospectively to all accidents occurring on or after June 26th, 2014.

It's not going to be applicable to accidents that happen before June 26th, 2014. This is something to watch out for in complaints that may include a statutory trespass claim.

Insurers should also be mindful of any claims involving children. As we discussed, the legislature specifically carved out an exception for trespassing children.

Though meeting the criteria of the exception is still pretty onerous for a minor plaintiff, it would be one area where I would expect these claims to come in.

John: Renee, thanks so much for joining us today.

Renee: Thank you for having me, John.

John: That was Renee Townsend, partner in the Troy, Michigan office of [Secrest Wardle](#). Special thanks to today's producer, Brian Cohen.

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