

# Wisconsin's Trespass Law

by Philip E. Harris\*

## I. Introduction

Wisconsin's trespass laws give landowners rights as well as responsibilities. This outline first addresses the landowner's rights and then the landowner's responsibilities to trespassers.

## II. Landowners' Rights to Prevent Trespassing

There are two sets of laws that can be used to prevent trespassing. One is the civil or tort laws that allow landowners to sue trespassers for damages they cause while trespassing. The other is the statutory trespass rules that impose a fine on trespassers.

### A. Civil Trespass

The civil trespass rules allow a landowner to recover damages caused by a trespasser.

1. A trespasser under these rules is anyone who is on the property without permission. Consequently, posting the land is not required to prove that a person is trespassing.
2. The civil trespass rules require the landowner to prove the damages caused by the trespasser. Therefore, if the trespasser has only walked across the property, the landowner is not likely to recover any damages.

### B. Statutory Trespass

Since the civil trespass rules impose no liability on the trespasser unless the landowner can prove damages, Wisconsin has enacted statutory trespass rules that impose a fine on the trespasser if he or she has violated the statute.

1. Note that some actions are statutory trespass if the user of the property does not have permission. See Wis. Stat. §943.13(1m)(a) and (am).

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2. Other actions are trespass only if the user has received notice that he or she is not allowed on the property. See Wis. Stat. §943.13(1m)(b), (e) and (f).

3. Notice can be given to a user personally or by posting the property

### III. Landowner's Duty to Trespassers

A. Generally, a landowner has no duty a trespasser other than to not maliciously try to injure them.

1. Therefore, there is generally no duty to warn trespassers of dangers on the property.

2. However, creating a danger for the purpose of injuring a trespasser can create a liability for the landowner.

Example: Landowner set up a trap gun with a wire to the trigger so that it will discharge toward anyone entering the door of an abandoned house. If the gun causes injury, the landowner may be held liable for the damages.

B. A landowner may use reasonable force to protect his or her property. In Wisconsin, it is never reasonable to use deadly force to protect property.

C. Attractive Nuisance

1. Landowners have a special duty to protect young children from injuring themselves even though the child is trespassing.

2. Because young children do not have the ability to know when they are in danger, landowners who have artificial condition on their property (such as a swimming pools, farm machinery, livestock, abandoned buildings or mine shafts) have a duty to protect children from injuring themselves.

3. In order to recover under the attractive nuisance doctrine, the victim must prove the following:

a. the owner knows or should know that children are likely to trespass in the area of the condition,

b. the owner knows or should know that the condition creates an unreasonable risk of death or serious bodily injury,

c. the children do not understand the danger because of their youth,

- d. the utility of the condition to the owner is slight compared to the risk to the children, and
- e. the owner fails to exercise reasonable care to protect the children.

D. Wisconsin's Recreational Use Statute

1. Under common law civil liability rules, landowners have a higher duty for the safety of users of their property if the users have the owner's permission to be on the property than if they are trespassers.
  - a. In general, that duty is to use reasonable care to protect the user.
  - b. Consequently, by giving a hunter permission to use her property, a landowner would increase her chances of being liable for injury to the hunter.
2. To reduce landowners' disincentive to allow hunters and other recreational users onto their property, Wisconsin enacted a recreational use statute that makes the landowner's duty to recreational users the same as their duty to trespassers.
3. The Recreational Use Statute protects landowners only if they are not in the business of selling the use of their land for recreational purposes.
  - a. To distinguish those who are in the business of recreational use from those who are not, the statute sets an arbitrary cut off of \$2,000 that the landowner can receive from recreational users each year.
  - b. Payments such as a gift of wild animals or any other product resulting from the recreational activity or payments of not more than \$5 per person per day for permission to gather any product of nature on the owner's property are not counted when applying the \$2,000 limit.