

8025 TRESPASS: OWNER'S DUTY TO TRESPASSER; DUTY TO CHILD TRESPASSER (ATTRACTIVE NUISANCE)**TRESPASSER: DEFINITION**

A person who enters or remains upon property in possession of another without express or implied consent is a trespasser.¹

Consent to be on the premises of another may be express or implied. There is an express consent when the possessor² expressly invites or authorizes another person to be on his or her premises. There is an implied consent when the possessor, by his or her conduct or his or her words, or both, by implication consents to such other person's being on the premises.

In determining whether an implied consent exists, you should look at all of the circumstances then existing, including the acquiescence of the possessor, if any, in the previous use of the premises by others (including the plaintiff); the customary use, if any, of the premises by others (including the plaintiff); the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises. If, under all the existing circumstances, a reasonable person would conclude that the possessor of the premises impliedly consented that the plaintiff be on the premises, then there was consent.

Question ____ asks: At the time and place in question, was (plaintiff) a trespasser?

If by your answer to Question ____ you have found that the plaintiff, _____, was

a trespasser, it will then be for you to determine whether the defendant, _____, as the (owner) (occupant possessor) of the premises, complied with those rules of law relating to the duties owed by an owner-occupant to a trespasser.

A trespasser enters upon premises of another at his or her peril. The (owner) (occupant-possessor) is under no duty to anticipate a trespasser's entry or to provide for a trespasser's safety. An (owner) (occupant possessor) may engage in any lawful work conducted in a customary manner, upon his or her premises without incurring liability to a trespasser. This is so even though some danger to trespassers reasonably may be anticipated due to the nature of the work being performed or the manner in which it is being conducted. The (owner's) (occupant-possessor's) only duty to a trespasser is to refrain from acts which willfully, wantonly, or recklessly cause injury or death to trespassers. If (owner) (occupant-possessor) becomes aware, or in the exercise of ordinary care should have become aware, of the presence of trespassers upon his or her premises, (he) (she) may not affirmatively act or set any force in motion likely to cause injury or death to trespassers.

Willful actions are deliberate acts with intent to accomplish a result. Wanton or reckless actions are those so unreasonable and dangerous that the actor knows or should know that it is highly probable harm to another will result.³

Question ____ asks:

At or immediately before the (injury to) (death of) (plaintiff), were the actions of (defendant) willful, wanton, or reckless?

If you determined that the actions of (defendant) were willful, wanton, or reckless, then you must determine if the actions were a cause of (plaintiff)'s (injury)(death);

Question ____ asks:

Was the action of (defendant) a cause of (injury)(death) to (plaintiff)?

(NOTE: If the plaintiff is a child and his or her claim is based on “attractive nuisance,” the following instruction should be given. For a suggested verdict, see Wis JI-Civil 8027.)

CHILD TRESPASSER

When a child trespasses upon the premises of another, the owner-occupant owes no duty of care to a child injured or killed unless all of the following apply:

- a) The possessor of real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous to children.
- b) The possessor of real property knew or should have known that children trespassed on the property.
- c) 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.
- d) 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.

- e) 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.

An artificial condition, as used in this instruction, includes a machine or device as well as a land condition artificially created. The duty of the possessor is to exercise ordinary care to eliminate dangers or otherwise protect children. Ordinary care is that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. The duty placed upon the possessor is to take such steps as a reasonable person would take under the circumstances. The duty of the possessor does not apply to children who know, or should know, of the danger involved in the condition.

In determining whether the (artificial condition), maintained on the land known to be subject to trespass by children, involves an unreasonable risk to them, you should consider and compare the recognizable risk to the children with the utility to the possessor of maintaining the condition. In this regard, you should consider whether safeguards could reasonably be provided which would obviate the danger without materially interfering with the purpose for the artificial condition. You must further decide if the (artificial condition) was a cause of the (injury to) (death of) (child).

NOTES

1. Wis. Stat. § 895.529(1)(b). This instruction was revised in accordance with 2011 Act 93.

2. Wis. Stat. § 895.529(1)(a). “Possessor of real property” means an owner, lessee, tenant, or other lawful occupant of real property.

3. This exception does not apply if the possessor used reasonable and necessary force for the purpose of self-defense or the defense of others under Wis. Stat. § 939.48 or used reasonable and necessary force for the protection of property under § 939.49

COMMENT

The committee revised the instruction and comment in 2012. The comment was revised in 2016. This revision was approved by the Committee in September 2021; it added to the notes and comment.

Wis. Stat. § 895.529. See Wis. Stat. § 895.529(4) which states: “This section does not create or increase any liability on the part of a possessor of real property for circumstances not specified under this section and does not affect any immunity from or defenses to liability available to a possessor of real property under common law or another statute.”

This instruction incorporates the former Wis JI-Civil 8012: Trespasser: Definition and Wis JI-Civil 8015: Trespass: Consent of Possessor to Another’s Being on Premises. The instruction also covers a claim based on attractive nuisance which formerly had been addressed in Wis JI-Civil 1011.

Special Verdicts. For special verdicts on the duty of a possessor of property, see Wis JI-Civil 8026 and 8027.

It is the opinion of the committee that there is no comparative negligence comparison involving an owner’s duty to a child trespasser (attractive nuisance). It is our opinion that Wis. Stat. § 895.529(3)(b) is designed to limit the liability of a landowner and that the statute does not provide for a comparison of negligence.

Burden of Proof. The committee believes the burden of proof as to the first verdict question (i.e. was the plaintiff a trespasser?) is on the defendant to show the plaintiff was a trespasser. The middle burden of proof applies to the question: “At or immediately before the injuries to plaintiff, were the actions of defendant willful, wanton, or reckless?”

Attractive Nuisance. See Wis. Stat. § 895.529(3)(b); Christians v. Homestake Enterprises, Ltd., 101 Wis.2d 25, 303 N.W.2d 608 (1981); Restatement, Second, Torts § 339. For a suggested verdict, see Wis JI-Civil 8027.

Duty to Non-Trespassers. In Antoniewicz v. Reszczyński, 70 Wis.2d 836, fn. 4, 236 N.W.2d 1 (1975), the court abolished the distinction between the duty owed to licensees and invitees by possessors of land. The decision created one common and equal duty that a possessor of land owes to all persons on his or her lands (excepting trespassers) and that is the duty to exercise ordinary care. See Wis JI-Civil 8020.

Duty of care owed to trespassers. Wis. Stat. § 895.529(2) states that “Except as provided in sub. (3), a possessor of real property owes no duty of care to a trespasser.” As noted in Note 2, supra, § 895.529(1)(a) defines a “possessor of real property” as “an owner, lessee, tenant, or other lawful occupant of real property.” However, there is no statutory definition provided for the phrase “other lawful occupant of real property.”

In Stroede v. Society Insurance, 2021 WI 43, 397 Wis.2d 17, 959 N.W.2d 305, the Wisconsin Supreme Court provided an interpretation of this phrase, and determined that such a person “must have some degree of possession or control over the property and the ability to give and withdraw consent to enter or remain on the property.” Id. at ¶19.

