RECREATIONAL LIABILITY

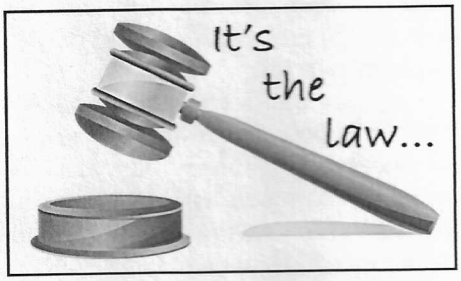
In most cases, law and statute provide immunity and liability protection for woodland owners

By Lars Loberg

Many woodland owners allow others to use their property for recreational purposes. Typical uses in Wisconsin include hunting, hiking, snowmobiling and riding ATVs. All uses include some level of risk of injury or death to the participant. A frequent question is whether a landowner is liable for injuries or death sustained by those engaging in outdoor recreation on the landowner's property.

Liability depends upon a number of factors, namely whether the person recreating was a trespasser or present with permission. If the user had permission, the issue is whether the landowner charged a fee for the individual's use of his or her property and whether the user was engaged in outdoor recreation as defined by statute. However, if the injured party was a trespasser, the question is whether the landowner's willful or reckless conduct resulted in injury or death, or whether the injured party was a child.

Generally, Wisconsin landowners are immune from liability for injuries sustained by individuals engaging in recreational activities. See *Wis. Stat. §895.52(2)*. Recreational activities are broadly defined to include virtually all outdoor activities, including, but not limited to, sledding, wood cutting, driving ATVs, hunting and bird-watching. See *Wis. Stat. §895.52(1)(g)*. Given the broad statutory immunity granted to landowners and seemingly never-ending list of what constitutes an outdoor recreational activity, most woodland owners in Wisconsin are protected from liability for damages sustained by those either trespassing or lawfully entering an owner's property to engage in outdoor recreation activities.



Notwithstanding the immunity granted to landowners, important statutory exceptions limit liability protection. For instance, if a landowner receives payment in exchange for an individual to recreate, then liability might attach if injuries are sustained. *Wis. Stat. §895.52(6)(a)* provides that a landowner who collects money, goods or services as payment for the use of the owner's property for recreational activities during which a death or injury occurs is not immune from liability if the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year in which the death or injury occurs exceeds $2,000. Importantly, the statute does not require each individual who is recreating to pay $2,000, but instead provides that if the total received by the landowner from all users exceeds $2,000, then immunity protection is lost.

The statute also defines what does not constitute a "payment" to a private property owner for the use of property for recreation: (1.) A gift of wild animals or any other product resulting from the recreational activity; (2.) An indirect non-pecuniary benefit to the private property owner or to the property that results from the recreational activity; (3.) A donation of money, goods or services made for the management and conservation of the resources on the property; (4.) A payment of not more than $5 per person per day for permission to gather any product of nature on an owner's property; (5.) A payment received from a governmental body (i.e. CRP); and (6.) A payment received from a nonprofit organization for a recreational agreement. See *Wis. Stat. §895.52(6)(a) (1-6)*. Ergo, if a landowner leases his property to a hunter and charges more than $2,000 to that hunter in any given calendar year for the hunter's right to recreate, then the landowner might be liable for injury sustained by the hunter.

A second exception to liability protection results from the malicious act or failure to act by a landowner. A malicious act is generally defined as a deliberately harmful act motivated by a desire to cause injury to another. *Wis. Stat. §895.52(6)(b)* provides that the malicious failure to act eliminates immunity protection. An example might include the deliberate failure to warn a deer hunter that the straps holding a tree stand to a tree have been cut and that use of the stand will result in a fall. Similarly, *Wis. Stat. §895.52(6)(c)* states that immunity protection is lost if a landowner acts maliciously. An example might include the intentional act of cutting the straps of a tree stand with the intent to cause harm to the hunter. Importantly, a malicious act or the malicious failure to act elim-

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inates liability protection for injuries or death sustained by even a trespasser. *See Hoffiander v. St. Catherine's Hosp., Inc., 262 Wis.2d 539, 664 N.W.2d 545, 575 (Wis. 2003).*

However, the State recently enacted legislation providing landowners with additional protections from liability for injuries sustained by a trespasser. Property owners in Wisconsin owe a lesser duty of care to trespassers than they do to employees, guests or invitees. A property owner owes a duty of reasonable care to individuals who enter their property with the property owner's permission. *Wis. Stat. §895.529* provides that a landowner owes no duty of care to a trespasser and may not be found liable for an occurrence on the property causing injury or death to the trespasser. Again, certain exceptions apply, namely that injury or death did not result from the willful, wanton or reckless act of the property owner without justification, or unless the trespasser was a child and other specific factors are present.

Courts have long recognized special protections for children and exceptions to immunity from liability for property owners when a child, even a child trespasser, is injured or killed. *Wis. Stat. §895.529(3)(b)* specifies when a property owner may be found liable for injury or death sustained by a child trespasser if all of the following factors apply: (1.) The landowner allowed artificial conditions to exist on the property that are inherently dangerous to children; (2.) The landowner knew or should have known that children trespassed on the property; (3.) The artificial condition that was inherently dangerous to children also involved an unreasonable risk of serious bodily harm or death to children; (4.) The child, because of his or her age, did not realize or discover the risk involved in entering the property; and (5.) The landowner could have, while maintaining the artificial condition, provided reasonable safeguards to prevent the danger of harm or death.

This 2011 statute, as it relates to children, is rooted in what is often referred to as the Attractive Nuisance Doctrine. The doctrine stands for the general premise that landowners may be liable for artificial conditions that attract and injure children, even if the children are trespassing. Importantly, both the statutory language and doctrine focus on "artificial conditions." An artificial condition is something that would not be present on the property naturally. The focus on artificial conditions should provide woodland owners with immunity for injury sustained even by a child trespasser if the child is injured or killed by playing in the landowner's woodlot that is otherwise unremarkable or typical of any other woodlot, but nonetheless exhibits dangerous characteristics, such as decadent or hollow trees, snags, eroded roots, windthrows and the like.

Photo: WDNR

Wisconsin woodland owners should generally feel secure when allowing people to recreate on their property, including deer hunters, because case law and statute provide broad immunity and liability protection.

Wisconsin woodland owners should generally feel secure when allowing people to recreate on their property because case law and statute provide broad immunity and liability protection. This is important because few individuals can afford to own property, but most woodland owners agree that supporting outdoor recreation is important to foster a connection to the outdoors. As woodland owners, we should embrace our unique ability to allow others to enjoy the outdoors knowing that we are protected from liability.

Lars Loberg (lloberg@loberglawoffice. com) is a partner with Loberg Law Office, Ellsworth, and has been interested in woodland issues for many years.