Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 1017 (as introduced 5-17-18)
Sponsor: Senator Peter MacGregor
Committee: Judiciary

Date Completed: 9-4-18

CONTENT

The bill would enact the "Premises Liability Act" to specify the liability of possessors of real property for injuries sustained by individuals who have the possessor's permission to be on the property.

The bill would take effect 90 days after its enactment.

Definitions

The bill would define "possessor" as any of the following:

-- A person that is in occupation of a premises with intent to control it.
-- A person that has been in occupation of a premises with intent to control it, if no other person has subsequently occupied the premises with intent to control it.
-- A person that is entitled to immediate occupation of a premises, if no other person is a possessor as described above.

"Person" would mean an individual, partnership, corporation, association, or other legal entity.

"Premises" would mean real property.

Invitees

Under the bill, a possessor would have a duty to use ordinary care to protect an invitee from risks of harm from a condition on the possessor's premises if both of the following applied:

-- The risk of harm was unreasonable.
-- The possessor knew or, in the exercise of ordinary care considering the character of the condition and the length of time that the condition had existed, should have known of the condition, and should have realized that the condition involved an unreasonable risk of harm to an invitee.

"Invitee" would mean an individual who is invited, expressly or impliedly, to enter or remain on premises for a commercial benefit to the possessor of the premises or for a purpose directly or indirectly connected with business dealings with the possessor.

Licensees

The bill specifies that a possessor of land would be liable only for physical harm caused to a licensee by a condition on premises if all of the following applied:

-- The possessor knew or should have known of the condition and should have realized that it involved an unreasonable risk of harm to the licensee, and should have expected that the licensee would not have discovered or realized the danger.
-- The possessor failed to warn the licensee of the danger.
-- The licensee did not know or have reason to know of the danger.

"Licensee" would mean an individual who enters or remains on premises for any purpose other than a business or commercial purpose with the express or implied permission of the possessor of the premises. The term would include a possessor's social guest.

Open and Obvious Danger

Under the bill, a possessor would owe no duty to protect an invitee or licensee from, or warn an invitee or licensee of, risks of harm from an open and obvious condition of the possessor's premises, unless there were special features that made the condition effectively unavoidable or created an unreasonably high risk of severe harm.

"Open and obvious" would mean the condition is known to the invitee or licensee or the condition would have been discovered by a reasonably careful person on causal inspection.

Other Provisions

The proposed Act would not do any of the following:

-- Affect or impair any defense that could be available to the owner or possessor of premises under any other law.
-- Create a duty of care of an owner who also was not a possessor of the premises.
-- Impair comparative fault under Sections 2955a or 2959 of the Revised Judicature Act, or under other Michigan law.
-- Create a duty of care to a trespasser.

"Owner" would mean a person that holds legal or equitable title to premises.

"Trespasser" would mean an individual who goes on the premises of another without the express or implied permission or invitation of the possessor, for the individual's own purposes, and not in the performance of any duty to the possessor.

(Section 2955a specifies that it is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury that action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual was less than 50% the cause of the accident or event, a damages award must be reduced by that percentage.

Under Section 2959, in an action based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death, a court must reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based. If that person's percentage of fault is greater than the aggregate fault of the other

person or persons, whether or not parties to the action, the court must reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based, and noneconomic damages may not be awarded.)

BACKGROUND

Comparative Fault

The Federal Employers Liability Act of 1906 established what is known as "comparative negligence", in which a plaintiff's damages are reduced proportionally by the percentage of the plaintiff's own negligence that caused his or her injury. Michigan adopted the comparative negligence standard in a 1979 Michigan Supreme Court case. (*Placek v. City of Sterling Heights* (405 Mich 638) involved a car accident in which the plaintiff, Patricia Placek, struck the defendant, a police officer traveling through an intersection during an emergency run. At trial, the plaintiff and the defendant each were found to be partially liable and the case was dismissed because, at the time, Michigan was a "contributory negligence" jurisdiction, which means that damages will not be awarded to the plaintiff if his or her own negligence is found to have contributed to the injury. However, on appeal, the Court of Appeals found that the trial court had erred in allowing the jury to hear that the Placeks has not been wearing their seatbelts, and ordered a new trial. At the second trial, the Placeks, again, were denied recovery based on contributory negligence grounds. On subsequent appeal, the Michigan Supreme Court ordered a third trial to determine the plaintiff's recovery under a comparative negligence standard.)

Trespassers

Public Act 226 of 2014 enacted the Trespass Liability Act, which specifies that a possessor, owner, lessee, or other lawful occupant of land 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 trespassers.

A possessor of real property may be subject to liability for physical injury or death to a trespasser, however, if any of the following apply:

-- The possessor injured the trespasser by willful and wanton misconduct.
-- The possessor was aware of the trespasser's presence on the property, or in the exercise of ordinary care should have known of the trespasser's presence, and failed to use ordinary care to prevent injury to him or her arising from active negligence.
-- The possessor knew, or from facts within his or her knowledge should have known, that trespassers constantly intrude on a limited area of the property and the trespasser was harmed as a result of the possessor's failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for the trespasser's safety.

A possessor of real property also may be subject to liability for injury or death to a trespasser if the trespasser is a child injured by an artificial condition on the property and all of the following apply:

-- The possessor knew or had reason to know that a child would be likely to trespass on the place where the condition existed.
-- 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 of death or serious bodily harm to a child.

-- The injured child, because of his or her youth, did not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it.
-- 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.
-- The possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the child.

Open and Obvious Danger

While a premises owner can be held liable for dangerous conditions on their property, he or she is not liable if the dangerous condition was "open and obvious". In Michigan, the standard for determining if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection". *Novotney v. Burger King Corp.*, 198 Mich App 470 (1993). This means that even if real property contains a dangerous condition that causes a plaintiff's injury, the nature of the dangerous condition should have served as a warning to the invitee, and he or she should have recognized the potential danger and taken reasonable precautions to protect himself or herself.

The open and obvious doctrine initially was based on Section 343A of the Restatement (Second) of Torts, which provides the following:

-- A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
-- In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

However, in *Lugo v. Ameritech Corp.* (464 Mich 512), a 2001 Michigan Supreme Court case, the Court replaced the Restatement approach with the following analysis: "[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk". A special aspect exists when the danger although open and obvious is unavoidable or imposes "a uniquely high likelihood of harm or severity of harm".

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Abbey Frazier

SAS\S1718\s1017sa