

**SUBJECT:** Landowner liability for harm to a trespasser

**COMMITTEE:** Judiciary and Civil Jurisprudence — committee substitute recommended

**VOTE:** 10 ayes — Jackson, Lewis, Bohac, Castro, S. Davis, Hartnett, Madden, Raymond, Scott, Thompson

0 nays

1 absent — Woolley

**WITNESSES:** For — Lee Parsley, Texas Civil Justice League; (*Registered, but did not testify*: Kathy Barber, National Federation of Independent Business; Mark Behrens, American Tort Reform Association; Luke Bellsnyder, Texas Association of Manufacturers; Ronald Cobb, American Insurance Association; Jayme Cox, Kinnan Golemon, Shell Oil; Cathy DeWitt, Texas Association of Business; Jon Fisher, Associated Builders & Contractors of Texas; Steve Hazlewood, Dow Chemical; Mike Hull, Texans for Lawsuit Reform; Dennis Kearns, BNSF Railway; Scott Norman, Texas Association of Builders; Bill Oswald, Koch Companies; Mari Ruckel, Texas Oil and Gas Association; Eric Sandberg, Texas Bankers Association; Tom Sellers, Conoco Phillips; Seth Terry, Texas Farm Bureau; Wendy Wilson, Texas Apartment Association; Daniel Womack, Texas Chemical Council)

Against — (*Registered, but did not testify*: Jim Grace, Center Point Energy)

**BACKGROUND:** Penal Code, ch. 9 authorizes the use of force in certain situations when the force is deemed immediately necessary. Subch. C authorizes the deadly use of force under limited circumstances. Subch. D authorizes the use of force to protect property.

Civil Practice and Remedies Code, ch. 75 governs the limitation of landowners' liability in Texas.

In 2010, the American Law Institute published Part One of *The Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, which generally guides legal professionals in all aspects of legal practice.

The recent *Restatement* adopts a unitary standard of reasonable care for nearly all persons who enter onto property, except for a trespasser deemed “flagrant.”

DIGEST:

CSHB 1971 would define a trespasser as a person who entered another person’s land without any express or implied legal right. Under the bill, an owner, lessee, or land occupant would not be liable for any injury to a trespasser, but would have a duty to refrain from injuring a trespasser willfully, wantonly, or through gross negligence.

An owner, lessee, or land occupant could be held liable for a trespassing child’s injury caused by an extremely dangerous artificial, or man-made, condition on the land if:

- he or she knew or reasonably should have known that the location of the artificial condition was one that a child would be likely to trespass upon;
- he or she knew or reasonably should have known that the artificial condition existed, and realized or should have realized that it involved an unreasonable risk of death or serious bodily harm to a child trespasser;
- the youth of the child trespasser prevented the child from assessing the danger involved in meddling with the artificial condition;
- the usefulness to the owner, lessee, or land occupant of maintaining the artificial condition and the trouble of removing the danger were small compared to the threat posed to the child trespasser; and
- he or she failed to use reasonable care to remove the danger or otherwise protect the child trespasser.

CSHB 1971 also would specify that an owner, lessee, or land occupant whose actions against a trespasser were justified under Penal Code, ch. 9, subch. C or D, would not be liable. The bill would not affect sections of the Civil Practice and Remedies Code governing the limitation of landowners’ liability in Texas, nor would it increase liability.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. It would apply only to causes of action that accrued on or after the effective date.

SUPPORTERS  
SAY:

CSHB 1971 would codify Texas common law as it currently stands and has been recognized for many years and would support the historical treatment of tort common law by Texas courts. Current common law reasonably does not require landowners to extend a duty of care to trespassers, except in very limited and well-defined circumstances. If courts were allowed to consider the influence of the *Restatement*, Texas law would expose landowners to a broad scope of liability with vague language that only excluded one type of trespasser from a duty of care. Because the definition of a “flagrant” trespasser does not exist in the *Restatement*, courts would experience increased litigation simply surrounding the meaning of the term. Texas courts, especially in the current economic environment, cannot afford any additional burden to their dockets.

CSHB 1971 would prevent the imposition of unfair financial burdens on Texas property owners. By rejecting the *Restatement’s* guidance, the bill would continue to alleviate landowners of an unnecessary burden to protect trespassers on their private property. If the unitary standard was adopted, property owners would face an increase in insurance rates, particularly in homeowner’s insurance, an already sensitive subject in Texas. As a result, owners and renters of residential property would be particularly affected. The effects of the *Restatement’s* new approach also would extend to businesses in Texas, both large and small.

The bill also would protect victims of trespass by continuing to hold trespassers responsible for their presence on property without permission. Without CSHB 1971, Texas courts would undoubtedly experience an increase in frivolous lawsuits. Giving trespassers additional rights to sue not only would promote bad public policy, but also would reject an application of common-sense principles to legal cases.

CSHB 1971 would maintain Texas’ protection of children by continuing to hold landowners to a higher standard of care regarding man-made conditions on property that could possibly attract a child, cause the child to trespass, and result in harm. By promoting a policy that protected children unable to make certain determinations for themselves, the bill would ensure that all landowners in Texas took precautions against the creation of dangerous conditions.

OPPONENTS  
SAY:

CSHB 1971 would prevent Texas from participating in the progressive application of more modern legal standards. The type of rule reflected in the bill would pit tort and property principles against one another by allowing a landowner to use the freedom associated with private property ownership in a way that conflicted with the duty of all persons to use reasonable care to protect others. Property should not be valued over the protection of persons in Texas.

The bill would hamper the ability of plaintiffs to pursue remedies for harm suffered on the land of others. Because courts generally are more comfortable making findings that no legal duty to use reasonable care existed, many tort cases are dismissed before reaching juries. CSHB 1971 would make it easier for courts to determine that no duty existed by codifying an overbroad rule applying to trespassers. As a result, the bill would infringe on a plaintiff's right to trial by jury by allowing courts to cross boundaries to reach into fact-determination issues usually reserved for juries.

CSHB 1971 would ignore guidance provided by leading judges and practitioners who drafted the *Restatement*. As a result, case law in Texas would continue to be confusing from varied applications of common law.

NOTES:

The substitute differs from the original in that it removed references to age limits for child trespassers.

The companion bill, SB 1160 by Seliger, passed the Senate by 31-0 on March 31 and was reported favorably without amendment by the House Judiciary and Civil Jurisprudence Committee on April 20, making it eligible to be considered in lieu of HB 1971.