

AGRICULTURAL ALTERNATIVES

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Understanding Agricultural Liability

As a farm business owner or someone who leases land for your farming operation, you face liability issues. As soon as someone enters your property, whether invited or not, you have some form of responsibility for that person's safety. The status of that person will determine how much responsibility you have for their safety. This publication will outline the various levels of responsibility and how you may determine those levels. Seek advice from your attorney and insurance agent about sources of liability for your individual enterprise. This publication will enable you to begin to consider your responsibility levels and provides the steps you can take to reduce your exposure to liability risks.

Who Faces the Risk of Liability?

Liability for injury to a person that occurs on someone else's land is not determined simply by identifying the owner of the property on which the injury occurred. Likewise, a person in possession and control of the premises on which the injury occurred, such as a tenant or renter, cannot be excused from liability simply because the person is not the owner of the property.

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Generally, the risk of liability and the rules for assigning responsibility are applied to persons who actually occupy, possess, or control the property where the injury occurs. Also factored into this analysis are separate agreements between owners and occupiers where one assumes an obligation to maintain or repair property or be responsible for events that occur on the property, even though not in possession or control of the property. An example of this would be someone who leases a farm or property for agricultural use and then holds an agritainment event on the property. In resolving such issues, a jury or court may note that possession and control can vary from one tract to another or even be shared by several people, which can then create the possibility of joint responsibility for an injury.

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How Is Liability Determined?

There are two approaches to determining whether you are liable to another for injuries or property damage occurring on your property. The first approach is based on English common law rules that vary your duty as a landowner/occupier according to the status of the injured person in relation to you at the time of the injury. This is called the “status-equals-duty-owed” approach. The second approach developed from criticism of the common law rules and attempts to replace them with a single rule that requires you to exercise reasonable care in any given situation. This approach is known as the “reasonable care” approach.

Status-Equals-Duty-Owed Approach

The general principle of this approach is that the duty a person in possession and control of property owes to another person on his or her land varies according to the status of the person at the time the injury occurs. Someone on the property at the invitation of the owner/occupier is entitled to greater expectation of personal safety than someone who enters the premises without permission of any kind. An example may be an invited guest on the property as opposed to a person who is trespassing. The invited guest would expect to have more rights if injured than a person trespassing would expect to have. As the status of the injured person changes in relation to the owner/occupier, the duty owed to the person also changes.

Three general categories of persons on land have been identified: trespassers, licensees, and invitees. The distinction between the categories is the circumstance under which the person’s presence on the land is accomplished. Trespassers are neither invited nor permitted. Licensees are not invited, but they are permitted. Invitees come by invitation, whether express or implied.

Trespasser

A trespasser is someone who enters another’s property without right, lawful authority, or express or implied invitation or permission. Such a person may enter for his or her own purpose (e.g., a hunter inadvertently enters your land) and may remain for an undetermined period. In determining status as a trespasser, the motive of the person entering the property is immaterial, as is the person’s age.

Licensees

Licensees, in comparison, have a higher status by reason of their permission or consent to be on the property obtained from the owner/occupier. An example of a licensee would be someone who delivers feed or supplies to the farm. In determining whether consent or permission is given, issues of express or implied consent arise.

For example, in the face of evidence that frequent use is being made of their property as a walk way and bike path, an owner/occupier’s failure to take action to stop the

unauthorized use may lead to the conclusion that the owner permits the use to continue. If a person discovers a trespasser on his or her property and allows that person to remain on the land, has the status changed from trespasser to licensee? Most would answer “yes” to that question if an express statement of permission is given, but situations of quiet acceptance or indifference are more difficult to resolve.

Invitee

The third classification is that of an invitee, either public or business. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open. If a landowner allows people on the property to hunt after obtaining permission, the person may be a public invitee. In this context, “invitation” is given a technical meaning that is narrower than its common meaning. Included in the concept are persons who enter the land of another for a purpose that is unrelated to a business or commercial purpose or that bestows an economic benefit to the occupant. A business visitor, by comparison, is a person whose presence does bestow an economic benefit to the owner/occupier. For example, a farm that operates an agritainment venture would benefit financially from the invitee being on the property.

Each status has its set of requirements, and a person’s status can change when permission to enter is withdrawn or a person goes beyond the limit of his/her permission. Status at the time of injury determines the duty owed.

For example, assume a person goes to a supply store to purchase items needed for a business. Upon entering the store, the person is an invitee since the person enters for a commercial transaction that provides an economic benefit to the store owner. After deciding on an item, if the person goes to the back of the store to pick up items purchased, his or her status would be that of a licensee since they have express permission to enter an area not normally accessible to customers. While in the pick-up area if the person enters a building marked “For Employees Only,” the person becomes a trespasser for having extended beyond his/her permission to be on the premises.

Duty-Owed-Under-the-Status Approach

To a trespasser, a landowner/occupier owes a duty to refrain from willful or wanton conduct that injures the trespasser or damages property. Because willful conduct intends to bring about a desired result, actual knowledge of the trespasser’s presence is necessary for it to exist. Since wanton conduct is the performance of an act without regard for the risk of harm or danger that the act obviously carries, actual prior knowledge of the trespasser’s presence is not required for wanton conduct to exist.

If the injured trespasser is a child, the rules for determining liability of an owner/occupier for the child’s injuries are modified. Children are naturally curious and are fascinated and explore new areas and new things. A child’s range of experiences is also limited when compared to an adult.

Therefore, acts that would likely create apprehension or fear in an adult may not create the same reaction in children.

In determining an owner/occupier's liability for injuries to a trespassing child caused by conditions on the land, several additional considerations are important. These considerations focus on the following questions:

- Did the owner/occupier know, or should have known, that children trespassed in the area where the injury occurred?
- Did the owner/occupier know that the condition of the property creates an unreasonable risk of death or serious harm to young children?
- Are the trespassing children too young to realize the risk of injury posed by the condition of the property?
- What is the value of the condition on the property that caused the injury and how does the value compare to the risk of harm to the children?
- Did the owner/occupier exercise reasonable care to protect the children?

For example, a property owner has four abandoned vehicles and items of equipment in an open field near a public road. The field is located less than one-quarter of a mile away from an elementary school. Children going to and from the school pass the field on their way. Along one edge of the field a path is developing that runs from the school toward a small group of homes where young children live.

The abandoned vehicles and equipment no longer operate, and some are only used for parts. One item is damaged as a result of an accident. The items are stored in the field to get them out of the way of the nearby equipment shed. There are no signs, fences, or warnings anywhere near the abandoned vehicles and equipment.

If a child from the elementary school were to wander across the field to explore one of the abandoned vehicles and be injured while climbing on it, consider how the five additional factors would affect your liability exposure.

To licensees, an owner/occupier owes a duty to avoid willful, wanton, and reckless conduct and to exercise reasonable care to correct a defect or warn a licensee of dangers that create an unreasonable risk of harm, are known to the owner/occupier, and that the owner/occupier should expect the licensee will not discover or realize. In many respects, this duty is similar to the duty owed to a trespasser. Intentional acts and those that exhibit a conscious indifference for the safety of others give rise to liability. The duty to warn reflects the special knowledge of the owner/occupier and an obligation to share the information, by warning, to those on the land with permission or consent. Since the permission can be given expressly, adequate warning can be given when permission is given through means such as warning signs, barricades, or enclosures that convey information about the condition and the risk. If a landowner has a dog that he/she knows will bite strangers, then the landowner must post "Beware of Dog" signs for people to see when entering the property.

To invitees, a person in possession or control of property owes a duty to their public and business invitees to have the premises in a reasonable, safe condition for use in a manner consistent with the purpose of the invitation. This duty includes taking steps to avoid exposing customers to unreasonable risk and to giving adequate and timely warnings of perils or defects that are known to the owner/occupier but not the licensee. Invitees expect the premises to be safe for their use through the exercise of reasonable care and frequent inspections designed to identify problems that can be corrected or for which a warning is provided until the problem is resolved. In case of a biting dog, if the landowner/occupier is inviting the public onto the property for financial gain, the owner/occupier should have the dog in an enclosed pen or run.

Exception for Pick-Your-Own Enterprises

Although the duty owed by an owner/occupier to an invitee is the most extensive of the three obligations, the Pennsylvania legislature has adopted a limited exception that applies to farm owners or tenants of agricultural land who operate a "pick-your-own" business for the picking and purchasing of farm products at a farm location. Unlike the general duty, such farm owners are immune from lawsuits or claims by injured customers of the business caused by conditions on the land. This immunity applies for the protection of the possessor unless the injuries were caused by a condition that involves unreasonable risk of harm, is known to the owner/occupier, and the owner/occupier fails to exercise reasonable care to make the condition safe or to warn of its presence and the risk associated with it. For example, a groundhog digs a new hole in the evening and a guest steps into it the next morning. The owner/occupier would not know the hole was there until the accident occurs. In comparison to the general duty owed to a business invitee, this immunity removes the affirmative obligation to inspect the premises to identify problem or defects in need of repair. Once such a defect or problem is found, the possessor has the duty to make the condition safe or to warn of its presence and its risk (Act 1990-112, effective July 11, 1990).

Reasonable-Care-Under-the-Circumstances Approach

With some frequency, the wisdom of the status-equals-duty approach has been called in to question. English law recognized the need to change it and did so in 1957 with a rule that requires an owner/occupier to exercise reasonable care to others on the property and abolishes the distinction between licensees and invitees. Some jurisdictions have gone beyond this and abolished all three common law classifications and replaced them with a single requirement to exercise reasonable care. Under this concept, the status of the injured person in relation to owner/occupier does not determine the obligation owed by the owner/occupier.

Under this approach, courts inquire whether the owner/occupier is exercising realistic care for the safety of all

persons that are reasonably expected to be on the property. The tort law concept of foreseeability becomes an important factor in deciding who can reasonably be expected to be on the property. Although this approach lessens the importance of the status determination, status is not totally irrelevant to the resolution of a dispute. If intrusion by another onto an owner/occupier's land is not foreseeable, or is against the will of the owner/occupier, such an intruder can expect a lower level of care to fulfill the reasonableness requirement. Owner/occupiers cannot be expected to maintain property in a safe condition to protect those who enter against the wishes of the owner/occupier.

The Role of Recreational-Use Statutes

Demand for recreational land is increasing, but the supply of public land on which these uses can take place is not increasing to meet the demand. Therefore, more users are looking to private landowners as the source of additional land for hiking, camping, fishing, swimming, and other outdoor recreational activities. Recognizing the liability risk and duty they would owe to those who enter their land with permission, owner/occupiers often refuse to permit people to enter their property for recreational use.

To solve the dilemma facing a private owner/occupier who is unwilling to permit others to use land for recreational uses, a statutory compromise was developed in the form of recreational-use statutes. For example, the Pennsylvania Game Commission encourages landowners to open their land for public hunting but does not offer any direct financial payments to the landowner. The landowner still retains the right to refuse any person access onto the property. These statutes encourage owner/occupiers to make their land available for use at no cost or for a fee to the user. In return, the statute modifies the duty owed by the owner/occupier to one who has permission to enter the property. In general, these statutes provide that an owner/occupier owes no duty of care to keep the premises safe for entry or use or a duty to give a warning of dangerous conditions, uses, structures, or activities that take place on the property. Under these circumstances, an owner/occupier is held to have neither extended any assurance that the premises are safe nor conferred upon the user the status of licensee or invitee to whom a duty of care is owed.

Most statutes, however, provide that owner/occupiers are not immune from all liability for injuries that occur on their property. The most common situations where owner/occupiers lose the protection of the act include those where a charge or fee is imposed on the user (e.g., fee hunting) or the injury is caused by the owner/occupier's willful or malicious failure to guard or warn against a dangerous use, structure, or activity on the land. This duty is generally

equivalent to the obligation owed by an owner/occupier to a known trespasser or other person who is on the premises solely for their own benefit or convenience and not that of the owner/occupier.

An important condition to have these laws apply is that the facility owner allows others to use his/her property at no cost or charge. If the primary purpose of allowing others to use your property is to earn additional income (agritainment), these laws will not apply.

Determining the Liability Risk

The preceding discussion of liability looks at the rules that apply if an injury-causing event occurs. If the event does not occur, then the rules will not be applied and individuals need not worry about liability. Because it is not always possible to avoid accidents that give rise to a liability question, a prudent course of action is to take steps to deal with or manage the risk of liability in case an event should occur.

Risk is a normal part of our lives. We face risks that deal with our health, job, family, finances, and future. Risk can take many forms, such as the risk of illness or disease or the risk of losing an investment in the stock market. Business activity involves a risk that the money invested in the business will earn a satisfactory profit or return on the investment. Planting crops and raising livestock involve several important risks that include weather, pests, and market prices.

Some risks are easy to manage since the likelihood that the risk will materialize is very small. Other risks are difficult to manage if the likelihood of injury is high and the injuries that result are serious. Some risks will be managed by simply accepting the risk and going on with a person's life. Other risks are managed by transferring the risk to another person or entity. Liability insurance transfers risk to an insurance company that is willing to accept the risk in return for premiums from its policyholders.

Before choosing which route to take in managing risk, the risk should first be analyzed and evaluated in terms of exposure. Exposure calculates the risk associated with an activity and then multiplies the risk by the frequency of coming in contact with that risk. Insurance companies use risk calculations in the following way.

For example, if experience shows that one person of every 1,000 people who engage in an activity will be injured as a result of an accident, then for every 10,000 people who participate in the activity 10 people can expect to be injured. If 50,000 people engage in the activity, then exposure increases to 50. If only 500 people engage in the activity, 0.5 person can expect to be injured, or one injury in every other year of operation.

After determining exposure, the next step is to translate exposure into a financial estimate of what the exposure will cost. Again, the experience of others starts the process. If experience shows that the typical injury suffered in this activity is a broken arm and the average hospital and physician's cost for treating a broken arm is \$5,000, then multiplying the exposure by the average cost of treating the typical injury allows a person to convert the risk into a dollar figure that can be used when purchasing insurance. Exposure and converting exposure to a dollar figure are only estimates based on the experience of others. Although most risks can be managed in order to minimize them, there is no accurate method to predict how large or small the cost of exposure will be. This process is simply one way of determining the seriousness and the financial cost of the risk.

The type of enterprise you operate may have an impact on the level of exposure you face. If you have a more traditional enterprise such as dairy or crops, your level of exposure will be lower than if you have an agritainment enterprise. The more times you invite the public to your enterprise, the greater the level of your exposure. Remember, even a traditional dairy or crop operation has exposure by having delivery personnel, pest scouts, and others come on to your farm.

There are two methods of managing your exposure to risk. The first method, which is not recommended, is to self-insure. This means that you do not purchase any insurance and rely on your cash flow or savings to withstand any risks or obligations that may come your way. The second method is to calculate your exposure to liability and purchase liability insurance to cover this exposure. This method shifts a

portion of the risk to an insurance company in exchange for the premiums you will pay.

You still maintain a responsibility to attempt to keep your liability exposure to a minimum. This involves conducting periodic safety checks, keeping in mind your liability exposure. Walk around your property (including any buildings) and determine whether anyone is creating paths or using remote areas for their own use. If you find such areas, immediately post "No Trespassing" signs and be more diligent in determining who the violators may be. Keeping unwanted visitors off of your farm may be difficult but necessary depending on their activity.

You should consult your insurance agent and conduct an in-depth determination of your level of liability exposure. Take the insurance agent on a tour of your farm and listen to his/her determination of your liability exposure. The agent will calculate your exposure and create an insurance package to suit your needs. As a general rule, you should have enough insurance to cover your net worth. Insurance rates will vary by company, location, history, and experience. For more information regarding insurance coverage, see *Agricultural Alternatives: Agricultural Business Insurance*.

Disclaimer

This publication is not meant to be a substitute for legal or insurance advice. It is to be used as an informational tool only. For specific and detailed advice about your operation, contact your attorney and insurance agent for more information.

For More Information

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Web Sites

A Guide to Farming in Pennsylvania:
extension.psu.edu/farm-business/guide

The National Agricultural Law Center:
www.nationalaglawcenter.org

The National Agricultural Law Center State Compilations:
www.nationalaglawcenter.org/reporter/clearinghouse

The Pennsylvania State University Agricultural Law Center:
law.psu.edu/aglaw

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