

LANDOWNER LIABILITY and other legal matters

I. Torts - A tort is a civil wrong committed by one person against another. The difference between a tort and a crime is simply that a crime is a wrong identified set out in statute by our state or federal legislature and a tort is between two individuals, without government involvement. Sometimes torts and crimes overlap (i.e. O.J. Simpson was charged and acquitted with murder but was sued in civil court for wrongful death and lost.) The practical difference is that the defendant (the bad guy) in a criminal case usually goes to jail when found guilty (loses his liberty) and the bad guy in a civil case just pays money. Because the loss of liberty is considered in our society to be much more serious than the loss of money, the plaintiff (government) in a criminal case has a much higher burden of proof (beyond a reasonable doubt) than the plaintiff (individual) in a civil case (preponderance of evidence).

A. Intentional torts - a situation where an individual, the defendant desires and intends to bring about a particular result. Primary intentional torts are:

1. Battery
2. Assault
3. False imprisonment
4. Infliction of emotional distress

B. Negligence - Our primary focus here. Defendant did not intend a particular result but has behaved carelessly. The tort of negligence occurs when Defendant's conduct imposes an unreasonable risk upon another, when results in injury.

1. The components of negligence are:
 - a. Duty
 - b. Breach
 - c. Causation
 - d. Damages

C. Strict liability - Abnormally dangerous activities (i.e. blasting) and the selling of a defective product.

II. Land owner's liability - regarding negligence, a land owner or possessor has a duty of care to act reasonably toward those who come on his land so as not to place an unreasonable risk of injury upon them.

A. Three categories - The common law of the United States generally and Kentucky specifically evolved a rigid series of categories of plaintiffs, as to each of which the landowner owed a sharply differing duty of care. The three principal classes were **trespasser**, **licensee**, and **invitee**.

1. Trespasser - One who has no right to come on land. Traditional rule was that the landowner owes no duty to a trespasser to make her land safe, to warn of dangers on it, to avoid carrying on dangerous activities on it, or to protect trespassers in any way.

- a. There are a number of exceptions to this rule. Some are
 - i. Constant trespass
 - ii. Discovered trespassers
 - Natural conditions v. artificial conditions
 - iii. Children.
 - Attractive nuisance (addressed below)

2. Licensee - a person who has the owner's consent to be upon the land but who does not have a business purpose for being there. Traditionally a higher duty of care than a trespasser but lower than an invitee. Examples: social guests, incidental services.

a. The difference in liability historically was that the owner has no duty to a licensee to inspect for unknown dangers.

3. Invitee - the major difference between licensee and invitee is that only to the former does the owner owe a duty of reasonable inspection to find hidden dangers and of affirmative action to remedy such conditions.

a. Who is invitee - the modern view is that the class of invitees consists not only of persons who are invited by the owner onto the land to conduct (directly or indirectly) business with him, but also those who are invited as members of the public for purposes for which the land is help open to the public.

b. Duty of care - the owner must exercise reasonable care for the safety of her invitees. Generally every person in the United States has a duty toward every other person of due care. But in the case of land ownership, specific rules have evolved.

- i. Duty to inspect and correct known dangers
- ii. Warning - or if they can not be corrected to warn against them.

c. Open and obvious - Generally no duty to correct or warn if the hazard is open and obvious. Whether something is open and obvious is highly fact specific and varies from case to case.

d. Control over third persons - Reasonable care by the owner may require him to exercise control over third persons on his premises. A hotel owner or bar, for example, may have a duty to take security measures to prevent criminal acts by third parties against patrons.

B. Erosion of category distinctions - A number of courts, including those in Kentucky, have rejected the rigid categories of trespasser, licensee, and invitee, in favor of a general single reasonable person standard of liability.

C. Lessor/Lessee - A Lessee of land is generally treated as if he were the owner.

D. Landowner's defenses - there are several defenses a landowner can put forth if sued by an injured party:

1. Comparative negligence - i.e., "yea, but you were negligent too, you failed to exercise care for yourself".

a. Fault would be apportioned if landowner proved that plaintiff failed to exercise duty of care for self.

2. Assumption of Risk - a plaintiff has been said to have assumed the risk of certain harm if she has voluntarily consented to take her chances that the harm will occur.

a. Modern rule - simply evidence to be used by Landowner for apportionment and comparative negligence.

i. Express v. implied

- Express - Liability waivers. This is where they come into play. If the plaintiff has explicitly agreed with the defendant in advance of any harm, that the plaintiff will not hold the defendant liable for certain harm, the plaintiff is said to have expressly assumed the risk. If there is no public policy against the agreement, the agreement will generally be enforced and plaintiff will lose. There are several factors which the courts evaluate to determine whether the agreement violates public policy. These include:

- 1 Bargaining power - if defendant has greater bargaining power and he uses the power to force plaintiff to waive liability, this will decrease likelihood of waiver enforcement.
- 2 Fine print - defendant must show the terms were brought home to plaintiff. Plaintiff must

be aware and defendant must be able to show awareness.

- 3 Intentionally or willfully negligent misconduct - generally a waiver won't include liability for willful or wanton conduct or gross negligence.

ii. Kentucky law - there are generally five factors to look at in determining the validity of a release or waiver:

- a. Voluntary signing of the release
- b. Equal bargaining power of parties
- c. Public interest in activity
- d. Recreational nature of activity
- e. Knowledge and familiarity of injured party with the

activity.

iii. Because of Kentucky's informal determinations of the considered factors for a release, it is very important that those above factors be observed. In a fairly modern case (***Coughlin v. T.M.H. International Attractions, Inc.***, 895 F.Supp. 159 (W.D. Ky. 1995), the Court explained that release forms are generally not favored under our legal system. In certain circumstances, one may be released of liability for ordinary negligence but not for willful or wanton behavior or gross negligence. In the above cited case, the court reasoned that the waiver was no good because the defendant knew of the dangers and the injured parties were not experienced cavers. The release read more as an advertisement than warning of specific risks. For a wording of the release used in ***Coughlin***, see "Premises Liability - Caves in Kentucky".

iv. Waivers - important to specify risks. Given the public policy disfavoring waivers and the opinions in ***Coughlin***, it is important to identify the risks involved rather than just advising that the risk "is significant, including the potential for permanent paralysis and death". Since the public and/or a novice caver wouldn't understand why there is a risk of injury, paralysis and death, the warning doesn't carry much weight. If the warning doesn't carry much weight, the injured party hasn't properly been warned and the respective bargaining power of the parties is unlevel.

E. Minors - a minor is any human being under the age of 18. Special legal status applies to minors and this special legal status also applies to incompetent adults.

1. Contracts - Minors lack the ability to enter into a legally binding contract. Since they don't have legal status yet, any document they sign can be voided.

a. Waivers - To have any affect for a minor, must also be signed by parent.

2. Negligence - an exception to the reasonable person standard discussed above, is that children are not held to the level of care which would be exercised by a reasonable adult. A child must merely conform to the conduct of a reasonable person of like age, intelligence and experience under like circumstances.

a. Children have a duty of care for their own safety which is therefore comparable to age, intelligence and experience. Consequently, an adult has a higher legal responsibility for a young child, to be sure they are safe and not unreasonably subject to danger. Naturally, this would include trip leaders for youth caving trips. The younger the child, the more careful you need to be. As stated above, even if a waiver exists, it is not valid if willful or wanton behavior or gross negligence. Takes less negligence to be considered "gross" where a child is concerned.

b. Duty to protect children from third parties - Again, as stated earlier, a landowner may have a duty to protect children from third parties. If an owner has knowledge that a third party on the premises has a criminal background, particularly concerning children, he has an extremely high duty to protect that child.

III. Kentucky Cave Laws - the Kentucky legislature has enacted several statutes regarding Caves. They are:

A. Thou shalt not burn, dump or dispose in a cave except acetylene gas in carbide lamps KRS 433.875

B. Thou shalt not kill, harm or remove life in a cave KRS 433.877

C. Thou shalt not sale speleothems KRS Chapter 433

D. Thou shalt not remove archeological, palentological, historic, prehistoric, features of caves KRS 433.879

E. Thou shalt not be liable if a fee hasn't been charged for use of cave and a spelunker is injured. KRS 433.883

1. KRS 433.883 - very important statute. Passed in 1988, the statute mandates that a cave owner SHALL not be liable for injuries sustained by any person using the cave for recreational or scientific purposes IF NO CHARGE has been made.

2. If charge has been made - all bets are off.

a. Must rely on:

- i. Inspection
- ii. Warnings
- iii. Waivers
- iv. Safety
- v. Lack of negligence

F. Any person violation KRS 433 is subject to prosecution for Class A or B misdemeanor.

IV. Recreational Use Statue - 411.190. An owner of land owes no duty to keep his land safe for recreational purposes or to give any warning of a dangerous condition, structure, condition or activity to persons who use for recreation IF NO CHARGE has been made.

A. Purposes include hunting, fishing, basketball, hiking, skiing, camping, boating, etc.

B. No protection if:

- 1. Charge
- 2. Gross, willful or wanton conduct

C. If you charge, all bets are off.

V. How to Minimize Liability

A. Don't charge

B. If you don't charge, post signs exclaiming land is for recreational use.

C. Use waivers always, even for those camping and hiking

- 1. Make sure parent with custody signs waiver
- 2. Waiver sets out dangers.

D. Post signs warning of hazards

E. Make cave as safe as possible.

F. Make sure cave users have proper equipment

G. Require guides to take precautions and to give warnings to the group as to what to expect.

H. Use a risk manager.

I. Be careful.

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