



# Land Occupier's Liability Guide

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TEXAS A&M UNIVERSITY  
Texas Real Estate Research Center

TECHNICAL REPORT	TR
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MAY 2023	

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# Land Occupier's Liability Guide

Rusty Adams – Research Attorney

This guide provides an introduction to land occupier's liability in Texas. It gives a basic understanding of liability concepts and the potential pitfalls for owners and occupiers of land. This guide does not cover every situation for which a land occupier might have liability, nor does it cover every point of law that might be applicable. This guide generally covers situations where injuries occur on privately owned land. Different rules may apply to land owned by governmental entities. Neither this guide nor any other communication of the Texas Real Estate Research Center should be considered legal advice, and no attorney-client relationship is created hereby. The Texas Real Estate Research Center does not take sides in any legal disputes. Communications to and from the Texas Real Estate Research Center are not attorney-client communications and are not protected by any privileges. For legal advice on a particular situation, consult a lawyer of your choice.

## Landowners vs. Land Occupiers

The first thing many readers may notice is that this is not a "Landowner's Liability Guide." Well, it is, but it's not only for landowners. It's for land *occupiers*. If a person is injured, it happens on land that is owned or controlled by someone. If the injured party seeks recovery, one of the relevant inquiries will be, "Who, if anyone, is liable?" (i.e., "Who is legally responsible?"). **Landowners** are not the only people with potential liability. Others who possess or occupy the property may be liable as well. A **manager** of the property may be liable for injuries sustained on the property, as may a **tenant** or **lessee** who occupies and controls the property. In certain situations, **contractors** who assume control over and responsibility for the premises may be liable. **Prior owners** of property usually do not have liability, but there are exceptions.

When determining whether a land occupier has potential liability, the primary question is whether he **occupies and controls** the property. In this guide, those potentially liable may be referred to as landowners, land occupiers, managers, tenants, lessees, contractors, or prior owners. They may also be referred to as **defendants**. Defendants—those who are sued—may have to pay judgments if they are found liable, and even defendants who avoid liability may have to pay significant costs in litigation. Hopefully, this guide will prevent readers from becoming defendants.

## Causes of Action: Premises Defects vs. Negligent Activity

In a lawsuit, a plaintiff must plead and prove a specific set of factual elements to obtain a legal remedy. These sets of elements are referred to as **causes of action**. The causes of action discussed in this guide generally fall into the tort law category of **negligence** and are of two types: **premises defects** and **negligent activity**. Both of these causes of action are based on negligence, but they are two separate and distinct causes of action.

**Premises defects** liability has to do with protecting people from being injured because of dangerous conditions and defects on the property, and generally deals with the defendant's failure to warn of the danger or to make the property safe.

**Negligent activity** liability deals with acts or omissions in conduct that create dangerous conditions. In these cases, the plaintiff is injured by affirmative, contemporaneous conduct occurring on the property, rather than a condition of the property itself.

To understand these theories of liability, it helps to understand the theory of negligence.

## Negligence

A negligence cause of action has four basic elements: duty, breach, proximate cause, and injury.

**Duty.** First of all, the defendant must owe a legal *duty* to the plaintiff.

**Breach.** Second, that duty must have been *breached* by the defendant. A defendant breaches the duty by failing to live up to the legal duty owed. If there is a duty owed to the plaintiff and it has been breached by the defendant, the defendant has been **negligent**. However, more is required for the defendant to be held liable for that negligence. Read on.

**Proximate Cause.** Third, the defendant's negligence (his breach of the duty) must be the *proximate cause* of the injury to the plaintiff. This will be discussed in greater detail momentarily.

**Injury.** Finally, the plaintiff must sustain injury that is proximately caused by the defendant's breach of the duty.



In some cases, the injury is bodily injury; in others, the injury may be to real or personal property or other economic damage. **Damages** are assessed in court and include (but are not limited to) such things as medical bills and lost wages. These types of damages are designed to compensate the plaintiff for the damage actually sustained as a result of the injury. A plaintiff may also recover certain noneconomic damages such as pain and suffering. **Exemplary damages** may also be available. Exemplary damages or **punitive damages** are designed to punish negligent behavior and/or to make an example of the defendant, and to encourage land occupiers to make their property safer.

## More on Proximate Cause

Proximate cause can be complicated and may be thought of in two parts. The first part is whether the breach was the **cause in fact** of the injury. That is, did the breach actually cause the injury? If the breach had not occurred, would the injury have occurred? If not, the element of proximate cause is not satisfied, and the plaintiff may not recover. Lawyers often refer to this as **but for** cause, as follows: But for the defendant's breach, the injury would not have occurred. The second part is **foreseeability**. Did the breach cause foreseeable harm to the plaintiff? If the harm is not foreseeable, the plaintiff may not recover. Courts will determine if the injury was the **natural and probable consequence** of the negligent act, so that the defendant should have foreseen it **under the circumstances** and acted differently (i.e., should not have breached his duty to the plaintiff). If the injury is too remote from the cause, or if there are other intervening causes that break the chain of causation, the plaintiff will not be able to recover.

## Premises Liability

Premises liability is liability for an **unreasonably dangerous condition** on the premises. It is a nonfeasance theory based on the idea that the owner should have taken steps to keep the plaintiff safe, but failed to do so. Premises liability may be based on the defendant's **failure to eliminate the danger** or on the defendant's **failure to warn** the plaintiff of a dangerous condition.

Remember, premises liability is a special type of negligence claim, so the elements of negligence (duty, breach, proximate cause, injury) must all be satisfied. What makes premises liability different is the nature of the **duty**. If the defendant has **actual or constructive knowledge** of a condition on the premises that poses an **unreasonable risk of harm**, the defendant must exercise **reasonable care to reduce or eliminate the risk**. This may be done by taking steps to make the property safer or otherwise limit the plaintiff's access to the dangerous condition, or it may be done by warning the plaintiff of the risk.

**Actual knowledge** means the defendant *knows* of the condition. Of course, it may be obvious that the defendant knew of the condition, or the defendant may admit knowing of the condition. The defendant's actual knowledge may also be reasonably inferred from other evidence. Examples might be that a landowner had previously been warned of a condition, or that other people had been injured before.

**Constructive knowledge** is a legal substitute for actual knowledge in which the law imputes actual knowledge to the defendant if circumstances are such that the defendant *should have known*. This means a condition on the property exists long enough that the owner or occupant had a **reasonable opportunity to discover** it and remedy the situation. Did you ever wonder why grocery stores put carpet in front of the grapes? A store would probably not be liable if a grape fell onto a tile floor and a customer immediately slipped on the grape. The store probably didn't have actual knowledge that the grape was there and couldn't be expected to pick it up. However, if the grape stayed on the floor and was trodden underfoot by customers for an hour, the store may have had a reasonable opportunity to discover the presence of the grape. That is, the store should have known of the dangerous condition. Then the store could have cleaned the mess, placing a warning sign over the grape in the meantime. If the store failed to discover and clean the mess within a reasonable time, the store's failure to clean the mess could lead to liability. What if it only takes ten minutes? Is that a "reasonable opportunity?" That gets decided in the courtroom. This is why the store often conducts regular patrols of the produce section, and why the store puts carpet in front of the grapes. The carpet mitigates the slippery mess created when a crushed grape goes undiscovered and may be viewed as a reasonable effort to reduce or eliminate the risk.

**Unreasonable risk of harm** means that a harmful event is probable enough that a reasonably prudent person would have foreseen that event, or some similar event, as likely. This is also a fact-specific matter that will be determined in a courtroom. In that inquiry, several factors will be considered. Was the condition unusual? Did the plaintiff necessarily have to pass nearby? Were there any safety standards and were they met? Had anyone complained of the danger or been injured before? Was the hazard marked? There is no definitive rule.

The duty owed by the defendant to the plaintiff varies depending on the legal status of the plaintiff, and the legal status of the plaintiff varies depending on why the plaintiff is on the property. Fulfilling the defendant's duty can be thought of as clearing a hurdle. The height of the hurdle depends on the legal status of the plaintiff.

## Duty to Trespassers

A person who is on the property without any right, lawful authority, or express or implied invitation, permission, or license, without any inducement to enter the property, is a **trespasser**. Fulfilling the land occupier's duty to the trespasser is a low hurdle. There is no duty to make the property safe for a trespasser, nor is there a duty to warn a trespasser. The only duty owed by a land occupier to a trespasser is **not to injure the trespasser willfully, wantonly, or by gross negligence**.

**Gross negligence** is conduct which, viewed objectively from the actor's standpoint, involves an **extreme degree of risk**. The degree of risk is evaluated by considering the probability of the potential harm (i.e., How likely is the injury?) and the magnitude of the potential harm (i.e., How bad would the injury be?).

### Probability of Harm x Severity of Harm = Degree of Risk

If there is an extreme degree of risk, the actor must have **actual, subjective awareness** of the risk involved, and nevertheless **proceed in conscious indifference** to the rights, safety, or welfare of others. In other words, the defendant must have been aware that his act or omission was likely to injure someone severely, and nevertheless acted (or failed to act) anyway. Simply, if the landowner knew of the peril, but didn't care, that is likely to be gross negligence.

Therefore, for a trespasser plaintiff to recover against a defendant, he must prove:

- The defendant breached his duty to the trespasser (i.e., he injured the trespasser willfully, wantonly, or by gross negligence).
- The defendant's act or omission was the proximate cause of the trespasser's injury.
- The damages caused by the defendant's act or omission.

## Duty to Licensees

A person who is privileged to enter and remain on the premises by **express or implied permission** of the owner is a **licensee**. A person who comes on the property by invitation or permission, but not for a business purpose, would be an example of a licensee, and the category of licensees includes social guests. This hurdle is a little higher. The duties owed to a licensee include those owed to a trespasser—not to injure willfully, wantonly, or by gross negligence. There is no general duty to make the property safe for a licensee or to change anything about the property. The land occupier is not required to make any special preparations for the licensee's safety. The licensee must "take the premises as he finds them." However, in addition to the duties owed to a trespasser, a land occupier who has **actual knowledge** of a dangerous condition that poses an

**unreasonable risk of harm** must either **make the condition safe or warn** the licensee. Note that there is no duty to make the condition safe **and** warn—one or the other is sufficient to fulfill the land occupier's duty to a licensee. Likewise, there is no duty to inspect the property for hidden or latent defects. There is also no duty owed to a licensee who **knows** of the defect. If the licensee has actual knowledge of the danger, the licensee's claim will fail. Liability can only arise from conditions of which the land occupier knows and the licensee does not.

Therefore, for a licensee plaintiff to recover against a defendant, he must prove:

- A condition on the premises posed an **unreasonable risk** of harm.
  - The defendant had **actual knowledge** of the condition.
  - The plaintiff **did not** have actual knowledge of the condition.
  - The defendant breached his duty to the licensee, i.e., he failed to exercise **ordinary care** to protect the plaintiff by both:
    - **failing to not make the condition reasonably safe**, and
    - **failing to warn the plaintiff** of the condition.
- For liability, the defendant must fail to do both. That is, doing one of these is sufficient to avoid liability.
- The defendant's act or omission was the **proximate cause** of the licensee's injury.
  - The **damages** caused by the defendant's act or omission.

## Duty to Invitees

A person who enters the premises of another at the express or implied invitation of the owner or occupier **for their mutual benefit** is an **invitee**. This category includes people who enter the property to conduct business or perform a service. Examples would include (but are not limited to) employees, landscapers, pest control workers, store patrons, mail carriers, and other persons who enter to conduct business. A landlord's tenant is an invitee of the landlord, as is any invitee or licensee (guest) of the tenant.

Fulfilling the land occupier's duty to an invitee is the highest hurdle. The land occupier's duty to invitees is to keep the property safe. That is, the land occupier must use **reasonable care** to protect invitees from a condition that creates an **unreasonable risk** of harm (i.e., take reasonable steps to reduce or eliminate the risk). This duty applies to conditions that the land occupier **knew about** or **by the exercise of reasonable care would have discovered**. If the owner **knows or should know** of the condition, he has a duty to take reasonable steps to reduce or eliminate the risk. Included in this duty is the duty to conduct a **reasonable inspection** of the premises for latent (hidden) defects that

present an unreasonable risk of harm. There are some cases that appear to impose a greater duty to inspect when the injured party is a “business invitee.” In light of the “knew or should have known” requirement, the duty to an “invitee” or a “business invitee” are essentially the same. The best practice is to conduct an inspection of the premises. Any hidden defects should be eliminated, if possible. If complete elimination is not possible, the land occupier should warn invitees of the danger.

Therefore, for an invitee plaintiff to recover against a defendant, he must prove:

- A condition on the premises posed an **unreasonable risk** of harm.
- The defendant **knew of the condition** or **by the exercise of reasonable care would have discovered the condition**.

(Note: If a plaintiff is a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, a *landowner* must have **actual knowledge** to be held liable. Tex. Civ. Prac. & Rem. Code § 95.003.)

- The defendant breached his duty to the invitee (i.e., he failed to take **reasonable steps to reduce or eliminate the risk**).
- The defendant’s act or omission was the **proximate cause** of the invitee’s injury.
- The **damages** were caused by the defendant’s act or omission.

What if the *plaintiff* had actual or constructive knowledge of the condition? Previously under Texas law, a land occupier had no duty to warn or protect invitees of things they already knew or of dangerous conditions or activities that were open and obvious. This doctrine was abrogated by *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) and reaffirmed by *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010). There are cases that follow the old rule, even after these two cases. However, the law is clear that the plaintiff’s knowledge of an open and obvious condition does not discharge the defendant’s duty.

While the plaintiff’s actual or constructive knowledge of such a condition no longer absolves the defendant, it *may* be considered in determining how much the plaintiff’s *own* negligence contributed to the plaintiff’s injury under the doctrine of **contributory negligence**. When contributory negligence is at issue in a case, the jury is asked to assign negligence on a percentage basis. If the plaintiff’s negligence is 20 percent, then the plaintiff’s recovery is reduced accordingly, but it does not relieve the defendant from liability. Texas does follow the “**51% bar rule**,” however. If the injury is found to be more than half attributable to

the plaintiff’s own negligence, the plaintiff may not recover any damages.

### **Natural Conditions and Wild Animals**

A land occupier is normally not liable for injuries caused by **natural** conditions that are **open and obvious**. For example, if there is a natural accumulation of mud, snow, or ice, a landowner is not liable for injuries to a plaintiff who slips and falls. Likewise, a wet sidewalk caused by rain will not usually result in liability. The idea is that these conditions occurring in their natural state do not pose an unreasonable risk of harm. However, a puddle caused by melting ice beside an ice machine could be a problem, particularly if they are not promptly addressed. Likewise, puddles caused by improper drainage could incur liability, particularly if they are allowed to remain for a long time and grow slippery algae.

A land occupier generally has **no duty** to protect from wild animals unless he has introduced nonindigenous animals into the area, reduced **indigenous** wild animals to **possession or control**, or **affirmatively attracted** the animals to the property.

### **Criminal Acts of Third Parties**

Generally, a premises owner **does not have a duty to protect invitees from criminal acts committed by third parties**. However, there is an exception. If the land occupier knows, or should know, of an unreasonable and foreseeable risk, there is a duty to use ordinary care to protect the plaintiff. In such cases, the key inquiry is foreseeability (i.e., whether circumstances were such that the land occupier should have foreseen trouble and taken steps to mitigate the risk).

The leading case of *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998) involved a plaintiff who was sexually assaulted by an intruder in her apartment. Ordinarily, a landlord would not be liable for such an occurrence. The Texas Supreme Court analyzed the facts and found that there was no pattern of criminal activity that would have made the risk to the plaintiff foreseeable by the landlord. In doing so, the court announced a set of factors for the analysis that have come to be known as the **Timberwalk factors**, as follows:

- **Proximity.** Has there been previous criminal conduct on or near the property?
- **Recency.** How recently did the conduct occur?
- **Frequency.** How often did the conduct occur?
- **Similarity.** Was the conduct similar to the criminal conduct in question?
- **Publicity.** What publicity was given to the occurrences of criminal conduct? Was it enough that the landowner knew or should have known about them?

In another case, a bar owner was liable for the injuries of a patron who became involved in a bar fight. Two rival groups of intoxicated patrons had spent an hour and a half threatening, cursing, and shoving each other. The court held that “a reasonable person who knew or should have known of the one-and-a-half hours of ongoing ‘heated’ verbal altercations and shoving matches between intoxicated bar patrons would reasonably foresee the potential for assaultive conduct to occur and take action to make the condition of the premises reasonably safe.” The court emphasized that it did not announce a general rule, but one that was specific to the facts of the case. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010).

A defendant might fulfill his duty in these situations by removing persons from the premises, providing adequate security, or otherwise taking steps to make the property safe.

## Attractive Nuisance

Land occupiers should also be aware of the doctrine of **attractive nuisance**, also known as the **turntable doctrine**. This rule arose from cases in which children trespassed on the property of railroads to play on the railroad turntables, used for turning rail cars and locomotives. This diversion was great fun until the children were maimed or killed by being caught in the moving parts. Remember that the only duty ordinarily owed to a trespasser is to refrain from injuring him willfully, wantonly, or by gross negligence. However, if a child “of tender years” comes on the property because of an attractive nuisance, they are legally treated as if they were invited on the property. That is, if there is something on the property that has a special attraction for young children “by reason of their childish instincts,” that would naturally be expected to attract children onto the premises, it can be the basis for liability. The attractive nuisance doctrine has been codified in Texas in Section 75.007 of the Civil Practice & Remedies Code. For the attractive nuisance doctrine to apply in Texas, these are the requirements:

- A highly dangerous **artificial condition** exists on the property. Natural conditions or features such as creeks or trees are not attractive nuisances.
- The land occupier **knew or reasonably should have known that children were likely to trespass**.
- The land occupier **knew or reasonably should have known of the condition**.
- The land occupier **realized or should have realized** that the condition involved an **unreasonable risk of death or serious bodily harm to children**.
- The injured child, **because of the child’s youth, did not discover the condition or realize the risk involved**. Note that there is no specific age requirement.

This is a fact question as to whether the child was of an age and maturity level to appreciate the danger.

- The land occupier **failed to exercise reasonable care to eliminate the danger or otherwise protect the child**.
- The **utility to the land occupier of maintaining the artificial condition was slight compared with the risk** to the child. The idea here is that it is easy and inexpensive enough to take precautions, such as a locked gate, to safeguard against harm to children who can see a condition as an amusement but not as a danger.

## Negligent Activity

A landowner or occupier may also be liable for injuries arising from an activity occurring on the premises, separately from premises defects. The **negligent activity** cause of action is based on acts or omissions in **conduct occurring on the property**, as a **contemporaneous result of the activity**, rather than a condition of the property itself. A negligent activity case is generally governed by ordinary negligence law. There must be a duty, breach, proximate cause, and damages. If an activity is not ongoing, but instead causes a condition on the premises by which a plaintiff is injured, the case is a premises defect case, not a negligent activity case. Defendants should be aware of this because plaintiffs will often try to frame the case as a negligent activity case, rather than a premises defect case, although these theories are often pleaded together. The Texas Supreme Court case of *Keetch v. Kroger Co.*, 845 S.W.2d 262, 266 (Tex. 1992) illustrates the reason why plaintiffs attempt to do so.

In *Keetch*, the plaintiff entered a Kroger grocery store to buy a loaf of bread. On her way to the checkout, she slipped on a slippery spot allegedly created by a product sprayed on plants in the floral department. She sued under both a premises liability theory and a negligent activity theory. Had Keetch been injured **by the activity of spraying**, she might have been able to recover on a negligent activity theory. However, because Keetch was not injured by the spraying but by **a condition created by the spraying**, the case was submitted to the jury only on the premises liability theory. This was important because Kroger **only had a duty to use reasonable care to reduce the risk created by a condition of which it knew or should have known**, and Kroger had **no actual or constructive knowledge** of the slippery spot. If the case had been submitted on a negligent activity theory, Keetch would have been able to show a breach of duty by showing only that Kroger had **failed to exercise reasonable care in spraying the plants**, instead of having to show that Kroger knew or should have known of the premises defect.



## Statutory Defenses

### Recreational Use Statute

The *Texas Recreational Use Statute* (Chapter 75, Civil Practice & Remedies Code), limits landowner liability when permitting others to use *certain property* for *certain recreational activities*. This protection comes in the form of *lesser duties* as well as *limits on liability*. The Recreational Use Statute was enacted to encourage landowners to allow public recreation on their property.

#### What Land is Covered?

To invoke most protections of the Recreational Use Statute, the land must be “*agricultural land*” as defined in the statute. The statute defines agricultural land as land *suitable for* use in production of:

- plants and fruits for human or animal consumption;
- fibers, floriculture, viticulture, horticulture, or planting seed;
- forestry: trees for lumber, fiber, or other items used for industrial, commercial, or personal consumption; *or*
- domestic or native farm or ranch animals kept for use or profit.

Note that the land does not have to be actually in use for such production to be protected by the statute. It only has to be “suitable for” such production.

Tex. Civ. Prac. & Rem. Code § 75.001

For the purpose of the statute, “*Premises*” includes:

- land,
- roads,
- water/watercourses,
- private ways, and
- buildings, structures, machinery, and equipment attached to or located on the land, roads, water, watercourses, or private ways.

Tex. Civ. Prac. & Rem. Code § 75.001

#### What Uses are Covered?

The protection afforded by the statute applies only to the specific definition of “*Recreation*” as defined by the statute.

*Recreation* is defined as an activity such as:

- hunting, fishing, swimming, boating, camping, picnicking, and hiking;
- pleasure driving, including off-road motorcycling and off-road automobile driving and the use of off-highway vehicles;

- nature study, including bird-watching;
- cave exploration;
- waterskiing and other water sports;
- *any other activity associated with enjoying nature or the outdoors*;
- bicycling and mountain biking;
- disc golf;
- on-leash and off-leash walking of dogs;
- radio-control flying and related activities; and
- rock climbing.

Tex. Civ. Prac. & Rem. Code § 75.001

Note that this list is not exclusive, and also note the catch-all phrase “any other activity associated with enjoying nature or the outdoors.” This, combined with the phrase “such as,” leaves room for other recreational uses not specifically mentioned.

Note also that “recreation” includes hockey, in-line hockey, skating, skateboarding, rollerblading, soap box derby, or paintball *only if the premises are owned, operated, or maintained by a governmental unit for those purposes*.

Tex. Civ. Prac. & Rem. Code § 75.002

#### Lesser Duties

An occupier of agricultural land does not owe a duty of care to a trespasser, and is not liable for any injury to a trespasser, except for wilful or wanton acts or gross negligence.

If an occupier of *agricultural land gives permission or invites* another to enter the premises *for recreation*, the land occupier owes *only those duties owed to a trespasser*. The land occupier does not offer assurance that the premises are safe for the intended purpose and assumes no responsibility or liability for injury caused by the acts of the person invited or permitted to enter.

If the land is *not* agricultural land, an occupier who *gives permission* to another to enter the premises *for recreation* also does not assure that the premises are safe for the intended purpose, nor does he assume responsibility or liability for injury caused by the acts of the person permitted to enter.

In either case, the landowner is required to *warn of latent artificial conditions if they are dangerous*. The landowner is still liable for injury by gross negligence, bad faith, or malicious intent. There are no limits on this liability.

## Limits on Liability

Private owners of agricultural land have the following liability limits:

- Maximum \$500,000 damages to a person, per person.
- Maximum \$1 million per occurrence of bodily injury or death.
- Maximum \$100,000 per occurrence for injury to or destruction of property.
- \$1 million total liability per occurrence, subject to the above.
- These limits are set forth in Tex. Civ. Prac. & Rem. Code § 75.004(a).

## Qualifications for Liability Limitation

These liability protections and limitations only apply if:

- land occupiers do not charge (this includes social guests if the land is agricultural land), *or*
- the land occupier charges for entry, but the total charges collected in a calendar year are less than 20 times the total ad valorem taxes from prior calendar year, *or*
- in the case of agricultural land, the land occupier has liability insurance in the amounts set forth in Section 75.004(a), above.

Tex. Civ. Prac. & Rem. Code § 75.003

## Other Activities

The statute's language, by using the phrase "such as," and by including the catch-all provision of "other activities," obviously contemplates activities other than those specifically enumerated. Competitive sports are not specifically mentioned. However, the Recreational Use Statute has been held not to limit liability for injuries to a spectator at a softball game. *Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48 (Tex. 2015); *Lawson v. City of Diboll*, 472 S.W.3d 667 (Tex. 2015). It is important to note that these cases both involved *spectators* on property owned by *governmental entities*. However, a landowner had no liability to a plaintiff who went to play softball and was injured while sitting on a swing. *City of Bellmead v. Torres*, 89 S.W.3d 611, 615 (Tex. 2002). The Court of Appeals decided the case by holding that softball was not "recreation" as defined by the statute. The Texas Supreme Court had other views. It held that even if softball is "recreation" within the meaning of the statute, the injury was not because of a defect in the softball facilities. It was a simple premises defect case. Whether softball was recreation was irrelevant. Sitting on a swing *was* recreation, and the injury was because of a defect in the swing. There was no liability because there was no willful, wanton, or grossly negligent conduct.

Note that the Supreme Court did not decide whether softball could be considered recreation under the statute. Because the court's holding rendered the question irrelevant, the court did not answer it.

## Community Gardens

For purposes of the Recreational Use Statute, "*community garden*" means the premises used for recreational gardening by a group residing in a neighborhood or community for the purpose of providing fresh produce for the benefit of residents of the neighborhood or community.

A land occupier, by giving permission to enter and use the land as a community garden, does not ensure that the premises are safe and does not assume responsibility or incur liability for property damage, bodily injury, personal injury, or death of a person who enters for a purpose related to a community garden. The land occupier also does not assume responsibility or incur any liability for an act of a third party that occurs on the premises.

Additionally, the attractive nuisance doctrine does not apply to a community garden.

The land occupier may still be liable for willful or wanton acts or gross negligence. The land occupier is required to post the warning required by Tex. Civ. Prac. & Rem. Code § 75.0025, which reads as follows:

### WARNING

TEXAS LAW (CHAPTER 75, CIVIL PRACTICE AND REMEDIES CODE) LIMITS THE LIABILITY OF THE LANDOWNER, LESSEE, OR OCCUPANT FOR DAMAGES ARISING FROM THE USE OF THIS PROPERTY AS A COMMUNITY GARDEN.

## Additional Provisions of the Texas Recreational Use Statute

Under the Recreational Use Statute, the attractive nuisance doctrine does not apply if a trespasser is over the age of 16 years. Tex. Civ. Prac. & Rem. Code § 75.003(b). An exception exists in certain provisions related to the liability of electric utilities. Also, remember that the doctrine does not apply at all in the case of a community garden. Proceed with caution, as the statute specifically provides that a land occupier "may be liable for injury to a child caused by [an attractive nuisance]." Tex. Civ. Prac. & Rem. Code § 75.007(c). It appears this provision is limited by the maximum age of 16 as set forth in Section 75.003(b).

The statute has other provisions that apply only to electric utilities and governmental entities, as well as certain protections of land occupiers for injuries due to actions or omissions of firefighters or peace officers.

## Gross Negligence

For purposes of the Recreational Use Statute, gross negligence requires that a land occupier have **subjective awareness** of an **extreme risk of harm**, and act (or fail to act) in **conscious indifference** to the risk. The case of *State v. Shumake*, 199 S.W.3d 279, 288 (Tex. 2006), is illustrative. That case involved a state park. The park had installed a manmade culvert to divert river water under a nearby park road. When river waters were high, the culvert was concealed from view, and created a dangerous undertow. There had been other recent reports of near drownings in the same area, but the park nevertheless took no action to remedy the condition, prevent access, or warn park visitors. A nine-year old girl was caught in the rushing river and trapped in the culvert, where she drowned. The court held that a landowner may be liable for gross negligence in such a situation. If a landowner *creates* a condition that the *recreational user would not reasonably expect to encounter in the course of the permitted use*, and the landowner *knows of the danger but fails to make the condition safe or warn users of the danger*, that creates liability for gross negligence.

## Farm Animal Liability Act

Chapter 87 of the Texas Civil Practice and Remedies Code was initially enacted as the Equine Activities Act and has been expanded over the years to provide protection to land occupiers engaged in farm animal activities. It protects from liability for property damages, personal injury, or death of a participant in a farm animal activity or livestock show if the injuries result from **inherent risk** of a farm animal, farm animal activity, showing, or raising or handling of livestock on a farm.

Some of the relevant definitions include the following:

“**Farm animal activity**” is defined as:

- a farm animal show, fair, competition, performance, rodeo, event, or parade that involves any farm animal;
- training or teaching activities involving a farm animal;
- owning, raising, boarding, or pasturing a farm animal, including daily care;
- riding, inspecting, evaluating, handling, transporting, loading, or unloading a farm animal belonging to another, without regard to whether the owner receives monetary consideration or other thing of value for the use of the farm animal or permits a prospective purchaser of the farm animal to ride, inspect, evaluate, handle, load, or unload the farm animal;
- informal farm animal activity, including a ride, trip, or hunt that is sponsored by a farm animal activity sponsor or a farm owner or lessee;
- placing or replacing horseshoes on an equine animal;

- examining or administering medical treatment to a farm animal by a veterinarian;
- assisting in or providing animal health management activities, including vaccination;
- assisting in or conducting customary tasks on a farm concerning farm animals;
- transporting or moving a farm animal; and
- without regard to whether the participants are compensated, rodeos and single event competitions, including team roping, calf roping, and single steer roping.

Tex. Civ. Prac. & Rem. Code § 87.001

“**Engaging in farm animal activities**” includes “riding, handling, training, driving, loading, unloading, feeding, vaccinating, exercising, weaning, transporting, producing, herding, corralling, branding, or dehorning of, assisting in or providing health management activities for, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with a farm animal. The term includes management of a show involving farm animals and engagement in routine or customary activities on a farm to handle and manage farm animals. The term does not include being a spectator at a farm animal activity unless the spectator is in an unauthorized area and in immediate proximity to the farm animal activity.” Tex. Civ. Prac. & Rem. Code § 87.001

“**Participant**” means:

- with respect to a farm animal activity, a person who engages in the activity, without regard to whether the person:
  - is an amateur or professional;
  - pays for the activity or participates in the activity for free; or
  - is an independent contractor or employee; and
- with respect to a livestock show, a person who registers for and is allowed by a livestock show sponsor to compete in a livestock show by showing an animal on a competitive basis, or a person who assists that person.

Tex. Civ. Prac. & Rem. Code § 87.001

Inherent risks against which persons are protected include:

- the propensity of a farm animal or livestock animal to behave in ways that may result in personal injury or death to a person on the animal, handling the animal, or otherwise around the animal;
- the unpredictability of a farm animal’s or livestock animal’s reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal;

- with respect to farm animal activities involving equine animals, certain land conditions and hazards, including surface and subsurface conditions;
- a collision with another animal or an object; and
- the potential of a participant to act in a negligent manner that may contribute to injury to the participant or another, including failing to maintain control over a farm animal or livestock animal or not acting within the participant's ability.

Tex. Civ. Prac. & Rem. Code § 87.003

In 2020, the case of *Waak v. Rodriguez*, 603 S.W.3d 103 (Tex. 2020) held that the protections of the Act did not apply to farm hands. The act was amended in 2021 to make it clear that employees *are included*.

Exceptions to the protections of the act exist if the land occupier:

- provided faulty equipment or tack and knew or should have known that it was faulty;
- provided the farm animal or livestock animal and did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the activity;
- knew of a dangerous or latent condition of the land for which warning signs were not conspicuously posted or provided to the participant;
- committed an act or omission with willful or wanton disregard for safety;
- intentionally caused the damage or injury; or
- with respect to a livestock show, the injured or deceased person was invited or otherwise allowed to participate in the activity and was not a "participant" (registered to show or assisting a person registered to show).

Tex. Civ. Prac. & Rem. Code § 87.003

### Required Warning Signs

The Farm Animal Liability Act requires the **posting of a statutory warning sign** in a **clearly visible location on or near the stable, corral, or arena**. The warning **must also be included in every written contract** entered into with a participant, including an employee or independent contractor, for professional services, instruction, or the rental of equipment or tack or a farm animal. The warning is as follows:

#### WARNING

UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE AND REMEDIES CODE), A FARM ANIMAL PROFESSIONAL OR FARM OWNER OR LESSEE

IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN FARM ANIMAL ACTIVITIES, INCLUDING AN EMPLOYEE OR INDEPENDENT CONTRACTOR, RESULTING FROM THE INHERENT RISKS OF FARM ANIMAL ACTIVITIES.

Tex. Civ. Prac. & Rem. Code § 87.005

### Notes on Warnings

Land occupiers who already have the signs posted should not be comfortable. The wording on the required signs changed in 2021. The statute reads that the warning "must be as follows." An old warning sign, even if it complied with the previous law, may not be sufficient if challenged in court. The case of *Lobue v. Hanson*, 625 S.W.3d 543 (Tex. App.—Houston [14th Dist.] 2021, no pet.) held that failure to post warnings and include the warning in contracts was not a basis for removing the liability protection accorded by the Act. The Act does not specifically define a penalty for non-compliance, so the holding may in fact be correct. Nonetheless, prudent land occupiers should not rely on that appeals court holding. The Texas Supreme Court and other appellate courts have not ruled on the issue. The warnings should be posted conspicuously in multiple places and included in all contracts, and they should use the current statutory language verbatim.

The specific requirements of the Act are found in Tex. Civ. Prac. & Rem. Code §§ 87.003-87.005. Land occupiers should familiarize themselves with all of Chapter 87.

### Agritourism Act

The Texas Agritourism Act, Chapter 75A of the Civil Practices and Remedies Code, provides protection for land occupiers engaged in agritourism activities on agricultural land.

Some of the relevant definitions include the following:

- "**Agricultural land**" means land that is **suitable for**:
  - use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed; or
  - domestic or native farm or ranch animals kept for use or profit.
- "**Agritourism activity**" means an activity on **agricultural land** for **recreational or educational purposes** of participants, **without regard to compensation**.
- "**Agritourism entity**" means a person engaged in the business of providing an agritourism activity without regard to compensation, including a person who displays exotic animals to the public on agricultural land.

- “**Agritourism participant**” means an individual, other than an employee of an agritourism entity, who engages in an agritourism activity.
- “**Agritourism participant injury**” means an injury sustained by an agritourism participant, including bodily injury, emotional distress, death, property damage, or any other loss arising from the person’s participation in an agritourism activity.
- “**Premises**” includes land, roads, water, watercourse, private ways, and buildings, structures, machinery, and equipment attached to or located on the land, road, water, watercourse, or private way.
- “**Recreation**” means an activity such as:
  - hunting;
  - fishing;
  - swimming;
  - boating;
  - camping;
  - picnicking;
  - hiking;
  - pleasure driving, including off-road motorcycling and off-road automobile driving and the use of off-highway vehicles;
  - nature study, including bird-watching;
  - cave exploration;
  - waterskiing and other water sports;
  - any other activity associated with enjoying nature or the outdoors;
  - bicycling and mountain biking;
  - disc golf;
  - on-leash and off-leash walking of dogs;
  - radio control flying and related activities; and
  - rock climbing.

Tex. Civ. Prac. & Rem. Code § 75A.001

Note again the broad language of the statute. Note also that employees of the agritourism entity are not agritourism participants.

An agritourism entity (including a person) is not liable for an agritourism participant injury or damages arising out of an agritourism participant injury **if**:

- The warning required by Section 75A.003 was properly posted, **or**
- The agritourism entity obtained a written agreement and warning statement from the agritourism participant with respect to the agritourism activity from which the injury arises.

The warning sign must be **posted and maintained in a clearly visible location on or near any premises on which an agritourism activity is conducted**, and **must contain the following language**:

#### WARNING

UNDER TEXAS LAW (CHAPTER 75A, CIVIL PRACTICE AND REMEDIES CODE), AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AN AGRITOURISM ACTIVITY.

Tex. Civ. Prac. & Rem. Code § 75A.003

The agreement and warning statement must be signed **before** the participant participates in the agritourism activity. It must be signed by the agritourism participant. If the participant is a minor, it must be signed by his parent, managing conservator, or guardian. **They must be contained in a document separate from any other agreement other than a different warning, consent, or assumption of risk statement.** The agreement must be in **bold type at least 10-points in size** and **contain the following language**:

#### AGREEMENT AND WARNING

I UNDERSTAND AND ACKNOWLEDGE THAT AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AGRITOURISM ACTIVITIES. I UNDERSTAND THAT I HAVE ACCEPTED ALL RISK OF INJURY, DEATH, PROPERTY DAMAGE, AND OTHER LOSS THAT MAY RESULT FROM AGRITOURISM ACTIVITIES.

Tex. Civ. Prac. & Rem. Code § 75A.004

Note that failure to post the required warnings or to obtain the required agreement and warning statement **is a basis for the land occupier to lose all limitations on liability.**

Tex. Civ. Prac. & Rem. Code § 75A.002-75A.004.

#### Exceptions

The Agritourism Act does not limit liability for an injury proximately caused by:

- negligence evidencing a **disregard for the safety of the agritourism participant**;
- a dangerous **condition on the land, facilities, or equipment** used in the activity, if the agritourism entity had **actual knowledge or reasonably should have known of the condition**;

- *dangerous propensity, that is not disclosed, of a particular animal used in the activity, if the agritourism entity had actual knowledge or reasonably should have known of the dangerous propensity;* or
- *failure to train or improper training of an employee actively involved in the agritourism activity.*

It also does not limit liability for injury intentionally caused by the agritourism entity.

The Agritourism Act protections are in addition to any other limitations of liability that may be available.

### **Protect Yourself!**

Texas landowners and occupiers should be aware of the law as it applies to land occupier liability, including common law duties and statutory protections, and take steps to protect themselves. It is easier and less expensive to prevent dangerous conditions than to defend lawsuits and

pay judgments. Texas statutes provide special protection for some landowners, and landowners should take advantage of all protections available to them. A “belt and suspenders” approach is the best policy. Land occupiers can take the following steps to protect themselves:

- Inspect the property.
- Fix what can be fixed.
- Give warnings where appropriate.
- Hang required warning signs. Follow the statutory language. Do more than what is required. Warn, warn, warn!
- Obtain signed waivers, agreements, and warning statements. Include all statutorily required agreements and warning statements.
- Put warnings and waivers in applicable contracts.
- Have appropriate insurance.



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