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Landowner Liability for Hunters

By Judon Fambrough

Hunting provides supplemental income to many Texas landowners. With the benefit, though, comes the added liability for the hunters' safety. In essence, lease hunting becomes a task in risk management.

To manage the risks, landowners must understand their legal responsibility (or duty) to hunters. Texas case law (or common law) and statutory law dictate the rules.

According to case law, a landowner's liability (or responsibility) for anyone entering the property depends on the legal classification of the person at the time of injury. There are four categories: an *invitee*, a *licensee*, a *trespasser* and *children under the attractive nuisance doctrine*. Theoretically, a hunter could fit in any one of these categories.

Fee-paying hunters are classified as invitees. Landowners have a legal duty to keep the premises safe for the invitee's protection. The landowner must give the fee-paying hunter adequate and timely notice of concealed or latent perils (dangerous conditions) that are personally known or that a reasonable inspection would reveal. Injuries caused by dangerous conditions that are apparent or that could be revealed by reasonable inspection are the landowner's responsibility.

However, fee-paying hunters have some responsibility for their safety. The law requires them to be on the lookout for open and obvious dangerous conditions. If an injury occurs, the degree that the hunter neglected to pay attention reduces any judgment

by the same proportion under the Texas Comparative Negligent Doctrine. No recovery is possible if the hunter is more than 50 percent responsible.

Nonpaying hunters with permission to hunt are classified as licensees. Landowners have a legal duty to warn licensees of known dangerous conditions or to make the conditions reasonably safe. No inspection is required.

Again, nonpaying hunters have a duty to be on the lookout for dangerous conditions. Any neglect reduces judgments under the Comparative Negligent Doctrine as described.

Hunters who enter without permission are classified as trespassers. The landowner owes them no legal duty. The law prohibits the landowner from willfully or wantonly injuring a trespasser except in self-defense or when protecting property. The landowner is liable for gross negligence or for acts done with malicious intent or in bad faith.

Unaccompanied, trespassing children are protected by the attractive nuisance doctrine. An attractive nuisance exists when: the child is too young to appreciate or realize a dangerous condition; the location of the condition is one that the landowner knew or should have known children frequent; and the utility of maintaining the condition is slight compared to the probability of injury to children. The landowner may avoid liability if any one of these conditions is missing.

According to statutory law, primarily Chapter 75 of the Texas Civil Practices and Remedies Code (TCP), landowners

owe a recreational guest (hunter) no greater degree of care than is owed a trespasser if there is no charge for entry.

If there is a charge, the landowners owe the hunter no greater duty than is owed a trespasser until the total charges during the year exceed 20 times the amount of the ad valorem taxes imposed on the premises for the previous year. If the property taxes levied against the land used for recreational purposes were \$1,000 in 2004 and paid on Jan. 1, 2005, the landowner is no longer protected by the statute when the charges for hunting exceed \$20,000 during the 2005 calendar year.

If the fee limit is exceeded, then the landowner faces the degree of care owed to either an invitee or licensee, whichever the case may be. The amount charged has no effect on the attractive nuisance doctrine.

What, then, are the landowner's alternatives for risk management — i.e., limiting liability?

First, the landowner may charge no fee or no more than 20 times the amount of ad valorem taxes imposed on the hunting premises the previous year. This is not a viable option for large-scale operations or where agricultural-use valuation is taken.

Chapter 75 of the TCPRC boosts the emerging trend in nature tourism. The statute provides protection to landowners for anyone entering the property for "recreational purposes." In addition to hunting, the statutory definition includes activities such as fishing; swimming; boating; camping; picnicking; hiking; pleasure driving, including off-road

motorcycling, off-road automobile driving and the use of all-terrain vehicles; nature study including bird-watching, and cave exploring; water skiing and other water sports; bicycling and mountain biking; disc golfing; on-leash and off-leash walking of dogs; radio-controlled flying and related activities; and other activities associated with enjoying nature or the outdoors.

However, a caveat applies to radio-controlled flying and related activities. The law does not protect the landowner when the flight begins on the property but the damages, injury or both occur elsewhere.

Second, the landowner can do as the common law dictates: inspect the property routinely and either warn the hunters of the dangerous conditions or make the conditions safe. This may be difficult because conditions change rapidly. Notifying all hunters may prove impossible.

Third, although insurance does not absolve the landowner of liability, a policy provides a source of funds. However, three problems emerge. First, how much insurance should the landowner carry? Second, if premium costs are passed to the hunters, the lease price may be prohibitive. And finally, insurance may spur litigation.

Texas Legislatures established guidelines for the amount of insurance coverage. Effective September 1, 1997, Section 75.004 of the Texas Civil Practices and Remedies Code was amended by placing caps on recoveries for acts or omissions caused by an owner, lessee or occupant on **agricultural land** when used for recreational purposes. The injury must relate to the property conditions. The following lists the caps:

- \$500,000 for each person;
- \$1 million for each single occurrence of bodily injury or death; and
- \$100,000 for each single occurrence for injury or destruction of property.

For agricultural land used for non-recreational purposes, landowners' liabilities are capped at the following levels:

- \$1 million for each single occurrence;
- \$1 million for each single occurrence of bodily injury or death; and
- \$1 million for each single occurrence for injury to or destruction of property.

However, the caps apply **only** if the owner, lessee or occupant has liability coverage in effect equal to or greater than the specified amounts.

Landowners achieve two advantages by having the minimum amounts of liability insurance. First, the landowners owe recreational guests no greater duty than is owed a trespasser, even though the charges exceed 20 times the amount of ad valorem taxes. Second, as mentioned earlier, the minimum amounts of insurance cap the landowners' liability if sued for an act or omission relating to the premises.

Conversely, the landowner may require the hunters to purchase and assign a liability insurance policy to the landowner covering the landowner's liability to the hunters. Again, the premiums may cause the lease price to become prohibitive. However, if this mechanism is used, the landowner must make sure he or she is included as an "additional insured" under the hunters' insurance coverage. If the landowner is not made an additional insured, he or she remains personally liable to the insurance company providing the coverage to the hunters.

Fourth, the landowner may secure waivers from the hunters releasing the landowner from liability. A *waiver* is defined as the intentional relinquishment of a known right. To be effective, the release provision must meet certain standards.

For instance, the agreement must be based on an offer and acceptance between parties who have equal bargaining power. For

this reason, a recent Texas appellate court ruled that parents cannot release, in advance, a minor's right to recover for personal injuries caused by the negligence of another (*Munoz v. II Jaz Inc. d/b/a Physical Whimsical*, 863 S.W. 2d 207 [1993]).

The agreement for the release must be based on consideration, but it need not be monetary. The agreement not to sue in exchange for the right to enter may be sufficient.

The Texas Supreme Court has added three requirements for an effective waiver agreement. First, the provision must state that the hunter indemnifies (releases) the landowner from any acts arising "from the landowner's negligence." This is sometimes referred to as the Express Negligence Doctrine (*Ethyl Corp. v. Daniel Const. Co.*, 725 S.W. 2d 705 [Tx. S. Ct., 1987]).

Second, the written contract must give the hunter fair notice of the release provision. The fair-notice principle focuses on the appearance and placement of the provision, not its content. However, the fair-notice requirement can be satisfied if the landowner can prove the hunter received actual notice or possessed actual knowledge of the provision (*Spense & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W. 2d 631 [Tx. S. Ct., 1963]).

Third, the release provisions must be conspicuous. The element of "conspicuousness" is tied to the previous "fair-notice" requirement. Basically, the release provision must be conspicuous enough to give the hunter fair notice of its existence (*Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W. 2d 505 [Tx. S. Ct., 1993]).

How "conspicuous" is conspicuous? No absolute answer can be given. However, the following suggestions may be useful.

- Make the written provision noticeable.
- Emphasize the entire paragraph—not just a portion. Better still, place the waiver statement at the beginning

or end of the contract on a separate sheet of paper.

- Use headings but not misleading ones.
- Italicize the headings.
- Ask the hunter to initial the waiver paragraph if it is part of the contract or sign the page if stated on a separate sheet.

For some protection from the attractive nuisance doctrine, the landowner or lease agreement

may require all children to be accompanied by an adult.

A waiver form was presented by the late Dean Patton, an attorney formerly with Morrill, Patton and Bauer in Beeville, Texas, at the 13th Advanced Real Estate Law Course sponsored by the Texas State Bar in 1991. The Real Estate Center has edited the form and included it at the end of the Center's publication entitled *The Texas Deer Lease*, publication 570.

The Real Estate Center does not endorse the form. It is offered as an example only. It has not been changed since 1991 and may not meet the requirements of subsequent court rulings.

This column is for information only; it is not a substitute for legal counsel. ♣

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