

Rural Landowner Liability for Recreational Activities in Nebraska



University of Nebraska



The Great Plains Ecotourism Coalition is committed to promoting environmental conservation and building thriving communities through nature-based tourism in the Great Plains. The Coalition includes both non-profit and for-profit members and is coordinated by staff at the Center for Great Plains Studies at the University of Nebraska. Its mission is to market the region, share information, and connect nature-based entrepreneurs with one another, creating opportunities for collaboration, learning and cooperation.

The Center's work in ecotourism is our strategy for preserving the enormous and precious biodiversity of Great Plains grasslands. The work is inspired by the highly successful models of ecotourism-driven conservation in Namibia and Botswana where high-value, low-volume ecotourism incentivizes private-landowner conservation, resulting in stable or growing species populations, thriving nearby human communities, and a deepening national consciousness of the economic and aesthetic value of their natural environment.

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A sparsely-populated region with highly variable weather set against grassy, rolling land, the Great Plains stretches westward from the Missouri River at Omaha and Kansas City to the Rocky Mountains, and northward from the Texas Panhandle into the Canadian Prairie Provinces.

The region invites inquiry into the relationships between its natural environment and the cultures brought to it by its various inhabitants, as scholars and residents work both to preserve healthy eco-systems and build thriving human communities.

The Center operates the Great Plains Art Museum, a graduate program, various scholarly projects, and outreach programs; it publishes *Great Plains Quarterly* and *Great Plains Research*; it presents public lectures and interdisciplinary symposia. Much of its work is accomplished by its Fellows and Associate Fellows.

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for Recreational Activities in
Nebraska**

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Introduction

Private landowners in rural Nebraska are allowing a wide range of people onto their land for a variety of purposes. Most landowners offering this access are concerned about how vulnerable they are to liability claims and what they should do to reduce their liability. This handout outlines the standards that govern landowner liability. For a longer version with more explanation, please consult the author at *anthony@unl.edu*.

Generally, Nebraska landowner-liability law consists of the standards that courts have developed over the years in cases involving plaintiffs who have been injured on landowners' properties. The legislature has also passed laws that sometimes change those liability standards. Below, the discussion begins with the baseline standard that courts have developed. From there, it discusses instances where the standards differ. The lesson that emerges is that, most often, landowners simply must act reasonably when it comes to protecting people from dangers that exist on their properties. And, in many instances, landowners need only refrain from recklessly endangering visitors.

The General Standard of Reasonableness

Generally speaking, courts have required landowners to act reasonably to protect people on their properties from harm. Judges have defined this duty of reasonable care by identifying a number of factors that they can use in any particular case. In determining whether a landowner has exercised reasonable care, a court will consider the following seven factors:

1. the foreseeability or possibility of harm;
2. the purpose for which the entrant entered the premises;
3. the time, manner, and circumstances under which the entrant entered the premises;
4. the use to which the premises are put or expected to be put;
5. the reasonableness of the inspection, repair, or warning;
6. the opportunity and ease of repair or correction or giving of the warning; and
7. the burden on the landowner and/or community in terms of inconvenience or cost in providing adequate protection.

Unfortunately, the factors don't provide much guidance to those concerned about liability. From a forward-looking perspective, the best advice is to be *careful and vigilant*. That is, if one encounters a danger and thinks to herself that someone could get hurt as a result of it, it is best to take precautions. This may include a warning or it may include restricting access to part of the property.

There are three types of common cases in which the general duty of reasonableness has been further refined. The first deals with *conditions* on the land (like a hole or a ditch). The second deals with the landowner's *activities* on the land (like the land-

owner cutting down trees or moving cattle). And the third deals with the *acts of third parties* on the land (like an outfitter guiding a hunt or a hike). In each of these types of cases, the court has offered standards of liability that further flesh out the broad notion of reasonable care.

Conditions: Perhaps the best way of summarizing liability when it comes to conditions on the landowner's premises is to think of a hazard on the property and the landowner's reaction to learning about it. For example, imagine a landowner who encounters a washout near a trail or area where people are likely to be and thinks "that needs to be fixed [or marked or something] because someone might get hurt", but then does nothing. This is the sort of situation where a court would probably impose liability. The law concerning liability in these sorts of situations is basically trying to encourage the landowner to warn the visitor about the hazard or fix it.

Activities: When it comes to landowner activities on the land, the standard basically requires the landowner to be careful and make efforts to protect those people who will not realize the risks that the activity presents. Being careful simply means to act reasonably. The seven factors mentioned above guide the analysis, with the key factors being the foreseeability of the harm and the ease with which the landowner could protect the entrant from the harm. Anticipating the ability of visitors to realize (or not) the dangers attending the activity is also a key element, which also places some responsibility on visitors to anticipate risks. The idea here is to make sure that landowners do something to protect people when they are in a better position to do so than the visitor is to protect himself.

An example may be a visitor who comes to a ranch to observe the process of working calves in a corral. Someone unfamiliar with the dangers attending the activity might be somewhat oblivious to angry cows, the danger of sitting on corral fences, or

any number of things that a rancher would be familiar with. In such instances, the landowner might be held liable, if she does nothing to warn visitors or guard against the harms that attend the setting.

Third Parties: Finally, a landowner can be held liable for injuries caused by third parties on his premises. These claims do not focus on third party's conduct. Rather they focus on the reasonableness of the landowner's efforts to protect the injured party from the third party. As one should expect, foreseeability becomes a very important factor. Imposing liability on a landowner for someone else's acts requires that the landowner have at least some responsibility for the harm, an opportunity to protect the plaintiff, or both. What the landowner knew and when he knew it becomes important. The existence of similar incidents in the past, or other facts that suggest the landowner was on notice of the hazard, are generally required to attribute liability to a landowner for the acts of third parties.

An example would be an outfitter that the landowner knows drives tour paths too quickly while conducting tours on the property. If the employee were to tip the vehicle over while traversing a side hill too quickly, the ensuing inquiry would focus on what the landowner did to protect the injured party from the employee's actions, as well as what the landowner knew and when he knew it.

The most important lesson of all of this is that to avoid liability the landowner needs to pay attention to the condition of his premises, the dangers attending his activities, and the dangers that third parties may present to people on the property. An attentive landowner likely will not be liable for a visitor's injuries, if the landowner makes an effort to protect or warn visitors of the dangers. Reasonableness is not, in most instances, much of a burden. Indeed, it is the standard that controls liability for nearly all of our daily activities.

Changing the Standards

With the baseline rule of reasonableness in mind, one can better understand exceptions to it. The duty of a landowner to act reasonably has been criticized as placing too much of a burden on landowners in some situations. As a result, judges and legislators have varied the baseline rule of reasonableness in areas where they have concluded the duty to be reasonable is inappropriate.

Trespassers

The clearest example arises with regard to trespassers. Most people would agree that landowners should have no duty to protect someone from harm who has not been given permission to enter the landowner's property. Of course, that does not mean that landowners can harm trespassers at will. So the courts have said landowners owe trespassers a duty to "refrain from willfully or wantonly injuring" a trespasser. A landowner's conduct is considered "willful and wanton" if the landowner (1) knew of a particular danger and (2) intentionally failed to protect the trespasser from it. Sometimes courts refer to this as a recklessness standard, requiring that the injured person show that the landowner exhibited "such reckless disregard of security and right as to imply bad faith." "Indifference to the safety of another or for the consequences of one's act" is another common statement of the standard.

Cases applying this standard say that landowners can protect themselves from liability to trespassers by, for example, fencing their property and posting no trespassing signs. One would still do well to post a warning near any particularly dangerous hazards that one knows about on a property, like cisterns or abandoned cellars. This would not, however, necessarily be required under the standard.

Trespassing children, however, are not viewed the same as other trespassers. In such cases, courts tend to apply a standard that looks more like the reasonableness standard, at least in cases where the landowner knows or should know that children would be likely to trespass on the property.

Recreational Users

The Nebraska legislature, like all other legislatures in the country, has found the general standard of reasonableness is inappropriate where the user is on the property for recreational purposes. Lessening the duty that landowners owe such users limits landowner liability. This, in turn, encourages landowners to open their land to the public for recreational use. Under the Nebraska statute,

[A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

The immunity offered by this statute is not absolute. Among other things, landowners are not protected from liability “for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.” Basically, the legislature has concluded that landowners owe recreational users the same duties that they owe trespassers.

There are two important limitations to the recreational-use statutes. First, the landowner may not charge an access fee for the use of the property. Second, the user must be using the property for recreational purposes. These two conditions limit the scope of these statutes.

Agritourism and Ecotourism Users

In 2015, the legislature enacted a set of laws to protect agritourism (and ecotourism) operations from liability in many instances. Basically, these statutes do the same thing that the recreation statutes do: change the standard from one of reasonableness to one of willful and wanton conduct. This reduces the landowner's liability risk. To be protected by these statutes, the landowner must be engaged in agritourism activities. In addition, if the landowner charges a fee for access to his property, he will not lose the statutes' protection, so long as he has issued a warning to entrants. The statute prescribes the language to use:

WARNING - Under Nebraska law, an owner of property, including lands and waters, is not liable for the injury to or death of the participant in agritourism activities or damage to the participant's property resulting from the inherent risks of such activities. Inherent risks include, without limitation, the risk of animals and land and water conditions, the ordinary dangers of structures or equipment ordinarily used in farming or ranching operations, and the potential for you or another participant to act in a negligent manner that may contribute to your own injury or death. You are assuming the risk of participating in the agritourism activities for which you are entering the owner's premises.

These agritourism statutes were subject to fairly intense debate in the legislature, which resulted in a few exceptions to their coverage (i.e., instances in which the baseline duty of reasonableness will likely continue to apply). The most notable exception involves harms resulting from faulty structures or equipment. With regard to such harms, the agritourism law requires the owner to observe the duty of reasonable care. Thus, an owner would do

well to inspect and remain reasonably vigilant when it comes to equipment and buildings on her premises. Warning participants of the dangers associated with such things would also be appropriate.

The statutes also appear to leave the standard of reasonableness intact for the acts of third parties, if the third party is the operator's employee. Again, the scope of this provision remains to be seen, but an agritourism operator would do well to pay close attention to his employees' actions.

Users Who Have Signed a Waiver

The final instance in which the reasonableness standard is often not applied is when the entrant has signed a waiver of the landowner's duty of reasonable care. An example of an enforceable waiver is the following:

I do agree to hold harmless the owners and possessors of this land for any injury I sustain resulting from conditions on the premises, or activities on the premises conducted by the owners, possessors, or third parties, and arising out of the owners' and possessors' negligence.

Courts have upheld similar waivers, at least in cases where the waivers went on to inform the entrant of the risks associated with the activity at issue in the case. Landowners would probably do well to take a similar approach, tailoring their waivers to specifically mention the risks to which the entrant is exposing herself, whether it be hunting, vehicle-based wildlife viewing, or whatever. However, if the landowner acts in a reckless or willful and wanton way, a waiver will generally not protect the landowner from liability.

Conclusion

As a general matter, landowners must exercise reasonable care in the maintenance and use of their premises. The reasonable-care standard is appropriately viewed as a baseline from which modifications deviate. This baseline is not a terribly burdensome standard from a landowner's perspective. Indeed, this is the standard we all must observe in nearly all of our daily activities. However, in some cases the standard has been changed. Trespassers do not get the same level of protection. And recreational users and agritourism participants are entitled to no more protection than trespassers in many cases. In addition, waivers are an effective way of disclaiming liability for breaching the reasonableness standard and for informing participants of the risks they may encounter.

Liability concerns should not discourage landowners from offering recreational and other opportunities to the public, for a fee or for free. Exercising reasonable care in the maintenance and use of their property, in all instances, meets the legal obligations that landowners have. And, in many instances, landowners need only avoid recklessness. To the extent there is remaining liability risk, liability insurance is an effective means of guarding against that risk. Seeking the advice of a lawyer before problems arise is also good idea.

Eco/agritourism liability FAQ

If I am not a landowner, do I have to worry about liability?

Yes. Anyone who has control over the property can be held liable for damages that participants suffer. The typical rural landowning resident is one of those potential defendants. But a tenant or someone else with a right to use and control the property for a particular purpose can too. An example would be a business holding a hunting lease on the property.

Does my insurance protect me from claims made by people who get injured on my property?

It might. This depends on the type of coverage you have. It is best to discuss matters with an insurance agent. In many instances, agritourism operations need an additional policy. These additional policies also often cover the costs of an attorney, in the event someone sues you. And those costs, even if you successfully defend yourself, can be burdensome. So you should absolutely check with an agent on what type of coverage you have and what you may need.

I've often seen signs about liability on agritourism operators' properties. Do I need to have those?

Yes and no. If you are offering activities that involve horses or other equines, you must have a sign under Nebraska law. The content of that sign is set out in the statutes. In addition, if you offer agritourism activities for a fee, then you may post the warning language described in the paper on a sign. Another option for agritourism operators (and a good additional measure for equine providers) is to include the language that would be on the sign in a document that the participant signs when they enter the property: a waiver.

What about paperwork? Do we need to have a long waiver for people to sign if they come to our place?

A waiver is a good idea for a number of reasons, though concerns about the length of such documents are understandable. First, Nebraska law requires you to notify agritourism participants and equine participants of the liability limits that they are under when they take part in those activities. The paperwork is a good way to notify them of these limits.

More broadly, however, this paperwork is a good way to explain the risks of an activity to the participants. This can be done in conjunction with a verbal presentation where an employee instructs participants about any dangers that they may encounter. And, such instructions are a good way of establishing that the landowner acted reasonably to protect the participant from harm.

What about people who don't do what we tell them? Like, for instance, when people jump a fence, ignore a sign, and go into an area that we don't want them in?

There is only so much you can do. And the law only expects you to act reasonably. Those who jump fences or ignore signs would likely be deemed trespassers, which would mean that your duties to them are much lower than those owed to some other people. The sign and fence themselves, probably fulfill the duties you owe them.

Of course, facts can change. If a path to the dangerous area develops and it would reasonably appear to guests that they can go around a sign or a fence, then that might raise some concerns. Taking further measures under those circumstances would be the best course of action. Examples of further measures would be a verbal warning at the beginning of a visit and an additional sign or something lying in the path to block it. In the end, you just want to make sure that people in that area know that they are not supposed to be there. Telling them why can also help.

What if two guests/customers harm each other? Am I responsible for that?

The test for harms from third parties is covered in the handout. But basically, you should think in terms of reasonableness and foreseeability. If you have a guest who is getting rowdy and dangerous, and you know about him and are worried he might harm someone else, then you should do what you can to get him out of there.

Who else should I talk to if I want to get into this business?

Two suggestions come to mind. First, a good insurance agent who works with these sorts of operations would be helpful. Second, a lawyer who does this kind of work can be helpful. As is the case with most business affairs, it is better to talk to such a person before problems arise, rather than after.



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