

The Farmer and Liability

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INTRODUCTION

A farmer's liability for damages and ability to recover for damages that occur in the course of running the farm business is governed by rules of law called "tort" law. In general, tort law sorts out who must pay for damages that occur when there is no contract that covers the incident. The following overview of tort law is intended to give farm producers an introduction to the effect of tort law on their liability for and ability to recover for the various damages that occur in the course of owning and operating a farm business.

Before discussing the legal rules it is important to note that some of the risk of liability for damages can be shifted to an insurance company by purchasing liability insurance. That purchase makes the insurance company a partner in the pursuit of risk reduction. As a partner, the insurance company has an interest in reducing the incidence of damages as well as providing legal counsel to minimize the legal liability for accidents that do occur.

Some legal terms will help to streamline the discussion. The person who is being accused of causing the damage will be referred to as the "tortfeasor." If a case is taken to court, the tortfeasor will be the defendant. The person who was damaged will be referred as the "victim" and will be the plaintiff if the case goes to court.

Although they have some similarities, tort law is distinct from criminal law. Criminal law is a set of rules that prohibit certain activities. Those rules are enforced by the state. Therefore, a violation of the criminal rules results in a prosecution by the state. The victim of the crime may be a witness in the case but is not a party to the criminal action. Tort law allows the victim to sue the tortfeasor in a civil action. Therefore, one incident could lead to both a criminal action by the state and a civil action by the victim.

OVERVIEW OF TORT LAW

The following overview of tort law is organized by the various categories of torts. This overview covers only the torts that are most likely to occur in the operation of a farm business.

Intentional Torts

One group of torts is called intentional torts because they involve an intentional action of a person. These are distinguished from torts that are accidental. An intentional tort is most likely to arise in a farm business when someone intrudes onto the farm property and that intrusion is resisted.

Intentional torts against a person include assault (an act causing fear that a battery will

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occur), battery (an act causing harmful or offensive touching), fraud (intentionally misleading someone to cause them to give up a legal right), libel (written defamation) and slander (spoken defamation). Intentional torts against property include trespass (entering property without permission) and conversion (an unauthorized taking of property).

Example 1: Without asking for permission, Hunter climbed over Producer's fence and set up a deer stand on Producer's back forty. Hunter trespassed on Producer's property.

Example 2: If Producer from Example 1 physically removed Hunter from her back forty, Producer may have committed a battery.

A person who is accused of an intentional tort can defend the claim by raising a defense of consent.

Example 3: If Hunter can show that he had permission to hunt on Producer's land, he would not be a trespasser because Producer consented to the action.

A person who is accused of an intentional tort can defend himself or herself by claiming self defense. This defense allows a person to use reasonable force to defend property and persons. Under Wisconsin law, deadly force can be used only if a person is being threatened with deadly force and has no means of retreating. However, a person is not required to retreat from his or her own home.

Example 4: If Hunter did not have permission to be on Producer's land, Producer could use reasonable force to remove Hunter. If Hunter resisted that force by using force that threatened personal injury to Producer, Producer could use reasonable force to protect herself from personal injury.

Negligence

In many cases, the liability for damages caused by an accident will be assigned by using the negligence rules. To recover under these rules, the victim of an accident must prove the following four elements:

1. The tortfeasor had a duty to exercise reasonable care under the circumstances.
2. The tortfeasor breached the duty by failing to exercise reasonable care.
3. The breach of the duty caused the victim's injury.
4. The amount of damage that resulted from the injury.

Because it was viewed as unfair to the tortfeasor to allow a victim to recover for damages that could have been prevented by the victim, the concepts of "last clear chance" and "contributory negligence" were added to require the victim to take reasonable action to avoid the accident. These rules generally prevented the victim from recovering any damages if he or she contributed to the accident. Because that rule was viewed as being too harsh on a victim who was only slightly responsible for the accident, many states adopted a comparative negligence standard. Under comparative negligence, 100% of the responsibility for the accident is allocated between the tortfeasor (or tortfeasors if there is more than one) and the victim. The victim's recovery is reduced

by his or her share of responsibility for the accident.

Example 5: Alice failed to yield the right of way to Bob at a stop sign and a collision occurred. Bob was driving in excess of the speed limit. If Bob's damages were \$1,000 but he was found to be 25% responsible for the accident and Alice was found to be 75% responsible for the accident, Bob would only recover \$750 from Alice.

Wisconsin has adopted a modified version of comparative negligence that allows the victim to recover only if his or her negligence is less than the tortfeasor's negligence. This modification is likely to have an effect only when there are more than two parties to an accident.

Example 6: Assume that Cathy was also involved in the accident discussed in Example 5. Cathy committed a lane change violation that contributed to the accident, but she was not damaged in the accident. If Cathy is found to be 10% responsible for the accident, Bob 15% responsible and Alice 75% responsible, Bob cannot recover anything from Cathy because he is more responsible than Cathy.

Strict Liability

Some activities are so dangerous that the person who carries out the activity is held liable for the damages no matter how much care is used in carrying out the activity. The person is strictly liable for any injury that occurs from the activity.

Strict liability applies only to activities that are "abnormally dangerous." Factors that are considered to determine if an activity is abnormally dangerous include:

1. The likelihood of harm to another person,
2. The gravity of the harm,
3. Whether reasonable care can reduce the risk of harm,
4. Whether the activity is common,
5. Whether the activity is appropriate for the location, and
6. The value of the activity to the community.

Courts have found various activities to be abnormally dangerous such as blasting, spraying pesticides, and keeping wild animals. Wisconsin statutes apply the strict liability rules to owners of stallions over one year old, bulls over six months old and boars, rams and billy goats over four months old.

To recover under the strict liability rules, the victim must prove the tortfeasor's activity caused the damage and the amount of the damages.

Example 7: Sally's two-year old bull escaped and ran through John's ginseng patch. If John can prove the bull caused damages and the amount of those damages, he can collect from Sally.

MEASURING DAMAGES

The object of paying damages to the victim is twofold. One object is to return the victim to the same condition as before the accident or intentional tort. The second objective is to create an incentive for people to avoid the accident or other tort that caused the damage.

Property Damage

The damage to property is measured by subtracting the fair market value of the property after the accident or other tort from the fair market value before. If the property is totally destroyed, that difference is simply the fair market value before the accident or other tort. If the property is not totally destroyed, that difference is often equal to the cost of repairing the property.

Example 8: The fender on Jane's car was dented in an accident. The cost of fixing the dent is \$500 but Jane decided not to have the dent fixed. The damages are \$500 because that is an estimate of the decrease in the fair market value of the car.

Note that fair market value does not take into account the sentimental value.

Example 9: Peter's antique vase was broken as a result of the negligence of Susan. The market value of the vase was \$600 but because Peter had inherited the vase from his mother, he would not have sold it for less than \$1,000. Peter's damages are \$600

Personal Injuries

Damages for personal injuries are measured by adding up the amount of medical expenses, lost earnings and pain and suffering. Medical expenses are relatively easy to determine. There may be some argument over the victim's lost earnings--especially if the victim is self-employed and does not have a set wage rate. Pain and suffering is most difficult to measure because only the victim knows his or her pain threshold and has an incentive to overstate the amount of pain and suffering.

APPENDIX

Wisconsin Statutes §895.045 Contributory negligence.

(1) Comparative negligence. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.