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***Civil Liabilities — Selected Legal
Principles for Home and Business Risk Management***

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Limitation

Civil liabilities are affected by legislative acts and a broad body of common law. The law in this area is somewhat complex and is subject to change over time. This publication is not intended as a substitute for legal advice but to assist the reader in avoiding legal entanglements and to communicate better with lawyers when involved in legal disputes. An experienced attorney should be consulted and retained where potential legal complications arise.

CIVIL LIABILITIES--SELECTED LEGAL PRINCIPLES FOR HOME AND BUSINESS RISK MANAGEMENT

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As society becomes more complex and as people become more mobile, legal responsibilities receive greater attention. The "law" is a body of rules and regulations that roughly follows society's composite notion of right and wrong. As such, the law changes over time as the needs and directions of society change. Changes in law are reflected through legislative acts, known as statutes, and referred to as code law and also through the development of legal concepts in the decisions of judges, referred to as judge made law or common law. It is imperative that each individual have a basic understanding of the law in order to minimize the risks of legal sanctions. Information and ideas presented here are intended to assist in analyzing the risks of loss or damage to one's own person or property, as well as the person or property of others. The broad legal concepts presented have a general application; however, they should not be considered an intensive expose or an inclusive listing. The topics addressed are complex and cannot be thoroughly examined in brief format.

Civil Liabilities

Civil law deals with conflicts between and among individuals and embraces a vast area of law involving harm to property and person. It is the area of law that is of greatest concern to most individuals today. In

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civil matters the state is involved only to the extent that courts are provided for the resolution of questions of liability, and rules are provided to aid in those resolutions. Criminal law, in contrast, deals with conflict between an individual and state or federal law defined as crime. In criminal prosecutions the state is generally an active party and serves as prosecutor because crime is viewed as an act against the state. It is not uncommon for a single act to give rise to both civil and criminal liability. In such a situation, criminal action determines guilt or innocence and the penalty for breaking the law, while the civil action, based on the same act, may determine liability and damages to the victim.

With the exception of contractual rights, most of the area of civil liabilities is covered by the body of law known as "tort" law. Tort law outlines a general set of rules creating standards of conduct and providing redress for the party harmed. With the exception of torts based on strict liability, the basis for all tort actions is fault. Every tort will involve the following elements: 1) a legal duty, 2) breach of that duty and 3) damage as proximate result. Torts may be categorized into three groups. First, there are torts such as assault, battery and false imprisonment, called intentional torts. In torts of this category the judge or jury may provide recovery well beyond any proven economic loss as a means of punishing the offending party. Second, torts involving negligence serve as a basis for a large percentage of tort actions. Negligence may be defined as failure to use reasonable care under the particular circumstances and may involve either a failure to do some act that a person of ordinary prudence would have done or the doing of some act that a person of ordinary prudence would not have done under similar circumstances. There are four basic links

in the negligence chain of liability. These are: 1) breach of the appropriate standard of care; 2) damages suffered by the harmed party; 3) a causal relationship between the breach of the applicable standard of care and the damages suffered; and 4) an absence of contributory negligence by the harmed party. A third broad base for tort liability is strict liability or liability without fault. Generally, strict liability has been reserved for extra hazardous or highly dangerous activities such as blasting, keeping of wild animals or the keeping of animals that are known to be vicious.

Liability to Visitors

Visitors have certain expectations as to their safety and well-being when they go upon the property of another. Generally these expectations are based in law and place a burden of care upon the person in possession of the real property as opposed to the landlord where the premises is rented or leased. As the law has developed, a visitor's legally based expectations may or may not be affected by whether or not he was upon the property of another by legal right or as a trespasser. For example, the law prohibits, as the use of excessive force, the setting of a spring gun that might either maim or kill a thief.

Under the traditional approach, as adopted from the common law of England and applied in Tennessee until very recently, visitors were categorized as either trespasser, licensee or invitee. The trespasser was one without any right to be upon the land, the licensee was one upon the land for his personal benefit and the invitee was one who was upon the land for the benefit of the possessor of the land as well as for his personal benefit.

Under this classification the business guest or invitee was entitled to the highest standard of care, notably reasonable care, while the adult trespasser was entitled to the least. Under this approach, which was inherited from the English culture, deeply rooted in the land and based on a feudalistic heritage, the only duties owed to trespassers and licensees by the possessor of lands was to refrain from willfully injuring them, from committing gross negligence resulting in injury to them and from leading them into a trap resulting in injury.¹ Until recently Tennessee courts have generally held that social guests were mere licensees and that ordinary negligence would not sustain a recovery by a social guest against his host.²

In recent years a minority of states have shifted toward a general duty of care for any person that might come upon the premises of another and away from the historic emphasis on status. The focus of the modern approach is on foreseeability of harm. The Tennessee Supreme Court recently took action to move in the direction of this trend. The court said, "We have reached the conclusion that it is both illogical and unjust to continue to employ the common law rules distinguishing between 'licensees' and 'invitees' in determining the 'premises liability' of owners and occupiers of land for injuries sustained by visitors upon that land. We make no judgment with respect to the duty owed to 'trespassers' since that particular issue is not presented by this case." The court went on to say that the duty owed by the landowner (person in possession) "is one of reasonable care under all of the attendant circumstances, foreseeability of the presence of the visitor and the likelihood of harm to him being one of the principal factors in assessing liability. Care that is reasonable in one context may be wholly unreasonable or more than reasonable in a different context."³

Reasonable care or "ordinary care" is defined by Tennessee courts as "that degree of care that a person of reasonable prudence would exercise under...the same or similar circumstances."⁴

Attractive Nuisance

The law recognized from the earliest times that a child does not have the ability or judgment to recognize and appreciate dangerous conditions. As a result, a means of imposing a higher duty of care upon occupiers of land for child trespassers became a part of the common law known as the "Attractive Nuisance Doctrine." In early cases involving attractive nuisances, the element of attraction of young children to the premises was important. If a child was attracted to the premises and was injured by a condition or instrumentality maintained by the possessor of the land, the courts have often been willing to impose a duty of care much higher than is imposed for an adult trespasser.

The elements of attractive nuisance in Tennessee are essentially those outlined in the Restatement of Torts (second) §339.⁵

§339 Artificial Conditions Highly Dangerous to Trespassing Children.

- (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
- (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
- (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

- (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Tennessee courts have consistently maintained the requirement that the injured child be enticed or lured onto defendant's premises by the instrumentality or condition causing the harm.⁶ The harshness of the enticement requirement has been modified by the playground doctrine under which the reasonable care standard is imposed if "the landowner knows or, by the exercise of reasonable care, should know that children of immature years are habitually trespassing upon his land to use it for a playground, under conditions other than natural, which the landowner knows or should know involve an unreasonable risk of bodily injury and which children because of their youth will fail to discover and appreciate."⁷

It should be noted that children coming to a farm premises with their parents normally have the status of their parents. It should also be noted that the attractive nuisance doctrine has the effect of changing the status of a child trespasser to a status requiring greater care by the land possessor. This means that the person in possession of the land will owe the standard of due care to the child trespasser where the attractive nuisance doctrine applies. Furthermore, should the Tennessee Supreme Court or the Tennessee Legislature go one step further and impose the due care standard as to all categories of visitors, then the attractive nuisance doctrine would have no effect.

Recreational Uses of Farm Property

Tennessee statutes limit the liability of owners and occupiers of land when they permit others to use their property for recreational purpose

without charge or consideration other than that paid by the government to the landowner or occupier. In such case the landowner can only be held liable for willful or malicious failure to guard or warn against a dangerous or hazardous condition, use, structure or activity.⁸ The statutes impose "no duty of care to keep such land or premises safe for entry or use by others for hunting, fishing, trapping, camping, water sports, hiking, or sightseeing, nor shall such landowner be required to give any warning of hazardous conditions, uses of, structures, or activities on such land or premises to any person entering on such land or premises for such purposes, except"⁹ when payment is made.

Injury to Employees

Injury to farm employees is handled under the rules of negligence in Tennessee because workers' compensation does not apply to agricultural workers. Duties of the employer to the employee include: 1) a duty to provide reasonably safe tools and equipment with which to work; 2) a reasonably safe place to work; 3) warning of dangers that employees are not aware of and are not likely to discover; 4) hiring reasonably competent employees generally; and 5) making reasonable rules for safe conduct of employees in doing their work.

The employer has defenses to his own negligence in three situations. First, where the employee is aware of the risk involved and voluntarily assumes it. This includes the ordinary risks inherent in the occupation and other risks for which the employee knows of the danger and voluntarily assumes it.¹⁰ Secondly, where the injury is caused by fellow employee where the employee causing the injury was selected by use of reasonable

care.¹¹ In such cases the injured employee must look to the employee causing the injury for compensation. The third situation in which the employer has a defense to his own negligence involves situations where the employee was contributorily negligent.¹² A situation such as one in which the employee failed to use safety equipment or otherwise failed to use due care for his own safety provides the employer with the defense of contributory negligence.

Partners as Employees

Members of a partnership are considered to be employees of each other. Thus, partners may be held vicariously liable for another partner's acts done within the scope of the partnership business. The Uniform Partnership Act as adopted in Tennessee goes far beyond the vicarious liability of the common law. Under the statute "all partners are liable jointly and severally for everything chargeable to the partnership."¹³ This means that any partner can be held liable individually for any civil liability or contract action wherein the partnership is liable or that all partners can be forced to bear the responsibility jointly. If one partner is held individually responsible, that partner would have a legitimate claim against other partners for a pro rata reimbursement except where his own negligence was the cause of the harm being compensated.

Workers' Compensation

Workers' compensation is a no-fault system providing compensation to employees or their dependents for job related accidents and diseases. This program provides fixed awards for various types and degrees of incapacitation for work. An award under the Workers' Compensation Act generally

precludes or bars any common law remedy which the employee might have had. The need to prove negligence on the employer's part is removed as is much of the legal complicity of negligence law suits. Where covered under workers' compensation, an employee can recover on proof of three things. First, that the employee suffered the alleged injury or illness. Second, that the injury or illness occurred while the employee was within the scope of employment. Finally, that the injury or illness was caused by or related to the employment.

Most workers are covered by the Tennessee Workers' Compensation Law, but a few categories are excluded from mandatory coverage, and corporate officers may elect to be exempt from coverage.¹⁴ The following categories are excluded from coverage: 1) employees of common carriers engaged in interstate commerce that are covered under the Federal Workers' Compensation Law; 2) employees who at the time of injury are classified as casual employees; 3) farm or agricultural laborers and domestic servants; 4) employees of employment situations where there are less than five regular employees; 5) state, county and municipal employees; and 6) persons performing voluntary service as ski patrolmen. The law provides that governmental entities and employers of less than five regular employees may accept the provisions of the Workers' Compensation Law by filing written notice 30 days or more before the happening of any accident or death to be covered. No voluntary participation provision is available for other categories of employers.

The Tennessee Workers' Compensation Law requires employers that are affected by the law to carry workers' compensation insurance or to furnish satisfactory proof of financial ability to pay all claims for workers' compensation that may arise against them.¹⁵ Most employers carry insurance

and thus are able to convert the risk of lawsuits brought by employees suffering job related injuries and illnesses into a fixed annual premium.

Vicarious Liability of Employers

Sometimes employers are held vicariously responsible for the negligent acts of those employed to work for them. Liability is assigned to the employer under the "doctrine of respondeat superior." Respondeat superior is a maximum that means "let the master answer." Whether or not the employer is held responsible for the negligent acts of employees will generally depend on the type of employment relationship involved. The two common relationships are employer-employee and employer-independent contractor. An employer-employee relationship generally exists where the employee uses the employer's tools and is closely supervised and under the control of the employer. Under this type of employment, the employer will usually be held liable for the negligent acts of the employee when the employee is acting within the scope of his employment and not on a frolic of his own. Even when the employee is doing something explicitly forbidden by the employer, the courts usually hold that the employee is within the scope of his employment so long as what the employee was doing is in the furtherance of his employer's business.

Generally the respondeat superior doctrine does not apply to employer-independent contractor relationships.¹⁷ Under employer-independent contractor relationships, the employer contracts to get a job done and generally will neither furnish the equipment used nor control how each step in the process will be carried out. Should the employer take control of the manner and means of performance, the courts usually consider the relation-

ship changed so that the independent contractor is treated as an employee and hold the employer liable, under the respondeat superior doctrine for harm done to others. There are exceptions to the rule that an employer will not generally be held liable for negligent acts of the independent contractor. First, where the employer is negligent in employing an incompetent person or firm to serve as an independent contractor.¹⁸ Thus, it is important to use care in selection of contractors, considering factors of experience, reputation, liability insurance coverage and whether the contractor is bonded. Tennessee law also prevents employers from shifting liability for inherently dangerous activities, such as, but not limited to, blasting, working with high voltage electricity or aerial spraying of chemicals, simply by contracting them out to independent contractors.¹⁹ Where the nature of the job to be done indicates that mischievous consequences may arise unless means to prevent them are adopted, the employer is under a nondelegable duty to see that appropriate preventative measures are taken. The employer should exercise caution in selecting the contractor, ascertain that proper precautions are taken and secure adequate liability insurance for the event that precautions prove less than adequate when ultrahazardous activities are involved.

Nuisance

Nuisance law is a field of tort liability that may provide relief when unreasonable or unlawful use by a person of his own property invades the rights of another, or to the public without regard to any particular type of tortuous conduct. Nuisance may arise as the result of intended conduct as well as from negligence or in situations where the law holds the

offender strictly liable for the result of his actions. Public nuisances arise where the rights of the general public are invaded, and in these cases the state serves as prosecutor. Public nuisance "comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interest of the community, or the comfort and convenience of the general public."²⁰ Tennessee courts have held a broad spectrum of activities including the handling of snakes as part of a religious ritual,²¹ profane swearing and cursing in public,²² eavesdropping²³ and stench from hog pens²⁴ to be public nuisances. While a different outcome might be expected on some of these issues if tried today, they illustrate the diversity of the group or offenses called public nuisance.

Private nuisances are civil actions that generally arise from the use of one's property in a manner that is unreasonable in relation to its utility and the harm which results. Usually one or a few people are offended by a substantial interference with rights in the use of their own property before the conduct of an offending neighbor will be declared a private nuisance by the courts. Conduct that is lawful and above reproach in one environment may be declared a nuisance in another. For example, the raising of hogs or other animals in confinement where a lagoon or some other method of collecting refuse is necessitated may generally be considered reasonable in a farming community. However, in a densely populated area or after an adjoining farm has been developed for homesites in a predominantly farming community, such activity may be unreasonable in relation to its utility and annoyance to neighboring homes.

Nuisances may be classified as either temporary or permanent depending on whether they can be corrected by expending labor and money. Damages

for a temporary nuisance can be obtained based on the injury to the value of the use and enjoyment of the property and is usually measured by the extent of reduction in rental value of the property.²⁵ An injunction to cease the offensive and unreasonable activity will sometimes be issued by the courts. When a nuisance is permanent in nature, the measure of damages is the reduction in the market value of property affected by the nuisance.²⁶

Damage Done by Animals

Damage done by livestock that are knowingly or negligently allowed to run at large will generally be charged to the person responsible for possession of the animal.²⁷ Note that this is a negligence standard as contrasted with the law in many states that makes the keeper of animals strictly liable for damage done by wandering animals. A person is considered negligent when he fails to exercise ordinary care, which is that degree of care expected of a person of ordinary prudence under the same or similar circumstances. Thus, under Tennessee law, if a tree falls across the fence during the night, or if a trespasser leaves a gate open, and livestock escape, the damage done should not be chargeable to the owner of the livestock. It should be noted that negligence depends on the particular facts and circumstances and is usually left to a jury for determination.

A strict liability standard applies where wild animals are kept in captivity and where notoriously mischievous domestic animals are kept. Owners or keepers of such animals are liable for any damage they may cause whether or not negligence is involved.

Common law principles apply to dog owners generally; however, they have been modified where leash laws apply and by special statutes in situa-

tions involving dogs that damage livestock. In situations involving personal injury, proof that the dog had vicious propensities and that these propensities were known by the dog's owner or keeper is required in order to recover damages. On the other hand, by Tennessee statute, "[i]gnorance of the vicious habits or character of the dog on the part of the owner shall be no defense in actions arising²⁸...[w]here any dog shall kill, or in any manner damage, any livestock in this state..."²⁹ These statutes make the dog owner liable for damage to livestock without regard to the dog's disposition. The terms vicious habits and vicious propensities are broadly defined in law. A dog may be considered to have vicious habits or propensities if it: 1) has bitten someone or caused physical harm before, 2) has a menacing disposition and snarls at people or 3) has a tendency to jump up and put his feet on people. More specifically, a dog is considered to have vicious propensities if it tends to do any act that might endanger a person or property in a given situation.

An owner keeping a dog having a known vicious propensity does so at his own risk. The basis of liability for personal injury caused by vicious dogs is not negligence in the manner the animal is confined, but in the fact that it is kept at all. Many people apparently believe that a dog is entitled to his first bite before liability will attach. However, this is not the law today, and it apparently never was.³⁰ The owner of a dog (or other animal) with vicious propensities has a duty to either kill it or restrain it in such a way that it will be unable to do the harm threatened.³¹

Insuring to Reduce Risk

The law does not generally place upon the individual the duty of being an insurer of the person or property of those in which he has contact. The burden of being an insurer is approximated where intentional torts are committed or where a strict liability standard applies. In other situations, with the exception of those involving nuisance, the standard of due care applies; and if the individual is not negligent, liability for harm should be avoided. However, the standard of due care is elusive of a definition that is easy to apply in all circumstances. Thus, one attempting to live up to the standard might misapply it or have temporary lapse in "reasonableness and prudence."

It may be wise to share the risk posed by civil liability by carrying liability insurance. Through adequate insurance protection the homeowner or proprietor of a business can reduce the risks of future unknown contingencies. It would be literally impossible to cover all potential risks with insurance, but catastrophic events that might lead to financial ruin can thereby be minimized. Insurance coverage will be limited to risks specifically covered by the policy and to specific dollar limits for each such covered risk. It is wise to review liability policy terms and limits periodically so that adjustments can be made and adequate policy coverage can be maintained.

Summary

The complexities of modern society make it imperative that each individual have a basic understanding of legal principals in order to minimize the risks of legal sanctions. Civil law deals with conflicts

between private citizens and is of greatest concern to most individuals today. The body of law regulating noncontractual civil liabilities is known as tort law. Torts involve the breach of a legal duty with resultant harm to the person or property of another. There are three categories of torts, namely: 1) intentional torts--as in assault and battery; 2) negligence--where there is no intent to cause harm but where the "due care" standard is violated; and 3) strict liability--where the law imposes liability without fault.

Negligence, the failure to use reasonable care under the circumstances, serves as a basis for a large percentage of tort actions. Lawsuits involving visitors to one's business or home, employer-employee relationships, damage done by animals and a variety of other legal situations will often be determined on the negligence issue.

Risks of civil liabilities can be reduced by carrying appropriate insurance. Claims for work related disease or injury to employees can be limited by carrying workers' compensation insurance. However, not all categories of employees can be covered by workers' compensation insurance. General liability insurance can be helpful to the homeowner or business proprietor to reduce the risks of future contingencies in many areas. Insurance coverage will be limited to specific risks outlined by the policy and should be reviewed periodically so that adequate coverage can be maintained.

Footnotes

¹Walker v. Williams, 384 S.W. 2d 447, 449 (Tenn. 1964).

²Anthony v. Anthony, 444 S.W. 2d 714, 715 (Tenn. App. 1969).

³Hudson v. Gaitan, 675 S.W. 2d 699, 703 (Tenn. 1984).

⁴Duckworth v. Greyhound Buslines, Inc., 469 f 2d 424, 426 (C.A. Tenn. 1972), Quoting Smith v. Roane-Anderson Co.'s, 207 S.W. 2d 553 (Tenn. App. 1947).

⁵Prosser, Restatement of Torts 2nd. §339.

⁶See, e.g., Bloodworth v. Stuart, 428 S.W. 2d 768 (Tenn. 1968); Gouger v. T.V.A., 216 S.W. 2d 739 (Tenn. 1949).

⁷Gatlinburg Const. Co. v. McKinney, 263 S.W. 2d 765, 767 (Tenn. App. 1953).

⁸Tenn. Code Ann. §§70-7-101 et seq.; Tenn. Code Ann. §§11-10-101 et seq.

⁹Id. §70-7-102; §11-10-103.

¹⁰Wilson v. Lindamood Farms, Inc., 675 S.W. 2d 187, 188 (Tenn. App. 1984).

¹¹East Tenn. V. and G. R. Co. v. DeArmond, 5 S.W. 600, 601 (Tenn. 1887).

¹²Hansard v. Ferguson, 132 S.W. 2d 221, 224 (Tenn. App. 1939).

¹³Tenn. Code Ann., §61-1-114.

¹⁴Id. §50-6-104.

¹⁵Id. §50-6-106.

¹⁶Id. §50-6-405.

¹⁷Kuhne v. U. S., 267 F. Supp., 649, 658 (D.C. Tenn. 1967).

- ¹⁸Mooney v. Stainless Steel, Inc., 338 F. 2d 127, 131 (C.A. Tenn. 1964).
- ¹⁹Pierce v. U. S., 142 F. Supp., 721, 729 (D.C. Tenn. 1956), Affd. U. S. v. Pierce, 235 F. 2d 466 (C.A. Tenn. 1956).
- ²⁰Prosser, William L., Law of Torts, 4th ed., 1971, p. 583.
- ²¹State ex. Rel. Swann v. Pack, 527 S.W. 2d 99, 113 (Tenn. 1975).
- ²²State v. Graham, 35 Tenn. 134, 139 (Tenn. App. 1855).
- ²³State v. Pennington, 40 Tenn. 299, 300 (Tenn. App. 1859).
- ²⁴Gay v. State, 18 S.W. 260, 261 (Tenn. 1891). (The Tennessee Supreme Court reversed the lower court's opinion on the basis that testimony had indicated that other hog pens in the neighborhood contributed to form the nuisance and thus the defendant's act alone was not the natural and direct cause of the nuisance.)
- ²⁵Pate v. City of Martin, 614 S.W. 2d 46, 48 (Tenn. 1981).
- ²⁶Anthony v. Construction Products, Inc., 677 S.W. 2d 4, 10 (Tenn. App. 1984).
- ²⁷Tenn. Code Ann., §44-8-101 (1964).
- ²⁸Id. §44-17-202.
- ²⁹Id. §44-17-201.
- ³⁰Prosser, William L., Law of Torts, 4th ed., 1971, pp. 501-02.
- ³¹Todd, R., Tennessee Fencing and Animal Restraint Laws, RR 80-01, July, 1980, Dept. of Ag. Econ., University of Tennessee Ag. Expt. Station,