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Tennessee Fencing and Animal Restraint Laws

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The Biblical account of Abraham and Lot parting to go separate ways because of strife between their herdsmen over grazing rights reminds us that livestock related disputes between cattlemen are not of recent origin. In more modern times fencing responsibilities and boundary locations have been the focal point of many quarrels between neighboring farmers. Another problem area results from personal injury and economic loss caused by pets.

The solution to most problems involving animals comes from cooperation between neighboring farmers in following statutory mandates or community customs. Lawsuits are expensive and, therefore, not many animal related disputes go to court. Of the cases that do go to court, few are appealed, and only appealed cases get into the published reporter system. Thus, information on the resolution of most disputes involving partition fences or damage caused by animals is not readily available. Information in this report is primarily based on Tennessee statutes and case law, supplemented by general legal principles where Tennessee law is not clear.

Purpose of this report is to inform Tennessee farmers and animal owners generally of their rights and responsibilities relating to animal confinement and fencing laws. It is expected that this information can help prevent misunderstandings that foster ill will and at the extreme, court action.

Fencing Laws

The earliest fence law in the United States was copied from the English Common Law. Under that system owners and occupiers of land had a duty to fence their land only if they kept animals on the premises. There was an absolute duty to keep livestock enclosed and their owner was liable for any damages to persons or property when they escaped. An early English case stated this rule of law as follows: "where my beasts of their own wrong without my will or knowledge, break anothers close (tresspass on the property of another) I shall be punished, for I am the tresspasser with my beasts . . . I am held by the law to keep my beasts without their doing wrong to anyone."[1]

Type of Fence Statue

Many states abandoned the common law rule or modified it to meet local needs as dictated by population and cropping intensity, as the nation developed. "Open range" or "fencing-out" type statues were adopted in many Western states where population was sparse and grazing was the dominant farming enterprise. "Fencing-out" type statutes require crop producers to fence crops with a legal fence in order to recover damages caused by trespassing livestock. However, "closed range" or "fencing-in" statutes were adopted in many of the more populous Eastern states. "Fencing-in" statutes require that livestock be enclosed and most of them have maintained the strict liability requirement of the common law.[2]

Tennessee Fencing Statutes

Tennessee abandoned the common law in 1858 when "fencing-out" statutes requiring crop producers to fence against livestock running at large were adopted.[3] If crops not fenced with a "legal fence" as defined by the statutes were damaged by livestock, the owner could not recover damages except where the livestock were notoriously mischievious in nature.[4] Later when population and crop production increased in some areas of the state, there was a need to return to the common law practices. In 1899 the Tennessee legislature changed the law making it unlawful for owners to knowingly allow their livestock to run at large in counties with a population of 59,000 or more. The population requirement to make the statutes effective in a given county was changed to 72,000 and above in 1901.[5]

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[1] *Eng. Rep. 156 (1688) as quoted by W. Prosser, Law of Torts 496 (4th ed. 1971).*

[2] *W Prosser, Law of Torts 496-97 (4th ed. 1971).*

[3] *Tenn. Code Ann. §44-1701 (1964).*

[4] *Id. §44-1710.*

[5] *Acts 1899. C23§1, as amended by Acts 1901, C114.*

Tennessee abolished all remnants of the "open range" system in 1947 with a statue that did not specifically mention fencing or fencing laws. The statute simply says, "It shall be unlawful for the owners of any livestock, as the same are commonly known and defined, to willfully allow the same to run at large in this state."[6] Though the statute refers to "owners" who "willfully" allow livestock to run at large, case law indicates that it applies generally to keepers of livestock who know or should have known their animals were at large.[7]

It seems clear that the 1947 statute is a return to the common law modified by a negligence standard. However, the legislature has not seen fit to remove the old statutes which require that crops be fenced and specify what constitutes a legal fence. Case law indicates that these statutes probably have been overruled by implication[8] and has stated emphatically that violation of the "legal fence" dictates does not constitute negligence per se (by means of itself).[9] Some old statutes remaining in the latest version of the Tennessee Code are antiquated and often misleading. More than a superficial reading is required to discover their current application, if any.

Responsibility for Damage by Animals

In Tennessee, keepers will generally be held liable for the damages caused by their livestock while knowingly or negligently at large. A person is said to be negligent when he fails to exercise that degree of care expected of a person of ordinary prudence under the same circumstances. It should be noted that negligence is ordinarily a question that will be determined by a jury. Thus, if a tree falls across a fence during the night and livestock escape that same night and cause an automobile accident or damage crops on a neighboring farm, the livestock owner would probably not be considered negligent unless he had knowledge of the situation and time to correct it. If, however, the damage occurred two weeks after the tree fell, the owner would have had ample time to discover the down fence and repair it. Therefore, a jury would likely find the livestock owner negligent because he had reason to know of the situation and time to correct it.

Where a negligence standard applies, the law places a duty of reasonable care on both the owner or keeper of animals and those who may be injured by them. If a person who fails to exercise reasonable care for his own safety is injured by an animal, the owner of the animal may use the defense of contributory negligence. If the jury finds contributory negligence, the injured party will be precluded from recovery of damages.

There are two situations where the negligence standard may not apply: 1) if wild animals are kept in captivity, and 2) if domestic animals are kept that are notoriously mischievious in nature.[10] Owners or keepers are liable for any damage caused by animals in the above two categories whether they are negligent or not. Thus, the owner of animals, such as monkeys, bears, lions, and elephants or domestic animals that have previously broken out or jumped fences should consider the risks involved and take extra precaution, such as supplemental insurance.

Partition Fences

Tennessee law recognizes two fence categories by special treatment for partition fences. Liability for damage caused by livestock escaping along a partition fence depends upon who was responsible for maintaining the fence where the livestock escaped. The Tennessee Code defines partition fences as "fences erected on the line between lands owned by different persons."[11]

The partition fence statute specifies how construction and maintenance will be shared between neighboring landowners in the absence of an agreement. An agreement or contract may be entered with respect to construction and maintenance of partition fences. In fact, parties involved might agree not to fence in a grain producing area. Once a valid contract is entered it will be enforceable between the parties and future purchasers who have knowledge of the contract. For this reason the agreement should be in writing and should be recorded so that future purchasers of the adjoining land will have record or constructive notice of the contract's existence. Where one party to the agreement fails to discharge his duty and as a result he himself is damaged by his neighbor's livestock, he cannot

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[6] *Tenn. Code Ann. §44-1401 (1964).*
[7] *Wilson v. White 102 S.W. 2d 531, 533 (1936).*
[8] *Folker v. Whitehurst 144 Tenn. 62, 72 (1921).*
[9] *Rogers v. Webb, 335 F. Supp. 584, 585 (1971).*
[10] *Tenn. Code Ann. §44-1710 (1964). Under this statute, originally enacted as Tennessee Acts of 1875, Ch. 110 §2, the owners of notoriously mischievious stock are held liable for all damages done to the enclosure or crops of others whether or not the claimant had a lawful fence.*
[11] *Id. §44-1712.*

recover damages "because he cannot complain of an injury that was the direct result of his own wrong."[12]

Where a contract or agreement is not in effect the Tennessee Code specifies that "[p]artition fences may be erected and repaired at the expense, jointly, of the occupants or owners; or if a person makes a fence a partition fence, by joining to it or using it as such, he shall pay to the person erecting it his proportion of the expense."[13] The code further provides that if either of two joint partition fence owners fail to keep his part of the fence in good repair, he shall be liable for any damages the other may sustain in consequence of such failure.[14] The Code also contains a provision for situations in which the parties cannot agree as to the amount the owner erecting or repairing a partition fence should be paid. "[O]n application by either [party] to a justice of the district (now a member of the County Legislative Body), he shall issue his order to three (3) disinterested freeholders, not related to either of the parties, to examine such fence, and to ascertain the amount to be paid to the owner erecting or repairing it."[15]

These statutes taken together appear to compel participation between adjoining landowners to build and maintain partition fences along their boundary. However, it should be noted that the statutory provisions for building and maintaining partition fences were enacted during the time that Tennessee was under the "open range" system and livestock was permitted to run at large. Case law rendered under that system says that the partition fence statutes are compulsory on adjoining landowners where the lands are cultivated. "The fence in such cases is equally beneficial to both of them, and the statute requires that they contribute equally to the expense of constructing and maintaining it."[16] The same case stated that statutes making it unlawful for livestock to run at large in certain populous counties did not repel the partition fence statutes. The partition fence statutes still appear to apply generally. A Tennessee court today would probably enforce joint participation between adjoining landowners, especially in situations where both parties benefit from the fence.

[12]*Brown v. Sams, 119 Tenn. 677, 682 (1907).*
[13]*Tenn. Code Ann. §44-1713 (1964).*
[14]*Id. §44-1714.*
[15]*Id. §44-1720.*
[16]*Brown V. Sams 119 Tenn. 677, 680 (1907).*

Liability For Injury Caused By Pets

Pets of all species may cause physical injury or property damage for which their owner or keeper may be responsible. The civil liability rules for pets other than wild animals are generaly the same as for domestic farm animals. The law is in some respects more definite with regard to dogs than other pets, however, because more court cases have involved dogs. For this reason, and because they occupy a rather unique position in the law, dogs will be the focal point for outlining the liabilities for injury caused by pets.

Legal Status of Dogs

The legal status of dogs is placed somewhere between wild animals and domestic animals. They are generally considered more dangerous than other domestic animals. A number of Tennessee statutes recognize this greater danger by placing liability on the dog owner or keeper in some instances without regard to fault. Thus, pet owners are more likely to be held liable for injuries inflicted by dogs than by other domestic pets.

Responsibility of Dog Owners

Tennessee law appears to favor property over the person with respect to injuries and damages caused by dogs. Common Law rules apply in personal injury cases requiring proof that the dog had vicious propensities and that these propensities were known by the owner or keeper of the dog 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 arising . . ."[17] "[w]here any dog shall kill, or in any manner damage, any livestock in this state . . ."[18] 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 receive a broad definition 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.

[17]*Tenn. Code Ann. §44-102 (1964).*
[18]*Id. §44-101.*

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, but this is not the law today and it apparently never was.[19] 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.

By Tennessee statute, dogs are not allowed to be at large except: 1) when in a hunt or going to or coming from a hunt, 2) while guarding or driving livestock, and 3) while being moved from one place to another in control of a person. "The foregoing exemptions shall not apply unless all damages done by dogs [herein] exempted, to the person or property of another, shall be paid or tendered to the person so damaged, or to his agent within thirty (30) days after the damage is done."[20] Another Tennessee statute makes it a misdemeanor, punishable by a fine of at least $5 and not over $25, to keep any dogs that kill or chase sheep and goats after notice of the dog's action.[21] Written notice by affidavit is required to obtain a conviction under this statute.

Tennessee law does not explicitly authorize killing a dog that has caused property damage. However, a statutory defense is provided in an action for damages against a person killing or injuring a dog on satisfactory proof that the dog was killing or worrying livestock.[22] A dog killing or injuring a person appears to have more protection than a dog killing livestock. A dog attacking and causing injury or death to a human may be destroyed on the order of a judge of the circuit court on petition giving the owners five days to appear and show cause why the dog should not be killed.[23]

Summary

Tennessee fence law has changed over time. At first the English Common Law was followed. "Fencing-out" statutes were adopted in 1858 but were modified at the turn of the century, requiring livestock to be enclosed in the more populous counties. In 1947, all remnants of the "fencing-out" or "open range" system was abolished. Tennessee law now prohibits owners from letting their livestock knowingly or negligently run at large. Special rules apply in determining liability in disputes between adjoining landowners when livestock escape through a partition fence. Generally, liability will be upon the party whose duty it was to maintain the fence where the animals escaped.

The standard of care which the law places upon the owner or keeper of animals will depend upon the circumstances involved. The owner or keeper of wild animals or of notoriously mischievous domestic animals may be held strictly liable for property damage or personal injury they cause. The owner of a dog may be held responsible for: 1) livestock injury caused by his dog, and 2) personal injury caused by his dog if he knew it had vicious propensities. In other situations a negligence standard generally applies which places a duty of reasonable care upon both the owner of farm animals and anyone who might be injured by them. When the reasonable care standard applies, a person injured by a farm animal must have exercised reasonable care for his own safety in order to recover damages. Otherwise the owner of the animal has a contributory negligence defense.

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[19] *W. Prosser, Law of Torts 501-02 (4th ed. 1971).*
[20] *Tenn. Code Ann. §§44-1408, 1409 (1964).*
[21] *Id. §39-418 (1975).*
[22] *Id. §44-103.*
[23] *Id. §44-123.*