

CHAPTER FIVE

FLOOR WAX AND DOG ATTACKS

Homeowner's Guide to Avoiding Liability

What if you wax the floor to impress your dinner guest, but she skids across it, falls, and breaks her hip?

What if the excavation for the dream house you're building causes your neighbor's basement wall to cave in?

What if your new pet Doberman takes a chunk out of the mailman's backside?

In any of these cases, you could be liable for thousands of dollars in damages. Any time someone gets hurt on your property because of your **negligence** (carelessness), you may be legally responsible. The same applies when you or your children carelessly or intentionally do things that cause damage to someone else's property.

A typical case involves someone slipping and falling, say on an icy walkway. Other common injuries involve power lawn mowers, swimming pools, boats and other recreational vehicles. Homeowners are liable only if a court finds them in some way negligent (though many settle before this point if they or their insurer believes that a court would find them negligent).

An Ounce of Prevention..

Thirty years ago, the injured party probably wouldn't have sought damages, because, after all, accidents happen. At the most, the homeowner might have been asked to reimburse the injured party's medical bills. But times have changed, and many people now feel they're entitled to full

compensation when they are injured--even by friends. In today's increasingly litigious society, a dinner guest who trips over an unsecured carpet might well file a lawsuit that drags on for years.

It is important to note that in 99 percent of the cases, the matter doesn't go to trial. Sometimes a suit is threatened but never filed, or is dropped before trial. In many other instances, the parties agree to an out-of-court settlement.

Most homeowners are smart enough to carry insurance, and the insurance company generally handles any claims against the homeowner. It's only when the insurer believes the claim is unreasonable that the matter is likely to land in court. Even then, the insurer will furnish the attorney and pay any damages awarded (up to the limit of the policy), along with court costs.

Still, facing a lawsuit and going to court is no fun. Lawsuits involve months of depositions, motions and counter motions before the trial even gets started. Even after a verdict is rendered, a party may appeal and the battle could go on for years.

As a homeowner, you're far better off both preventing injuries in the first place and protecting yourself with a solid insurance policy in the event the unavoidable and unexpected does occur. If you don't, your finances--and your peace of mind--may well be at risk.

The Law of Negligence and Liability

Historically, the law identified four categories of people who might be injured on your property--invitees (e.g., a mail carrier), social guests (e.g., a dinner guest), licensees (e.g., someone who stops to ask directions), and trespassers (e.g., a burglar)--and the homeowner's duty of care depended on the category the injured party fell into.

Today, these distinctions have all but disappeared, though in a few jurisdictions the trespasser is still in a separate legal category from "lawful" visitors. The courts in most states now hold property owners to the same standard with respect to everyone: a duty to employ reasonable care in maintaining your property and to warn people of hazards. So, for example, if you've given someone permission to pick gooseberries on your property, you'd better warn the berry picker that the local gun club is doing target practice nearby.

Generally, courts hold homeowners responsible only if they are in some way negligent. The law doesn't expect you, the homeowner, to guarantee that someone visiting your house will not get hurt. People do trip over their own feet and lightning does strike. But it's your responsibility to take reasonable care to protect people from hazards that you know about. The lack of such care is called negligence.

In what circumstances might you be held liable? The following should raise red flags for you: If you fail to maintain your property or create a condition that may result in injury or damage to someone else's property.

- If you know about a hazard and expect people to come onto your property, but do not eliminate the hazard, erect barriers, or warn people.
- If you are not careful about hazards that might attract children.
- If your actions (or inaction) may cause damage to your neighbors' property.

Artificial Hazards

Generally, courts don't hold homeowners liable for injuries stemming from natural hazards such as lakes and streams, even if the one hurt is a child, unless some other negligence is involved.

Homeowners are more likely to be responsible if the hazard was created artificially.

For instance, a man was pushing a child on a tree swing while attending a barbecue in New York. He stepped back onto a rotted plywood board covering a sewer trap, which gave way under his weight. A court found the homeowners liable because they knew about the danger but made it even worse by hanging the swing where anyone pushing a child on it would have inevitably stepped on the rotted cover.

Another example occurred in Idaho where a couple was showing a prospective renter through their house, when the prospect fell down the basement stairs and got badly injured. She sued the homeowners for damages because the stairway failed to meet the local building code-- there was no handrail and the stair treads were of differing widths. A court ruled their ignorance of the code was no excuse and they could be held liable.

On the other hand, take the case of a Nebraska man who just finished shoveling his driveway in the freezing mist. He was inside getting some salt to finish the job when the mail carrier slipped and fell on the driveway. The mail carrier sued, but the court ruled the homeowner was blameless because he didn't create the hazard and was doing his best to eliminate it.

As these cases illustrate, the law does not expect you to anticipate every harm that might occur when people are on your property. It does expect you to exercise due care in minimizing hazards, inform visitors of potential hazards, and use common sense in maintaining your property.

Children and Attractive Nuisances

The law concerning a property owner's responsibility for children, even when they are trespassing, has changed over the years. Back in 1901, a five-year-old drowned after falling into an uncovered excavation that had filled up with water. The court ruled that because the child was a trespasser and the property owners didn't know there were children around the pit, they weren't liable.

Even then, however, another legal doctrine was evolving, stemming from injuries caused to children playing on railroad turntables left unsecured in areas the public frequented. A locomotive turntable makes a fine merry-go-round, and in a series of late nineteenth century cases involving such injuries, the courts found the railroads negligent. Some dangerous places look like such fun that landowners should expect children to come play, the courts ruled.

The law calls them **attractive nuisances**. Even though an uninvited child wandering into your yard to inspect the swimming pool might well be a trespasser, the law says you have a special duty to erect barriers to protect children from harm's way.

That's why the Supreme Court of Georgia recently refused to dismiss a case against the owners of a swimming pool where a two-year-old drowned. The swimming pool was in the side yard of their home on a corner lot, three blocks from an elementary school. The yard and swimming pool were unfenced, and the pool had both a diving board and playground-type slide for easy access to the water.

Many states have specific statutes dealing with protective features you need around a swimming pool. Failure to adhere to these safety standards would probably make you liable in case of an accident. Check with your local building officials to determine the laws in your area--and make sure you obey them.

Or take the case of the Michigan family that stopped at a private home to buy raspberries. While the adults were talking, the two preschool boys wandered into the garage, where they found a loaded gun. One shot the other. The court ruled that although homeowners can't be expected to childproof their homes, those who have reason to expect children to come around--such as the couple who sold raspberries from their home--should expect children to act on childish impulses and should take steps to protect them.

The message is clear. If there's a way in, the child finds it, and he or she gets injured, you may be liable. That's why precautions such as fences, locked gates, and swimming pool covers--and good liability insurance--are so important.

Recreational Use

What if you own a lot of land and allow someone to use it for hunting, fishing, cross-country skiing, or any other recreational activity? Are you liable if the person gets hurt? Probably not. In the 1970s, virtually all states enacted **recreational use statutes**, designed to encourage people to open their land for recreational use without fear of liability. The statutes don't protect you if you charge a fee, or if you're malicious in your failure to warn of hazards--such as not telling snowmobilers there's a cable strung at neck height across their path. For more information about such statutes in your state contact a lawyer, your state's department of conservation or the department that issues hunting and fishing licenses.

Social Host Liability

So you like to throw parties? What's your potential liability if things get out of hand and one guest picks a fight with another? Some courts have ruled that you (the host) aren't responsible for the conduct of your guests, unless your parties routinely turn into brawls. Likewise, if one of your guests is horsing around, crashes into a ceiling fixture and slices his tendons, you likely won't be responsible.

Where you might be liable is if you let your guest drink too much, then put him into his car and send him out on the highway. That's what happened in a landmark New Jersey case, where the homeowners had been drinking Scotch for a couple hours with one of the husband's subcontractors. They walked him to his car, saw him off and called shortly to see if he'd made it home. He hadn't. Thoroughly drunk, he'd been in a head-on collision where a woman was seriously hurt. The case went to the state Supreme Court, which held the hosts liable.

That's a lesson worth learning. In fact, insurance companies are now offering host liquor liability policies.

Animal Attacks

Suppose your poodle attacks the delivery truck driver. Are you liable? Probably. The law holds people responsible for the actions of their pets. Most states have so-called "dog-bite statutes," holding owners legally liable for injuries inflicted by their animals. If there's no such statute, you can still be found liable under the common law rule that owners are legally responsible if they knew the animal was likely to cause that kind of injury. You may also be found liable if you violated a leash law or a requirement to keep your pets fenced.

Most dog-bite statutes eliminate the old "one-bite" rule, which essentially gave every dog one free bite because until then the owner had no reason to believe it was dangerous. However, you the owner may still defend yourself by arguing that the person injured was trespassing, breaking the law, unreasonably careless, knowingly took the risk, or provoked your dog to attack.

Many states and municipalities have enacted "vicious dog statutes," which enable an animal control officer or a judge to declare a particular dog vicious and require the owner to confine the dog securely or muzzle it in public. Some states make it illegal even to own a dog that's been declared vicious. And some cities have imposed an outright ban on certain species, such as pit bulls, which they consider inherently vicious. Also, many jurisdictions ban wild animals being kept as pets, such as wolves, bears, and dangerous snakes.

If you own a dog or another animal that might injure someone, find out what the laws are in your area by calling your locality's animal control office. Know your pet's temperament and be careful to keep it out of the path of strangers. Keep vaccinations current, and post warning signs if you think your pet might injure someone. These should be prominent and straightforward signs--e.g. "beware of dog"--so people are clearly informed of the danger involved. (However, the signs may not absolve you from liability if a child climbs into the yard or the dog gets out.)

Damage to Neighboring Property

Just as your liability for injury to people turns on the question of negligence, so does your liability for damage to someone else's property. Traditionally, property owners were not responsible for damage caused by falling tree limbs and other natural occurrences on their property, but only for damage caused by artificial conditions, such as an unsecured board from your lumber pile being

carried by the wind through your neighbor's plate glass window. The current trend, though, is for courts to apply an ordinary standard of care/negligence in both cases.

So keep an eye on your trees. If there's visible rot, better take the limb off before it falls on your neighbor's new car. Maintain your property well enough that, short of a tornado or hurricane, the wind won't blow things from your place over to your neighbor's.

If you excavate near the property line and cause your neighbors' land to subside, you may be liable whether or not their house is affected. Check with a civil or geological engineer if you're planning to excavate and think you have reason to be concerned. Your builder or contractor will know of one, or you can find one yourself through the Yellow Pages.

Similarly, if changes you make to the contours of your land cause excess rain water to pour onto your neighbor's property and results in damage, you may be liable. If you're planning to change the contours of your land, ask an attorney or your local housing authority about your state law.

Other Areas of Concern

- **Damage by children.** As a rule, you're liable for injury and damage caused by your minor children, though such damage will usually be covered by your homeowner's policy. However, if your children are over 13 and intentionally cause damage, your homeowner's policy probably won't pick up the cost. You'd better teach the kids to respect other people and their property and make sure they learn these lessons well.

- **Waterfront areas.** If you live along a river or stream, state and local laws designed to protect wildlife habitat may preclude your clearing brush or changing the lay of the land. Don't do it without checking with your state's department that deals with fish, wildlife and parks, usually located in your state capital.
- **Pollution** You could be liable for the cost of cleaning up pollution stemming from underground oil tanks or old dump sites on your property, whether or not you caused the problem in the first place. That's something worth looking into before you buy a piece of property, because there's not much you can do about it afterwards. Ask the seller if there are any such problems, and have your attorney include a clause in your purchase agreement that covers you in the event such problems arise. If there is special concern because of the unique nature of the property, you might even consider hiring an environmental consultant.
- **Wetlands.** Federal laws govern the draining and filling of wetlands. If you have places on your property that are boggy even part of the year, avoid serious legal trouble by finding out what your responsibilities are before making changes. You might start with your state's department of environmental protection, probably located in the state capital. The federal Office of Wetlands Protection in Washington, DC also might be able to help.
- **Utility lines.** As a rule you're not liable for maintenance of utility lines crossing your property, but to be safe don't do anything to cause potential damage to them, such as planting fast-growing trees under them.

Comparative Negligence and Assumption of Risk

While your best defense to any charge of negligence is that you exercised due care, there are several other defenses available as well. In some cases, a jury may decide that although a homeowner was partially responsible for what happened, the person injured was also partially responsible. This is called **comparative** or **contributory** negligence.

For example, if you forget to tell your house guest that you've just dug a pit in your back yard for the new septic system, and the guest decides to get a breath of fresh air and wander around in the back yard in total darkness, a jury might find both of you partly responsible for your guest's broken leg. In that case, the jury might reduce the amount of the damage award you might otherwise have to pay.

In other cases, the jury might decide to absolve you of any responsibility because of what the law calls assumption of risk. For instance, when a Georgia homeowner and his neighbor were trying to get rid of a nest of wasps, the neighbor climbed a ladder and sprayed the nest with insecticide. The wasps swarmed out, and the frightened neighbor fell off the ladder. Then he sued the homeowner for the resulting injuries. The court ruled that the neighbor knew perfectly well that wasps tend to swarm, yet assumed the risk. Accordingly, the homeowner wasn't liable.

In Case of Injury

Until now, the discussion has centered on what to do to avoid hazards in and around your home.

But what do you do if someone is injured on your property?

First and foremost, do all you can to help--express concern, ask what injuries might have been suffered, make the victim as comfortable as possible, call for medical assistance, etc.

Do not, however, say anything to suggest or admit guilt or negligence. While it is natural to feel bad for the injured party and want to soothe any pain and suffering, as well as your own feelings of guilt, it is not a good idea to complicate your potential liability with such statements.

Rather, it's up to the law to decide who's responsible. Notify your insurer in writing (and speak to your attorney) as soon as possible, and don't talk with the other party or their attorney about liability until you have taken these steps. You may well decide later to offer to defray some medical bills of the injured party, but do this after you have had the chance to review the situation with a clearer head and the appropriate parties.

There is one other situation where the law requires you to act. If someone has been hurt on your property or is in danger, you may have a legal duty to offer humanitarian aid even though you had nothing at all to do with the injury. For instance, a Minnesota cattle buyer became severely ill while inspecting a farmer's cattle. A court later ruled that the farmer had a duty not to send the man, who was helpless and fainting, out on the road alone on a cold winter night

Liability Insurance

Given your potential liability, you are asking for trouble if you do not carry adequate liability insurance. Without adequate insurance, it only takes one person seriously injured by your negligence to generate a huge liability award and deplete your financial nest egg, not to mention your psychological well-being.

The liability portion of your homeowner's policy is designed to cover unintentional injuries on the premises and unintentional damage to other people's property. In other words, injuries caused by your negligence are covered, but not those you inflict on purpose.

A typical homeowner's policy includes \$100,000 of liability insurance, which won't go far if someone is severely injured. For a slight increase in premium you can raise that to \$300,000 or \$500,000, and some companies offer \$1 million or more. The coverage includes harm caused by your children and pets, except intentional harm if the child is over 13. If your pet attacks people routinely, the insurer may cancel your policy or refuse to renew it.

Most standard homeowner's policies *don't* cover:

- Employees and clients of your home-based business, including the children in your home-based day care if you take in more than three children and have no special endorsement
- Claims by one member of the household against another
- Any disease you pass on to someone

If you have a home-based business that involves people coming to your house, be sure to obtain a separate business rider. And if you have a swimming pool or other special hazard, check the policy provisions to make sure you're covered.

If you have domestic employees, even part-time such as nannies--you may be required to carry worker's compensation insurance, which costs a little over \$100 per year. Worker's compensation sets limits on awards; if you don't have it, you could have to pay far larger damages. And there may be civil and criminal penalties if you don't carry it. Contractors working on your house should already have workers' compensation for their employees. You should ask to see proof

of such coverage, and don't hire them if they don't produce sufficient verification or don't have adequate coverage.

Umbrella Coverage

What if someone gets so badly hurt on your property that the liability portion of your homeowner's policy doesn't cover it? That's when you'd be glad to have an umbrella liability policy, sometimes called a "personal excess liability" policy. This would protect you in case of a big judgement that would quickly eat up your regular policy coverage.

These policies are relatively inexpensive because the insurers are betting you'll never need to file a claim. Their coverage takes up where your home and auto policies leave off, so in order to obtain one you have to have certain levels of basic home and auto liability insurance--generally \$100,000 in liability coverage on your homeowner's policy and \$250,000/ \$500,000 on your auto (\$250,000 per person, \$500,000 per accident; or sometimes \$300,000 in single-limit coverage).

You also have to meet certain eligibility requirements, such as owning no more than four cars. If you've been convicted for driving under the influence of alcohol in the past three years, you are not likely to get approved for coverage.

Some umbrella policies pay the deductible amount that isn't covered by basic policies. Others impose a deductible, called a "retained limit," in certain circumstances. For instance, if your homeowner's policy doesn't cover slander or libel (most don't without a special endorsement), an umbrella policy with a retained limit might require you to pay the first \$250 of a judgment for slander. The other kind would pay from dollar one.

Most umbrella policies don't cover injuries you cause with your motorcycle and certain watercraft, such as high-powered speedboats.

Your premium for the umbrella policy will be determined based on the number of houses, rental units and vehicles you own. If you have one house and two cars, a typical premium costs \$100 to \$150 for \$1 million in coverage. You will get \$2 million in coverage for only about \$50 to \$100 more in premium costs.

People usually determine their need for umbrella liability coverage not so much by how many hazards they have on their property as by the assets they have to protect. After all, the wealthier you are, the more you have to lose if someone is injured on your property. Some people buy \$5 million in coverage, and some even take out umbrellas over their umbrellas. Consult your insurance agent to help decide what type and amount of coverage is best for you.

Sidebar: A CHECKLIST FOR A SAFE HOME

- Repair steps and railings.
- Cover holes.
- Fix uneven walkways.
- Install adequate lighting.
- Clear walkways of ice and snow as soon as possible.
- Be sure children do not leave toys on steps and sidewalks.
- Replace throw rugs that slip or bunch up.
- Reroute extension cords that stretch across traffic lanes.
- Repair frayed electrical cords.

- Keep poisons and other hazards out of the reach of children, even if you don't have children.
- Warn guests about icy conditions and other hazards.
- Restrain your pet.
- If there are children in your area, erect barriers to your swimming pool: an automatic pool cover or a tall fence with a good lock that you lock, and an alarm on the sliding glass door from your home to the pool.
- Keep any guns securely locked and out of sight, where children cannot see them or gain access to them.
- Remove nails from stored lumber; secure any lumber piles.
- Don't leave ladders standing against the side of the house or garage.
- Don't let children stand nearby when you mow the lawn.
- Don't let your guests drive drunk or under the influence of drugs.
- Anticipate safety problems and take reasonable steps to prevent harm before it occurs.

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