

HOUSE BILL REPORT

ESSB 5808

As Reported by House Committee On:
Judiciary

Title: An act relating to agritourism.

Brief Description: Concerning agritourism.

Sponsors: Senate Committee on Agriculture, Water, Trade & Economic Development
(originally sponsored by Senators Warnick, Chase, Walsh, Brown, Becker, Short and Bailey).

Brief History:

Committee Activity:

Judiciary: 3/22/17, 3/23/17 [DPA].

**Brief Summary of Engrossed Substitute Bill
(As Amended by Committee)**

- Establishes that an agritourism professional is not liable for unintentional injury, loss, damage, or death resulting exclusively from the inherent risks of an agritourism activity, with certain exceptions.
- Requires every agritourism professional to post a specified warning notice at the site of an agritourism activity and to include the warning notice in written contracts.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Muri, Assistant Ranking Minority Member; Frame, Goodman, Graves, Haler, Hansen, Kirby, Klippert, Orwall and Shea.

Staff: Audrey Frey (786-7289).

Background:

Tort Duty Generally.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A tort is an act or omission that gives rise to injury or harm for which liability can be imposed. The boundaries of tort law are defined by common law and state statutory law. Torts fall into three general categories: intentional torts, negligent torts, and strict liability torts.

Intentional torts are acts or omissions that a person knew or should have known would result in injury or harm to another person, such as intentionally hitting a person, spreading lies about a person, or deliberately destroying a person's belongings.

Negligent torts occur when injury or harm results from a person's failure to exercise ordinary care, such as by doing something that a reasonably careful person would not do under the same or similar circumstances, or failing to do something that a reasonably careful person would have done under the same or similar circumstances—for example, causing a traffic accident by failing to follow traffic rules. (With respect to adults, ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances. With respect to children, ordinary care means the same care that a reasonably careful child of the same age, intelligence, maturity, training, and experience would exercise under the same or similar circumstances.)

Strict liability torts occur when a particular result or harm manifests from a specific type of activity or situation, regardless of the degree of care that a person exercises. For example, liability for harm that results from making and selling defective products and liability for harm that results from abnormally dangerous activities are types of strict liability torts.

Premise Liability Law. Under Washington premise liability law, which is a subset of tort law, the liability of an owner or occupier of premises generally depends on the status of the entrant—i.e. whether the entrant is a trespasser, licensee or social guest, or invitee. (If the entrant is a child, different liability rules may apply.)

With respect to trespassers, an owner or occupier of premises owes a duty not to commit willful or wanton misconduct. A trespasser is a person who enters or remains upon the premises of another without permission or invitation, express or implied.

With respect to licensees or social guests, an owner or occupier of land owes a duty of ordinary care in connection with dangerous conditions of the premises of which the owner or occupier has knowledge or should have knowledge, and of which the licensee or social guest cannot be expected to have knowledge. This includes a duty to warn the licensee or social guest of dangerous conditions. A licensee is a person who goes upon the premises of another, with the permission or tolerance of the owner or occupier, but either without any invitation, express or implied, or for some purpose not connected with a business interest or business benefit to the owner or occupier. A social guest is a person who goes upon the premises of another, with an invitation, express or implied, but for a purpose not connected with any business interest or business benefit to the owner or occupier.

With respect to invitees, an owner or occupier of premises generally owes a duty to use ordinary care to keep the premises in a reasonably safe condition. This includes an affirmative duty to inspect the premises and discover dangerous conditions, followed by any repair, safeguards, or warnings as may be reasonably necessary for the invitee's protection

under the circumstances. Invitees include both business visitors and public invitees. (A business visitor is a person who is invited to enter or remain on land for a purpose that is directly or indirectly connected with business dealings with the possessor of the land. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.)

Statutorily Created Immunities.

A variety of statutes create exceptions to general tort law by providing immunity to certain persons under certain circumstances, for example:

- *Recreational Use Immunity Statute.* Originally enacted in 1967, the Recreational Use Immunity Statute creates an exception to Washington premise liability law, encouraging landowners to make land and water areas available to the public for recreational purposes by limiting landowner liability. Landowners and certain other persons who allow members of the public to use their land or water areas for a broad range of recreational activities *without charging a fee* are not liable for unintentional injuries to recreational users, with certain exceptions.
- *Limitations on Liability for Equine Activities.* Originally enacted in 1989, the Equine Activities Immunity Statute provides that an equine activity sponsor or equine professional is not liable for injury or death of a participant engaged in an equine activity, with certain exceptions.

Summary of Amended Bill:

Immunity Provided to Agritourism Professionals.

A statutory framework providing agritourism professionals with immunity from certain types of tort liability is created:

- An agritourism professional is not liable for injury, loss, damage, or death of a participant resulting exclusively from any of the inherent risks of agritourism activities.
- No participant or participant's representative may pursue an action or recover from an agritourism professional for injury, loss, damage, or death of the participant resulting exclusively from any of the inherent risks of agritourism activities.
- In any action for damages against an agritourism professional related to an agritourism activity, the agritourism professional *must* plead the affirmative defense of assumption of the risk of agritourism activity by the participant.

Exceptions. The liability protection offered to agritourism professionals is not absolute. Nothing prevents or limits the liability of an agritourism professional if the agritourism professional does any of the following:

- commits an act or omission that is grossly negligent or constitutes willful or wanton disregard for the safety of the participant and that act or omission proximately causes injury, damage, or death to the participant;
- has actual knowledge or reasonably should have known of an existing dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in such an activity and does not make the

danger known to the participant and the danger proximately causes injury, damage, or death to the participant;

- permits minor participants to use facilities or engage in agritourism activities that are not reasonably appropriate for their age (This provision shall not be interpreted to relieve a parent or guardian of a minor participant of the duty to reasonably supervise the minor's participation in agritourism activities, including assessing whether the minor's participation in an agritourism activity is reasonably appropriate for his or her age.);
- knowingly permits participants to use facilities or engage in agritourism activities while under the influence of alcohol or drugs; or
- fails to warn participants as required by the specified warning notice.

Any limitation on legal liability provided to an agritourism professional is in addition to any other limitations on legal liability otherwise provided by law.

Warning Notice Required.

Every agritourism professional must post and maintain signs that contain the specified warning notice.

Posting Requirements. Every agritourism professional must comply with the following requirements regarding posting and maintaining warning notice signs:

- The sign must be placed in a clearly visible location at the entrance to the agritourism location and at the site of the agritourism activity.
- The warning notice must consist of a sign in black letters, with each letter to be a minimum of one inch in height.

Warning Notice Required in Written Contracts. Every written contract entered into by an agritourism professional to provide professional services, instruction, or rental of equipment to a participant, whether or not the contract involves agritourism activities on or off the location or at the site of the agritourism activity, must contain the warning notice in clearly readable print.

Liability for Failure to Comply with the Warning Notice Requirements. An agritourism professional who fails to comply with the warning notice requirements is prohibited from invoking the privilege of immunity. Failure to comply with the warning notice requirements may be introduced as evidence in any claim for damages.

Definitions.

Agritourism Activity. "Agritourism activity" means any activity carried out on a farm or ranch whose primary business activity is agriculture or ranching and that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities including, but not limited to:

- farming, ranching;
- historic, cultural, and on-site educational programs;
- recreational farming programs that may include on-site hospitality services;
- guided and self-guided tours;
- petting zoos, farm festivals, corn mazes, hayrides;
- harvest-your-own operations;

- barn parties; and
- horseback riding, fishing, and camping.

Agritourism Professional. "Agritourism professional" means any person in the business of providing one or more agritourism activities, whether or not for compensation.

Inherent Risks of Agritourism Activity. "Inherent risks of agritourism activity" means:

- those dangers or conditions that are an integral part of an agritourism activity including certain hazards, such as:
 - surface and subsurface conditions;
 - natural conditions of land, vegetation, waters;
 - the behavior of wild or domestic animals; and
 - ordinary dangers of structures or equipment ordinarily used in farming and ranching operations; and
- the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others (unless the participant acting in a negligent manner is a minor or is under the influence of alcohol or drugs), including:
 - failing to follow instructions given by the agritourism professional; or
 - failing to exercise reasonable caution while engaging in the agritourism activity.

Participant. "Participant" means any person, other than the agritourism professional, who engages in an agritourism activity. "Person" means an individual, fiduciary, firm, association, partnership, limited liability company, corporation, unit of government, or any other group acting as a unit.

Amended Bill Compared to Engrossed Substitute Bill:

The phrase "agricultural producers" is replaced with the phrase "farmers and ranchers" in the intent and legislative findings section.

The term "bed and breakfast accommodations" is removed from the definition of "agritourism activity."

One of the exceptions to the immunity provided to agritourism professionals is modified by adding a sentence stating that the exception does not relieve a parent or guardian of a minor participant of the duty to reasonably supervise the minor's participation in agritourism activities.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) There are a lot of people that want to experience life outside of an urban setting, and sometimes there is a small amount of inherent risk when you do that. This bill will help farmers educate people about farm life and where food comes from and do it without risk to landowners.

The bill was originally brought by a family farmer from Ellensburg. She brought this bill because, as she was trying to build a sustainable operation as a new family farm, there were some things that were keeping her up at night—mainly the liability that could result through no fault of her own when she invites people onto her property who could potentially wander off into equipment that is necessary for the operation of the farm. This bill provides some reasonable protections for her concerns. There are agritourism protections like this bill in well over 20 states, and the original language of this bill was modeled after several laws that already exist in states including North Carolina, Wyoming, and Colorado.

In rural Kittitas County, which is very small compared to other counties, there are dozens of agritourism businesses popping up. The economic value of these operations totals in the tens of millions of dollars. Businesses include everything from you-pick farms, pumpkin patches, party barns, overnight farm experiences, chuck wagon dinners, and more. Under the state's Growth Management Act (GMA) requirements, there are very limited opportunities in rural areas for economic development, and agritourism is becoming more valuable. Agritourism is compatible with agricultural operations and rural lifestyles. Supporting agritourism helps counties meet the GMA obligations to preserve and protect agriculture, the agricultural industry, and rural character. This bill will support this growing industry.

Multi-generation farmers support this bill. A fourth generation farm that started as a dairy farm is now going down the path of agritourism business. The farm hosts a variety of operations, including a you-pick blueberry patch, pumpkin patch, you-cut Christmas tree farm, and a wedding barn. Tens of thousands of people visit the farm every year. This exposes the farm to a variety of people. The farm has a lot of inherent risks—irrigation ditches, livestock that children want to interact with, or structures on the property that, if not properly engaged with, could put people at risk. The farm goes to great lengths to protect employees and guests. There is a lot of signage that advises guests of how to properly engage with activities, but adults do not always behave like adults. Farms cannot make people follow signs, but farms are liable if people do not follow signs.

Another farm has been in the agritourism business for about 30 years. There is a tremendous amount of exposure to the public, and the farm has been taking steps to provide instruction for guests that are on the farm. The agritourism revenue stream is why the farm is able to operate today and continue on for future generations. If agritourism goes away, then there will be diminishing agricultural land in the area as farms go out of business. Some signs have guidelines for parents—height restrictions, weight restriction, and age restrictions—but it is up to the parents to supervise their kids and not take their one-year-old child into the corn maze. Safety is taken very seriously. There are areas on the farm that are fenced off, roped off, or have stop signs in place.

There are some concerns with language that was added on the Senate floor. The term "agritourism professionals" refers to family farmers and ranchers that use an agritourism activity as a way to diversify the family farm and help the family farm maintain its economic viability. Without that diversity, some of these farms in the rural-urban fringe areas will be lost. Family farmers need protection from frivolous lawsuits, and the cost of liability insurance has been rising over the past few years. A bill like this will help farmers get liability insurance.

(Opposed) None.

Persons Testifying: Senator Warnick, prime sponsor; Paul Jewell, Kittitas County; Keith Stocker, Stocker Farms; Darren Carleton, Carleton Farms; Tom Davis, Washington Farm Bureau and Washington Cattlemen's Association; and Bob Ricci, Bob's Corn and Pumpkin Farm.

Persons Signed In To Testify But Not Testifying: None.