

A landowner who owned a large tract of land in the mountains sought to protect a herd of wild deer that lived on part of the land. Although the landowner had posted signs that said, "No Hunting—No Trespassing," hunters frequently intruded to kill the deer. Recently, the landowner built an eight-foot-high chain-link fence, topped by three strands of barbed wire, across a gully on her land that provided the only access to the area where the deer lived.

A wildlife photographer asked the landowner for permission to enter the land to photograph the deer. Because the landowner feared that any publicity would encourage further intrusions by hunters, she denied the photographer's request. Frustrated, the photographer attempted to climb the fence. He became entangled in the barbed wire and suffered extensive lacerations. The wounds became infected and ultimately caused his death.

The photographer's personal representative has sued the landowner.

Is the personal representative likely to prevail?

- A. No, because the photographer entered the landowner's land after the landowner had refused him permission to do so and therefore was a trespasser.
- B. No, because the potential for harm created by the presence of the barbed wire was apparent.
- C. Yes, because the landowner had no property interest in the deer that entitled her to use force to protect them.
- D. Yes, because the landowner may not use deadly force to protect her land from intrusion.

Explanation:

Use of mechanical device to defend property

Type of device	Examples	Privileged use
<i>Unlikely</i> to cause death or serious bodily harm	Barbed wire fence	Reasonably necessary to protect against intrusion
	Spiked wall	not unreasonably dangerous <i>and</i> customarily used for this purpose <i>or</i> reasonable care taken to make use known
<i>Likely</i> to cause death or serious bodily harm	Spring gun	Reasonable belief that intruder threatens death or serious bodily injury
	Electric fence Man-trap	

Almost every jurisdiction has enacted a [survival statute](#) that enables a decedent's personal representative to pursue tort claims on the decedent's behalf—so the photographer's personal representative can sue the landowner on the photographer's behalf. However, the landowner can assert that she was **privileged** to use reasonable force to **defend her property** from trespassers like the photographer. A **mechanical device** that is ***unlikely to cause death or serious bodily harm*** can be used for this purpose when:

the use of such a device is **reasonably necessary to protect the property** from intrusion that **particular device** is **not unreasonably dangerous** *and* the device is customarily used for this purpose *or* **reasonable care** is taken to **make its use known**.

Here, a barbed wire fence was reasonably necessary to protect the landowner's property since her "No Trespassing—No Hunting" signs were frequently disregarded. The fence was not unreasonably dangerous since an eight-foot-high fence topped with barbed wire threatens only the most determined of trespassers. And the potential for harm created by the barbed wire was apparent—not concealed. Therefore, the fence was a privileged means of protection, and the personal representative will not prevail.

(Choice A) The photographer would have been a trespasser regardless of whether the landowner had refused him permission to enter. And since trespassers can recover for injuries caused by *concealed or deadly* devices (eg, spring guns), the photographer's trespasser status is not enough to defeat his personal representative's claim.

(Choice C) Although the landowner had no property interest in the *deer*, she was entitled to use reasonable force to protect her property interest in the *land*.

(Choice D) Deadly force may never be used merely to defend property. But barbed wire is *not* deadly force since it does not usually cause death or serious bodily harm.

Educational objective:

Nondeadly mechanical devices are a privileged means of protecting property when (1) such a device is reasonably necessary to prevent intrusions, (2) the device used is not unreasonably dangerous, and (3) the device is customarily used for this purpose *or* reasonable care is taken to make its use known.

References

Restatement (Second) of Torts § 84 (Am. Law Inst. 1965) (use of mechanical device to defend property).

Restatement (Second) of Torts § 926 (Am. Law Inst. 1979) (survival actions).

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