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THE NEW "PICK-YOUR-OWN" STATUTES: DELINEATING LIMITED IMMUNITY FROM TORT LIABILITY

Terence J. Centner*

Over the past several years, state legislatures have been asked to provide immunity from liability for members of certain interest groups including providers of horses, risky sport activities, and "pick-your-own" produce. This Article reports on statutory provisions providing tort immunity for producers who allow the public to come onto their property to harvest crops. Provisions allowing profit-making businesses to qualify for tort immunity are not new, but the expansion to cover pick-your-own operators signifies a significant policy change regarding personal liability. The pick-your-own provisions may indicate a policy shift imposing greater responsibility for persons engaging in activities to use care in avoiding injuries and less responsibility for qualifying service providers. As legislatures contemplate new immunity provisions, Professor Centner advises that these new provisions should be harmonized with existing standards and liability exceptions. When compared to the sport activity statutes, he concludes that the new pick-your-own statutes fail to provide sufficient protection for pick-your-own operations.

INTRODUCTION

Past successes at the state level in securing legislative protection for agricultural objectives¹ have led agricultural

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1. Two examples of such legislation are right-to-farm laws and new provisions regarding implied warranties of animal health. A number of states have enacted right-to-farm laws to protect agricultural producers against nuisance actions. See Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 163-65 (delineating a model right-to-farm statute); Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99, 101 (1988) (noting that 49 states had adopted right-to-farm statutes); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 350 (1984) (concluding that right-to-farm statutes reverse the preference for development under traditional nuisance law to favor the less intensive use of land).

As for livestock warranties, Nebraska began a trend in 1976 with the enactment of a disclaimer of liability for implied warranties of animal health. See NEB. REV. STAT. § 91-2-316(3)(d) (1992). Nearly one-half of the states adopted similar amendments in the subsequent decade. See, e.g., Terence J. Centner & Michael E. Wetzstein, *Reducing Moral Hazard Associated with Implied Warranties of Animal Health*, 69 AM. J. AGRIC. ECON. 143, 143 (1987) (noting that 25 states had charted modified warranty laws); D. L. Uchtman et al., *Do Statutory Exclusions of Implied Warranties in Livestock Sales Immunize Sellers from Liability?*, 8 OKLA. CITY U. L. REV. 21, 22-23 (1983) (noting that 21 states had enacted new statutory provisions).

interest groups to expand their efforts on a number of fronts.² While selected land use,³ anti-nuisance,⁴ financial,⁵ business,⁶

2. For example, in the six years following the enactment of a new equine liability law by Washington, see 1989 WASH. LAWS 292, §§ 1, 2, over 30 states enacted equine liability statutes. For a list of the states, see Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997, 1000 n.23 (1995).

3. See, e.g., ROBERT E. COUGHLIN & JOHN C. KEENE, *THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS* (1981) (providing a reference guide to programs aimed at protecting farmland); NEIL D. HAMILTON, *A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW* (1992) (analyzing land use issues with respect to livestock production); Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L. Q. 401, 478-83 (1987) (discussing potential problems with state land use programs for preserving agricultural lands); Julian Conrad Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 476-77 (1982) (evaluating agricultural land preservation programs to disclose ineffective coordination and implementation); Anne E. Mudge, *Impact Fees for Conversion of Agricultural Land: A Resource-Based Development Policy for California's Cities and Counties*, 19 ECOLOGY L. Q. 63, 96 (1992) (suggesting that states should implement fee programs to allow conversion of some farmland while providing long term protection of other prime farmland).

4. See *supra* note 1 (describing the development of right-to-farm laws); see also Randall Wayne Hanna, "Right to Farm" Statutes—*The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U. L. REV. 415, 439 (1982) (arguing that states should implement right-to-farm statutes in conjunction with farmland preservation programs); Mark B. Lapping et al., *Right-to-Farm Laws: Do they Resolve Land Use Conflicts?*, 26 J. SOIL & WATER CONSERV. 465, 467 (1983) (finding an educational value in right-to-farm laws).

5. See, e.g., Christopher R. Kelley & Alan R. Malasky, *Federal Farm Program Payment-Limitations Law: A Lawyer's Guide*, 17 WM. MITCHELL L. REV. 199, 334-38 (1991) (analyzing payment limitations under federal farm programs); Drew L. Kershen & J. Thomas Hardin, *Congress Takes Exception to the Farm Products Exception of the UCC: Centralized and Presale Notification Systems*, 36 U. KAN. L. REV. 383, 522-28 (1988) (evaluating federal filing provisions for farm products and the problems of retroactivity and preemption); Drew L. Kershen & J. Thomas Hardin, *Congress Takes Exception to the Farm Products Exception of the UCC: Retroactivity and Preemption*, 36 U. KAN. L. REV. 1, 78-79 (1988) (analyzing issues accompanying the adoption of federal financing provisions concerning security interests in farm products); Keith G. Meyer, *Agricultural Credit and the Uniform Commercial Code: A Need for Change?*, 34 U. KAN. L. REV. 469, 503 (1985) (opposing federal legislation concerning the sale of farm products and advocating a central filing system); Steven C. Turner et al., *Agricultural Liens and the U.C.C.: A Report on Present Status and Proposals for Change*, 44 OKLA. L. REV. 9, 57 (1991) (surveying state lien laws as a foundation for developing federal agricultural finance provisions); Edward A. Morse, Note, *Mediation in Debtor/Creditor Relationships*, 20 U. MICH. J.L. REFORM 587, 614 (1987) (evaluating mediation as a method to address financial problems and as an alternative to repossessing collateral).

6. See, e.g., Terence J. Centner, *The New "Tractor Lemon Laws": An Attempt to Squeeze Manufacturers Draws Sour Benefits*, 14 J. PROD. LIAB. 121, 136 (1992) (finding that new tractor lemon laws are not consumer friendly); Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE J. AGRIC. L. 7, 27 (1996) (considering challenges for a new agriculture); Roger A. McEowen, *Planning for the Tax Effects of Liquidating and Reorganizing the Farm and Ranch Corporation*, 68 NOTRE DAME L. REV. 467, 506 (1992) (analyzing the effects

and bankruptcy⁷ provisions for the agricultural sector have garnered considerable attention,⁸ another important developing area involves statutory exceptions to reduce tort liability in situations involving potential negligence. Because of the investment and risk that accompany various agricultural activities, states have passed laws to allow parties engaged in agricultural enterprises to avoid liability for qualifying conduct or situations.⁹

One of the reasons for the advancement of new liability exceptions for parties engaged in agriculture is the level of risk inherent in this sector of the economy.¹⁰ Agriculture tends to be one of the more dangerous occupations.¹¹ In 1994, reported safety data regarding occupational death rates and disabling injuries showed twenty-six deaths per 100,000 agricultural workers, one fewer than mining and quarrying, the most dangerous occupation.¹² More than one-third of the

of the Tax Reform Act of 1986 on farm planning); Donald B. Pederson, *Agricultural Labor Law in the 1980s*, 38 ALA. L. REV. 663, 698 (1987) (analyzing the issues in providing benefits for agricultural laborers); Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679, 693 (1991) (raising the question of whether anti-corporate farming statutes help preserve family farms or impede efficient production).

7. See, e.g., Jerry L. Jensen, *Obtaining Operating Capital in a Chapter 12 Farm Reorganization*, 54 MO. L. REV. 75, 119 (1989) (delineating provisions of Chapter 12 as they apply to family farmers); Christopher R. Kelley & Susan A. Schneider, *Selected Issues of Federal Farm Program Payments in Bankruptcy*, 14 J. AGRIC. TAX'N & L. 99, 100-05 (1992) (describing federal farm program payments as they relate to the bankruptcy estate); David Ray Papke, *Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law*, 54 MO. L. REV. 871, 897-98 (1989) (analyzing ideological beliefs regarding farmer-related bankruptcies and Chapter 12's nervous protection of a vanishing breed); Susan A. Schneider, *Recent Developments in Chapter 12 Bankruptcy*, 24 IND. L. REV. 1357, 1378 (1991) (arguing that Chapter 12 continues to be an important protection for farmers).

8. Two bibliographies provide a helpful summary of scholarly materials currently available regarding agricultural law. See Salley J. Kelley et al., *Agricultural Law: A Selected Bibliography, 1985-1992*, 19 WM. MITCHELL L. REV. 481 (1993); Mary G. Persyn & Tim J. Watts, *Selected Bibliography on Agricultural Law: 1980-1985*, 34 U. KAN. L. REV. 703 (1986).

9. For instance, in providing statutory protection to persons involved in equine activities, the Illinois General Assembly found that the state and its citizens "derive numerous economic and personal benefits from equine activities." 745 ILL. COMP. STAT. 47/5 (West Supp. 1996). The statute states that "it is the intent of the General Assembly to encourage equine activities by delineating the responsibilities of those involved in equine activities." *Id.*

10. A Colorado statute providing immunity for qualifying animal owners notes the risks involved in equine and llama activities. See COLO. REV. STAT. § 13-21-119 (Supp. 1996).

11. Agriculture has been defined to include the "production of crops and livestock (farming) [and] agricultural services, forestry, and fishing." NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 136 (1995). The inclusion of forestry excludes logging. See *id.*

12. See *id.* at 48. Similar rates were found in 1992 and 1993. See *id.* at 50. Thus, it is generally agreed that farming ranks as one of the most dangerous occupations

non-fatal occupational injuries to agricultural workers come from contact with objects and equipment.¹³ Farm machinery often involves parts and applications that are especially dangerous to users, with tractor overturns alone accounting for more than half of the reported on-the-farm fatalities.¹⁴ Other problems include dangerous exposure to sunlight¹⁵ and various health problems caused by agricultural pesticides and chemicals.¹⁶

Agricultural services also reported significant non-fatal occupational injuries and illnesses,¹⁷ although the reported number of missed days for agricultural workers is below the average for all industries.¹⁸ In sum, there is a significant risk of injury due to the dangers involved in agricultural occupations.

Moreover, changes in tort liability,¹⁹ including shifts from comparative to contributory negligence²⁰ as well as advances

in the country. See David S. Pratt, *Occupational Health and the Rural Worker: Agriculture, Mining and Logging*, 6 J. RURAL HEALTH 399 (1990); see also Judy Hayes Bernhardt & Ricky L Langley, *Accidental Occupational Farm Fatalities in North Carolina: 1984-1988*, 8 J. RURAL HEALTH 60 (1992) (examining unintentional work-related farm fatalities in that jurisdiction).

13. See NATIONAL SAFETY COUNCIL, *supra* note 11, at 53; see also John J. May, *Issues in Agricultural Health and Safety*, 18 AM. J. INDUS. MED. 121, 122 (1990) (estimating that 40 to 60 percent of agricultural injuries relate to the use of machinery).

14. NATIONAL SAFETY COUNCIL, *supra* note 11, at 137 (reporting figures for 1994, with a summary of farm death information for 11 prior years).

15. For farmers, the skin is the organ system most commonly at risk. See May, *supra* note 13, at 127. Of the major occupational categories, agriculture has the highest rate of occupational skin disease. See NATIONAL SAFETY COUNCIL, *supra* note 11, at 72.

16. It is recognized that pesticide and chemical exposure cause injuries, but a systematic summarization of the related injuries is difficult. Rather, chemical and pesticide exposure is often simply listed as a problem. See Lynn Engberg, *Women and Agricultural Work*, 8 OCCUPATIONAL MED. 869, 872-73 (1993) (summarizing health risks from types of pesticides); Pratt, *supra* note 12, at 401-04 (summarizing acute and chronic effects of pesticides on humans).

17. See NATIONAL SAFETY COUNCIL, *supra* note 11, at 65 (delineating cases both with and without lost workdays).

18. See *id.* at 69 (showing that agriculture and forestry workers experienced below average rates for days away from work). This may be because fewer protections are afforded rural workers as compared to urban workers. See Pratt, *supra* note 12, at 399.

19. See William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort*, 44 U. MIAMI L. REV. 731, 732 (arguing in favor of the exclusion of tort liability from business disputes because of the use of tort law to undermine allocations of risk); George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, J. ECON. PERSP., Summer 1991, at 31 (reviewing the development and expansion of tort law).

20. Under a contributory negligence standard, the negligence of a plaintiff often defeated liability. Under a comparative negligence standard, both potential victims

in the use of scientific evidence in the identification of polluters,²¹ have encouraged lawsuits against agricultural producers and others in the agricultural sector.²² Given the current state of technology and competition, the pastoral perceptions of the once bucolic occupation are outdated. Although amber waves of grain may grace the American landscape, the beauty of the pastoral countryside does not diminish the danger of agricultural activities.

Legislative bodies have employed three distinguishable methods to help parties avoid liability for injuries and property damages. The first method is to provide that certain individuals are not liable for damages unless established criteria are met.²³ Good Samaritan statutes are the classic example of immunity statutes that incorporate this method.²⁴

and tortfeasors have moderate incentives to use caution in avoiding accidents, while other standards entail relatively weak incentives for one party and strong incentives for the other. See Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1067 (1986) (noting changes from 1900, when all states had a defense of contributory negligence, to 1986, when only six states had not switched to comparative negligence); Samuel A. Rea, Jr., *The Economics of Comparative Negligence*, 7 INT'L REV. L. & ECON. 149, 160 (1987) (concluding that comparative negligence leads to a more efficient level of care).

21. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 182-204 (1992) (describing through case excerpts how plaintiffs may use scientific information to establish a case, with the focus on proof of causation).

22. Large damage awards have also led to increases in insurance rates, thereby causing problems for some firms in securing insurance coverage. See Robert G. Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 AM. U. L. REV. 285, 286 (1988) (discussing the problems of higher insurance costs).

23. See, e.g., N.J. STAT. ANN. § 2A:62A-1.1 (West Supp. 1997) ("A municipal, county or State law enforcement officer is not liable for any civil damages as a result of any acts or omissions undertaken in good faith in rendering care at the scene of an accident or emergency to any victim thereof, or in transporting any such victim to a hospital or other facility where treatment or care is to be rendered; provided, however, that nothing in this section shall exonerate a law enforcement officer for gross negligence."). As this statutory provision demonstrates, immunity statutes often limit the immunity by defining conduct that is not excused—in this case, gross negligence.

24. See CAL. BUS. & PROF. CODE § 2398 (West 1990) (licensees providing emergency medical assistance to participants of athletic events); GA. CODE ANN. § 26-2-374 (1982) (persons assisting a human who is choking); GA. CODE ANN. § 31-11-8 (1996) (licensees providing ambulance service); GA. CODE ANN. § 46-5-131 (1992) (participants in 911 emergency service); GA. CODE ANN. § 51-1-30.1 (Supp. 1996) (drivers of fire apparatus); GA. CODE ANN. § 51-1-30.2 (Supp. 1996) (drug abuse instructors); GA. CODE ANN. § 51-1-30.3 (Supp. 1996) (persons donating services to schools); 225 ILL. COMP. STAT. ANN. 60/31 (West Supp. 1997) (persons providing services at free medical clinics); IND. CODE ANN. § 15-5-1.1-31 (West 1983) (veterinarians); N.Y. GEN. MUN. LAW § 205-b (McKinney Supp. 1997) (volunteer firefighters); OHIO REV. CODE ANN. § 2305.233 (Banks-Baldwin 1994) (assistance under reciprocal fire protection agreements); OHIO REV. CODE ANN. § 4765.49 (Banks-Baldwin Supp. 1996) (emergency

The second method is to alter the duty owed to selected persons, thereby narrowing the circumstances in which remedies are available if injury occurs.²⁵ Recreational use statutes are a classic example of this method.²⁶ The third method is exemplified by legislative provisions that enumerate the responsibilities of participants in sporting activities.²⁷ Under sport activity statutes, participants have certain duties²⁸ and may not collect damages for injuries which arise from the inherent dangers of the sport.²⁹

This Article examines a new category of statutory provisions that states have introduced to lessen the liability of parties who allow the public to come onto their property to harvest produce. For convenience, the Article refers to these as "pick-your-own" statutes.³⁰ Although Good Samaritan statutes for gleaning³¹ have existed for many years,³² the pick-your-own statutes expand immunity coverage beyond charitable activities to include profit-making business activities as well.³³ The pick-your-own statutes may be a part of a growing number of statutory provisions enacted to reduce liability of persons involved in business activities in a manner previously

medical personnel and agencies); WIS. STAT. ANN. § 146.37 (West Supp. 1996) (persons on health care oversight committees).

25. See, e.g., MO. ANN. STAT. § 537.346 (West 1988) ("[A]n owner of land owes no duty of care to any person who enters on the land without charge . . .").

26. See John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective Is the Protection?*, 24 IND. L. REV. 1587 (1991) (describing recreational use statutes generally); Stuart J. Ford, Comment, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, WIS. L. REV. 491 (1991) (describing the Wisconsin recreational use statute and discussing such statutes generally).

27. See *infra* notes 47-56.

28. See, e.g., N.Y. GEN. OBLIG. LAW § 18-105 (McKinney 1989) ("All skiers have the following duties: 1. Not to ski in any area not designated for skiing; 2. Not to ski beyond their limits or ability to overcome variations in slope, trail configuration and surface or subsurface conditions . . .; 3. To abide by the directions of the ski area operator . . .").

29. See, e.g., COLO. REV. STAT. § 33-44-112 (1995 & Supp. 1996) ("Notwithstanding any judicial decision or any other law or statute to the contrary, . . . no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing.").

30. See *infra* note 63 for a comprehensive list of pick-your-own statutes.

31. "Gleaning" is the gathering of grain after reapers, or of grain left ungathered by reapers. See BLACK'S LAW DICTIONARY 690 (6th ed. 1990).

32. See *infra* note 37 for a comprehensive list of gleaning statutes.

33. See, e.g., MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1997) ("A cause of action shall not arise . . . for injuries to a person . . . who is on the land or premises for the purpose of picking and purchasing agricultural or farm products . . .").

available only for persons involved in governmental or charitable activities.³⁴

In order to situate pick-your-own statutes within the existing legal structure of liability immunity provisions, Part I identifies several other areas of statutory law that provide immunity against tort liability in certain situations. Part II discusses several aspects of the pick-your-own statutory provisions and divides them into two categories according to the structures through which they convey statutory immunity. One approach combines an unreasonable risk standard with affirmative duties; the second employs an egregious misconduct standard that provides immunity unless conduct is willful, wanton, or reckless.

Part III examines several cases involving injuries to persons picking produce. Part IV builds on this analysis by evaluating the justifications offered for legislative efforts to limit liability and explores the likely effects of the two statutory schemes on the results in the cases. Finally, the Article identifies four specific issues for legislatures to consider when enacting these types of provisions (qualifications on a defendant's status, premises covered, actions precluded, and conduct excused) and suggests some guidelines for their application.

I. STATUTORY EXCEPTIONS TO LIABILITY

States have enacted Good Samaritan and recreational use statutes to provide immunity from tort liability in various circumstances.³⁵ Four categories of statutes that provide legislative exceptions from common law liability for parties involved in enumerated activities are particularly useful for an analysis of pick-your-own provisions.

34. See *infra* notes 35–56 and accompanying text.

35. For an analysis of Good Samaritan statutes and the difficulties they create, see Frank B. Mapel, III & Charles J. Weigel, II, *Good Samaritan Laws—Who Needs Them?: The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. LAW J. 327 (1981); see also Eric A. Brandt, Comment, *Good Samaritan Laws—The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303 (1983) (updating the Mapel & Weigel analysis). See generally Robert A. Mason, Comment, *Good Samaritan Laws—Legal Disarray: An Update*, 38 MERCER L. REV. 1439 (1987) (analyzing Good Samaritan statutes and case law). For recent literature concerning recreational use statutes, see *supra* note 26.

The first category of statutes consists of "gleaning statutes," which provide immunity for the charitable act of allowing needy individuals to collect crops remaining after a harvest.³⁶ Sixteen states have adopted gleaning statutes.³⁷ While gleaning historically involved the harvesting of "farm products from the fields of a farmer who grants access to the fields without charging a fee,"³⁸ in some states the term also includes donation and distribution activities.³⁹

The second category of immunity provisions consists of veterinary Good Samaritan Statutes. These statutes provide some degree of immunity to veterinarians treating animals in certain circumstances.⁴⁰ To qualify under a veterinary Good Samaritan statute, a veterinarian generally must be treating an animal in an emergency.⁴¹ Several of the statutes require

36. Blackstone notes that the poor may have a right "by the common law and custom of England" to enter another's land after harvest to glean a crop without being guilty of trespass. 3 WILLIAM BLACKSTONE, COMMENTARIES *212.

37. See ARK. CODE ANN. § 18-60-107(a) (Michie Supp. 1995); CAL. CIV. CODE § 846.2 (West Supp. 1997); IDAHO CODE §§ 6-1301 to -1302 (1990 & Supp. 1996); IND. CODE ANN. §§ 34-4-12.9-1 to -3 (West Supp. 1996); LA. REV. STAT. ANN. §§ 9:2799, 9:2800.4 (West 1991 & Supp. 1997); ME. REV. STAT. ANN. tit. 14, § 159-A (West Supp. 1996); MD. CODE ANN., CTS. & JUD. PROC. § 5-308.1 (1995); MICH. COMP. LAWS ANN. § 324.73301(3) (West Supp. 1997); NEV. REV. STAT. § 41.491 (1996); N.Y. AGRIC. & MKTS. LAW §§ 71-y to -z (McKinney 1991 & Supp. 1997); N.C. GEN. STAT. § 106-706 (1996); OHIO REV. CODE ANN. § 2305.35 (Banks-Baldwin 1994); 42 PA. CONS. STAT. ANN. § 8338 (West Supp. 1996); TENN. CODE ANN. §§ 70-7-102 to -103 (1995); UTAH CODE ANN. § 4-34-5 (1995); WASH. REV. CODE ANN. § 69.80.031 (West Supp. 1997). Tennessee does not use the terms glean or gleaning but rather pick and picking. See TENN. CODE ANN. §§ 70-7-102 to -103 (1995). Because no consideration is permitted for the Tennessee provisions, see TENN. CODE ANN. § 70-7-104 (1995), it is more analogous to a gleaning statute than a pick-your-own statute. Nevada lists gleaning in its recreational use statute. See NEV. REV. STAT. § 41.510(4)(j) (1995).

38. MD. CODE ANN., CTS. & JUD. PROC. § 5-308.1(a)(6)(i) (1995).

39. See LA. REV. STAT. ANN. § 9:2799.3 (West 1991) (donation of food); NEV. REV. STAT. § 41.491(1) (1995) (donation of food and grocery products); N.Y. AGRIC. & MKTS. LAW § 71-z (McKinney 1991 & Supp. 1997) (donation of canned or perishable food).

40. See ALA. CODE § 34-29-90 (1991); ALASKA STAT. § 09.65.097 (Michie 1996); CAL. BUS. & PROF. CODE § 4826.1 (West 1990); COLO. REV. STAT. § 12-64-118 (1991); FLA. STAT. ANN. ch. 768.13(3) (Harrison 1994); 225 ILL. COMP. STAT. 115/18 (West 1995); IND. STAT. ANN. § 15-5-1.1-31 (West 1983); KAN. STAT. ANN. § 47-841 (1993); LA. REV. STAT. ANN. § 37:1731(c) (West Supp. 1997); MD. CODE ANN., AGRIC. § 2-314 (Supp. 1996); MASS. GEN. LAWS. ch. 112, § 58A (1996); MINN. STAT. ANN. § 346.37, subd. 2 (West 1990); N.J. STAT. ANN. § 45:16-9.11 (West 1995); OKLA. STAT. ANN. tit. 59, § 698.17 (West 1989); 42 PA. CONS. STAT. ANN. § 8331.1 (West Supp. 1996); R.I. GEN. LAWS § 4-15-15 (1987); TEX. REV. CIV. STAT. ANN. art. 8891 (West Supp. 1997); VA. CODE ANN. § 54.1-3811 (Michie 1994).

41. See, e.g., MASS. GEN. LAWS ch. 112, § 58A (1996); see also Terence J. Centner, *Legal Rights of Veterinarians under Veterinary Good Samaritan Statutes and Equine Liability Statutes*, 210 J. AM. VET. MED. ASS'N, 190, 191 (1997). But see VA. CODE ANN. § 54.1-3811 (Michie 1994) (stating that no emergency is required).

that there be no fee for the veterinary service,⁴² and others specify that veterinarians are not immune if their conduct is grossly negligent.⁴³

The third category of statutes, groundwater liability statutes, reduces the liability of agricultural producers for groundwater contamination.⁴⁴ These statutes preclude liability of agricultural producers who apply registered pesticides according to label instructions and regulations. These statutes, which do not apply to personal injury claims,⁴⁵ alter strict liability standards by providing that producers are liable only if they are negligent.⁴⁶

Finally, the relative frequency of injuries that result from risky sport activities gave rise to the fourth category. This category consists of statutes that attempt to limit the liability of persons providing or involved in the provision of an enumerated sport activity. Activities that have received special statutory protection include horseback riding,⁴⁷

42. See ALA. CODE § 34-29-90 (1991); COLO. REV. STAT. ANN. § 12-64-118 (1996); FLA. STAT. ANN. ch. 768.13(3) (Harrison 1994); KAN. STAT. ANN. § 47-841(a) (1993); LA. REV. STAT. ANN. § 37:1731 (West Supp. 1988); MASS. GEN. LAWS. ch. 112, § 58A (1996).

43. See ALASKA STAT. § 09.65.097 (Michie 1994); CAL. BUS. & PROF. CODE § 4826.1 (West Supp. 1990); 225 ILL. COMP. STAT. 115/18 (West 1994); IND. CODE ANN. § 15-5-1.1-31 (West 1983); MD. CODE ANN., AGRIC. § 2-314 (Supp. 1996) (relying on the standard set forth in MD. CODE ANN., CTS. & JUD. PROC. § 5-343 (1995)); 42 PA. CONS. STAT. ANN. § 8331.1 (West 1996); TEX. REV. CIV. STAT. ANN. art. 8891 (West Supp. 1997); VA. CODE ANN. § 54.1-3811 (Michie 1994).

44. See GA. CODE ANN. § 2-7-170 (Michie 1990); IDAHO CODE § 39-127 (1993); IOWA CODE ANN. § 455E.6 (West 1997); MINN. STAT. ANN. § 18D.101 (West Supp. 1997); VT. STAT. ANN. tit. 10, § 1410(d) (Supp. 1996); see also Terence J. Centner, *Groundwater Quality Regulation: Implications for Agricultural Operations*, 12 *HAMLIN L. REV.* 589, 597-99 (1989) (outlining liability standards regarding agricultural pesticide contamination).

45. See GA. CODE ANN. § 2-7-170 (Michie 1990) (covering "damages, response costs, or injunctive relief relating to any direct or indirect discharge or release into, or actual or threatened pollution of, the land, waters, air, or other resources of the state"); IDAHO CODE § 39-127 (1993) (covering groundwater contamination); IOWA CODE ANN. § 455E.6 (West 1997) (covering costs of active cleanup and damages associated with nitrates); MINN. STAT. ANN. § 18D.101 (West Supp. 1997) (covering the cost of active cleanup and damages associated with agricultural chemicals in groundwater); VT. STAT. ANN. tit. 10, § 1410(d) (Supp. 1996) (covering the alteration of groundwater quality or character).

46. See, e.g., GA. CODE ANN. § 2-7-170 (Michie 1990). For a case where a defendant was liable under strict liability for groundwater contamination, see *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) (finding that an abnormally dangerous ponding of toxic formation water supported strict liability).

47. See ALA. CODE § 6-5-337 (1993); ARIZ. REV. STAT. ANN. § 12-553 (West Supp. 1996); ARK. CODE ANN. §§ 16-120-201 to -202 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-21-119 (West Supp. 1996); CONN. GEN. STAT. ANN. § 52-577p (West Supp. 1996); DEL. CODE ANN. tit. 10, § 8140 (Supp. 1996); FLA. STAT. ANN. ch. 773.01-05

skiing,⁴⁸ roller skating,⁴⁹ whitewater rafting,⁵⁰ hockey,⁵¹ and hiking.⁵² The objective of sport activity statutes is to place on participants the burden of the harm from certain characteristic injuries, the risks of which are inherent in the particular sport.⁵³ Many of these statutes define duties for persons making property or activities available to the public,⁵⁴ and others specify duties or responsibilities for participants.⁵⁵

(Harrison 1994); GA. CODE ANN. §§ 4-12-1 to -4 (Michie 1995); HAW. REV. STAT. ANN. §§ 663B-1 to -2 (Michie 1995); IDAHO CODE §§ 6-1801 to -1802 (1990); 745 ILL. COMP. STAT. ANN. 47/1 to 47/999 (West Supp. 1996); IND. CODE ANN. §§ 34-4-44-1 to -12 (West Supp. 1996); KAN. STAT. ANN. §§ 60-4001 to -4004 (1994); LA. REV. STAT. ANN. § 9:2795.1 (West Supp. 1997); ME. REV. STAT. ANN. tit. 7, §§ 4101 to 4104-A (West Supp. 1996); MASS. GEN. LAWS ch. 128, § 2D (1996); MICH. COMP. LAWS ANN. §§ 691.1661-.1667 (West Supp. 1996); MINN. STAT. ANN. § 604A.12 (West Supp. 1997); MISS. CODE ANN. §§ 95-11-1 to -7 (1994); MO. ANN. STAT. § 537.325 (West Supp. 1996); MONT. CODE ANN. §§ 27-1-725 to -728 (1995); N.M. STAT. ANN. §§ 42-13-1 to -5 (Michie Supp. 1995); N.D. CENT. CODE §§ 53-10-01 to -02 (Supp. 1995); OR. REV. STAT. §§ 30.687-.697 (1995); R.I. GEN. LAWS §§ 4-21-1 to -4 (Supp. 1996); S.C. CODE ANN. §§ 47-9-710 to -730 (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS §§ 42-11-1 to -5 (Michie Supp. 1996); TENN. CODE ANN. §§ 44-20-101 to -105 (1993); TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001-.005 (West Supp. 1996); UTAH CODE ANN. §§ 78-27b-101 to -102 (1996); VA. CODE ANN. §§ 3.1-796.130-.133 (Michie 1994); WASH. REV. CODE §§ 4.24.530-.540 (1996); W. VA. CODE §§ 20-4-1 to -7 (1996); WYO. STAT. ANN. §§ 1-1-121 to -123 (Michie Supp. 1996); *see also* Act Effective March 3, 1997, § 2305.321, 1996 Ohio Legis. Bull. 1215 (Anderson).

48. *See* ALASKA STAT. §§ 05.45.010-.210 (Michie 1996); COLO. REV. STAT. ANN. §§ 33-44-101 to -114 (West 1995 & Supp. 1996); CONN. GEN. STAT. §§ 29-211 to -214 (1983); IDAHO CODE §§ 6-1101 to -1109 (1990); ME. REV. STAT. ANN. tit. 32, §§ 15217, 15218 (Supp. 1996); MASS. GEN. LAWS ch. 143, §§ 71N-O (1996); MICH. COMP. LAWS ANN. §§ 408.321-.344 (West 1985 & Supp. 1996); MONT. CODE ANN. §§ 23-2-731 to -736 (1995); N.J. STAT. ANN. §§ 5:13-1 to -11 (West 1996); N.M. STAT. ANN. §§ 24-15-1 to -14 (Michie 1994); N.Y. GEN. OBLIG. LAW §§ 18-101 to -108 (McKinney 1989 & Supp. 1997); N.D. CENT. CODE §§ 53-09-01 to -11 (1989 & Supp. 1995); OHIO REV. CODE ANN. §§ 4169.01-.99 (Banks-Baldwin 1994 & Supp. 1996); OR. REV. STAT. §§ 30.970-.990 (1995); R.I. GEN. LAWS §§ 41-8-1 to -4 (1990); UTAH CODE ANN. §§ 78-27-51 to -54 (1992 & Supp. 1994); WASH. REV. CODE §§ 70-117.010-.040 (1996); W. VA. CODE §§ 20-3A-1 to -8 (1996).

49. *See* 745 ILL. COMP. STAT. ANN. 72/1 to 30 (West Supp. 1996); MICH. COMP. LAWS ANN. §§ 445.1721-.1726 (West Supp. 1997); N.J. STAT. ANN. §§ 5:14-1 to -7 (West 1996); S.C. CODE ANN. § 52-21-10 to -60 (Law. Co-op. Supp. 1996).

50. *See, e.g.*, W. VA. CODE §§ 20-3B-1 to -5 (1996).

51. *See* 745 ILL. COMP. STAT. ANN. 52/1 to 52/99 (West Supp. 1996).

52. *See* IDAHO CODE §§ 6-1201 to -1206 (1990) (dealing with outfitters and guides).

53. *See, e.g.*, N.J. STAT. ANN. § 5:14-6 (West 1996) ("Roller skaters and spectators are deemed to have knowledge of and to assume the inherent risks for roller skating, insofar as those risks are obvious and necessary.")

54. *See, e.g.*, COLO. REV. STAT. §§ 33-44-107 to -108 (1995 & Supp. 1996) (ski area operators); IDAHO CODE §§ 6-1103 to -1104 (1990) (same); MICH. COMP. LAWS ANN. § 408.326a (West 1985) (same); N.J. STAT. ANN. § 5:14-4 (West 1996) (roller skating rink operators).

55. *See, e.g.*, MONT. CODE ANN. §§ 23-2-735 to -736 (1996) (dealing with tramway passengers and skiers).

By establishing these duties, the statutes preclude the participants from recovering for injuries resulting from any of the inherent dangers and risks of the sport.⁵⁶

Although it is possible to distinguish the provisions of these four categories of tort exceptions from those of the pick-your-own statutes, there are also some important similarities. From the gleaning statutes, the pick-your-own statutes adopt the precept that immunity is available against persons entering agricultural lands.⁵⁷ Similarly, the two immunity strategies of the pick-your-own statutes⁵⁸ mirror those of veterinary Good Samaritan statutes⁵⁹ in that they maintain liability either for gross negligence or for willful conduct.⁶⁰ Although groundwater contamination legislation has not been widely adopted, it demonstrates that agricultural interest groups are able to alter liability standards for agricultural producers.⁶¹ The sport activity statutes indicate that possessors of property may not be required to provide their services free of charge to qualify for statutory immunity.⁶²

56. See, e.g., N.J. STAT. ANN. § 5:14-7 (West 1996) ("The assumption of risk set forth [in] this act shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a roller skater or spectator for injuries resulting from the assumed risks . . ."); *Schmitz v. Cannonsburg Skiing Corp.*, 428 N.W.2d 742 (Mich. Ct. App. 1988) (finding that all skiers assume the obvious and necessary dangers of skiing).

57. Persons allowed to glean enter the possessor's land to secure agricultural products free of charge. See, e.g., IND. CODE ANN. § 34-4-12.9-3 (West Supp. 1996). Persons allowed to enter to pick their own produce may pay for the goods. See, e.g., MICH. COMP. LAWS ANN. § 324.73301(5)-(6) (West Supp. 1996).

58. See *infra* notes 100-39 and accompanying text.

59. Actually, the veterinary Good Samaritan Statutes have three different standards concerning conduct that does not qualify under statutory immunity provisions. Under some statutes, veterinarians are liable for certain negligent actions. See Centner, *supra* note 41, at 194. Most statutes impose liability for gross negligence, although a few seem to provide immunity for such conduct. See *id.*

60. The unreasonable risk strategy adopted by three pick-your-own statutes means that a possessor may be liable for negligence if there was an unreasonable risk, while under an egregious misconduct strategy a possessor may not be liable for gross negligence.

61. The groundwater contamination legislation may place liability on innocent victims. See Centner, *supra* note 44, at 603.

62. All of the sport activity statutes allow possessors to collect fees yet qualify for statutory immunity. See *infra* notes 27-29 & 47-56.

II. PICK-YOUR-OWN STATUTES

Five states have adopted pick-your-own statutes that contain provisions addressing injuries to persons harvesting agricultural produce for personal use.⁶³ As with other statutes providing some type of protection from liability, the pick-your-own statutes attempt to limit liability in various situations.⁶⁴ New Hampshire seems to have been the first state to adopt this type of statute, with a stated purpose of "encourag[ing] productive agriculture within the state."⁶⁵ While the spread of pick-your-own statutes has been slow, recent legislative action signals an interest in enacting this type of statutory protection.⁶⁶

As with many groups of similar state statutes, some major distinctions exist among provisions enacted to achieve similar objectives. Differences exist among the various state provisions regarding defendant qualifications, precluded recovery actions, and the scope of protected activities.⁶⁷ The major difference among the pick-your-own statutes, however, concerns the structural means by which they confer immunity. The most prevalent strategy grants immunity unless a condition creates an unreasonable risk accompanied by enumerated prerequisites.⁶⁸ A second group of statutes provides an exception from liability as long as the defendant did not engage in willful, wanton, or reckless conduct.⁶⁹

63. See ARK. CODE ANN. § 18-60-107(b), (c) (Michie Supp. 1995); MASS. GEN. LAWS ch. 128, § 2E (1996); MICH. COMP. LAWS ANN. § 324.73301(5)-(6) (West Supp. 1996); N.H. REV. STAT. ANN. § 508:14 (1997); 42 PA. CONS. STAT. ANN. § 8339 (West Supp. 1996). One might argue that Maine and Tennessee have pick-your-own statutes, but the provisions do not apply to harvesting activities if there was consideration. ME. REV. STAT. ANN. tit. 14, § 159-A (West Supp. 1995); TENN. CODE ANN. §§ 70-7-102, -103 (1995). Thus, the Maine and Tennessee provisions are actually gleaning statutes rather than pick-your-own statutes. See *supra* note 37.

64. See, e.g., MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996) ("A cause of action shall not arise against the owner . . .").

65. N.H. REV. STAT. ANN. § 508:14 (1997).

66. Recently introduced legislative bills include: H.B. 5524, Feb. 1996 Sess. (Conn.); H.B. 1591, 88th Leg., 2d Sess. (Mo. 1996); A.B. 475, 207th Leg., 1st Sess. (N.J. 1996); S.B. 1332, 207th Leg., 1st Sess. (N.J. 1996); S.B. 2056, 220th Sess. (N.Y. 1997); S.B. 301, 1996 Sess. (Vt.).

67. See *infra* Parts II.A-B.

68. See ARK. STAT. ANN. § 18-60-107(b) (Michie Supp. 1995); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1997); see also *infra* Part II.C.

69. See MASS. GEN. LAWS ch. 128, § 2E (1996); N.H. REV. STAT. ANN. § 508:14 (1997); see also *infra* Part II.D.

A. Defendant Qualifications

One major difference among pick-your-own statutes concerns qualifications for statutory protection. A description of the potential defendants that qualify for statutory immunity, various statutory preconditions, and the type of liability thwarted by the statutes provides important parameters for understanding the pick-your-own provisions.

The first qualification involves the relationship of the defendant to the premises. While the original New Hampshire statute limited qualification to the owners of land,⁷⁰ many of the current pick-your-own statutes cover other persons including operators,⁷¹ tenants,⁷² lessees,⁷³ and employees.⁷⁴ Given the variety of leasing and business arrangements prevalent in agricultural production, the New Hampshire limitation to owners may fail to offer protection to individuals involved in pick-your-own operations and may thereby limit the effectiveness of the statutory immunity.

A second qualification for the protection afforded by the pick-your-own statutes involves the type of land upon which the accident occurred. The Massachusetts statute only applies if the injury or damage occurred on a farm.⁷⁵ Would a small pick-your-own operator, such as a person allowing the public to pick blueberries for some extra income, qualify as an owner of a farm? The answer would depend on the definition of "farm."⁷⁶ The liability exception of the New Hampshire statute is limited to an owner of land,⁷⁷ raising a question whether

70. See N.H. REV. STAT. ANN. § 508:14 (1997). Although the New Hampshire statute was amended in 1985 to include occupants and lessees, the pick-your-own provisions only apply to owners of land. See *id.*

71. See, e.g., MASS. GEN. LAWS ch. 128, § 2E (1996) (covering operators).

72. See, e.g., ARK. STAT. ANN. § 18-60-107 (Michie Supp. 1995); MICH. COMP. LAWS ANN. § 324.73301 (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339 (West Supp. 1996).

73. See, e.g., ARK. STAT. ANN. § 18-60-107 (Michie Supp. 1995); MICH. COMP. LAWS ANN. § 324.73301 (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339 (West Supp. 1996).

74. See, e.g., MASS. GEN. LAWS ch. 128, § 2E (1996).

75. See *id.* (limiting coverage to an "owner, operator, or employee of a farm").

76. A part-time operator may not have a farm; the "business" may be a hobby. Should a pick-your-own hobby qualify for statutory protection?

77. See N.H. REV. STAT. ANN. § 508:14 (1997) (providing coverage to an owner of "land").

general tort law would apply to accidents in buildings or on the shoulder of a road of a pick-your-own operation. By way of contrast, other states' pick-your-own provisions offer immunity from suit for injuries occurring on "land or premises" if the statutory conditions are met.⁷⁸

As cases applying the recreational use statutes demonstrate, the type of land or water covered by the statute is also critical. For example, in determining the coverage of the Arizona recreational use statute,⁷⁹ the Arizona Supreme Court addressed the question of whether a roadway was within the description of "premises" enumerated by the statute.⁸⁰ The plaintiff was injured while riding a bicycle on a roadway owned by a private corporation operating water canals.⁸¹ The defendant corporation claimed immunity under the recreational use statute.⁸² After noting the statute's unusual description of the type of land covered,⁸³ the court concluded that only land used for a purpose enumerated in the statutory definition of "premises" could qualify for immunity.⁸⁴ Since a roadway was not within the statute's description of "premises," the statutory immunity was unavailable to the defendant.⁸⁵ Because statutory exceptions from liability such as these may

78. See, e.g., ARK. CODE ANN. § 18-60-107 (Michie Supp. 1995); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1997).

79. ARIZ. REV. STAT. ANN. § 33-1551(A) (West 1990).

80. See *Bledsoe v. Goodfarb*, 823 P.2d 1264, 1269-71 (Ariz. 1991). At the time of the accident, the statute limited its grant of immunity to owners of "premises," defined as "agricultural, range, mining or forest lands, and any other similar lands which by agreement are made available to a recreational user, and any building or structure on such lands." ARIZ. REV. STAT. ANN. § 33-1551(B)(1) (West 1990). The statute was amended in 1993 to include parks and flood control lands as well as trails and waterways on the lands. See ARIZ. REV. STAT. ANN. § 33-1551(C)(3) (West Supp. 1996).

81. See *Bledsoe*, 823 P.2d at 1266-67. The plaintiff was severely injured when he rode into a cable strung across the roadway "to prevent access of unauthorized motor vehicles." *Id.*

82. See *id.* at 1267. The defendant asserted that the roadway was necessary to maintain the canals used to transport water for the irrigation of crops. Although the land was not cultivated, it was used to support agricultural land; therefore argued the defendant, it fell within the enumeration of agricultural lands. See *id.* at 1269.

83. See *id.* at 1268.

84. See *id.* at 1270. The court opined that application to all land capable of being used for or supporting agricultural, mining, range, or forest uses would vitiate the statute's land type limitation provision. See *id.*

85. See *id.* at 1270. The court also concluded that the roadway did not constitute "other similar lands" as described by the statute. *Id.* at 1271.

be narrowly construed,⁸⁶ it is likely that the qualifications of the Massachusetts or New Hampshire provisions will fail to provide meaningful immunity to agricultural operators for some injuries.

B. Statutory Limitations on Actions

Some of the pick-your-own statutes restrict their liability exception by allowing employees and contractors of the defendant to maintain tort actions. The New Hampshire statutory exemption does not apply to "an employee of the landowner. . . ."⁸⁷ Three pick-your-own statutes specifically provide that they do not alter the rights of employees and contractors.⁸⁸ Therefore, injuries to an employee or contractor by an owner, tenant, or lessee remain actionable under these statutes.

The Massachusetts statute incorporates a warning requirement into the pick-your-own provisions.⁸⁹ The owner or operator of a farm must post and maintain signs with a warning notice.⁹⁰ The statute sets forth requirements for the location, size of print, and text of the warning.⁹¹

Pick-your-own statutes also differ significantly in terms of the types of injury for which they preclude recovery. Whereas all of the statutes provide immunity in cases of injuries to

86. See, e.g., *id.* at 1270 (concluding that the term "agricultural land" should be narrowly construed in Arizona because it was intended to limit the statutory protection); *Tijerina v. Cornelius Christian Church*, 539 P.2d 634, 637 (Or. 1975) (concluding that the Oregon recreational use statute and the term "agricultural land" should be interpreted narrowly in light of the legislative purpose). *But see Ervin v. City of Kenosha*, 464 N.W.2d 654, 659 (Wis. 1991) (finding that the Wisconsin recreational statute should be construed broadly to insulate persons from liability).

87. N.H. REV. STAT. ANN. § 508:14(II) (1997).

88. See ARK. CODE ANN. § 18-60-107(b) (Michie Supp. 1996); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1996).

89. MASS. GEN. LAWS ch. 128, § 2E (1996).

90. See *id.*

91. The signs must be visible to persons entering the pick-your-own operation, and each letter on the sign is required to be at least one inch in height. See *id.* The notice must specifically explain that "the owner, operator, or any employees of this farm, shall not be liable for injury or death of persons, or damage to property, resulting out of the conduct of this 'pick-your-own' harvesting activity in the absence of wilful, wanton, or reckless conduct." *Id.*

persons engaged in pick-your-own activities,⁹² only New Hampshire and Massachusetts provide additional protection by limiting liability for property damage.⁹³ Moreover, the Massachusetts statute explicitly includes death within the scope of its liability exception.⁹⁴

Finally, the statutes impose differing limitations on the activities qualifying for immunity. These differences are significant because courts interpreting recreational use statutes have held that if a statute enumerates the activities that qualify for immunity, a plaintiff's actions must fall within the enumerated activities to trigger the statute.⁹⁵ All of the statutes cover harvesting produce, and three statutes define agricultural and farm products.⁹⁶ The New Hampshire statute, however, limits the statutory exception to gathering produce of the land;⁹⁷ it is uncertain whether the statute covers the gathering of nursery or apiary products.⁹⁸ Most of the statutes do cover cut-your-own Christmas tree and firewood operations.⁹⁹

92. See statutes cited *supra* note 63.

93. The Massachusetts statute relieves qualifying defendants from liability for "injuries or death to persons, or damage to property, resulting from the conduct of [the farm] in the absence of wilful, wanton, or reckless conduct." MASS. GEN. LAWS ch. 128, § 2E (1996). The New Hampshire statute says that an owner of land is not liable for "property damage to any person." N.H. REV. STAT. ANN. § 508:14 (1997).

94. See MASS. GEN. LAWS ch. 128, § 2E (1996).

95. See, e.g., *Farnham v. Kittinger*, 634 N.E.2d 162, 164 (N.Y. 1994) (analyzing whether the use of a motorized vehicle fell within the statutory requirement of "motorized vehicle operation for recreational purposes," N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989)). The New York Court of Appeals found that a person in a four-wheel-drive vehicle that pulls off the road for personal reasons does not automatically trigger the recreational statute's immunity framework unless there is "a showing of particularized recreational use." *Farnham*, 634 N.E.2d at 166. This inquiry may involve analyzing the subjective recreational intent of the plaintiff. See *id.*

96. See MICH. COMP. LAWS ANN. § 324.73301(6) (West Supp. 1996) ("As used in this section, 'agricultural or farm products' means the natural products of the farm, nursery, grove, orchard, vineyard, garden, and apiary, including, but not limited to, trees and firewood."); ARK. CODE ANN. § 18-60-107(c) (Michie Supp. 1995); 42 PA. CONS. STAT. ANN. § 8339(b) (West Supp. 1997).

97. See N.H. REV. STAT. ANN. § 508:14 (1983) (including "pick-your-own or cut-your-own arrangements").

98. See *supra* note 96.

99. See, e.g., ARK. CODE ANN. § 18-60-107(c) (Michie Supp. 1995) (covering trees and firewood); MASS. GEN. LAWS ch. 128, § 2E (1996) (covering Christmas trees); MICH. COMP. LAWS ANN. § 324.73301(6) (West Supp. 1996) (covering trees and firewood); N.H. REV. STAT. ANN. § 508:14 (1997) (covering cut-your-own arrangements); 42 PA. CONS. STAT. ANN. § 8339(b) (West Supp. 1997) (covering trees and firewood).

C. Immunity Under an Unreasonable Risk Standard

The pick-your own statutes of several states provide that persons are not liable for injuries unless the circumstances explicitly set out in the statute are met and the injuries were caused by a condition involving an unreasonable risk.¹⁰⁰ The states that enacted these statutes may be said to have adopted an "unreasonable risk" standard.¹⁰¹ The statutory prerequisites for liability¹⁰² are taken from section 343 of the *Restatement (Second) of Torts*.¹⁰³ A dangerous condition is not required, only a condition that involves an unreasonable risk.¹⁰⁴ Moreover, the Arkansas and Michigan statutes impose the additional requirement that the plaintiff not know of the condition or risk.¹⁰⁵

Like section 343 of the *Restatement*, the pick-your-own statutes hold possessors liable only under specifically defined

100. The Michigan statute, for example, provides as follows:

A cause of action shall not arise against the owner, tenant, or lessee of land or premises for injuries to a person, other than an employee or contractor of the owner, tenant, or lessee, who is on the land or premises for the purpose of picking and purchasing agricultural or farm products at a farm or "u-pick" operation, unless the person's injuries were caused by a condition that involved an unreasonable risk of harm and all of the following apply:

- (a) The owner, tenant, or lessee knew or had reason to know of the condition or risk.
- (b) The owner, tenant, or lessee failed to exercise reasonable care to make the condition safe, or to warn the person of the condition or risk.
- (c) The person injured did not know or did not have reason to know of the condition or risk.

MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996); accord ARK. CODE ANN. § 18-60-107(b) (Michie Supp. 1995); 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1997).

101. Liability for unreasonable risks has historically been premised on one of three theories: "[F]ailure to warn, negligent maintenance, or defective physical structure." *Bertrand v. Alan Ford, Inc.*, 537 N.W.2d 185, 186 (Mich. 1995) (analyzing section 343 of the *Restatement (Second) of Torts*).

102. See *supra* note 100 for the text of a statute incorporating section 343's preconditions of liability into its unreasonable risk standard.

103. RESTATEMENT (SECOND) OF TORTS § 343 (1965) (subjecting a possessor of land to liability for harm to his invitees only if the dangerous condition was known to or discoverable by the possessor).

104. See *infra* note 114 (discussing a case decided under sections 343-43A of the *Restatement (Second) of Torts* which involved an unreasonable risk, rather than a dangerous condition).

105. See *infra* notes 115-17 and accompanying text.

circumstances.¹⁰⁶ Therefore, a defendant retains the statutory immunity if any single prerequisite is not met, despite the existence of a condition involving an unreasonable risk.¹⁰⁷ A plaintiff can maintain a cause of action only by alleging sufficient facts to meet the statutory prerequisites.

After establishing the initial prerequisite of an unreasonable risk, the plaintiff must substantiate two allegations: that the defendant knew or had reason to know of the condition, and that she failed to exercise reasonable care.¹⁰⁸ The defendant is only liable if she knew or had reason to know of a condition or risk that caused an injury.¹⁰⁹ Evidence of constructive knowledge of the condition or risk by a defendant would meet this prerequisite.¹¹⁰

The plaintiff must also show that the defendant failed to exercise reasonable care with respect to the condition or risk.¹¹¹ If the defendant exercised reasonable care to make the condition safe or to warn the plaintiff of the condition or risk, the defendant continues to qualify for the statutory immunity.¹¹² Conversely, an allegation that the defendant failed to use reasonable care, when combined with the other statutory requirements, could present a fact question for the jury and preclude summary judgment for a pick-your-own operator.¹¹³

106. The rule concerning obvious dangers set forth in section 343A of the *Restatement* may also apply. Physical harm resulting from a danger that is known or obvious should not give rise to liability unless the possessor of land "should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS § 343A (1965).

107. The *Restatement's* provisions addressing liability for unreasonable risks must be read together with section 343A, which concerns known and obvious dangers. See *id.* § 343 cmt. a. If an obvious danger causes injury to an invitee, the possessor may not be liable. See *id.* § 343A.

108. See ARK. CODE ANN. § 18-60-107(b)(1) (Michie Supp. 1995); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339(a)(1) (West Supp. 1997).

109. The condition of which the defendant knew or should have known must involve an unreasonable risk of harm. See, e.g., *supra* note 100.

110. See *Lawless v. Sasnett*, 408 S.E.2d 432, 433 (Ga. Ct. App. 1991) (evaluating an accident in a fruit orchard, finding that the evidence could establish constructive knowledge of a condition, and reversing summary judgment for the orchard owners).

111. See MICH. COMP. LAWS ANN. § 324.73301(5)(b) (West Supp. 1996) ("The owner, tenant, or lessee failed to exercise reasonable care to make the condition safe, or to warn the person of the condition or risk."); see also ARK. CODE ANN. § 18-60-107(b) (Michie Supp. 1996); 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1997).

112. See *supra* note 111.

113. See, e.g., *Lawless*, 408 S.E.2d at 433 (finding that the orchard owners failed to present evidence that they exercised reasonable care and concluding that a jury could find the owners liable).

Thus, under the pick-your-own statutes involving unreasonable risks, plaintiffs may maintain negligence actions for some conditions.¹¹⁴

Some pick-your-own statutes require one additional prerequisite to establish liability in cases where a condition involves an unreasonable risk: that the plaintiff did not know or have reason to know of the condition or risk that caused the injury.¹¹⁵ A plaintiff who knew the risks involved, even if they would normally be considered unreasonable, is estopped from maintaining a lawsuit for injuries under these pick-your-own statutes.¹¹⁶ This added prerequisite means that it may be more difficult for a plaintiff to offer evidence of an unreasonable risk that would present a jury question.¹¹⁷

Perhaps the most important aspect of the unreasonable risk pick-your-own statutes is that they establish an affirmative duty beyond that which a possessor of land normally owes licensees.¹¹⁸ Under the common law of many states,¹¹⁹ the scope of the duty of care owed by possessors of property to entrants is based on the entrant's legal status as an invitee, licensee, or trespasser.¹²⁰ Possessors have a duty to maintain

114. The meaning of such a standard may be noted from a case involving a fall by a 74-year-old plaintiff. *See* *Bertrand v. Alan Ford, Inc.*, 537 N.W.2d 185 (Mich. 1995) (analyzing sections 343 & 343A of the *Restatement (Second) of Torts*). The plaintiff tripped over a step in defendant's service department, which was crowded with vending machines, a cashier's window, and a door. *See id.* at 192. The court held that although the risk of falling was obvious, whether the risk was unreasonable was a question for the jury. *See id.*

115. *See, e.g.*, MICH. COMP. LAWS ANN. § 324.73301(5)(c) (West Supp. 1996) ("The person injured did not know or did not have reason to know of the condition or risk."). The *Restatement* does not impose this requirement. *See* RESTATEMENT (SECOND) OF TORTS §§ 343, 343A (1965).

116. This follows from the policy that a person who knows of a danger should use ordinary care to prevent injury from the known danger. *See Bertrand*, 537 N.W.2d at 187 (interpreting sections 343 and 343A of the *Restatement* to require that invitees use ordinary care to avoid injury from obvious dangers, except in certain situations).

117. *See, e.g., id.* at 193 (finding a jury question in a case involving sections 343 and 343A).

118. *See* RESTATEMENT (SECOND) OF TORTS § 343 cmt. b (noting that the language of section 343 imposes an additional duty to invitees).

119. A Missouri case reports that nineteen states and the District of Columbia have abolished the licensee-invitee distinction. *See Carter v. Kinney*, 896 S.W.2d 926, 929-30 (Mo. 1995) (listing Alaska, California, Colorado (although reinstated), Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, Tennessee, and Wisconsin).

120. *See Morin v. Bell Court Condo. Ass'n*, 612 A.2d 1197, 1199 (Conn. 1992) (finding that although licensees take the premises as found, there is an obligation to exercise reasonable care for the protection of invitees); *Weiseler v. Sisters of Mercy*

property in a reasonably safe condition for invitees, who are invited to conduct business with the possessor.¹²¹ Possessors of property must make known dangers safe for licensees, who enter for their own purposes, because possessors have a duty to refrain from engaging in willful, wanton, or reckless conduct.¹²²

The pick-your-own statutes impose a duty on possessors to exercise reasonable care in making premises safe or in warning invitees of conditions involving an unreasonable risk.¹²³ If evidence shows that the defendant had constructive knowledge of a condition involving an unreasonable risk, a breach of reasonable care to make the condition safe, or a duty to warn the injured party of the condition, a plaintiff can establish a cause of action for an injury that must be heard by the trier of fact.¹²⁴ Under these conditions, it would be possible for a defendant who failed to exercise reasonable care to incur liability despite the existence of a pick-your-own statute that employs an unreasonable risk standard.¹²⁵

D. Immunity Except for Egregious Misconduct

Another group of state liability statutes immunizes operators from liability for injuries to persons engaged in pick-your-own activities unless the defendant engaged in willful, wanton, or reckless conduct.¹²⁶ Under such provisions, a

Health Corp., 540 N.W.2d 445, 449 (Iowa 1995) (noting that invitees can expect land to be safe for their entry); *Carter*, 896 S.W.2d at 928 (noting that a property "possessor's intention in offering the invitation determines the status of the [entrant] and establishes the duty of care the possessor owes the visitor").

121. See *Morin*, 612 A.2d at 1199 (noting that possessors have a duty to inspect and maintain premises in a reasonably safe condition for invitees); *Riddle v. McLouth Steel Products Corp.*, 485 N.W.2d 676, 679 (Mich. 1992) (noting that premises owners must exercise care to protect invitees from conditions that might result in injury).

122. See *Morin*, 612 A.2d at 1199 (noting that a possessor must use reasonable care to refrain from subjecting a licensee to danger and to warn a licensee of dangerous conditions known to the possessor but possibly not observable to a licensee).

123. For an example of the statutory wording, see *supra* note 100.

124. The absence of knowledge or implied knowledge by the plaintiff is also critical under the Arkansas and Michigan statutes. See *infra* notes 171-76 and accompanying text.

125. The negligence would involve a breach of reasonable care to make the condition safe or to warn the injured party of the condition.

126. See MASS. GEN. LAWS ch. 128 § 2E (1996); N.H. REV. STAT. ANN. § 508:14 (1997).

defendant who is simply negligent or grossly negligent may qualify for immunity and avoid liability for injuries or property damage.¹²⁷ Liability under this type of statutory scheme may be similar to the duty of care owed by landowners to licensees to refrain from wantonly or willfully causing injury.¹²⁸

State courts have relied upon interpretations of other statutes to ascertain the meaning of willful, wanton, and reckless misconduct. Willful conduct is "action intended to do harm;"¹²⁹ if a person intentionally persists in conduct that involves a high probability of substantial harm to another, the conduct is wanton or reckless.¹³⁰ Willful and wanton conduct generally involves "actual intention or . . . a conscious disregard or indifference for the consequences" regarding the safety of other persons.¹³¹ Bare allegations of willfulness, or allegations of simple negligence, will not suffice to preclude summary judgment against a plaintiff who is required to establish willful misconduct.¹³² As the Georgia Supreme Court stated, "Wanton

127. Because courts suggest that willful, wanton, and reckless conduct goes beyond gross negligence, an allegation of gross negligence would be insufficient to raise a cause of action under a pick-your-own statute. *See Lane v. Meserve*, 482 N.E.2d 530, 532 (Mass. App. Ct. 1985) (noting that willful and reckless conduct is different in kind from negligence); *Armstrong's Case*, 472 N.E.2d 669, 672 (Mass. App. Ct. 1984) (suggesting that the evidence required for gross negligence is less than the evidence required to show wanton and reckless conduct); *see also Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897, 901 (Utah 1990) (suggesting that gross negligence, defined as reckless indifference, is insufficient to show willful or malicious conduct); *Atkin Wright & Miles v. Mountain State Tel. & Tel. Co.*, 709 P.2d 330, 335 (Utah 1985) (stating that willful misconduct goes beyond gross negligence).

128. *See, e.g., Fuehrer v. Board of Educ.*, 574 N.E.2d 448, 450 (Ohio 1991) (finding a person injured on school property to be a licensee when the person entered the property for his own benefit); *Provencher v. Ohio Dep't of Transp.*, 551 N.E.2d 1257, 1260 (Ohio 1990) (finding that a person injured at a state roadside rest area was a licensee).

129. *Gage v. City of Westfield*, 532 N.E.2d 62, 68 (Mass. App. Ct. 1988); *see also Seeholzer v. Kellstone, Inc.*, 610 N.E.2d 594, 597 (Ohio Ct. App. 1992) ("Willful conduct involves an intent, purpose or design to injure.") (quoting *Denzer v. Terpstra*, 193 N.E. 647 (Ohio 1934)). The *Seeholzer* court found that by failing to exercise any care at all to warn known trespassers of the danger of an unmarked cable, the defendant may have acted wantonly. *See id.* at 599.

130. *See Gage*, 532 N.E.2d at 68. Wanton conduct may involve "a failure to exercise any care whatsoever toward those to whom a duty is owed under circumstances in which there is a great probability that harm will result." *Easterling v. American Olean Tile Co.*, 600 N.E.2d 1088, 1092 (Ohio Ct. App. 1991) (finding that violation of a statute did not constitute willful or wanton misconduct).

131. *Synder v. Olmstead*, 634 N.E.2d 756, 761 (Ill. App. Ct. 1994) (considering conduct that contributed to a tractor accident).

132. *See Hoye v. Illinois Power Co.*, 646 N.E.2d 651, 654 (Ill. App. Ct. 1995) (finding that unsupported allegations of recklessness or carelessness failed to

conduct consists of that conduct which is so reckless or so charged with indifference to the consequences [as to be the] equivalent in spirit to actual intent."¹³³ Reckless conduct is defined through state case law, and may vary from state to state.¹³⁴ The reckless disregard of safety is generally considered somewhat less egregious than malicious conduct.¹³⁵

These pick-your-own statutes, with their egregious misconduct standard,¹³⁶ seem to offer greater protection for defendants than the unreasonable risk standard.¹³⁷ As discussed previously, the unreasonable risk standard allows pick-your-own operators to incur liability for inappropriate conduct with respect to a condition involving an unreasonable risk.¹³⁸ Conversely, given the high threshold of willful, wanton, or reckless conduct, a pick-your-own statute incorporating an egregious misconduct standard would likely shield a pick-your-own operator from liability for some inappropriate conduct that involves an unreasonable risk, as long as the conduct is not willful, wanton or reckless.¹³⁹

establish willfulness within the exception of the state's recreational use statute); *Bragg v. Genesee County Agric. Soc'y*, 644 N.E.2d 1013, 1018 (N.Y. 1994) (noting that the record failed to present evidence of malice or willful intent that would preclude defendants from qualifying for the immunity provided by the state's recreational use statute).

133. *Chrysler Corp. v. Batten*, 450 S.E.2d 208, 212 (Ga. 1994) (quoting *Hendon v. DeKalb County*, 417 S.E.2d 705, 712 (Ga. Ct. App. 1992)) (finding the evidence insufficient to establish conduct that manifested a willful or wanton disregard for life or property).

134. Compare *Forbush v. City of Lynn*, 625 N.E.2d 1370, 1372 n.6. (Mass. App. Ct. 1994) (noting that the terms willful, wanton, and reckless are often used interchangeably) with *Gage v. City of Westfield*, 532 N.E.2d 62, 68-69 (Mass. App. Ct. 1988) (distinguishing willful conduct from wanton and reckless conduct).

135. See, e.g., *Ervin v. City of Kenosha*, 464 N.W.2d 654, 663 (Wis. 1991) (analyzing Wisconsin's recreational use statute and noting that reckless disregard of safety does not necessarily show maliciousness).

136. See MASS. GEN. LAWS ANN. ch. 128 § 2E (West Supp. 1995); N.H. REV. STAT. ANN. § 508:14 (1983 & Supp. 1995).

137. See *supra* notes 126-35 and accompanying text (describing egregious misconduct provisions).

138. See *supra* notes 111-14 and accompanying text (discussing failure to use reasonable care).

139. This assumes that willful or wanton conduct involves more than exposing potential plaintiffs to an unreasonable risk.

III. CASES AGAINST PICK-YOUR-OWN OPERATIONS

Although there are few reported cases against pick-your-own operators, this does not necessarily mean that there are few accidents at pick-your-own operations; the lack of reported litigation may be due to the nature of the injuries. Typical accidents at pick-your-own operations, such as falling from a stepladder¹⁴⁰ or stepping in a hole,¹⁴¹ may involve only minor injuries and may not be litigated, especially at the appellate level. Moreover, these cases may not reach an appellate court due to the use of insurance to pay the claims, settlement outside of court, or satisfactory resolution by a trial court.¹⁴² Furthermore, the limited assets of some pick-your-own operations may discourage appellate litigation.¹⁴³

Nevertheless, the existing cases demonstrate some important aspects of injuries occurring on the premises of pick-your-own operations. The most common cause of action against a pick-your-own operation for injuries to a person harvesting produce would likely be based upon a negligence theory.¹⁴⁴ In some cases, however, a plaintiff may be able to show that the injuries arose from a defective product provided under a bailment so that a defendant would be strictly liable.¹⁴⁵ Finally, although a number of courts have held that

140. See, e.g., *Ciaglo v. Ciaglo*, 156 N.E.2d 376, 378 (Ill. App. Ct. 1959) (involving a fall from a ladder); *Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d 753, 754 (Mo. Ct. App. 1978) (involving a fall from a three-legged ladder); *Christmann v. Murphy*, 642 N.Y.S.2d 123 (App. Div. 1996) (involving a fall from a stepladder); *Klump v. Bowman*, 498 N.Y.S.2d 561, 562 (App. Div. 1986) (involving a fall from an old, spliced ladder).

141. See, e.g., *Lawless v. Sasnett*, 408 S.E.2d 432 (Ga. Ct. App. 1991) (involving injuries to an ankle from stepping in a hole); *Walsh v. Richey-Gilbert Co.*, 346 P.2d 1010 (Wash. 1959) (involving injuries sustained by stepping into a hole when dismounting from a ladder).

142. Presumably, most pick-your-own operators would have property insurance that would cover common accidents.

143. Marginal pick-your-own operators would perhaps be forced out of business by protracted litigation. Furthermore, some persons injured at pick-your-own operations in small towns and rural areas may forgo litigation given the social contacts among persons in such areas and the self-sufficiency of many of the residents.

144. See *infra* notes 159-60 and accompanying text.

145. See, e.g., *Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d 753, 757-58 (Mo. Ct. App. 1978) (finding that an orchard owner was a bailor or lessor of a defective ladder). See *infra* notes 169-70 and accompanying text.

allegations of negligence with respect to obvious dangers and known conditions are insufficient to establish a cause of action,¹⁴⁶ a dangerous condition known to a pick-your-own operator but not to an invitee harvesting produce is often sufficient to establish a negligence cause of action.¹⁴⁷

A. Obvious Dangers and Known Conditions

Three cases involving pick-your-own accidents demonstrate that the plaintiff's awareness of the particular condition that led to the accident causing the injuries is especially important. If there was an obvious danger, or if the plaintiff should have been aware of the condition, the pick-your-own operator may not be liable for the injuries.

In *Christmann v. Murphy*,¹⁴⁸ an action involving injuries sustained due to a fall from a stepladder,¹⁴⁹ the court examined the duties that the landowner owed to the plaintiff. The court concluded that there was no duty to warn of dangers associated with the normal use of the stepladder¹⁵⁰ because these dangers were obvious.¹⁵¹ Because the plaintiff had not alleged any defects concerning the ladder¹⁵² or that the defendant's conduct in providing the stepladder caused the accident, the plaintiff had not shown any negligence that would establish a viable cause of action.¹⁵³

The Illinois Appellate Court came to a similar conclusion in *Ciaglo v. Ciaglo*,¹⁵⁴ holding that the plaintiff had not shown that any negligence of the defendants contributed to her injuries.¹⁵⁵

146. See *infra* notes 148–58 and accompanying text (describing cases involving obvious dangers and known conditions).

147. See *infra* notes 159–63 and accompanying text (describing dangerous conditions known to the defendant and not the plaintiff).

148. 642 N.Y.S.2d 123 (App. Div. 1996).

149. See *id.* at 124.

150. The court found that the “defendant had no duty ‘to protect plaintiff from the unfortunate consequences of [her] own actions.’” *Id.* at 124–25 (quoting *Macey v. Truman*, 519 N.E.2d 304, 305 (N.Y. 1987)).

151. See *Christmann*, 642 N.Y.S.2d at 124.

152. It was “undisputed that the stepladder was not defective.” *Id.* at 124.

153. See *id.*

154. 156 N.E.2d 376 (Ill. App. Ct. 1959).

155. See *id.* at 380. The plaintiff was injured when a cow frightened her and she fell off a ladder, but the plaintiff did not present any evidence that the cow had a “mischievous propensity to commit injury.” *Id.* The court found that the plaintiff was a licensee because she was a social guest visiting her son, the lessor of the farm on which the accident occurred. See *id.* at 379–80.

The final case, *Walsh v. Richey-Gilbert Co.*,¹⁵⁶ involved a condition of which the plaintiff should have been aware due to plaintiff's experience working in orchards.¹⁵⁷ Under the doctrine of assumption of risk, the plaintiff's awareness precluded him from maintaining a suit for injuries from the known danger.¹⁵⁸

B. Dangerous Conditions Involving an Unreasonable Risk of Harm

Unlike obvious or known conditions that cause injuries, a dangerous condition involving an unreasonable risk of harm known to a pick-your-own operator may lead to liability. Persons gathering produce at a pick-your-own operation have the status of invitees, and state law treats them accordingly.¹⁵⁹ If a dangerous condition involving an unreasonable risk, combined with a lack of ordinary care to keep the premises safe, precipitates an accident, the injured plaintiff may have a cause of action for negligence.¹⁶⁰

Moreover, defendant property owners may incur liability for not keeping their premises safe if they have constructive knowledge that a dangerous condition exists.¹⁶¹ In *Lawless v. Sasnett*,¹⁶² the court held that the defendants' constructive knowledge of a dangerous condition which had resulted in injury was sufficient to establish a case.¹⁶³ While the plaintiff was walking among the nectarine trees, she stepped into a

156. 346 P.2d 1010 (Wash. 1959).

157. *See id.* at 1011. The plaintiff had worked in orchards in the same valley for 21 years. *See id.* The plaintiff was injured when he stepped in a hole covered by a mat of cover crop and weeds. *See id.* at 1010. The court found that although the matted cover crop could conceal a dangerous hole, the plaintiff was aware of the risk of holes. *See id.* at 1011. Due to the plaintiff's experience in orchards, he knew that gophers and irrigation leaks caused holes and that some would be large enough to step in. *See id.*

158. *See id.* at 1011.

159. *See, e.g.,* *Lawless v. Sasnett*, 408 S.E.2d 432, 433 (Ga. Ct. App. 1991) (finding that the person picking fruit was an invitee).

160. *See id.* at 433.

161. *See id.* at 433 (finding that the testimony established the possibility that the defendants should have known of the hole).

162. 408 S.E.2d 432 (Ga. Ct. App. 1991) (relating to an injury to a plaintiff visiting the defendants' orchard).

163. *See id.* at 432.

hole and suffered multiple fractures to her right ankle.¹⁶⁴ The plaintiff claimed that she had looked down toward the ground prior to her injury but that the grass, which was about one foot in height, prevented her from seeing the hole.¹⁶⁵ The defendants moved for summary judgment, claiming that they had no knowledge of the hole.¹⁶⁶ On appeal, the court found that constructive knowledge of the hole's existence could be sufficient to establish a case.¹⁶⁷ Because the defendants had failed to present evidence that they had used reasonable care in inspecting the premises, the court of appeals reversed the grant of summary judgment.¹⁶⁸

C. Bailments

Negligence may not be the only cause of action when one is injured in a pick-your-own situation. In some situations, a pick-your-own operator's act of supplying equipment, such as a ladder, may create a bailment relationship.¹⁶⁹ In some states, a bailor or lessor may be held strictly liable for an injury arising from the provision of a defective product.¹⁷⁰

D. Accidents Under Pick-Your-Own Immunity Provisions

In order to deduce the true effect of the new pick-your-own statutes, it is necessary to ascertain how the findings of the reported cases involving pick-your-own accidents fit with the provisions of these new statutes. The question is this: if a

164. *See id.*

165. *See id.*

166. *See id.* at 433.

167. *See id.* The plaintiff's testimony concerning the size of the hole allowed an inference that it had existed for a substantial period of time and was large enough that it should have been observable by the defendants. *See id.*

168. *See id.*

169. *See Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d 753, 757-58 (Mo. Ct. App. 1978) (finding that an orchard owner was a bailor or lessor of a defective ladder).

170. *See id.* (imposing absolute liability on a landowner who provides a defective ladder to a person picking fruit on his or her land).

pick-your-own statute had applied to the accidents which occurred in these cases, how would it have affected the results of the litigation?

Assuming the facts of the *Ciaglo* accident¹⁷¹ in a jurisdiction that has adopted an unreasonable risk standard, it is clear that there is a need for a statutory definition of the plaintiff's knowledge or constructive knowledge.¹⁷² The injury in *Ciaglo* occurred after a cow frightened the plaintiff, who was on a ladder picking fruit.¹⁷³ The presence of a cow near a person using a ladder is a condition that seems to involve an unreasonable risk of harm.¹⁷⁴ It also appears that the plaintiff and one of the defendants both knew of the condition.¹⁷⁵ The Arkansas and Michigan pick-your-own statutes provide immunity in situations where the plaintiff knew or should have known of the condition involving the unreasonable risk of harm.¹⁷⁶

The Pennsylvania pick-your-own statute, however, contains no comparable provision concerning a plaintiff's knowledge of the unreasonably dangerous condition.¹⁷⁷ A plaintiff may defeat the immunity provided by the Pennsylvania statute if the defendant failed to exercise reasonable care in making a known condition safe.¹⁷⁸ Because the *Ciaglo* defendants could have excluded their cattle from the area where the plaintiff was picking fruit, their failure to exercise reasonable care in making the premises safe would likely give rise to liability.¹⁷⁹

171. *Ciaglo v. Ciaglo*, 156 N.E.2d 376, 378 (Ill. App. Ct. 1959). See *supra* notes 154-55 and accompanying text.

172. Both the Arkansas and Michigan unreasonable risk statutes define these terms, but the Pennsylvania statute does not. Compare ARK. CODE ANN. § 18-60-107(b) (Michie Supp. 1995) and MICH. COMP. STAT. LAWS ANN. § 324.73301(5) (West Supp. 1996) with 42 PA. CONS. STAT. ANN. § 8339 (West Supp. 1997).

173. See *Ciaglo*, 156 N.E.2d at 378.

174. Under the Michigan statute the condition need not be dangerous; it simply must involve an unreasonable risk of harm. See *supra* note 100.

175. From the facts of the case, one can infer that the plaintiff knew cattle were in the area of the tree; the opinion states that the plaintiff fed the yearlings in an enclosure that apparently contained the tree where plaintiff was injured. See *Ciaglo*, 156 N.E.2d at 378.

176. ARK. CODE ANN. § 18-60-107(b) (Michie Supp. 1995); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996).

177. 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1997).

178. This includes constructive knowledge by the plaintiff. See *supra* notes 159-68 and accompanying text. For the wording of a statute that defines constructive knowledge, see *supra* note 100.

179. Liability stems from the violation of the statutory duty to exercise reasonable care. See 42 PA. CONS. STAT. ANN. § 8339(a)(2) (West Supp. 1997).

By prescribing a duty of care, the Pennsylvania pick-your-own statute seems to increase the liability of pick-your-own operations;¹⁸⁰ the statute may create liability in situations where none would have existed under common law.

The same result should follow, albeit for different reasons, if the *Ciaglo* accident occurred in a jurisdiction with a pick-your-own statute adopting an egregious misconduct standard.¹⁸¹ Although the defendants had not engaged in egregious conduct that would defeat the statutory immunity, the *Ciaglo* defendant who did not own the farm¹⁸² would not qualify for immunity because in New Hampshire immunity is only available to landowners.¹⁸³ Nevertheless, because the New Hampshire statute does not impose any duty, the defendant operator may qualify for immunity under common law principles governing obvious or known conditions.¹⁸⁴

An analysis of the *Lawless* case,¹⁸⁵ in which the plaintiff broke her ankle when she stepped in a hole, suggests alternate results under the two differing standards. Whereas an unreasonable risk standard would not shield the defendant from liability, an egregious misconduct standard should provide sufficient immunity for the defendant.

Under pick-your-own statutes incorporating an unreasonable risk standard,¹⁸⁶ the statutory immunity may not apply if

180. See *supra* notes 118–25 and accompanying text (describing the creation of an affirmative duty).

181. See *supra* notes 126–39 and accompanying text (describing the egregious misconduct provisions).

182. One defendant was the landowner and the second was the operator of the farm. A third defendant was the assistant manager of the farm, but he was never served with process. *Ciaglo*, 156 N.E.2d at 377.

183. See N.H. REV. STAT. ANN. § 508:14 (1997).

184. Possessors of property have no duty to warn licensees of obvious or patent dangers. See, e.g., *Dorton v. Francisco*, 833 S.W.2d 362, 365 (Ark. 1992) (noting that although an owner of property has no duty to warn licensees of obvious dangers, there is a duty to warn of hidden dangers). A similar principle governs invitees: when dangers are known or obvious, a possessor generally is not liable for the physical harm they cause. See *Riddle v. McLouth Steel Products Corp.*, 485 N.W.2d 676, 683 (Mich. 1992) (holding that the “no duty to warn of open and obvious dangers’ rule remains viable in Michigan.”). However, this rule is subject to a limitation that operates to hold a possessor of land liable. See *Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445, 450 (Iowa 1995) (finding that although the injury arose from an obvious condition, the possessor should have anticipated the harm and taken steps to prevent it).

185. *Lawless v. Sasnett*, 408 S.E.2d 432 (Ga. Ct. App. 1991); see *supra* notes 159–68 and accompanying text.

186. These include the Arkansas, Michigan, and Pennsylvania statutes. See *supra* notes 100–06.

certain statutory prerequisites are established. A condition involving an unreasonable risk, accompanied by the defendant's constructive knowledge of the condition, his failure to use reasonable care to make the condition safe, and the plaintiff's ignorance of the condition, would defeat the statutory immunity.¹⁸⁷ The facts of the *Lawless* case do in fact establish these prerequisites: the defendants had constructive knowledge of a condition involving an unreasonable risk that caused the injury,¹⁸⁸ they did not exercise reasonable care to make the condition safe or warn the plaintiff of the condition or risk,¹⁸⁹ and the plaintiff did not know of the condition.¹⁹⁰ This combination of factors would preclude defendants from claiming immunity under a pick-your-own statute that adopts an unreasonable risk standard.¹⁹¹

A court deciding the *Lawless* case under a statute adopting an egregious misconduct standard¹⁹² would likely reach a different result. The existence of a hole¹⁹³ in an orchard does not seem to constitute willful, wanton, or reckless conduct,¹⁹⁴ and the defendants would likely avoid liability. Thus a pick-your-own statute encompassing an egregious misconduct standard would indeed defeat liability in a number of circumstances.

In summary, an analysis of the two pick-your-own standards reveals a significant potential difference in their effect. Statutes incorporating an unreasonable risk standard may not

187. See *supra* notes 104–25 and accompanying text.

188. The evidence supported a reasonable inference that the defendants had not used reasonable care in inspecting the premises for holes. *Lawless*, 408 S.E.2d at 433.

189. The jury could reasonably infer that defendants had failed to use reasonable care in cutting the grass, such that the grass grew to heights that hid the hole. See *id.*

190. See *id.* at 432. The plaintiff testified that she did not see the hole, and that the area in question was covered with grass approximately one-foot in height. See *id.*

191. See, e.g., MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1996); *supra* notes 100–17 and accompanying text.

192. See *supra* notes 126–39 and accompanying text (describing the egregious misconduct provisions).

193. If the defendant purposefully created a hole, a court might infer willful, wanton, or reckless conduct that would disqualify the defendant from immunity. Similarly, if the defendant knew that animals such as gophers or woodchucks were creating holes in an area to be traversed by the public picking produce but did not attempt to remedy the situation, a jury might find reckless conduct that would disqualify the defendant from immunity.

194. A question may arise concerning recklessness. However, the defendants testified that they had cut the grass as needed and had sprayed a weed spray to kill the grass in areas the mower did not reach. See *Lawless*, 408 S.E.2d at 432. This evidence seems to preclude a finding of recklessness.

offer producers effective immunity, whereas statutes incorporating an egregious misconduct standard would better assist defendants in avoiding liability.

IV. RATIONALE AND STRATEGIES FOR LEGISLATIVE ACTION

The foregoing analysis of pick-your-own statutes presents several issues that may deserve legislative attention. This Part analyzes these statutory provisions to determine whether special statutory assistance is needed, whether a preferable model can be identified, and what issues states should consider in drafting pick-your-own provisions.

A. Is Assistance Needed?

Although statistics suggest that agricultural activities are dangerous,¹⁹⁵ many pick-your-own activities do not involve the dangerous machinery often associated with agricultural accidents.¹⁹⁶ In the absence of any meaningful data concerning accidents and lawsuits involving pick-your-own operations, some may argue that there is no real need for legislative relief. Yet, a legislative body should find merit in taking action to protect this type of activity because pick-your-own operations result in lower prices and fresher produce for consumers.¹⁹⁷

Moreover, support of this type of activity often encourages the growth of small business operations near urban areas.¹⁹⁸

195. See *supra* notes 11–18 and accompanying text.

196. This is not true, however, where a chain saw is used to harvest a Christmas tree or to cut firewood.

197. See Surendra P. Singh et al., *Direct Marketing of Fresh Produce and the Concept of Small Farmers*, 2 J. INT'L FOOD & AGRIBUS. MARKETING 97, 98–99 (1991) (noting that consumers have a renewed interest in purchasing fresh produce and many consumers can save money by buying directly from farmers).

198. See Shida Rastegari Henneberry & Catherine Barron, *Marketing and Purchasing Oklahoma Fruits and Vegetables*, 63 OKLA. CURRENT FARM ECON. 15, 16 (1990) (classifying produce growers, including pick-your-own operations, as small operations); Singh, *supra* note 197, at 115–17 (noting a greater concentration of pick-your-own operations in urban counties).

This comports with the positive public sentiment toward the maintenance of open space and agricultural uses in developed areas.¹⁹⁹ If legislatures are willing to extend special protection to operators of ski, roller-skating, and equine facilities to help them avoid liability for sports-related injuries,²⁰⁰ pick-your-own operators should be entitled to enjoy similar protection.

Another reason for supporting statutory tort immunity for pick-your-own operations is that comparative negligence, as opposed to contributory negligence,²⁰¹ potentially exposes operators to far greater liability for customer injury.²⁰² Moreover, having to litigate these issues may render many pick-your-own operations unprofitable because they often have limited financial resources.²⁰³ Pick-your-own statutes applying an egregious misconduct standard would help operators avoid litigation over customer injuries, thereby facilitating the continued availability of pick-your-own produce and the continued viability of these small businesses.

Analysis of the *Lawless* case²⁰⁴ showed how a pick-your-own statute applying an egregious misconduct standard may change existing law.²⁰⁵ The central question is whether customers or operators should bear the risk for accidents. Should customers who pick their own produce be able to assume that the ground of an orchard does not have hidden dangers, so that they can collect damages for any injury? If so, should injured customers be able to maintain every lawsuit simply by

199. See Owen J. Furuseth, *Public Attitudes Toward Local Farmland Protection Programs*, GROWTH & CHANGE, Summer 1987, at 49, 52 (finding that 71% of survey respondents favored protecting local agricultural resources in Mecklenburg County, North Carolina); B. Delworth Gardner, *The Economics of Agricultural Land Preservation*, 59 AM. J. AGRIC. ECON. 1027, 1028-29 (1977) (noting a societal interest in preserving agricultural land for open space and environmental amenities).

200. See *supra* notes 47-56 and accompanying text.

201. Comparative negligence allows recovery despite some negligence by a plaintiff, whereas under contributory negligence, a negligent plaintiff is barred from recovery. See *supra* note 20.

202. See, e.g., *Klump v. Bowman*, 498 N.Y.S.2d 561, 562 (App. Div. 1986) (finding that a damage award to an injured customer of a pick-your-own operation was inadequate in a case where the jury had apportioned liability in an amount of 60% against that customer).

203. See, e.g., *Henneberry & Barron*, *supra* note 198, at 16 (classifying pick-your-own operations in Oklahoma as small operations). Because of the limited financial resources of a small operation, a lawsuit could cause the operation to go out of business.

204. *Lawless v. Sasnett*, 408 S.E.2d 432, 433 (Ga. Ct. App. 1991). See *supra* notes 163-68 and accompanying text.

205. See *supra* notes 185-94 and accompanying text.

alleging that a property owner failed to use ordinary care in inspecting the premises or in keeping them safe?²⁰⁶ Or should customers, injured possibly due to their own carelessness, suffer the consequences of their actions unless there was egregious conduct by the defendant property owners?

Responses to these questions depend both on jury determinations of reasonableness and on the duties that pick-your-own operators owe to their customers. Although one may question whether it is possible to draw a satisfactory distinction between conditions involving an unreasonable risk or egregious conduct and those for which pick-your-own operators should not be liable, it appears that the new statutory dispensation provides a preferable resolution of standards for treatment of liability for pick-your-own accidents.²⁰⁷ With the new pick-your-own legislation, as with the sport activity statutes, states express dissatisfaction with the standards which the common law has established for the customers of certain types of business activities.²⁰⁸ In view of the protection the sport activity statutes afford against liability for inherent risks, the pick-your-own statutory immunity is also a reasonable protection.

B. Finding an Appropriate Standard

The previous examination of liability statutes revealed three possible models that legislatures might adopt in developing pick-your-own tort immunity statutes: Good Samaritan, recreational use, and sport activity protections.²⁰⁹ These models are useful in determining the proper standard of care for operators of pick-your-own facilities.

Existing pick-your-own statutes adopt one of two standards of care. One, the unreasonable risk standard, imposes liability

206. The *Lawless* court applied this standard. See *Lawless*, 408 S.E.2d at 433.

207. For example, the egregious misconduct statutory standard seems to imply that a pick-your-own operator should not incur liability for injuries caused by holes if the holes resulted from uneven terrain due to horticultural practices or acts of nature.

208. See *supra* notes 120–22 and accompanying text (distinguishing standards for business invitees from standards for licensees).

209. See *supra* notes 23–29 and accompanying text.

when an operator fails to exercise reasonable care in making premises safe. The other, the egregious misconduct standard, imposes liability only when a defendant acts willfully, wantonly, or recklessly.

The unreasonable risk standard resembles the recreational use model in that both focus on the care that possessors of real property owe to others.²¹⁰ Pick-your-own statutes that adopt an unreasonable risk standard seem to establish an affirmative duty to exercise reasonable care in making premises safe.²¹¹ These statutes allow some cases to proceed based on ordinary and gross negligence, thereby offering less protection for operators than recreational use statutes.²¹² In sum, pick-your-own statutes incorporating an unreasonable risk standard provide inadequate protection to pick-your-own operators.²¹³

The second standard of care, the egregious misconduct standard, imposes liability on a defendant who engaged in willful, wanton, or reckless conduct. Statutes adopting this standard provide immunity from some injuries.²¹⁴ Existing pick-your-own statutes that use an egregious misconduct standard make it more difficult for plaintiffs to sustain actions against pick-your-own operators than under statutes that employ an unreasonable risk standard. Nevertheless, cases involving sport activity statutes suggest that an

210. Under both standards, the defendant cannot be held liable unless he has failed to exercise reasonable care with respect to the condition or risk. *See, e.g., Newman v. Sun Valley Crushing Co.*, 844 P.2d 623, 628 (Ariz. 1992) (finding that a defendant's failure to warn or guard against a dangerous condition could rise to the level of willful and malicious conduct necessary to justify liability under a recreational use statute).

211. *See supra* notes 118-25 and accompanying text.

212. An analysis of the facts of the *Lawless* case demonstrates this. *See supra* notes 185-91 and accompanying text.

213. In contrast to pick-your-own statutes that employ an unreasonable risk standard, under recreational use statutes, persons often incur liability "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," CAL. CIV. CODE § 846 (West 1982), but are protected against actions that arise from simple negligence. *See, e.g., Hubbard v. Brown*, 785 P.2d 1183, 1184 (Cal. 1990) (applying the state's recreational use statute and ordering reinstatement of a judgment of dismissal of a negligence claim); *Hoye v. Illinois Power Co.*, 646 N.E.2d 651, 654 (Ill. App. Ct. 1995) (affirming the dismissal of a negligence action because the state's recreational use statute requires more than negligence for an action to proceed). Such recreational statutes may also provide immunity from gross negligence. *See Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897, 901 (Utah 1990) (stating that gross negligence defined as reckless indifference was not sufficient to show willful or malicious conduct).

214. For one example, see *supra* notes 192-94 and accompanying text.

egregious misconduct standard may not go far enough in protecting pick-your-own operators.²¹⁵

A sport activity statute²¹⁶ might provide a better model for the appropriate standard of care for pick-your-own operators, because it addresses assumption of risk and places responsibilities on participants.²¹⁷ Under sport activity provisions, participants who engage in risky activities are unable to recover damages from sports activity operators.²¹⁸ States could draft pick-your-own statutes in a similar manner, placing greater responsibility on consumers to take care when engaging in pick-your-own activities.²¹⁹

C. Issues for Legislative Consideration

This examination of the pick-your-own statutes demonstrates that considerable variation exists among the statutory provisions. Because pick-your-own operations need protection from lawsuits for some injuries, there are four issues which deserve particular legislative consideration in providing that protection: defendant qualifications, premises covered, actions precluded, and conduct excused.

1. Status of the Defendant—A statutory exception for pick-your-own operations must include all the various parties involved in a pick-your-own operation. Statutory protection of landowners or operators, to the exclusion of associated

215. For example, ski operators in Idaho have no duty of care with respect to activities they undertake to lessen risks inherent in the sport of skiing. *See Northcutt v. Sun Valley Co.*, 787 P.2d 1159, 1162 (Idaho 1990) (analyzing IDAHO CODE §§ 6-1103, -1104, -1106 (1990)). The defendant operator had placed a sign on the slope indicating its relative degree of difficulty in compliance with the ski statute, IDAHO CODE § 6-1103 (1990); the plaintiff collided with the signpost. The court held that under the qualifying provision of the statute, the defendant did not have any duty to mark his trails and slopes in accordance with any standard of care. *See Northcutt*, 787 P.2d at 1163.

216. *See supra* notes 47–56 and accompanying text.

217. *See supra* notes 53 & 56.

218. *See, e.g., Northcutt*, 787 P.2d at 1160 (holding that the state's ski statute immunized the defendant ski operator from liability for negligence where the plaintiff collided first with another skier, then with a signpost).

219. Possible changes include delineating affirmative duties for persons picking produce or expanding the description of the risks assumed by such persons. *Cf. N.Y. GEN. OBLIG. LAW* § 18-105 (McKinney 1989 & Supp. 1995) (defining duties of skiers); *N.J. STAT. ANN.* § 5:14-6 (West 1996) (stating that roller rink patrons assume "obvious and necessary" risks).

personnel, does not provide very useful protection.²²⁰ A pick-your-own operation may involve owners of land, operators, occupants, lessees, and employees, all of whom should be candidates for statutory immunity. This does not mean that all of these classes merit the same level of immunity,²²¹ but each must be considered in the immunity provisions so that all persons potentially involved in pick-your-own mishaps receive appropriate relief.

2. *Premises Covered*—States must incorporate coverage of a sufficiently broad category of premises into their statutory provisions for pick-your-own operations if the statute is to provide meaningful protection. The Massachusetts statute, for example, limits liability only for injuries incurred on the agricultural land itself, thereby potentially precluding coverage for accidents occurring at sales facilities.²²² The New Hampshire statute only covers an owner's land.²²³ If a legislative body goes to the trouble of delineating an exception to common law tort liability for pick-your-own operations, it should insure that the exception has coverage sufficient to provide operators with meaningful protection from that liability.

3. *Actions Precluded*—Depending on individual needs and concerns, legislatures may enact provisions designed to preserve the rights of employees and contractors.²²⁴ The purpose of the pick-your-own provisions was to address injuries to customers harvesting produce, not to negate existing liability provisions for employees and contractors.²²⁵ Statutory provisions should be constructed to leave intact existing liability provisions for these persons.

Another concern may be whether any warning to customers harvesting produce is necessary. Some of the sport activity statutes require warning signs,²²⁶ as does the Massachusetts

220. See *supra* notes 70–74 and accompanying text.

221. See *infra* notes 224–25 and accompanying text.

222. See MASS. GEN. LAWS ch. 128 § 2E (1996); see also *supra* note 75 and accompanying text.

223. See N.H. REV. STAT. ANN. § 508:14 (1997); see also *supra* note 77 and accompanying text.

224. See *supra* notes 87–88 and accompanying text.

225. See statutes cited *supra* note 88.

226. This is true of many of the equine liability statutes. See Terence J. Centner, *Adopting Good Samaritan Immunity for Defendants in the Horse Industry*, 12 AGRIC. AND HUM. VALUES 69, 78 (1995) (listing warning requirements for various equine liability statutes in chart form); see also COLO. REV. STAT. § 33-44-107 (1995 & Supp. 1996) (prescribing sign requirements under a ski safety statute).

pick-your-own statute.²²⁷ Perhaps customers picking produce need to know that they are assuming certain risks and that a different liability standard exists for injuries occurring during their harvesting activities.

A final concern involves the scope of damages covered by pick-your-own statutes. Comparing these immunity statutes raises the question of whether property damage should be covered as well.²²⁸ More information on actual accident losses is needed to address this issue.

4. *Conduct Excused*—States must also attempt to achieve consistency in the conduct they excuse. Statutes incorporating an egregious misconduct standard potentially excuse gross negligence.²²⁹ Conversely, statutes incorporating an unreasonable risk standard do not always excuse liability accompanying conditions involving an unreasonable risk.²³⁰ Although these statutes are not intended to provide a defense against all injuries, the statutes following the unreasonable risk standard do not provide sufficient protection to pick-your-own operators.²³¹ In view of the sport activity statutes and the protection they offer sport facility operators,²³² legislatures should enact the stronger egregious misconduct standard in order to ensure adequate protection for pick-your-own operators.

CONCLUSION

Pick-your-own statutes seek to offer enumerated parties protection against liability for some tortious conduct. The level of protection provided to pick-your-own operations varies with the immunity standard the particular state applies. Thus, the pick-your-own statutes are categorized according to two standards. The provisions of the Arkansas, Michigan, and Pennsylvania pick-your-own statutes adopt an unreasonable risk standard. This standard establishes an affirmative duty for

227. See MASS. GEN. LAWS ch. 128 § 2E (1996).

228. See *supra* note 93 and accompanying text.

229. See MASS. GEN. LAWS ch. 128 § 2E (1996); N.H. REV. STAT. ANN. § 508:14 (1997); see also *supra* notes 136–39 and accompanying text.

230. See ARK. CODE ANN. § 18-60-107 (Michie Supp. 1996); MICH. COMP. LAWS ANN. § 324.73301 (West Supp. 1996); PA. STAT. ANN. tit. 42, § 8339 (West Supp. 1996).

231. This was illustrated by the analysis of the facts of the *Lawless* case. See *supra* notes 185–91 and accompanying text.

232. See *supra* notes 215 & 218.

possessors of property to exercise reasonable care in making premises safe or in warning invitees of conditions involving an unreasonable risk. The immunity these three statutes offer may not apply to injuries caused by a condition involving an unreasonable risk; thus pick-your-own operations are negligent, and potentially liable, if they fail to exercise reasonable care.

The New Hampshire and Massachusetts statutes incorporate an egregious misconduct standard that provides immunity for injuries except when a defendant's conduct was willful, wanton, or reckless. This standard appears to protect pick-your-own operations from liability for injuries in some situations where the operator may have been negligent or grossly negligent. Thus, the adoption of a pick-your-own statute incorporating an egregious misconduct standard alters state common law to offer some added protection for pick-your-own operations against liability for injuries of persons harvesting produce.

Although a legislature may be hesitant to enact a pick-your-own statute creating a new statutory exception for a particular interest group, it should consider two questions. First, what justification is there for creating tort immunity? The location of pick-your-own operations, agricultural land preservation, and availability of fresh food products offer a sufficient justification. Second, what duties and standards of care does the state want to impose upon citizens and activities within its jurisdiction? If legislative provisions already provide tort immunity for skiing, roller skating, or equine operators, there is no reason to believe that pick-your-own operations do not merit similar treatment. As currently drafted, the two pick-your-own standards do not provide as much protection as the sport activity statutes do. Rather, the current pick-your-own provisions simply reallocate a few of the risks to persons who engage in harvesting activities. States could better encourage these beneficial operations by affording them the same comprehensive immunity that they currently reserve for sport and recreational activities.

