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An Agricultural Law Research Note

Recreational Use of Private Lands: Associated Legal Issues and Concerns

by

Roger A. McEowen

The National Agricultural Law Center
University of Arkansas
1 University of Arkansas
Fayetteville, AR 72701

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Roger A. McEowen*

Recreational activities on private lands have increased in recent years due to the inability of public lands to meet demand. The prospect of monetary gain and the liability protection provided by state law for recreational activities on private land provide other incentives for the increased use of farm and ranch land for recreational activities. The key questions for those wishing to operate fee-based recreational activities on rural land are potential liability exposure to participants, the extent to which state law provides liability protection, and whether additional steps are necessary to insulate against liability claims.

Review of Premises Liability Law

Adult and child trespassers. The traditional approach varied the duties owed to the entrant based upon the benefit the entrant bestowed upon the owner or possessor, with the adult trespasser owed the lowest duty. An owner or possessor of land only has a duty to refrain from willfully or wantonly injuring an adult trespasser. Child trespassers are treated differently.[1] Under the "attractive nuisance doctrine," if a landowner has a reasonable expectation that children will be attracted to the premises by a dangerous artificial condition on the land, trespassing children can be treated legally as an invitee.[2] Potentially, this doctrine has a wide reach with respect to agriculture. Many farm assets such as livestock, machinery and equipment can attract curious children to the premises. For farm ponds, most courts that have considered the question have indicated that bodies of water are not attractive nuisances and that child trespassers will be treated the same as adult trespassers in terms of

* *Associate Professor of Agricultural Economics and Extension Specialist, Agricultural Law and Policy, Kansas State University, Manhattan, Kansas; Visiting Professor of Law, University of Arkansas School of Law, Fayetteville, AR; member of Kansas and Nebraska Bars.*

[1] Children, by their nature, lack mature judgment and generally cannot appreciate dangers that are inherent on the land on which they are trespassing. Children that can appreciate the danger of a particular situation are not covered by the doctrine. Hence there is no age cut-off for application of the rule.

[2] As to invitees, the landowner must make and keep the premises safe and must warn of existing dangers. *See, e.g.*, McGaughey v. Haines, 189 Kan. 453, 370 P.2d 120 (1962) (plaintiff, a four-year-old boy, fell from tractor on neighbor's land and attached disk ran over plaintiff causing serious and permanent injuries; defendant not liable because defendant had no knowledge of children playing on land on previous occasions); Griffin v. Woodard, 486 S.E.2d 240 (N.C. Ct. App. 1997)(doctrine inapplicable where child trespasser realizes risk involved and facts demonstrate that child can otherwise be held to adult standard).

the duty that the owner or occupier of the real estate owes to them.[3] For farm ponds located in remote areas, most courts hold that it would be an unfair burden on property owners and occupiers to have to shoulder liability for injury to child trespassers. However, items associated with farm ponds (such as a pier, dock or tree tire swing) can be attractive nuisances.

A limitation to the attractive nuisance doctrine is that it does not apply if the child is trespassing on land before noticing the object on the land that ultimately results in harm to the child. This is known as the "allurement limitation," and stems from a Kansas case ruled on by the United States Supreme Court in 1922. Under the facts of the case, the doctrine was held not to apply to children ages eight and eleven that died after jumping into an exposed cellar hole containing sulphuric acid. The Court noted that the children were trespassing at the time the "pool" was discovered.[4]

Other entrants. A licensee is anyone on the premises with permission or acquiescence, but who does not bestow a benefit on the landowner or occupier. Examples include the hunter with permission who does not pay a fee. While the landowner or occupier is not obligated to make the premises safe, due care must be exercised to avoid injury to the licensee. In addition, a licensee is entitled to a warning of hidden dangers and hazards known to the landowner or occupier that the licensee cannot reasonably be expected to discover.

A social guest is a person on the premises who does not confer an economic benefit, but does confer a social benefit on the landowner or occupier. A social guest might be able to recover from a fall on a highly waxed floor, a faulty step or a poorly lighted stairway, for example. If it can be established that the premises were carelessly maintained, a social guest is likely to recover.

An invitee is a person on the premises for business purposes or for mutual advantage rather than solely for the benefit of the person entering the property. Examples include business guests such as cattle buyers, milk truck drivers, veterinarians and employees. Door-to-door salesmen can be classified as invitees once they have been greeted and invited inside. To invitees, the landowner or occupier owes a duty to make and keep the premises safe and to warn of existing dangers.[5]

Modern approach to premises liability. In recent years, court opinions in various states have moved away from basing an owner or occupier's liability to entrants on the status of the entrant. The

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[3] The attractive nuisance doctrine only applies to artificial conditions on the land. The doctrine does not apply to natural bodies of water. However, the "natural bodies of water" exception does not apply when the child is an "invitee." *See, e.g.*, Degas v. Majestic Mobile Manor, Inc., 129 Wash. 2d 43, 914 P.2d 728 (1996).

[4] United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922). The doctrine has also been held inapplicable on the same theory to a nine-year old child who fell through a hole in the second floor of a barn after removing floorboards. The barn was not an artificial condition and the child was trespassing at the time the barn was discovered. Cruce v. Kennington, 220 Ga. App. 49, 467 S.E.2d 227 (1996).

[5] This requires the landowner or occupier to search out dangers and maintain a level of surveillance for risks that can befall a person who is on the premises as a business guest or invitee. *See, e.g.*, Curvin v. Pinyan, 717 So. 2d 435 (Ala. 1998)(invitee employed to catch chickens in defendant's chicken house injured by fall of "over-winched" fan; defendant not liable for invitee's injuries because defendant kept premises in reasonably safe condition and gave warning of dangerous conditions). employees have successfully sued employers for the employer's failure to provide a safe working area and to warn of existing dangers. *See, e.g.*, Baumler v. Hemesath, 534 N.W.2d 650 (Iowa 1995).

modern approach tends to replace the traditional entrant classification scheme with the ordinary negligence principles of foreseeable risk and reasonable care.[6]

Recreational Use Statutes

In 1965, model legislation was promulgated by the Council of State Governments that was designed to provide a measure of liability protection to rural landowners who made their land available to the general public for recreationsl purposes without charge. Most states have enacted some version of the model legislation. For example, the Kansas version is contained in Kan. Stat. Ann. §§58-3201-3207 (2002) and covers a wide array of recreational activities that might occur on agricultural land. Rural landowners covered by the statute owe no duty to entrants to keep the premises safe or to give any warning of a dangerous condition.[7] To obtain the protection of the statute, however, a rural landowner must not charge the entrant a fee.[8]

Fee-Based Activities

Comprehensive liability insurance. Owners and occupiers of rural land in Kansas that operate fee-based recreational activities on their land are not covered by the recreational use statute. Thus, other means of protecting against potential liability claims must be utilized. Many farmers and ranchers have a general comprehensive liability policy covering bodily injury and property damage arising out of farming activities and activities that are incidental to farming. However, most standard policies do not provide liability protection for claims arising out of business pursuits other than farming. Thus, fee-based recreational activities are likely not covered.[9] Likewise, recreational

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[6] In some states, the owner or occupier owes a duty or "reasonable care under all of the circumstances" to all entrants other than trespassers. In these states, the cases are decided on a case-bay-case basis with several factors considered such as the foreseeability of harm to the entrant, the magnitude of the risk of injury, the individual and social benefit of maintaining the condition, and the burden to the landowner or occupier in providing adequate protection. *See*, Webb v. City of Sitka, 561 P.2d 731 (Alaksa 1977*);* Rowland v. Christian, 69 Cal. 2d 108, 433 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence v. Zadovich, 489 P.2d 308 (Colo. 1971); Pickard v. City & County, 452 P.2d 445 (Haw. 1968); Keller v. Molls, 472 N.E.2d 161 (Ill. App. 1984); Rosenau v. City of Estherville, 199 N.W.2d 125 (Iowa 1972); Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La. 1976); Limberhand v. Big Ditch Co., 706 P.2d 491 (Mont. 1985*);* Ovellette v. Blanchard, 364 A.2d 631 (N.H. 1976); Basso v. Miller, 352 N.E..2d 868 (N.Y. 1976); Moody v. Mann's Auto Repair, 871 P.2d 935 (Nev. 1994); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127 (R.I. 1975). Several other states, however, retain the common law duty with respect to trespassers and all other unlawful entrants, but utilize a standard of reasonable care for all lawful entrants. *See*, Jones v. Hansen, 867 P.2d 303 (Kan. 1994); Poulin v. Colby College, 402 A.2d 846 (Me. 1979); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972); Heins v. Webster County, 552 N.W.2d 51 (Neb. 1996); Ford v. Bd. of County Commissioners, 879 P.2d 766 (N.M. 1994); Nelson v. Freeland, 507 S.E.2d 882 (N.C. 1998); O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977); Hudson v. Gaitan, 675 S.W.2d 699 (Tenn. 1984); Antoniewicz v. Reszczynski, 236 N.W.2d 1 (Wis. 1975); Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993).

[7] Kan. Stat. Ann. §58-3203 (2002).

[8] Kan. Stat. Ann. §58-3204 (2002).

[9] *See, e.g.*, Heggen v. Mountain West Farm Bureau Mutual Insurance Co., 715 P.2d 1060 (Mont. 1968)(no coverage under comprehensive farm policy for injury to participant in steer roping contest; profit motive present even though all entry fees paid out in prize money; contests regular and continuous).

activities are probably not incidental to farming activities.[10] Consequently, endorsements to an existing policy may be necessary to ensure coverage, or it may be necessary to buy a standard commercial general liability policy and then modify it with an endorsement. In any event, it may be wise to require recreational users to carry their own liability insurance in addition to whatever coverage the owner or occupier may have.

Liability release forms. Another means of protection against liability is to have recreational entrants sign liability release forms. To be an effective liability shield, the release must be drafted carefully. The courts generally construe release language against the drafter and severely limit the landowner's ability to contract away liability for the landowner's negligence.[11] Thus, while the law generally disfavors release agreements, courts will uphold them if they contain clear and unambiguous language, are not inordinately long and complex, and are the result of roughly equal bargaining power between the contracting parties.[12] However, release agreements signed by minors are generally not enforceable, and courts tend not to uphold release agreements signed by a parent for a minor child.[13] This could be an especially important point with respect to hunting and fishing activities that can be engaged in by underage youth.

Other issues. Persons conducting fee-based recreational activities must also take care to ensure compliance with the Americans With Disabilities Act,[14] Title II of the Civil Rights Act of

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[10] *See, e.g.*, Windt v. Fidelty & Casualty Co. of New York, 507 P.2d 1383 (Cal. Supp. Ct. 1973)(insured operated stable for fee and several horses escaped causing traffic accident and killing driver; stable not within reasonable interpretation of "farming," but associated grazing activity covered under policy. Repairing fences and keeping gates closed incidental to normal farming activities; because accident related to unclosed gate, policy covered landowner's liability for driver's death.

[11] *See, e.g.*, Steele v. Mt. Hood Meadows Oregon, Ltd., 159 Ore. App. 272 (1999)(release provided no defense against plaintiff's negligence claim; release failed to specifically refer to negligence and was partially ambiguous); Bothell v. Two Point Acres, Inc., 965 P.2d 47 (Ariz. 1998)(release strictly construed against drafter and failed to bar liability as a matter of law); *but see*, Street v. Darwin Ranch, Inc., 75 F. Supp.2d 1296 (D. Wyo. 1999)(release used in context of participation in trail ride upheld; release fairly entered into and evidenced parties' intent to release defendant from negligence in clear and unambiguous language).

[12] *See, e.g.*, B&B Livery, Inc. v. Riehl, 960 P.2d 134 (Colo. 1998)(rider injured by fall from horse provided by livery; release agreement precluded rider's claims).

[13] *See, e.g.*, Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002)(public policy of state gave minors significant protection that prevented parent or guardian from releasing minor's own prospective claim for negligence; opinion did not address effect of parental releases when minor child participating in activities whose inherent danger could not be eliminated by reasonable care).

[14] 42 U.S.C. §§12101-12213 (2003). The Act defines "public accommodation" broadly. *See* 42 U.S.C. §12182(a) (2003). Compliance with the Act can only be avoided if certain strict requirements are satisfied. *See* 42 U.S.C. §12182(b)(3).

1964,[15] and the Safe Drinking Water Act.[16] They must also ensure that the activities of guests do not constitute a nuisance to neighboring landowners[17] and that guests do not trespass on others' lands.

Summary

Certain common sense steps should be taken to minimize the liability risks associated with fee-based recreational activities. Those include conducting routine safety audits, plugging abandoned wells, fencing off dangerous areas, separating recreational users from livestock, establishing and posting guidelines and having emergency supplies and equipment available. With proper structuring and planning, fee-based recreational activities can provide additional income for the farm and ranch family.

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[15] 42 U.S.C. §§2000a-a-6 (2003). The Act prohibits discrimination based on race, color, religion or national origin in many places of exhibition or entertainment. *See, e.g., Un*ited States v. Jackson Lake, Inc., 312 F. Supp. 1376 (S.D. Ala. 1970)(family-owned recreational complex with swimming and picnic held to be "place of entertainment" subject to Title II's non-discrimination provisions).

[16] 42 U.S.C. §§300f-300j-26. The Act could apply, for example, to a bed and breakfast, hunting or fishing lodge, dude ranch, or almost any recreational business that furnishes water to at least 25 persons. *See* 42 U.S.C. §300f(4).

[17] *See, e.g.*, Gray v. Barnhart, 144 Pa. Commw. 474, 601 A.2d 924 (1992)(jury question presented as to whether shooting range constituted nuisance).