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Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors

by

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ARTICLES

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In enacting provisions regarding equine activities,[1] the Arkansas General Assembly has created a new Good Samaritan

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1. ARK. CODE ANN. §§ 16-120-201 to -202 (Supp. 1995):

16-120-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Equine" means a horse, pony, mule, donkey, or hinny;

(2) "Equine activity" means:

(A) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting;

(B) Equine training and teaching activities;

(C) Boarding equines;

(D) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine; and

(E) Rides, hunts, or other equine activities of any type, however informal or impromptu;

(3) "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether nonprofit or operating for profit, which sponsors, organizes, or provides facilities for an equine activity; and

(4) "Participant" means any person, whether amateur or professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

16-120-202. Liability.

(a)(1) Except as provided in subdivision (a)(2) of this section, an equine activity sponsor or an employee of an equine activity sponsor shall not be liable for

paradigm for conduct involving horses and other equids.[2] The provisions, called the Arkansas equine liability statute,[3] provide

an injury to or the death of a participant resulting from the inherent risks of equine activities.

(2) Nothing in subdivision (a)(1) of this section shall prevent or limit the liability of an equine activity sponsor or an employee of an equine activity sponsor who:

(A)(i) Provided the equipment or tack and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury;

(ii) Provided the equine animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or to determine the ability of the participant to engage safely in the equine activity and to safely manage the particular equine based on the participant's representation of his ability;

(B) Owned, leased, rented, or otherwise was in lawful possession and control of the land or facilities upon which the participant sustained injury because of a dangerous latent condition which was known or should have been known to the equine activity sponsor or to an employee of the sponsor and for which warning signs have not been conspicuously posted;

(C) Committed an act or omission that constituted willful or wanton disregard for the safety of the participant, and that act or omission caused the injury;

(D) Intentionally injured the participant.

(3) Nothing in subdivision (a)(1) of this section shall prevent or limit the liability of an equine activity sponsor or an employee thereof under liability provisions as set forth in products liability laws.

(b)(1) Every equine activity sponsor shall post and maintain signs which contain the warning notice specified in subdivision (b)(2) of this section. Such signs shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine activity sponsor conducts equine activities. The warning notice specified in subdivision (b)(2) of this section shall appear on the sign in black letters, with each letter to be a minimum of one inch (1") in height.

(2) The signs described in subdivision (b)(1) of this section shall contain the following warning notice:

WARNING

Under Arkansas Law, an equine activity sponsor is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risks of equine activities.

(c) Provided, the immunity provided for in this section is not applicable with respect to thoroughbred horse racing as authorized and regulated in § 23-110-101 et seq.

ARK. CODE ANN. §§ 16-120-201 to -202 (Supp. 1995).

2. *See* Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997 (1995); Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157 (1995).

3. ARK. CODE ANN. §§ 16-120-201 to -202 (Supp. 1995). The term "equine liability statute" refers to a statute that provides immunity from liability for qualifying persons for injuries that occur during equine activities. Some states have added llamas to the coverage of their statutes. *See, e.g.*, GA. CODE ANN. §§ 4-12-1 to -4 (1995). Since most of the similar legislation enacted in 38 states involves only equids, reference will be to equine liability statutes. *See infra* note 6 (list of statutes).

immunity to equine activity sponsors and their employees in certain situations[4] and change longstanding negligence rules regarding the conduct of animal business owners.[5] For practitioners, the Arkansas equine liability statute offers a defense to causes of action resulting from horse accidents.

Legislatures in thirty-eight states have enacted equine liability statutes.[6] The expansion of tort liability,[7] increases in insurance costs,[8] and the dangerousness of activities involving animals[9] are the primary factors that have persuaded the General Assembly to modify tort liability in this area.

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4. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

5. The business owners must be sponsoring, organizing, or providing facilities for an equine activity. ARK. CODE ANN. § 16-120-201(3). *See infra* notes 56-59 and accompanying text.

6. ALA. CODE § 6-5-337 (1993); ARIZ. REV. STAT. ANN. § 12-553 (West 1996); ARK. CODE ANN. §§ 16-120-201 to -202 (Supp. 1995); COLO. REV. STAT. ANN. § 13-21-119 (West 1997); CONN. GEN. STAT. ANN. § 52-557p (West Supp. 1997); DEL. CODE ANN. tit. 10, § 8140 (Supp. 1996); FLA. STAT. ANN. §§ 773.01-.05 (West 1997); GA. CODE ANN. §§ 4-12-1 to -4 (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. 1997); IND. CODE ANN. §§ 34-4-44-1 to -12 (Michie Supp. 1997); KAN. STAT. ANN. §§ 60-4001 to -4004 (1994); LA. REV. STAT. ANN. § 9:2795.1 (West Supp. 1997); ME. REV. STAT. ANN. tit. 7, §§ 4102-4103 (West Supp. 1996); MASS. GEN. LAWS ANN. ch. 128, § 2D (West Supp. 1997); MICH. COMP. LAWS §§ 691.1661-.1667 (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. 1997); MONT. CODE ANN. §§ 27-1-725 to -728 (1995); 1997 Neb. Laws 153 (March 26, 1997); N.M. STAT. ANN. §§ 42-13-1 to -5 (Michie Supp. 1995); N.D. CENT. CODE §§ 53-10-01 to -02 (Supp. 1995); OHIO REV. CODE ANN. § 2305.321 (Banks-Baldwin Supp. 1997); OR. REV. STAT. §§ 30.687-.697 (Supp. 1996); 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 ANN. §§ 42-11-1 to -5 (Michie Supp. 1997); TENN. CODE ANN. §§ 44-20-101 to -105 (1993); TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001-.005 (West 1997); UTAH CODE ANN. §§ 78-27b-101 to -102 (1997); VA. CODE ANN. §§ 3.1-796.130-.133 (Michie 1994); VT. STAT. ANN. tit. 12, § 1039 (Supp. 1996); WASH. REV. CODE ANN. §§ 4.24.530-.540 (West Supp. 1997); W. VA. CODE §§ 20-4-1 to -7 (1996); WIS. STAT. ANN. § 895.481 (West 1997); WYO. STAT. §§ 1-1-121 to -123 (Michie 1997).

7. *See, e.g.*, George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSPECTIVES 31 (1991) (evaluating the development of tort law and its expansion).

8. The most difficult years to secure insurance may have been between 1985 and 1988. *See* NORTH AMERICAN HORSEMEN'S ASSOCIATION 1993 YEARBOOK OF NEWS, SAFETY PROGRAMS: THE FINANCIAL IMPACT ON INSURANCE 9 (1993) [hereinafter NAHA 1993 YEARBOOK].

9. Legislative bodies have also felt that other sport activities are so dangerous that they need special legislative dispensation. *See infra* notes 35-36 and accompanying text.

Classic Good Samaritan statutes provide immunity to qualifying doctors and others who render voluntary assistance.[10] Most of these statutes provide immunity against negligence actions; as a result, qualifying persons who commit a negligent act or omission while performing a good deed are excused from liability. Although Good Samaritan statutes vary significantly, five major elements form the Good Samaritan paradigm:[11] (1) a protected class,[12] (2) a zone of protection, such as an emergency situation or an accident site,[13] (3) a gratuitous act,[14] (4) good faith, and (5) a negligence standard of conduct. To qualify for immunity, the negligence standard of conduct cannot be exceeded.[15] Thus, Good Samaritans remain liable for injuries arising from gross negligence or from wanton disregard for the safety of another.[16]

Although the original Good Samaritan statutes were enacted to encourage physicians to render medical assistance, the expansion of the Good Samaritan paradigm has provided partial immunity for a wide range of classes and activities.[17] The Ar-

10. ARK. CODE ANN. § 17-95-101 (1995) (providing a liability exception for persons rendering emergency care).

11. 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. L.J. 327, 327 (1981) (analyzing Good Samaritan statutes with respect to the five elements).

12. Initially, the protected class was physicians.

13. *See, e.g.*, Jackson v. Mercy Health Center, 864 P.2d 839, 845 (Okla. 1993) (finding that an emergency regarding the visiting husband of a patient was within the zone of protection of a Good Samaritan statute). Some Good Samaritan statutes extend immunity to persons who were not involved in an emergency or accident. *See, e.g.*, VA. CODE ANN. § 54.1-3811 (Michie 1994) (providing immunity for veterinary professionals who render health care services to animals in good faith without charge or compensation).

14. Many Good Samaritan statutes still preclude the collection of a fee or a charge for the service. *See, e.g.*, ARK. CODE ANN. § 17-95-101(a) (1995) (providing that the Good Samaritan provisions only apply for physicians if there was no consideration).

15. This element of the paradigm generally involves some type of aggravated misconduct. *See* Mapel & Weigel, *supra* note 11, at 342.

16. *See, e.g.*, CAL. BUS. & PROF. CODE § 2398 (West 1990) (providing that persons providing voluntary medical assistance are liable for gross negligence).

17. *See, e.g.*, CAL. BUS. & PROF. CODE § 2398 (West 1990) (licensees providing emergency medical assistance to participants of athletic events); GA. CODE ANN. § 31-11-8 (1991) (licensees providing ambulance service); GA. CODE ANN. § 51-1-30.1 (Supp. 1997) (drivers of fire apparatus); 225 ILL. COMP. STAT. ANN. 60/31 (West Supp. 1997) (persons providing services at free medical clinics); 745 ILL. COMP. STAT. ANN. 20/1 (West 1993) (law enforcement officers); IND. STAT. ANN. § 15-5-1.1-31 (Michie 1993) (veterinarians); LA. REV. STAT. ANN. § 9:2799 (West 1991) (donees of food); N.Y. GEN. MUN. LAW § 205-b (McKinney Supp. 1997) (volunteer firefighters); OHIO REV. CODE

kansas Good Samaritan statute delineates three subsections that provide immunity for qualifying persons.[18] Subsections (a) and (b) require good faith, an accident or emergency, and the standard of care of a reasonable and prudent person.[19] While subsection (a) also requires gratuitous assistance,[20] subsection (b) does not impose such a requirement, although other prerequisites for qualification are prescribed.[21] Subsection (c) addresses emergency medical assistance provided by a physician or surgeon at school athletic events and contests.[22] Statutory exceptions exist for persons helping a human who is choking,[23] persons or entities responding to an emergency at the request of a qualifying governmental agency,[24] persons assisting at hazardous materials accidents,[25] and teachers and other persons dealing with drug abuse or suicide attempts by their students.[26]

A modification of the Good Samaritan immunity was enacted for recreational land owners. The Arkansas Recreational Use Statute[27] establishes a defense for property owners and others[28] who "make land and water areas available to the public for recreational purposes."[29] The statute states that property owners who allow others to use their land for recreational purposes do

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ANN. § 4765.49(E) (Banks-Baldwin Supp. 1997) (dispatchers or communicators of requests for emergency medical services); WIS. STAT. ANN. § 146.37 (West Supp. 1996) (persons on oversight health care committees).

18. ARK. CODE ANN. § 17-95-101 (1995).

19. ARK. CODE ANN. § 17-95-101(a)-(b) (1995).

20. ARK. CODE ANN. § 17-95-101(a) (1995). To qualify as a Good Samaritan, the person must lend "emergency care or assistance without compensation." ARK. CODE ANN. § 17-95-101(a) (1995).

21. ARK. CODE ANN. § 17-95-101(b) (1995). For example, the prerequisites include a belief that the injured person is under imminent threat of danger, could be aided by assistance, and the assistance is calculated to lessen the threat. ARK. CODE ANN. § 17-95-101(b) (1995).

22. ARK. CODE ANN. § 17-95-101(c) (1995).

23. ARK. CODE ANN. § 20-57-207 (1991).

24. ARK. CODE ANN. § 16-120-401 (Supp. 1995).

25. ARK. CODE ANN. § 8-7-101 (1993).

26. ARK. CODE ANN. § 6-17-107 (1993).

27. ARK. CODE ANN. §§ 18-11-301 to -307 (1987 & Supp. 1995). Although the statute is not titled as the Arkansas Recreational Use Statute, cases have established this nomenclature. *See, e.g.*, Roten v. United States, 850 F. Supp. 786, 788 (W.D. Ark. 1994).

28. While statutory dispensation is only available to owners of land, ARK. CODE ANN. § 18-11-305 (1987), the definition of owner includes a "possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises." ARK. CODE ANN. § 18-11-302 (Supp. 1995).

29. ARK. CODE ANN. § 18-11-301 (1987).

not "[e]xtend any assurance that the . . . premises are safe for any purpose."[30] However, owners who charge fees for recreational activities may not qualify.[31] Owners also remain liable "[f]or malicious . . . failure to guard or warn against an ultrahazardous condition . . . or activity actually known to the owner to be dangerous."[32]

While Good Samaritan statutes generally require charitable acts or activities,[33] state equine liability statutes are quite different in that they cover business activities.[34] Recently, additional statutory exceptions have secured special dispensation for providers of sport activities[35] and pick-your-own fruit and vegetable business operations[36] in some states. Although the vicissitudes of tort liability with respect to animal activities may justify the special dispensation granted by the Arkansas equine liability statute,[37] perhaps the immunity should be accompanied by provisions that would augment the safety of participants.[38]

This article analyzes the Arkansas equine liability statute,[39] commencing with observations concerning the absence of a

30. ARK. CODE ANN. § 18-11-305(1) (1987). Section 18-11-305 is entitled "Owner's immunity from liability." However, the provisions do not directly grant immunity, but rather limit the liability of qualifying persons in various situations. ARK. CODE ANN. § 18-11-305 (1987).

31. ARK. CODE ANN. § 18-11-307(2) (1987). A fee from a lease, however, does not disqualify a property owner from statutory immunity. ARK. CODE ANN. § 18-11-307(2) (1987); *see also* John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?*, 24 IND. L. REV. 1587, 1602-05 (1991) (delineating the nonqualification provision associated with charges).

32. ARK. CODE ANN. § 18-11-307(1) (1987).

33. *See supra* notes 14 & 20 and accompanying text.

34. *See* Centner, *supra* note 2; Carmel, *supra* note 2.

35. *See, e.g.*, MICH. COMP. LAWS §§ 408.321-.344 (West 1985 & Supp. 1997) (skiing); W. VA. CODE §§ 20-3B-1 to -5 (1996) (whitewater rafting); IDAHO CODE §§ 6-1201 to -1206 (1990) (outfitters and guides); COLO. REV. STAT. ANN. § 13-21-120 (West Supp. 1997) (watching baseball); 745 ILL. COMP. STAT. ANN. 72/1 to 72/30 (West Supp. 1997) (roller skating).

36. *See, e.g.*, ARK. CODE ANN. § 18-60-107(b)-(c) (Supp. 1995); MASS. GEN. LAWS ANN. ch. 128, § 2E (West Supp. 1997); MICH. COMP. LAWS ANN. § 324.73301(5)-(6) (West Supp. 1997); N.H. REV. STAT. ANN. § 508:14 (1997); PA. STAT. ANN. tit. 42, § 8339 (West Supp. 1997); *see also* Terence J. Centner, *The New "Pick-Your-Own" Statutes: Delineating Limited Immunity from Tort Liability*, 30 U. MICH. J.L. REF. 743 (1997).

37. For example, liability could result when a horse kicks a rider. *See infra* notes 91-129 and accompanying text.

38. The sport activity statutes often prescribe duties for the persons receiving legislative dispensation. *See, e.g.*, COLO. REV. STAT. §§ 33-44-106 to -108 (West 1990 & Supp. 1996) (delineating the duties of ski operators).

39. ARK. CODE ANN. §§ 16-120-201 to -202 (Supp. 1995).

gratuitous act requirement and the limitations on the protected class. While the equine statute fails to follow the Good Samaritan paradigm, it delineates qualifications that reasonably limit the protected class. In the second section, the immunity provided by the equine liability statute is contrasted with that provided by other Arkansas statutes and with the immunity provided by two recent cases from other states. Next, section three proposes two additional safety prerequisites for the Arkansas statute and similar statutes in other states. The first proposal is to revise the existing statutory warning requirement to acknowledge the importance of wearing a helmet. Another proposal is to add a subsection which requires minors to wear a helmet when engaging in equestrian activities on public property. Through these minor amendments, equine liability statutes could be more effective in reducing the number of persons who sustain injuries in equine activities.

I. QUALIFICATIONS OF A GRATUITOUS ACT AND A PROTECTED CLASS

Two major elements of the Good Samaritan paradigm may be examined to distinguish significant provisions of the Arkansas equine liability statute from other liability statutes. First, the Arkansas equine statute dispenses with the Good Samaritan paradigm requirement of a gratuitous act or benevolence. Second, the enumerated class under the Arkansas statute, equine activity sponsors and their employees, is less inclusive than those covered by equine liability statutes enacted in other states.

A. Absence of a Gratuitous Act Requirement

In provisions granting immunity to Good Samaritans and recreational property owners, legislatures have distinguished among acts and activities that are charitable and those that are part of a vocation or business, or for which a fee is charged.[40] Under these statutes, good deeds and charitable services generally have formed the basis for departing from existing liability touchstones.[41] However, equine liability statutes depart from the traditional Good Samaritan paradigm in that all of these statutes

40. *See supra* notes 20 & 31 and accompanying text.
41. *See supra* notes 18-26 and accompanying text.

except one[42] cover persons involved in profit-making businesses and activities.[43] By that, equine liability statutes constitute a much greater exception to negligence liability than the traditional Good Samaritan statutes that decline to cover persons receiving compensation.

A survey of the Arkansas statutory provisions limiting liability indicates a reluctance to grant immunity to persons engaging in profit-making activities,[44] but several exceptions exist. These exceptions include persons associated with food service operations[45] and pick-your-own operators,[46] who both qualify for immunity despite being engaged in a business. In addition, under the Arkansas Recreational Use Statute, landowners who lease their property may still qualify for statutory immunity.[47] Teachers and school personnel who assist suicidal youths and counsel or assist persons on matters concerning drug abuse may also qualify for statutory immunity despite receiving compensation.[48]

Because the Arkansas equine liability statute provides immunity for some acts and omissions constituting gross negligence, the General Assembly considered observing the Good Samaritan paradigm by only providing immunity to nonprofit organizations or benevolent activities. The initial Arkansas equine liability statute incorporated this paradigm,[49] and the current Minnesota equine liability statute illustrates the idea.[50] Under the Minnesota statute, immunity is limited to a carefully circumscribed class of nonprofit organizations and those donating

42. *See* MINN. STAT. ANN. § 604A.12, subd. 2 (West Supp. 1997).

43. ARK. CODE ANN. § 16-120-201(3) (Supp. 1995) (defining equine activity sponsors to include persons, groups, and corporations operating for a profit).

44. *See, e.g.*, ARK. CODE ANN. § 8-7-101 (1993) (precluding compensation for Good Samaritans providing assistance with hazardous materials); ARK. CODE ANN. § 16-120-401 (Supp. 1995) (precluding compensation when providing specialized equipment in response to an emergency); ARK. CODE ANN. § 17-95-101(a), (c) (1995) (precluding compensation for basic Good Samaritan immunity); *but see* ARK. CODE ANN. § 17-95-101(b) (1995) (revealing no preclusion against compensation in medical emergencies).

45. ARK. CODE ANN. § 20-57-207(f)-(g) (1991).

46. ARK. CODE ANN. § 18-60-107(b)-(c) (Supp. 1995).

47. ARK. CODE ANN. § 18-11-307(2) (1987).

48. ARK. CODE ANN. § 6-17-107 (1993).

49. 1991 Ark. Acts 103, § 1.

50. MINN. STAT. ANN. § 604A.12, subd. 2 (West Supp. 1997). In addition, the Minnesota statute covers cows and other livestock. MINN. STAT. ANN. § 604A.12, subd. 2 (West Supp. 1997).

services, livestock, facilities, or equipment to nonprofit organizations.[51] By that, the Minnesota statute provides immunity for nonprofit organizations such as 4-H clubs, scouts, youth groups, and church groups. Furthermore, private persons or businesses donating services and facilities in Minnesota qualify for immunity regarding injuries resulting from the inherent risks of livestock activities.[52]

The Arkansas General Assembly rejected a similar requirement in its 1995 amendment of the equine liability statute.[53] The inclusion of profit-making equine businesses and activities has been justified by the special risks involved with such activities rather than by acts of benevolence.[54] Because equine activities involve the propensity of the animal to behave so as to cause an injury, or the unpredictability of an animal's reaction to movements or objects, equine liability statutes limit immunity to these inherent risks of equine activities.[55]

B. Delineating the Protected Class

A second control provided by the Arkansas equine liability statute is incorporated in the limitation restricting immunity to equine activity sponsors.[56] Immunity statutes normally delineate a protected class of persons who are afforded statutory dispensation, and the Arkansas equine liability statute limits the protected class to equine activity sponsors and their employees.[57] Individuals and organizations, whether nonprofit or operating for a profit, are considered equine activity sponsors if they sponsor, organize, or provide facilities for an equine activity.[58]

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51. MINN. STAT. ANN. § 604A.12, subd. 2 (West Supp. 1997):
Immunity from liability. Except as provided in subdivision 3, a nonprofit corporation, association, or organization, or a person or other entity donating services, livestock, facilities, or equipment for the use of a nonprofit corporation, association, or organization, is not liable for the death of or an injury to a participant resulting from the inherent risks of livestock activities.
MINN. STAT. ANN. § 604A.12, subd. 2 (West Supp. 1997).

52. *See* MINN. STAT. ANN. § 604A.12, subd. 2 (West Supp. 1997).

53. 1995 Ark. Acts 353, § 1.

54. Similar reasoning has led to the enactment of sport activity statutes to provide immunity to business owners and others engaged in offering the public dangerous sport activities such as skiing and whitewater rafting. *See supra* note 35.

55. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

56. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

57. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

58. ARK. CODE ANN. § 16-120-201(3) (Supp. 1995).

Through the definition of "equine activities," sponsors may be associated with shows, competitions, performances, training and teaching, boarding, and riding an equine belonging to another.[59]

While these statutory provisions seem to cover most equine activities, the restriction regarding equine activity sponsors is quite different from the restrictions provided by a number of other equine liability statutes.[60] For example, the Louisiana and Georgia statutes provide immunity to sponsors, professionals, and "any other person."[61] By restricting immunity to equine activity sponsors and their employees, and by requiring equine activity sponsors to have sponsored, organized, or provided facilities for an equine activity, the Arkansas legislature has prevented several categories of persons from qualifying for statutory immunity. Classes of persons who may not qualify include other participants,[62] horse owners who allow a friend to ride their horse,[63] competition judges who are not employees of the sponsor,[64] and veterinarians who are hired as independent contractors rather than as employees.[65] The significance of this limitation

59. ARK. CODE ANN. § 16-120-201(2) (Supp. 1995).

60. Equine liability statutes have been classified as "sponsor and professional" statutes and "inherent risk" statutes. Centner, *supra* note 2, at 1011-13. Because the Arkansas equine liability statute only provides immunity to sponsors and their employees, the statute more closely resembles the sponsor and professional statutes. *Id.* Sponsor and professional statutes generally offer immunity to fewer persons than inherent risk statutes. *Id.* at 1035. Nearby states that have adopted inherent risk statutes include Alabama, ALA. CODE § 6-5-337 (1993), Louisiana, LA. REV. STAT. ANN. § 9:2795.1 (West Supp. 1997), Mississippi, MISS. CODE ANN. §§ 95-11-1 to -7 (1994), Missouri, MO. ANN. STAT. § 537.325 (West Supp. 1997), Tennessee, TENN. CODE ANN. §§ 44-20-101 to -105 (1993), and Texas, TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001-.005 (West 1997).

61. *Compare* ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995) (covering only equine activity sponsors and their employees) *with* GA. CODE ANN. § 4-12-3(a) (1995) *and* LA. REV. STAT. ANN. § 9:2795.1B (West Supp. 1997) (covering sponsors, professionals and any other person).

62. Participants are not sponsors or employees of sponsors, so they do not qualify for immunity. *See* ARK. CODE ANN. §§ 16-120-201(4), -202(a)(1) (Supp. 1995).

63. Horse owners are not sponsors of an "equine activity," as defined by the statute, so they do not qualify for immunity. *See* ARK. CODE ANN. §§ 16-120-201(2), -202(a)(1) (Supp. 1995).

64. If competition judges are not sponsors or employees of the sponsor, they do not qualify for immunity. *See* ARK. CODE ANN. §§ 16-120-201(4), -202(a)(1) (Supp. 1995).

65. Independent contractors are not sponsors or employees of the sponsor, so they do not qualify for immunity. *See* ARK. CODE ANN. §§ 16-120-201(4), -202(a)(1) (Supp. 1995). For an evaluation of the differences in coverage among state equine liability statutes, see Centner, *supra* note 2, at 1009-11, 1038-39.

may be seen when analyzing two recent equine cases from Louisiana and Georgia.[66]

II. ESTABLISHING A GENERAL STANDARD OF CONDUCT

The general directive of the Arkansas equine liability statute provides that qualifying persons "shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities."[67] Subsection (a)(2)(C) further states that sponsors or employees who have "[c]ommited an act or omission that constituted willful or wanton disregard for the safety of a participant, and that act or omission caused the injury," remain liable for their actions.[68] Combining these two provisions[69] provides a general standard: Qualifying sponsors and their employees have immunity for some conduct involving negligent and grossly negligent acts.[70]

Five exceptions in the equine liability statute limit the scope of the immunity provided by the general standard.[71] Exceptions for equipment and tack,[72] reasonable and prudent efforts by providers,[73] dangerous latent conditions,[74] intentional acts,[75] and products liability law[76] establish multiple rules for analyzing liability for equine mishaps. These exceptions prescribe different standards, allowing persons providing equipment or animals to be liable for negligence in selected situations.[77]

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66. *See infra* notes 91-129 and accompanying text.

67. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

68. ARK. CODE ANN. § 16-120-202(a)(2)(C) (Supp. 1995).

69. ARK. CODE ANN. § 16-120-202(a)(1), (a)(2)(C) (Supp. 1995).

70. Gross negligence is something less than willfulness or wantonness. *See, e.g.*, Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan, 740 S.W.2d 127, 132 (Ark. 1987) (distinguishing between gross negligence and willful and wanton conduct); National By-Products, Inc. v. Searcy House Moving Co., 731 S.W.2d 194, 195 (Ark. 1987) (noting that proof of gross negligence is not sufficient to meet the requirement for punitive damages whereby wantonness is needed).

71. ARK. CODE ANN. § 16-120-202(a)(2) (Supp. 1995). *See* Centner, *supra* note 2, at 1017-32 (explaining the exceptions and their application to selected activities).

72. ARK. CODE ANN. § 16-120-202(a)(2)(A)(i) (Supp. 1995).

73. ARK. CODE ANN. § 16-120-202(a)(2)(A)(ii) (Supp. 1995).

74. ARK. CODE ANN. § 16-120-202(a)(2)(B) (Supp. 1995).

75. ARK. CODE ANN. § 16-120-202(a)(2)(D) (Supp. 1995).

76. ARK. CODE ANN. § 16-120-202(a)(3) (Supp. 1995).

77. For example, under a suitability exception, a plaintiff-participant may maintain an action against a provider of an equine if the defendant-provider failed to employ rea-

A. Contrast with Other Arkansas Statutes

The Arkansas equine liability statute, which grants immunity for some acts involving gross negligence, may be compared with the provisions of the Arkansas Recreational Use Statute.[78] The recreational use statute denies immunity whenever an individual has acted maliciously in failing "to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous."[79] The United States District Court for the Western District of Arkansas interpreted this statute in *Roten v. United States*,[80] holding that proof of negligence was not sufficient to preclude the dismissal of a tort action where the defendant raised the defense offered by the recreational use statute.[81] Due to the absence of a malicious failure to guard or warn against an ultra-hazardous condition, as required for liability under the recreational use statute, the complaint was dismissed.[82]

As a result, both the equine and recreational use statutes may enable a person who was grossly negligent to avoid liability for resulting injuries.[83] Such dispensation is more generous than that provided by the Arkansas Good Samaritan Statute;[84] the immunity provided by subsections (a) and (b) of section 17-95-101 is limited to individuals who act as a reasonable and prudent person.[85] Under a prudent person standard, Good Samaritans who are grossly negligent will not qualify for statutory immunity; possibly, Good Samaritans who are merely negligent will

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sonable and prudent efforts to inquire about the participant's ability to engage safely in equine activities. ARK. CODE ANN. § 16-120-202(a)(2)(A)(ii) (Supp. 1995). This suggests that negligence of a provider in providing an equine may be actionable.

78. ARK. CODE ANN. §§ 18-11-301 to -307 (1987).

79. ARK. CODE ANN. § 18-11-307(1) (1987).

80. 850 F. Supp. 786 (W.D. Ark. 1994).

81. *Id.* at 793-96.

82. *Id.* at 795; *see also* Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982), *rev'd on other grounds*, 719 F.2d 963 (8th Cir. 1983) (granting summary judgment due to the provisions of the recreational use statute since there was no evidence of willful or wanton conduct).

83. This statement assumes that the maliciousness requirement in the recreational use statute means something more than gross negligence. ARK. CODE ANN. § 18-11-307(1) (1987). Another caveat to avoiding liability for gross negligence under the equine liability statute is that none of the statutory exceptions providing different standards for liability is applicable. ARK. CODE ANN. § 16-120-202(a)(2)-(3) (Supp. 1995).

84. ARK. CODE ANN. § 17-95-101 (1995).

85. ARK. CODE ANN. § 17-95-101(a)-(b) (1995).

also fail to qualify for immunity. Under subsection (c) of section 17-95-101, physicians who are grossly negligent while volunteering at an athletic event do not qualify for immunity.[86]

The significance of the equine liability statute's general standard of conduct is that profitable equestrian businesses that qualify as sponsors are afforded greater protection against liability than most Good Samaritans. In Arkansas, an equine activity sponsor engaged in a profit-making business activity may escape liability for gross negligence involving the inherent risks of equine activities,[87] yet a Good Samaritan physician who acts unreasonably or is grossly negligent in attempting to rescue an accident victim does not qualify for statutory immunity.[88] Moreover, a physician who is on-call remains liable for ordinary negligence.[89] While policy reasons and distinctions between the activities addressed by these separate statutes may justify such results, they are nevertheless surprising.[90]

B. Interpretations by Courts in Other States

Recently, appellate courts in Louisiana and Georgia considered the meaning of the general standard of conduct under similar equine liability statutes.[91] In both cases, the statutory immunity provided by the equine liability statutes is analogous

86. ARK. CODE ANN. § 17-95-101(c) (1995).

87. ARK CODE ANN. § 16-120-202(a)(2)(C) (Supp. 1995). This statement only applies to the inherent risks of equine activities for which the statutory exceptions are not applicable. *See supra* notes 71-77 and accompanying text (listing the statutory exceptions under which there would be liability).

88. ARK. CODE ANN. § 17-95-101(a) (1995). The statute does not delineate liability for gross negligence, but its immunity is only available to an individual acting as a reasonable and prudent person. ARK. CODE ANN. § 17-95-101(a) (1995). Good faith is also required. ARK. CODE ANN. § 17-95-101(a) (1995).

89. The Good Samaritan statute requires emergency care at the scene of an accident or emergency. ARK. CODE ANN. § 17-95-101(a) (1995).

90. The argument that equine liability statutes should only excuse persons who have made a donation or who are involved in a benevolent act is advanced as a statutory configuration that would bring equine liability statutes closer to Good Samaritan principles. *See infra* notes 130-167 and accompanying text.

91. *See* Muller v. English, 472 S.E.2d 448 (Ga. Ct. App. 1996); Gautreau v. Washington, 672 So. 2d 262 (La. Ct. App. 1996), *cert. denied*, 675 So. 2d 1123 (La. 1996); *see also* Cave v. Davey Crockett Stables, Case No. 03A01-9504-CV-00131, 1995 Tenn. App. LEXIS 560 (Aug. 29, 1995) (analyzing alleged negligent conduct regarding a horse accident under the Tennessee equine statute, TENN. CODE ANN. §§ 44-20-103 to -104 (1993)).

to the immunity provided by the Arkansas statute.[92] Moreover, all three statutes establish the same general standard of conduct; persons remain liable for acts or omissions that constitute willful or wanton disregard for the safety of another.[93] However, a major distinction exists in the statutes' protected classes because the Louisiana and Georgia statutes do not restrict immunity to equine activity sponsors and their employees.[94]

In *Gautreau v. Washington*,[95] a Louisiana appellate court considered whether the conduct of a defendant reflected willful and wanton disregard for the safety of the plaintiff.[96] The plaintiff was injured when the defendant's horse kicked her while she was waiting with her horse at the entrance to a horse show.[97] The defendants claimed immunity under the provisions of the Louisiana equine liability statute,[98] contending that they should not be held liable because the conduct did not amount to willful or wanton disregard for the safety of the plaintiff.[99] Testimony established that the horse had never kicked anyone before this incident occurred and that it had kicked the plaintiff because it was brushed by a third horse.[100] Based on the record, the court found that the plaintiff's injuries were a result of the inherent risks associated with equine activities. The court also stated that the facts offered no support for a finding that the defendant's conduct involved the willful or wanton disregard for the safety of the plaintiff.[101] Thus, under the Louisiana equine liability statute, the defendants were immune from the suit.[102]

A similar case was recently considered by the Georgia Court of Appeals. In *Muller v. English*,[103] an experienced equestrian was injured when the defendant's horse "suddenly

92. *Compare* ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995) *with* GA. CODE ANN. § 4-12-3(a) (1995) *and* LA. REV. STAT. ANN. § 9:2795.1B (West Supp. 1997).

93. *Compare* ARK. CODE ANN. § 16-120-202(a)(2)(C) (Supp. 1995) *with* GA. CODE ANN. § 4-12-3(b)(3) (1995) *and* LA. REV. STAT. ANN. § 9:2795.1C(4) (West Supp. 1997).

94. *See supra* notes 60-66 and accompanying text.

95. 672 So. 2d 262 (La. Ct. App. 1996), *cert. denied*, 675 So. 2d 1123 (La. 1996).

96. *Gautreau*, 672 So. 2d at 266-67.

97. *Id.* at 264.

98. LA. REV. STAT. ANN. § 9:2795.1 (West Supp. 1997).

99. LA. REV. STAT. ANN. § 9:2795.1C(4) (West Supp. 1997); *Gautreau*, 672 So. 2d at 266-67.

100. *Gautreau*, 672 So. 2d at 266.

101. *Id.* at 267.

102. *Id.*

103. 472 S.E.2d 448 (Ga. Ct. App. 1996).

and without warning kicked her in the leg."[104] The plaintiff claimed that the horse was a habitual kicker[105] and that it should have been marked with a red ribbon on its tail to denote that it was irritable.[106] The plaintiff also alleged that the defendant's horse was vicious, with a known propensity to kick,[107] and that these facts established a willful or wanton disregard for the plaintiff's safety.[108]

The *Muller* defendants moved for summary judgment based on the provisions of the Georgia equine liability statute,[109] a statute that is similar to the Arkansas equine liability statute except that it does not limit the protected class.[110] The defendants argued that, given the facts, the statute precluded a finding of liability.[111] The court agreed,[112] holding that the plaintiff's allegations did not establish liability under the statute's general standard.[113] As in *Gautreau*, the issue was whether the defendant committed an act or omission that constituted willful or wanton disregard for the safety of the plaintiff.[114] Case law interpretations of other statutes and the common law revealed that willful conduct requires actual intent to do harm or inflict injury.[115] To show wanton conduct, the conduct must be "so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent."[116] Noting the

104. *Id.* at 450.

105. *Id.* at 453. The plaintiff was not able to substantiate this allegation. The evidence indicated that the horse had kicked on two other occasions. *Id.*

106. *Id.* at 454. There was no agreement as to the precise meaning of a red ribbon. *Id.*

107. *Id.* at 452. The plaintiff argued that the defendant's horse was a dangerous latent condition because it was a vicious animal allowed to be at liberty by careless management. *Id.* The court dispensed with this argument through a reasoned analysis of the pertinent definitions. *Id.*

108. *Id.* at 452.

109. GA. CODE ANN. §§ 4-12-1 to -4 (1995).

110. *See supra* notes 60-66 and accompanying text.

111. *Muller*, 472 S.E.2d at 450. The dispute centered on whether the defendants met certain conditions precedent to the statute or whether the defendants were liable under one of the statutory exceptions. *Id.*

112. *Id.* at 454.

113. *Id.* (analyzing GA. CODE ANN. § 4-12-3(b)(3) (1995)). The statutory provision in the Arkansas equine liability statute is essentially the same as the provision in the Georgia statute. ARK. CODE ANN. § 16-120-202(2)(C) (Supp. 1995).

114. *Muller*, 472 S.E.2d at 454.

115. *Id.* at 452 (citations omitted).

116. *Id.* (referring to Chrysler Corp. v. Batten, 450 S.E.2d 208 (Ga. 1994)).

plaintiff's experience with horses[117] and the nature of the equine activity,[118] the court concluded that the plaintiff had failed to present evidence that the conduct of the defendant's horse was not ordinary equine behavior.[119] As a result, the defendants were immune from suit under the Georgia equine liability statute.[120]

Thus, in both *Gautreau*[121] and *Muller*,[122] the court found that the injury sustained by the plaintiff resulted from an inherent risk of equine activities. The Arkansas equine liability statute does not define "inherent risks,"[123] but the meaning should include risks characteristic of or intrinsic to the equine activity.[124] Under the Arkansas statute, injuries such as those reported in *Gautreau* and *Muller* should be considered to have resulted from inherent risks of equine activities.[125]

The finding of an inherent risk does not end the inquiry whether the Arkansas equine liability statute offers immunity to defendants. Under the Arkansas equine liability statute, only equine activity sponsors and their employees qualify for immunity.[126] In *Gautreau* and *Muller*, the defendants were participants in the equine activity; they were riding the horses that imparted the kicks.[127] Participants are not covered by the statutory definition of equine activity sponsors and employees unless they participated in the organization, sponsorship, or provision of facilities for the activity or were employees of a sponsor.[128] By failing to qualify as a sponsor or employee, the defendants in

117. The plaintiff was an experienced rider and fox hunter. *Id.* at 453.

118. The activity was a fox hunt, and witnesses testified that fox hunting often involved horses that kick. *Id.*

119. *Id.* at 452. In a footnote, the court recognized the possibility that an inference of willful or wanton disregard for the safety of a participant could occur in a less hazardous equine activity or where children were involved. *Id.* at 452 n.6.

120. *Id.* at 454.

121. *Gautreau*, 672 So. 2d at 266.

122. *Muller*, 472 S.E.2d at 452.

123. ARK. CODE ANN. § 16-120-201 (Supp. 1995).

124. *See, e.g.*, Halpern v. Wheeldon, 890 P.2d 562 (Wyo. 1995). In this case, the Wyoming Supreme Court interpreted the meaning of inherent risk as employed in the Wyoming recreational use statute, which specifically covered equine activities. *Id.* at 564. The court found that an inherent risk must satisfy two requirements: (1) it must be characteristic of or intrinsic to the sport or recreational opportunity, and (2) it must be a risk that cannot be reasonably eliminated, altered, or controlled. *Id.*

125. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

126. ARK. CODE ANN. § 16-120-202(a)(1) (Supp. 1995).

127. *Muller*, 472 S.E.2d at 450; *Gautreau*, 672 So. 2d at 264.

128. ARK. CODE ANN. § 16-120-201(3) (Supp. 1995).

Gautreau and *Muller* would not be afforded protection by the Arkansas equine liability statute. This restriction on the protected class embodied in the Arkansas statute has significant consequences. In Arkansas, negligence law will be altered in fewer situations than in neighboring states that have adopted statutes providing more comprehensive immunity.[129]

III. SAFETY PREREQUISITES

The absence of a gratuitous act requirement in equine liability statutes does not preclude the consideration of other requirements to further worthwhile objectives. One such concern is adequate encouragement of safety precautions under the statutory immunity provisions.[130] Many equine liability statutes recognize participant safety through warning sign requirements.[131] For example, some statutes require written contracts involving professional services or the rental of equipment to provide a warning notice.[132] The Arkansas equine liability statute requires equine activity sponsors to post warning signs at visible locations near areas where the equine activities are conducted.[133] The signs must read as follows:

> WARNING
>
> Under Arkansas law, an equine activity sponsor is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risks of equine activities.[134]

Signs providing this warning are expected to encourage participants to use greater care while enjoying equine activities.

While this requirement of a warning provision should be applauded, the question that should be addressed is whether this

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129. *See supra* notes 60-66 and accompanying text.

130. Immunity statutes encourage safety during acts by Good Samaritans and others through restrictions involving good faith and a reasonable and prudent person standard. *See supra* note 19 and accompanying text.

131. Terence J. Centner, *Adopting Good Samaritan Immunity for Defendants in the Horse Industry*, 12 AGRIC. & HUM. VALUES 69, 78 (1995).

132. *See, e.g.*, WIS. STAT. ANN. § 895.481(5) (West 1997).

133. ARK. CODE ANN. § 16-120-202(b)(1) (Supp. 1995). The Arkansas statute does not address the consequences of failing to post a sign. Other equine liability statutes disqualify defendants from statutory immunity for the failure to post a required sign. *See, e.g.*, LA. REV. STAT. ANN. § 9:2795.1G (West Supp. 1997).

134. ARK. CODE ANN. § 16-120-202(b)(2) (Supp. 1995).

notice provision is sufficient to promote safety, given current information and knowledge about injuries from equine activities.[135] Equine liability statutes were intended to reduce insurance and liability costs associated with equestrian mishaps; therefore, the reduction of injuries is extremely important.[136] Data on equine accidents suggests that head injuries are particularly dangerous[137] and that the low level of use of protective headgear among equestrians is a major contributor to these injuries.[138] Standards developed by the American Society for Testing Materials and certified by the Safety Equipment Institute provide information that may be used to select appropriate equestrian headgear.[139]

The United States Pony Clubs Accident Study suggests that the use of approved headgear has reduced head injuries of its riders by more than fifty percent.[140] A similar safety program of the North American Horsemen's Association (NAHA) also attests to the importance of helmets.[141] NAHA's safety program, which was developed for equine liability insurance, requires that participants be advised to wear helmets and, in some cases, requires that helmets be available.[142] Injury figures from NAHA indicated that only 8% of its injury claims involved head injuries for persons insured under its programs, as opposed to 21% to 22% for the industry as a whole.[143] Recently, NAHA has become more exacting in its protective headgear program, requir-

135. Safety legislation that has been passed for children riding bicycles raises the issue of whether similar equine legislation should be enacted. *See* GA. CODE ANN. § 40-6-296(e)(1) (1997) (requirements for helmets of children riding on public ways).

136. *See, e.g.*, ALA. CODE § 6-5-337(a) (1993) (noting the risks of equine activities and the liability associated with the risks).

137. *See, e.g.*, Doris Bixby-Hammett & William H. Brooks, *Common Injuries in Horseback Riding*, 9 SPORTS MED. 36, 37 (1990) (reporting that 20% of horse-related injuries occur to the head and face); David E. Nelson et al., *Helmets and Horseback Riders*, 10 AM. J. PREVENTIVE MED. 15, 15 (1994) (reporting that studies in Australia and Sweden indicate that 70% of deaths from horse-related activities are the result of head injuries).

138. Corrine Condie et al., *Strategies of a Successful Campaign to Promote the Use of Equestrian Helmets*, 108 PUB. HEALTH REP. 121 (1993); Bixby-Hammett & Brooks, *supra* note 137, at 41.

139. David E. Nelson et al., *supra* note 137, at 18.

140. Drusilla E. Malavase, *United State Pony Clubs Accident Study*, 7 AM. MED. EQUESTRIAN ASS'N NEWS 6, 7 (1996).

141. NAHA 1993 YEARBOOK, *supra* note 8, at 8-9.

142. *Id.* at 10.

143. *Id.*

ing a Safety Equipment Institute certified American Society for Testing Materials standard F-1163 equestrian riding helmet.[144]

Given the reported data on head injuries, equestrians should be encouraged to wear helmets. It is essential that participants in equine activities become more aware of the importance of wearing a helmet.[145] Strategies associated with other recreational activities may offer ideas to achieve greater safety in conjunction with equine activities. A conspicuous comparison is bicycle riders and the tactics that have been employed to encourage the use of bicycle helmets.[146] A purview of state legislation reveals that at least thirteen states have enacted provisions concerning bicycle helmet requirements and other requirements involving bicycle sales and rentals.[147] Although Arkansas has not adopted provisions regarding bicycle helmets for minors, the special dispensation of the equine liability statute may justify a different legislative scheme for minors who engage in equine activities.

A. Encouraging the Use of a Helmet

An initial provision that would encourage the use of headgear in dangerous sport activities is a requirement of a sign or other statement at appropriate facilities.[148] While many equine liability statutes require activity sponsors to post signs warning

144. NORTH AMERICAN HORSEMEN'S ASSOCIATION 1995 YEARBOOK OF NEWS, NAHA RISK REDUCTION PROGRAMS, CONTRACTS & LEGAL AGREEMENTS ARE UPDATED 10 (1995).

145. *See* Bixby-Hammett & Brooks, *supra* note 137, at 46 (arguing that the medical community has a responsibility to educate equestrians about the benefits of wearing approved headgear).

146. ALA. CODE §§ 32-5A-280 to -286 (Supp. 1996); CAL. VEH. CODE § 21212 (West Supp. 1997); 1997 Conn. Pub. Acts 46; DEL. CODE ANN. tit. 21, § 4198L (Supp. 1996); FLA. STAT. ANN. § 316.2065 (West Supp. 1997); GA. CODE ANN. § 40-6-296(e) (1994); MD. CODE ANN., TRANSP. II § 21-1207.1 (Supp. 1996); MASS. GEN. LAWS ANN. ch. 85, §§ 11B-11D (West 1993 & Supp. 1997); N.J. STAT. ANN. §§ 39:4-10.1 to -.4 (West Supp. 1997); N.Y. VEH. & TRAF. LAW § 1238 (McKinney 1996), *as amended by* 1996 N.Y. Laws 16; R.I. GEN. LAWS § 31-19-2.1 (Supp. 1996); TENN. CODE ANN. §§ 55-52-101 to -106 (1993); W. VA. CODE §§ 17C-11A-1 to -9 (1996).

147. *See supra* note 146.

148. For example, some of the ski activity statutes that provide immunity for the inherent risks of skiing require signs to be posted. *See, e.g.*, COLO. REV. STAT. ANN. §§ 33-44-107, -112 (West Supp. 1997) (requiring signs and limiting liability).

persons of the dangers of the sport's inherent risks,[149] the equine statutes do not require notice about the importance of a helmet. The absence of such a requirement in equine liability statutes may be contrasted with state laws concerning bicycle sales and rentals.[150] To encourage safety and promote the use of a bicycle helmet, businesses engaged in selling or renting bicycles in Massachusetts[151] and New Jersey[152] must display a sign regarding the use of a bicycle helmet. A few bicycle statutes also preclude businesses from renting bicycles to minors without a helmet.[153]

The promotion of helmets for equine activities could be effected through a requirement that equine activity sponsors advocate the use of a helmet in warning signs.[154] For example, section 16-120-202(b)(2) of the Arkansas equine liability statute could read as follows:

> The signs described in subdivision (b)(1) of this section shall contain the following warning notice:
>
> WARNING
> Under Arkansas law, to provide for safer activities, riders are encouraged to wear a helmet. An equine activity spon-

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149. Some statutes also require warnings in written contracts. *See* Centner, *supra* note 2, at 1015-17, 1038-39.

150. MASS. GEN. LAWS ANN. ch. 85, § 11D (West 1993 & Supp. 1997); N.J. STAT. ANN. §§ 39:4-10.1-.4 (West Supp. 1997).

151. MASS. GEN. LAWS ANN. ch. 85, § 11D (West 1993 & Supp. 1997). The Massachusetts provision requires a sign to be posted, in an area conspicuous to customers, stating that "Massachusetts law requires that a bicycle helmet be worn by persons twelve years of age and under who are operators or passengers on a bicycle." MASS. GEN. LAWS ANN. ch. 85, § 11D (West 1993 & Supp. 1997).

152. N.J. STAT. ANN. § 39:4-10.3 (West Supp. 1997). The New Jersey provision states as follows:

> A person regularly engaged in the business of selling or renting bicycles shall post a sign at the point where the sale or rental transaction is completed stating: "STATE LAW REQUIRES A BICYCLE RIDER UNDER 14 YEARS OF AGE TO WEAR A HELMET."

N.J. STAT. ANN. § 39:4-10.3 (West Supp. 1997).

153. For example, FLA. STAT. ANN. § 316.2065 (West Supp. 1997) states that

> [a] person may not knowingly rent or lease any bicycle to be ridden by a child who is under the age of 16 years unless:
>
> 1. The child possesses a bicycle helmet; or
> 2. The lessor provides a bicycle helmet for the child to wear.

FLA. STAT. ANN. § 316.2065 (West Supp. 1997); *see also* ALA. CODE § 32-5A-284 (Supp. 1996) (requiring businesses renting bicycles to provide a helmet to any person who is required to wear a helmet).

154. *See* Centner, *supra* note 131, at 74.

> sor is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities.

Through this small amendment to the warning provision of the Arkansas equine liability statute, riders would be more likely to wear helmets, and the statute could further the objective of safer equine activities.[155] Equine activity sponsors are already required to post a warning;[156] the proposed amendment simply alters the language so equine participants will become more aware of the advantages of wearing a helmet. However, by stating that riders are encouraged to wear a helmet, the provision would not create an affirmative duty.[157]

B. Safety of Minors

The existence of bicycle helmet statutes indicates that some state legislatures have deemed legislation necessary to champion the safety of children riding bicycles.[158] "[T]o reduce the incidence of disability and death resulting from injuries incurred in bicycling accidents," bicycle statutes require minors to wear helmets while riding a bicycle on property open to the public.[159] Generally, this requirement applies to minors who are less than sixteen years of age,[160] but California requires helmets for persons less than eighteen years of age,[161] and Rhode Island only

155. Rather surprisingly, none of the various equine liability statutes addresses the issue of helmets. *See supra* note 6 (listing the state equine liability statutes).

156. ARK. CODE ANN. § 16-120-202(b)(2) (Supp. 1995).

157. Concern has been raised about the potential of equine liability statutes to create duties. *See* Centner, *supra* note 2, at 1036-37. While the statutes do intend to create duties concerning warning notices, most of them do not intend to create other duties. Perhaps equine liability statutes should incorporate a caveat from recreational use statutes that the provisions are not intended to create a duty of care or ground for liability. *See, e.g.*, ARK. CODE ANN. § 18-11-303(1) (1987) (providing that the Arkansas Recreational Use Statute does not create any duties).

158. *See, e.g.*, TENN. CODE ANN. § 55-52-102 (1993) (stating that "[d]isability and death of children resulting from injuries sustained in bicycling accidents are a serious threat to the public health, welfare, and safety of the people of Tennessee"); *see also supra* note 146 (listing the bicycle statutes).

159. ALA. CODE § 32-5A-282 (Supp. 1996). The Alabama statute also makes it unlawful for any parent or guardian to knowingly permit a minor to ride a bicycle on a public way without a helmet. ALA. CODE § 32-5A-283 (Supp. 1996).

160. *See, e.g.*, ALA. CODE § 32-5A-282 (Supp. 1996).

161. CAL. VEH. CODE § 21212(a) (West Supp. 1996).

covers children less than nine years of age.[162] The provisions are limited to persons riding on public highways, bicycle paths, and sidewalks.[163] By that, the statutes do not affect bicycle activities on private property.[164] These statutes attest to the belief that additional protection of young children is warranted.

Given the safety protection afforded children who ride bicycles, why not provide young equestrians equivalent protection from head injuries? This protection could be accomplished by amending equine liability statutes to require minors engaging in equine activities on public property to wear a helmet. For the Arkansas equine liability statute,[165] a new section 16-120-202(d) could incorporate the provisions. The suggested subsection could read as follows:

> (d) To provided for safer equine activities, no person under the age of sixteen (16) years shall ride an equine on property that is being made available for use by the general public without wearing a helmet.
>
> (1) For the purposes of this subsection, the term "helmet" means a piece of protective headgear which meets or exceeds the F-1163 impact standards for equestrian riding helmets set by the American Society for Testing Materials and certified by the Safety Equipment Institute.
>
> (2) For the purposes of this subsection, a person shall be deemed to wear a helmet only if a helmet of good fit is fastened securely upon the head with the straps of the helmet.
>
> (3) Violation of any provision of this subsection shall not constitute negligence per se or contributory negligence per se or be considered evidence of negligence or liability. No person under the age of sixteen (16) who fails to comply with any provision of this subsection may be fined or imprisoned.

The last two sentences of this proposal address whether a violation of the statute should be available to prove negligence. A

162. R.I. GEN. LAWS § 31-19-2.1 (Supp. 1996).

163. *See, e.g.*, GA. CODE ANN. § 40-6-296(e)(1) (1997).

164. Cognizance of the need for a helmet on public property should encourage the use of helmets on private property. Furthermore, the use of helmets by minors would encourage the use of helmets by adults.

165. ARK. CODE ANN. § 16-120-202 (Supp. 1995).

number of states have decided that the bicycle helmet provisions should not alter negligence law.[166] To assure this result, the legislatures have stated that failure to wear a helmet is not evidence of negligence and shall not be considered as evidence of negligence or liability.[167] By incorporating this helmet requirement for minors, the Arkansas equine liability statute would help reduce head injuries and contribute to a safer recreational activity.

IV. CONCLUSION

The Arkansas equine liability statute is a creative approach to the risks and accident costs associated with equine mishaps. It alters existing negligence by providing Good Samaritan immunity in qualifying situations. By limiting the immunity to the inherent risks of equine activities and by restricting the protected class to equine activity sponsors and their employees, however, the statute does not alter negligence law in many situations. Under the general standard of conduct, a person who commits an act or omission that constitutes willful or wanton disregard for the safety of a participant does not qualify for statutory immunity. Exceptions to this general standard denote situations in which equine activity sponsors and employees may be liable for mere negligence.

Legislatures should generally be hesitant to alter existing liability provisions, especially when championed by narrow special interest groups, but a more important issue is harmony among a state's divergent legislative provisions. What standards of conduct have been adopted by the Arkansas General Assembly for various other activities? Existing Good Samaritan provisions generally provide that qualifying persons remain liable for gross negligence.[168] The new pick-your-own provisions also al-

166. *See, e.g.*, GA. CODE ANN. § 40-6-296(e)(5) (1997); 1997 Conn. Pub. Acts 46; DEL. CODE ANN. tit. 21, § 4198L (Supp. 1996); N.Y. VEH. & TRAF. LAW § 1238 (McKinney 1996), *as amended by* 1996 N.Y. Laws 16; TENN. CODE ANN. § 55-52-106 (1993).

167. *See supra* note 166.

168. *See, e.g.*, ARK. CODE ANN. § 17-95-101 (1995) (providing liability for negligence by Good Samaritans in some cases and for gross negligence in others); ARK. CODE ANN. § 6-17-107 (Repl. 1993) (delineating liability for gross negligence for teachers and counselors); ARK. CODE ANN. § 8-7-101 (Repl. 1993) (providing liability for gross negligence of persons assisting at hazardous waste accidents); ARK. CODE ANN. § 18-11-307

low plaintiffs to maintain actions in gross negligence, and, in some cases, the defendant may be held liable for negligence.[169] Under the recreational use statute, an individual does not incur liability for negligent failure to guard against an ultra-hazardous activity, but does incur liability if the failure was "malicious."[170] Thus, it may be concluded that the liability protection provided by the Arkansas equine liability statute's general standard of conduct exceeds the immunity provided by other similar legislation.

The general standard, however, may not be the critical determinant of the actual immunity provided by the Arkansas liability statute. The immunity is first limited to the inherent risks of equine activities. Next, an analysis of the protected class discloses the exclusion of participants, horse owners, judges, and veterinarians in certain cases where these persons do not meet the definition of an equine activity sponsor. Statutory exceptions regarding persons providing equipment and animals, dangerous conditions, intentional acts, and products liability law further reduce the coverage of the immunity. Finally, defendants who have engaged in egregious conduct should not escape liability due to the Arkansas equine liability statute.

Equine liability statutes grant qualifying persons immunity without requiring a gratuitous act or special benevolence. Considering other Good Samaritan statutes, this departure from the traditional Good Samaritan paradigm is unusual. However, further consideration of sport activity and pick-your-own statutes suggests that the absence of special benevolence may not be that uncommon. Yet consideration should be given to additional requirements that would encourage safer equine activities. One suggestion is to amend the statutory warning requirement to include language encouraging the use of a helmet. This suggestion would increase participants' consciousness of the safety benefits of wearing a helmet during equine activities. A second

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(1987) (establishing liability for persons making property available for recreational uses if they maliciously fail to guard or warn against an ultra-hazardous condition).

169. ARK. CODE ANN. § 18-60-107(a)-(b) (Supp. 1995). For certain conditions involving an unreasonable risk of harm, the defendant remains liable for negligence if the plaintiff establishes the statutory prerequisites. ARK. CODE ANN. § 18-60-107(b) (Supp. 1995).

170. ARK. CODE ANN. § 18-11-307(1) (1987); *see also* Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994).

recommendation is a new statutory subsection modeled after similar bicycle helmet provisions to afford minors riding horses greater safeguards against head injuries. Recognizing that persons who engage in equine activities should be responsible for taking appropriate safety precautions, the suggested helmet provision would assign responsibility to participants and their parents and require minors to wear equestrian helmets when riding on property used by the general public. Through these legislative proposals, Arkansas could retain the immunity provided by the equine liability statute yet provide equestrians a safer recreational activity.