

A "CUT AND PASTE" OF MODEL REC USE LAW TO INCLUDE PUBLIC

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At its meeting in Anaheim, California on October 21, 1986, the Board of Trustees of the National Recreation and Park Association endorsed the following policy: "It is the policy of the Trustees of the National Recreation and Park Association to encourage and help promote the enactment of state recreational use statutes." This policy was one of several statements adopted regarding the perceived "liability crisis." Under a recreational use statute, the landowner owes no duty of care to a recreational user on the premises free of charge. Although there is no liability for ordinary negligence, liability will be imposed for willful or wanton misconduct. Willful or wanton misconduct, unlike ordinary negligence, goes beyond mere carelessness; it is more outrageous behavior which demonstrates an utter disregard for the physical well being of others.

Despite the NRPA policy statement, enactment of recreational use statutes is not the real issue. Forty-nine jurisdictions have already enacted recreational use statutes. My research on this topic identified the following state code citations for existing recreational use statutes. To the best of my knowledge, each of these statutes is still good law.

Ala. Code 15-1.
Ariz. Rev. Stat. Ann. 3351.
Ark. Stat. Ann. 50-1101-1107 (1971).
Cal. Civil Code 846 (West Supp. 1981).
Col. Rev. Stat. 33-41-101-105 (1974).
Conn. Gen. Stat. Ann. 52-557f - 557i (Supp 1981).
Del. Code Ann. tit. 7, 5901-5907 (1975).
Fla. Stat. Ann. 375.251 (West 1974).
Ga. Code Ann. 105-403-409 (1968).
Haw. Rev. Stat. 520-1 to -8.
Idaho Code 36-1604 (Supp. 1981).
Ill. Ann. Stat. ch. 70 31-37 (Smith-Hurd Supp. 1981).
Ind. Code Ann. 14-2-6-3.
Iowa Code Ann. 111C.1-111C.7 (West Supp. 1981).
Kan. Stat. Ann. 58-3201-3207 (1976).
Ky. Rev. Stat. Ann. 150.645 (Baldwin Supp. 1980).
La. Rev. Stat. Ann. 9:2795 (West Supp. 1981).
Me. Rev. Stat. Ann. tit. 12, 3001-3005 (Supp. 1981).
Md. Nat. Res. Code Ann. 5-1102-1108 (1974).
Mass. Gen. Laws Ann. ch. 21 17C (West 1973).
Mich. Comp. Laws Ann 300.201 (1967).
Minn. Stat. Ann. 87.01-87-026 (1977).
Miss. Code Ann. 89-2-1 et seq. (1985).
Mo. Stat. Ann. 537.345-537.347.
Mont. Code Ann. 70-16-301-302.

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Neb. Rev. Stat. 37-1001-1008 (1978).
Nev. Rev. Stat. 41.510 (1979).
N.H. Rev. Stat. Ann. 212:34 (1978).
N.J. Stat. Ann. 2A:42A-2-42A-5 (West Supp. 1981).
N.M. Stat. Ann. 17-4-7 (1978).
N.Y. Gen. Oblig. Law 9-103 (McKinney Supp. 1981).
N.C. Gen. Stat. 113-120.5-120.6 (1975).
N.D. Cent. Code 53-08-01-06 (1974).
Ohio Rev. Code Ann. 1533.181 (Page 1978).
Okla. Stat. Ann. 76, 10-15 (West 1976).
Ore. Rev. Stat. 105.655-105.680 (1979).
Pa. Stat. Ann. tit. 68, 477-1-477-8 (Purdon Supp.
R.I. Gen. Laws , 32-6-1 to -7.
S.C. Code 27-3-10-70 (1977).
S.D. Comp. Laws Ann. 20-9-5 (Supp. 1979).
Tenn. Code Ann. 51-801-805 (1977).
Tex. Rev. Civ. Stat. Ann. art. 16 (Vernon 1969).
Utah Code Ann. 5714-1 to -7.
Vt. Stat. Ann. tit. 10 5212 (1973).
Va. Code 29-130.2 (Supp. 1981).
Wash. Rev. Code Ann. 4.24.200-210
W. Va. Code 19-25-25-6 (1977).
Wis. Stat. Ann. 2968 (West 1973).
Wyo. Stat. 34-19-101-106 (1977).

With minor variations, many of the above cited forty-nine laws adhere to the format of a model statute described below. This model statute, entitled "Public Recreation on Private Lands: Limitations on Liability," appeared in the 1965 edition of *Suggested State Legislation* from the Council State Governments. To date, state courts in only nineteen jurisdictions have considered directly or indirectly the applicability of these statutes to public entities. Of this number, twelve jurisdictions have extended limited recreational use immunity to public entities. Under the terms of the Federal Tort Claims Act, these statutes are uniformly held applicable to the federal government. (For a further discussion of the applicability of recreational use statutes to public entities, see the "NRPA Law Review" for October and November 1986, and February 1987.)

Perhaps the real policy issue before the National Recreation and Park Association is, therefore, to encourage and help promote the modification of existing recreational use statutes to broaden existing immunity to include public park and recreation agencies. With this objective in mind, I have superimposed language from existing recreational use statutes in various jurisdictions. The purpose of this rather crude "cut and paste" endeavor is to illustrate the manner in which minor modifications to the 1965 model statute can broaden the immunity of this legislation to expressly include most public entities. Further, these suggested modifications would extend such immunity to most lands and activities involving public park and recreation agencies. (Modifications to the 1965 model statute appear in italicized capital letters. The state statutes from which this language is derived are also noted in parentheses.)

1965 MODEL ACT AS MODIFIED

[Title should conform to state requirements. The following is a suggestion: "An act to encourage landowners to make land and water areas available to the public by limiting liability in connection therewith."]

(Be it enacted, etc.)

Section 1. The purpose of this act is to encourage owners of land to make the land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

Section 2. An used in this act:

(a) "Land" means PRIVATE OR PUBLIC, (Idaho, Washington) land, IMPROVED OR UNIMPROVED (Maine), WHETHER URBAN OR RURAL, (Washington), [including] roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(b) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises ,including ANY PRIVATE CITIZEN, A MUNICIPALITY, THE STATE OR THE FEDERAL GOVERNMENT, AND ANY EMPLOYEE OR AGENT OF THE FOREGOING, (Wisconsin).

,OR ANY PUBLIC ENTITY AS DEFINED IN THE (applicable provision of the state code) WHICH HAS AN INTEREST IN LAND. (Colorado).

"PERSON" INCLUDES ANY INDIVIDUAL REGARDLESS OF AGE, MATURITY OR EXPERIENCE, OR ANY CORPORATION, GOVERNMENT OR GOVERNMENTAL SUBDIVISION OR AGENCY, BUSINESS TRUST, ESTATE, TRUST, PARTNERSHIP, OR ASSOCIATION, OR ANY OTHER LEGAL ENTITY. (Colorado).

(c) "Recreational Purpose" includes, but is not limited to, any SPORTS OR RECREATIONAL ACTIVITY OF WHATEVER NATURE UNDERTAKEN BY A PERSON WHILE USING THE LAND, INCLUDING PONDS, LAKES, RESERVOIRS, STREAMS, PATHS, AND TRAILS APPURTENANT THERETO. OF ANOTHER AND INCLUDES, BUT IS NOT LIMITED TO, ANY HOBBY, DIVERSION, OR OTHER SPORTS OR OTHER RECREATIONAL ACTIVITY SUCH (Colorado) the following, or any combination thereof: hunting, fishing, CAMPING (Colorado), swimming, boating, camping, picnicking, hiking, HORSEBACK RIDING, SNOWSHOEING, CROSS COUNTRY SKIING, BICYCLING, RIDING OR DRIVING MOTORIZED RECREATIONAL VEHICLES, SWIMMING, ROCK CLIMBING... OR ENGAGING IN ANY OTHER FORM OF SPORTS OR OTHER RECREATIONAL ACTIVITY (Colorado), INCLUDING PRACTICE AND INSTRUCTION IN ANY THEREOF (New Jersey), pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites, OR OTHER SIMILAR ACTIVITIES UNDERTAKEN FOR RECREATION, EXERCISE, EDUCATION,

RELAXATION, OR PLEASURE ON LAND OWNED BY ANOTHER (Missouri). IT SHALL INCLUDE ENTRY, USE OF AND PASSAGE OVER PREMISES IN ORDER TO PURSUE THESE ACTIVITIES. (Maine).

(d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land. However, charge or consideration DOES NOT INCLUDE... THOSE ENTRANCE FEES PAID TO THE STATE, ITS AGENCIES OR DEPARTMENTS, MUNICIPALITIES, OR THE U.S. GOVERNMENT. (Wisconsin)

Section 3. Except as specifically recognized by or provided in Section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Section 4. Except as specifically recognized by or provided in Section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

- (a) Extend any assurance that the premises are safe for any purpose.
- (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
- (c) Assume responsibility for or incur liability for any injury to persons or property caused by an act or omission of such persons.

Section 5. Unless otherwise agreed in writing, the provisions of Section 3 and 4 of this act shall be deemed applicable to the duties and liability of an owner leases to the state or any subdivision thereof for recreational purposes.

Section 6. Nothing in this act limits in any way any liability which otherwise exists:

- (a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
- (b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

Section 7. Nothing in this act shall be construed to:

- (a) Create a duty of care or ground of liability for injury to persons or property.

(b) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this act to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

Section 8. [Insert effective date.]

REMOVE AMBIGUITY FROM STATUTE

It has been said that no one should witness how laws or hot dogs are made. Because if you do, you will not be able to stomach either. One of the ways laws are made is to adopt language from similar statutes in other jurisdictions. This is the approach taken in the "cut and paste" public immunity statute described above. In determining whether a particular recreational use statute applies to public entities in a given jurisdiction, state courts will look primarily to the expressed language of the statute. Consequently, the modifications described above are intended to remove any uncertainty or ambiguity that the state legislature intended to confer broad public immunity under an existing recreational use statute.

Expand "Land" definition: Expanding the definition of land to expressly include public land effectively rebuts the original presumption of the model statute that such statutory immunity was intended for private landowners, not governmental units. In addition, the inclusion of references to urban and improved land would reverse the interpretation by some state courts (e.g. New York, New Jersey, Louisiana) that this statutory immunity is limited to rural or unimproved land. Further, the statutory definitions of "owner" and "person" have been modified with language from recreational use laws in Wisconsin and Colorado to expressly include governmental units.

Expand Scope of "Recreational Purpose": Some jurisdictions, most notably Louisiana, have limited the scope of recreational use immunity to activities traditionally conducted in the "true outdoors," i.e. primarily rural in nature. Expanding the enumerated list of recreational activities to include sports, hobbies, diversions, and any other recreational activity with language from the Colorado effectively rejects this narrow construction of the statute.

Entrance Fees not a "Charge": Ordinarily, recreational use immunity is lost if a fee is charged for the use of the premises. Including language from the Wisconsin statute, expressly excludes entrance fees from this statutory definition of "charge" as an exception to recreational use immunity.