

FOREST AND WOODLOT

Reducing Recreation Liability Risk

When People Come Onto Your Land to Play, Make Sure You Don't Have to Pay.

By Gary Goff & Tommy Brown

Editor's note: This article is part of a series focusing on risk management funded by the New York Crop Insurance Education Program under the Risk Management Agency (USDA) and the NYS Department of Agriculture & Markets. The information in this article does not substitute for good legal advice. We suggest that you discuss your concerns with your attorney and insurance agent.

We live in a lawsuit-prone society. What would happen if a snowmobiler is seriously injured cutting through your land? Or a trespasser is pinned in the collapse of a dilapidated outbuilding? Or a hunter accidentally shoots someone on your property?

Could any of these result in a lawsuit that could threaten your farm?

The answer is, of course: "It depends." But there are practical steps you can take to reduce your liability in the event someone using your property for recreational purposes gets hurt.

In general, the law is on your side – assuming you are a reasonable and responsible landowner. Every Northeast state has recreational-use statutes. These laws recognize that landowners who allow others to use their land for recreation are providing a public service. The intent of these laws is to encourage landowners to allow recreational activities on their lands by limiting the liability of those who do so.

These statutes vary in some aspects from state to state, but are very similar in many ways. Understanding the basics of these statutes will help you decide whether to allow various uses of your land, and then help you manage your remaining liability to anyone using your land for recreation, including trespassers.

Aside from granting access as a good neighbor, there are several mutually beneficial reasons to allow recreation on your land. For example, recreational hunting or trapping can help you manage nuisance wildlife such as deer, geese, muskrats, and beaver. If harvesting timber is an objective, allowing visitors to remove low-grade trees (non-commercial firewood cutting is covered by limited liability statutes in some states) can improve growth of higher value trees. The periodic presence of neighbors and friends on your land can discourage trespassers and unwanted activities.

GET RID OF HAZARDS

"Limited liability statutes" cover all non-commercial (free access) recreation activities in most states, with the notable exception that the New York law does not cover swimming. In some states, covered recreational activities also include gleaning, gathering wood, and improving the land for a given activity. (See the online Table of State Liability Laws listed in the Resource Spotlight for the statute in your state.)

The extent of your liability generally varies depending on whether or not you allow access "free of charge." Maine law allows some payment to owners if it is not for exclusive access to the property and if the use is not primarily commercial. Massachusetts law allows a voluntary contribution to be made to the owner. In other states any payment voids the limited liability offered under the statutes.



Providing recreational access to your lands can provide neighbors with unique opportunities without burdening you with too much risk.
Photo courtesy Steve Morreale

The limited liability statutes in each state are very similar about the duty of care landowners owe to recreationists. When they apply, the laws state that the landowners do not assume responsibility for injuries caused to recreationists, nor do they have the duty to keep the premises safe for use by others, nor must they give warning of hazardous conditions.

However, owners aren't protected from liability if they "willfully or maliciously" fail to guard or warn against a hazardous condition or use, or in other states, if they engage in "willful, wanton, or reckless conduct."

Some examples of cases where owners have been found liable despite the protection of limited liability statutes include maintaining on the property an unprotected open well, a hazardous fallen-in building, or a high structure with deteriorated walkways. Natural hazards such as steep slopes or lakes and streams generally don't put landowners at risk.



Recreational vehicle access is commonly included in most states limited liability laws.
Photo courtesy Arctic Cat.

Where owners were found liable, plaintiffs successfully showed that the owner:

- Knew about the condition.
- Failed to minimize the hazard.
- Knew people engaged in recreation activities in the area.
- Had the opportunity to warn people about the hazard, but failed to do so.

Note that even a trespasser could potentially win a lawsuit in any state in the Northeast involving this type of hazard. So you need to protect yourself against such hazards. Get rid of them if at all possible. If that isn't possible, put barricades around them and post "Keep Out" and warning signs.

SUITS ARE NOT LIKELY

Generally, limited liability statutes carry the same weight regardless of whether you have given permission to a recreationist or not, and regardless of whether your property is posted or not.

Limited liability statutes have held up very well in court cases, even on appeal to higher courts. In New York, for example, the basic limited liability statute was enacted in 1956. Since then, we have not found one case that was decided against a private landowner for activities covered under the statute, except for the type of obvious hazards (such as abandoned wells and old buildings) referred to earlier. A very small number had to be appealed to a higher court,

Claimants can bring suits regardless. But their legal council is unlikely to pursue a case when these statutes can be invoked in defense because the chance of a favorable decision is extremely small.

Many landowners are further protected by their liability insurance policies. Most include an "obligation to defend" clause stipulating that the insurance company will provide the insured with an attorney at no cost should the landowner be sued. If your

policy does not include that clause, you may still win the case, but you will be responsible for your legal fees.

If you have livestock, be sure to check with your agent to make sure that you are covered should livestock injure recreationists.

PAY TO PLAY?

What if you charge people to use your property for recreation? A genuine gift given after the experience as a "thank you" (not required nor expected) for access typically does not invalidate limited liability statutes. But receipt of special consideration or compensation – money, goods, or services – in payment for access generally shifts more responsibility to the landowner. In such circumstances, landowners do have the responsibility to keep the property in a reasonably safe condition and must warn the user of any known dangerous conditions that could cause injury.

Keep in mind that even a verbal agreement is a legal and binding contract when both parties know of and expect that access to the land is contingent upon some form of "payment." So it is wise to prepare a written contract – with the aid of an attorney – that spells out the specifics of the agreement. A good contract that protects both parties against "surprises" is well worth the modest cost.

Obviously, you should also inform and work with your insurance company regarding any "pay-to-play" endeavors. Few homeowner insurance policies will cover suits brought against the landowner where recreationists are required to make payment for access. Usually for a small premium increase, you can add a rider in the policy that covers specific, occasional "for-fee" uses.

It is a good idea to have all recreationists using your property sign a "hold harmless" or "waiver of liability" form to release the landowner of liability for specific activities and specific types of injuries. For example, hunters should acknowledge that other hunters may be on the land while they are there, and recreation vehicle users should acknowledge that they know they may encounter fences and gates on your property. Such a document will not provide absolute protection, but it will strengthen your case should you end up in court. Note however that hold harmless releases are not valid for minors, even if their parents sign the waiver.

There is much you can do as a landowner to manage liability obligations to recreationists who use your land. (See summary sidebar: How to reduce recreational use risks.) Be aware of legal obligations and take reasonable precautions. If you use common sense and are smart about transferring most of the obligations (including insurance and legal fees) to the users, your obligations need not be worrisome, or costly.

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How to Reduce Recreational Use Risks

- Understand the basics of recreational-use liability statutes.
- Know who is likely to be on your land, when they will be there and what activities they will be pursuing.
- Identify what dangers exist.
- Eliminate known hazards.
- If you can't eliminate a hazard, barricade it and/or post warning signs.
- Inform users of the potential hazards.
- Check the provisions of your home- or farm-owner liability policy. Make sure your insurance agent knows about recreational activities on your property and be sure that the scope of activities and settlement coverage are adequate.
- If you are leasing recreational access to others, work with your lawyer to prepare contracts with clearly detailed provisions that adequately protect both your rights and the rights of the lessees.

Resource Spotlight Reducing Recreation Liability Risk

Recreational Access and Owner Liability. Tommy Brown. Fact Sheet. DNR, Coop. Ext., Rm. 108, Fernow Hall, Cornell Univ., Ithaca, NY 14853. 4pgs. www.dnr.cornell.edu/ext/info/pubs/index.htm

Publications from Natural Resource, Agriculture, and Engineering Service (NRAES). See links below or request catalog from: NRAES, P.O. Box 4557, Ithaca, NY 14852-4557. Phone: (607) 255-7654.

Forest Landowner's Guide to Evaluating and Choosing a Natural Resource-based Enterprise. Jonathan Kays and Joy Drohan. NRAES-151. www.nraes.org/publications/nraes151.html

"Recreational Access to Private Lands: Liability Problems and Solutions." John Copeland. pgs. 237-250 In Natural Resources Income Opportunities for Private Lands Conference, Hagerstown, MD. 1998. NRAES-140. 275pgs. www.nraes.org/publications/nraes140.html

Table of State Liability Laws. www.imba.com/resources/trail_issues/liability_chart.html

Hunting Leases that Protect the Landowner and the Resource. Robert Malmshiemer and David Colligan. NY Forest Owner. July-Aug., 2001: pgs. 8-10.

New York Forest Owners Association, 1-800-836-3566 or online at www.nyfoa.org.