Landowner's Liability for Land Users and Statutory Protection for Landowners

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Introduction

The right to exclude others from privately owned land is considered one of the most fundamental rights that an American property owner possesses. Landowners in this country enjoy the sense of autonomy that comes with owning a tract of land and hold dear the right that allows them its exclusive use and benefit. However, this country is losing open spaces at a phenomenal rate and attitudes towards the sovereign use of land have begun to slowly change. The population in this country is steadily suburbanizing and is in greater need than ever for access to lands that provide outdoor recreational activities.

Many state governments have enacted statutes that limit the liability of a landowner with regard to the users of his land. These statutes provide a shield to landowners that help insulate them from liability for injuries to users of their land, and therefore, encourage landowners to open their land for use by the general public. However, protective statutes notwithstanding, landowner liability is still a primary concern for property owners and farmers alike. As open lands continue to dwindle in size and number, and public lands fail to keep up with the demands placed upon them, illegal trespassing onto private lands for recreation, hunting and other activities has unfortunately increased. It is important that landowners and farmers know their rights and responsibilities when others use their land (both legally and illegally); it is the objective of this essay to provide an overview of general tort principles and specific Pennsylvania law as related to the liability of landowners when others use their land both with permission and without.

Dangers Facing Land Users

Agriculture is a highly dangerous occupation. In 1992, there were 1,200 agriculturally related deaths in this country and an additional 140,000 serious injuries.[1] It stands to reason, therefore, that both invited and uninvited users of farmland will be exposed to many of the same risks and dangers that farmers and ranchers are exposed to everyday. A small sampling of some of the potential risks that land entrants may face on a piece of agricultural land

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[1] *The Center does not provide legal advice, nor is its work intended to be a substitute for such advice and counsel.*

include exposure to a multitude of fertilizers and other chemicals, exposure to large and potentially dangerous farm and domestic animals, the risk of coming into contact with highly dangerous farm machinery, dangers from the land itself including such things as holes and deep water lakes and ponds, and finally, risks from negligent farm employees for which the farmer may be vicariously liable.[2]

Causes of Action Against Landowners

When a user of land is injured on the land, it is quite likely that a lawsuit will be filed against the landowner regardless of the level of the landowner's involvement in the situation. It is further likely that the lawsuit will include claims for compensation for the injury, compensation for pain and suffering, negligent infliction of emotional distress, and medical expenses and lost wages.

Two types of tort-based claims may be made against a landowner in a situation where a land entrant is injured on the land. The first is a claim for the imposition of strict liability against the landowner.[3] Strict liability (**liability without fault**) is based upon the notion that some activities are so inherently or abnormally dangerous that liability should be imposed without a finding of fault regardless of whether the defendant (landowner) exercised reasonable care. In a strict liability action, the plaintiff does not need to show a breach of duty, but does need to prove causation and damages. Typical examples of actions that will give rise to the imposition of strict liability include statutory violations, injuries caused by abnormally dangerous animals and injuries caused by abnormally dangerous activities like blasting, transporting hazardous materials and application of poisons and other chemicals to crops (crop dusting).[4]

A second tort claim that may be made against the landowner is a claim that the landowner has acted negligently.[5] Most agricultural tort actions are, in fact, based on negligence and not strict liability. This is good for the farmer because under an accusation of negligence, he will have a chance to prove the standard of care that he provided in a certain situation, which is obviously something that he would not get a chance to show the court in an action progressing under a strict liability theory. As discussed above, **negligence is the failure to exercise ordinary care such as a reasonably prudent and careful person under similar circumstances would exercise**. The four primary parts to a negligence claim are duty, breach of duty, actual harm done to another, cause-in-fact, and proximate cause. Under a negligence claim, the primary question the court will analyze is the level of the duty of care owed by the landowner to the land entrant/user. This level of the duty of care will depend mainly upon the classification of the land user.

Limiting or Expanding the Duty of Care According to Context or Relationship

Trespassers

A trespass is defined as, "any unconsented to or unauthorized intrusion or invasion of private premises or land of another."[6] In other words, a trespasser is one who enters or remains upon the land without the landowner's consent. "Trespass to land" includes the following elements:[7]

1. The intentional entry upon land of another.
2. Intent includes either purpose to enter or substantial certainty that entry will take place.
3. In trespassory torts, the defendant is liable for damages even if no physical or economic harm is done to the land.
4. There is no requirement that the defendant be conscious of wrongdoing.

The duty of care owed to trespassers is very low. The rule in many jurisdictions is that the landowner only needs to refrain from willful, wanton or reckless conduct that could harm a trespasser. A hunter, for example, who enters upon the land of another to hunt without any permission from the landowner would be a trespasser and owed only the minimal level of care from the landowner. The analysis does, however, grow more complicated if the trespasser is a discovered trespasser or a tolerated trespasser. In other words, if the landowner is aware that someone has been coming onto his land repeatedly for whatever purpose, the landowner must use reasonable care toward the trespasser or, depending on the frequency and duration of the toleration, may even have a duty to make the premises safe or to provide a warning of dangers that the trespasser would not likely discover on his own.

In addition to tolerated trespassers, a landowner may have a special duty with regard to child trespassers. Most jurisdictions, including Pennsylvania, apply section 339 of the Restatement (Second) of Torts, commonly referred to as the attractive nuisance or child trespasser doctrine. This doctrine requires that the following elements be met in order to win on a claim of attractive nuisance against a landowner:[8]

1. Trespass by children is foreseeable
2. Landowner knows or has reason to know of the danger
3. The child, by reason of age, will not be able to protect himself from the danger.
4. The burden of eliminating the danger is slight compared to the gravity of the potential harm. (Called the Risk Utility Formula)
5. The landowner fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

Under the attractive nuisance doctrine, a landowner can be held liable for injuries to a trespassing child when the same landowner would not be held liable were the trespasser an adult. An attractive nuisance is anything that may capture the interest of a child and attract the child to trespass onto land in order to investigate the object that is attracting them. Examples of things that have been classified by courts as attractive nuisances include tractors and other farm machinery, lakes and ponds, farm animals, easily accessed barns and storage sheds, et cetera.[9] Because children do not possess the level of reasoning that most adults do, they may very well be attracted to a dangerous item or area of rural land that could pose a great risk to their safety. The Superior Court of Pennsylvania set forth the rule for determining whether or not a thing is an attractive nuisance in the case, *Murdock v. Pennsylvania Railroad Company*.[10] The court states:

"The amount of use that will bring otherwise private ground within the playground rule must depend to a large extent on the circumstances of each case. It may be said that the use contemplated is such as to cause the place to be generally known in the immediate vicinity as

a recreation center, and its occupancy should be shown to be of such frequency as to impress it with the obligation of ordinary care on the part of the owner." The court further states, "To compel the owners of such property either to enclose it or fill up their ponds and level the surface so that trespassers may not be injured would be an oppressive rule. The law does not require us to enforce any such principle even where the trespassers are children. It would be extending the doctrine [attractive nuisance doctrine] too far to hold that a pond of water is an attractive nuisance."

What the *Murdock* court was essentially saying is that the determination of whether or not a thing is an attractive nuisance is heavily factual and depends greatly upon the individual situation in question. However, the court makes clear that things like farm ponds, streams, and other such features of the land are not attractive nuisances per se. Such things only become attractive nuisances if, as the above quote states, the pond or other land feature is an open and notorious, "recreation center" that children have been attracted to for a significant period of time or if there is some reason that the pond or other land feature constitutes an, "unusual danger." Then, the landowner would have a heightened duty to make the premises as safe as possible.[11]

Licensees

A licensee is a person who is invited onto land by the landowner for social purposes that have no economic value to the landowner.[12] Examples of licensees include social guests and unsolicited door-to-door sales people. A hunter who has permission to hunt on private property but does not have to pay a fee would also be considered a licensee.

It is important to remember that in Pennsylvania, failure to post no hunting or no trespassing signs along the boundaries of privately owned property is considered implied permission for anyone to enter the property for hunting and fishing activities and these land entrants are considered licensees and protected as such.

The duty of care that landowners owe to licensees is higher than that owed to trespassers. The landowner has the duty to warn licensees of known dangers. This means that the landowner must warn the licensee about any dangerous conditions that the landowner knows are on the land and knows that the licensee will not discover on his own. However, there is no positive duty of the landowner towards licensees to inspect for dangerous conditions or to repair dangerous conditions once they are discovered.

Invitees

The third and final category of land users is that of invitee. An invitee is a person who is invited onto private land (either expressly or impliedly) for the financial benefit of the landowner.[13] A landowner who charges people for the use of his land to either hunt, fish, or recreate in some other manner owes the highest level of legal duty to the paying land users. The landowner must not merely warn the invitee of known dangers, but must go further by actively inspecting the land and premises to find dangerous conditions and then alert the land users of the conditions. Further, the landowner has a duty to repair found dangers to the extent that repair is feasible. The exact duty a landowner owes to an invitee does alter somewhat with different factual situations, but the overall duty owed to invitees is the highest out of any of the three classifications of land users.

Statutory Protection for Landowners

Pennsylvania's *Recreation Use of Land and Water Act*[14]

Many states have enacted what are known as recreational use statutes. The purpose of these statutes is to provide immunity from personal injury lawsuits filed against a landowner by a person who was physically injured while using that particular landowner's land. 68 P.S. § 477-1 is Pennsylvania's recreational use statute and the following is a breakdown of the law and its significant parts:

TITLE 68. REAL AND PERSONAL PROPERTY
CHAPTER 11. USES OF PROPERTY
RECREATION USE OF LAND AND WATER

Purpose of the Act

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

Definitions

1. **Land** — land, roads, water, watercourses, private ways and buildings, structures and machinery or equipment when attached to the realty.
2. **Owner** — means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.
3. **Recreational Purpose** — includes, but is not limited to: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports, cave exploration and viewing or enjoying historical, archaeological, scenic, or scientific sites.
4. **Charge** — means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

In short this Act provides:

Overview of Act Provisions

- The Act generally provides that an owner of land owes no duty 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 the premises.

- The Act protects landowners from liability when their land is used for recreational purposes by the public without charge, whether or not the landowner has invited or permitted the public to enter his land. (See ***Friedman v. Grand Central Sanitation, Inc.*** in endnote 10).
- The only time a landowner's liability is not limited under the Act is for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity or if the landowner charges for entry onto his land.
- The Act only provides liability protection to individuals who have a legal interest in the land.
- Absent a legal interest in a particular parcel of land, the act provides no protection
- However, the definition of "owner" and court interpretations have allowed for a broad concept of landowner. An owner of land, under the Act, includes not only fee holders of land title, but lessees, occupants, or even persons who are simply in control of the land. This broad-sweeping definition helps to encourage greater recreational use of land because the liability risk for recreational groups such as leasing hunt clubs is significantly reduced.
- Generally, the more restrictions the landowner places upon his land, the less likely he is to be protected by the Act.

In addition to liability for physical injuries, there are other areas of liability related to the recreational use of land that landowners should be aware of. For example, the Americans with Disabilities Act, which became law on July 26, 1990, prohibits private entities from discriminating against an individual on the basis of his or her disability.[15] In the land use context, this would mean that a landowner who holds his land open to use by the public may face a liability action at some point if he fails to provide appropriate access to his land for people with various disabilities.

Discrimination is another potential liability hotspot that landowners who open their land to the public may encounter. A private landowner would not be allowed to discriminate on the basis of race, color, religion or national origin because Title II of the Civil Rights Act of 1964 prohibits this type of discrimination.[16] Recreational facilities made available to the public would fall within the ambit of Title II's non-discrimination provisions.

U-Pick Statute

A second Pennsylvania law that limits the liability of farmers with regard to land entrants is

42 Pa. C.S. § 8339, commonly referred to as the "U-Pick" statute. U-Pick operations are rapidly growing in popularity across this country. A U-Pick operation is any farming operation that allows the general public to enter onto private farmland for the purpose of self-picking berries, Christmas trees, fruits, vegetables, pumpkins and any other agricultural products for a fee. U-Pick operations benefit the public by allowing people the opportunity to go "down on the farm" and get some fresh air and outdoor family-oriented recreation while the operations benefit the farmers by giving them the opportunity to create strong bonds with the non-farming community while representing agriculture in a positive light.

While U-Pick operations are very productive for both the community and the farmers, many farmers have been historically unwilling to expose themselves to the great liability risks that come along with inviting members of the public to parade all across your farm property. The Pennsylvania legislature realized the great benefits of the U-Pick operations and passed 42 Pa. C.S. § 8339 to provide immunity from liability for farmers who operate a U-Pick business. The following is the "U-Pick" statute in its entirety:

42 Pa. C. S. § 8339
Title 42 Part VII Chapter 83 Subchapter C
Agricultural Immunity

General Rule — No cause of action shall arise against the owner, tenant or lessee of land or premises for injuries to any person, other than an employee or contractor of the owner, tenant or lessee, who is on the land or premises for the purpose of picking and purchasing agricultural or farm products at a farm or "u-pick" operation, unless the person's injuries were caused by a condition which involved an unreasonable risk of harm and all of the following apply:

1. The owner, tenant or lessee knew or had reason to know of the condition or risk.
2. The owner, tenant or lessee failed to exercise reasonable care to make the condition sake or to warn the person of the condition or risk.

Definitions — As used in this section, the term "Agricultural or Farm Products" means the natural products of the farm, nursery, grove, orchard, vineyard, garden and apiary, including, but no limited to, trees and firewood.

Liability Insurance and Recreational Use

*****A special thanks goes to the Kauffman Insurance Agency and the Millville Mutual Insurance Company for providing the Ag Law Center with a copy of a typical Pennsylvania Farmers Comprehensive Personal Liability Policy*****[17]

In addition to looking towards tort law principles and the agricultural immunity statutes discussed above, farmers often seek the liability protection offered by a typical farmers comprehensive personal liability policy (FCPL). By paying premiums to an insurance carrier, farmers secure liability protection through insurance companies who absorb the risk and pay the costs of bodily injury or property damage claims.

While the typical FCPL does protect farmers in many instances of liability situations on the farm, one area for which a standard FCPL does not provide coverage is recreational use of the farmer's land. The policy that was sent to us here at the Ag Law Center includes coverage for bodily injury and property damage arising out of farming activities, but does not extend this coverage to non-farming business use of land that a farmer may participate in. What this means in a nutshell is that recreational activities are not included in a standard FCPL policy. This can be very risky for landowners who charge a fee for recreational activities on their property. Because the Recreational Use Statute excludes protection for landowners who charge a fee for the use of their land, and because even insured farmers will not ordinarily be covered under a standard FCPL, any farmer who charges for the recreational use of his property is fully exposing his own wallet to tort liability lawsuits.[18] However, farmers in Pennsylvania who do not charge a fee are ordinarily protected by the Recreational Use Statute, and depending upon their non-farming operation, may also be protected by the U-Pick statute.

In short, farmers and landowners need to be very wary and make sure that they fully understand both the law and their insurance coverage before even entertaining the idea of engaging in a non-farming business use on their land. However, farmers should not be discouraged to open up their lands to use by the general public. There is enough protection afforded through both insurance companies and the legislation of Pennsylvania to ensure that smart farmers and landowners have little to worry about when it comes to land use liability. Furthermore, by opening large tracts of private farmland to the general public, farmers can improve their image and help bring the realization to the public as a whole that farming and open spaces are vital to America's longevity and prosperity and are well deserving of protection and respect.

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[1] John D. Copeland, *Recreational Access to Private Lands: Liability Problems and Solutions*, Natural Resources Income Opportunities for Private Lands Conference, April 5-7, 1998, p. 237-250, 238.

[2] Vicarious liability is the imposition of liability on one person for the tortious actions of another, based solely on the relationship between the two parties; employer-employee, for example.

[3] John D. Copeland, *Recreational Access to Private Lands: Liability Problems and Solutions*, Natural Resources Income Opportunities for Private Lands Conference, April 5-7, 1998, p. 237-250, 239.

[4] See ***Lobozzo v. Adam Eidemiller, Inc.***, 437 Pa. 360, (1970) for an example of a court assigning strict liability to ultrahazardous activity. In this case, the defendant was blasting large sections of a public highway. The Supreme Court of Pennsylvania discusses strict liability at length in this opinion and concluded that, "If blasting, even though carefully performed, causes damage, it by that fact becomes "tortious" and actionable, and one whose property is injured or destroyed may have recovery."

[5] *Id.* at 239.

[6] Black's Law Dictionary 1566 (6th ed. 1990).

[7] See ***Rossino v. Kovacs***, 553 Pa. 168, (1998). In this case, the Supreme Court of Pennsylvania discusses in detail the elements of trespassing and the duty of care owed by landowners to trespassers.

[8] ***Beckett v. Kamaratos***, 40 Pa. D. & C.4th 410, 413 (1998).

[9] John D. Copeland, *Recreational Access to Private Lands: Liability Problems and Solutions*, Natural Resources Income Opportunities for Private Lands Conference, April 5-7, 1998, p. 237-250, 240.

[10] See ***Murdock v. Pennsylvania Railroad Company***, 150 Pa. Super. 156, (1942). In this case, young boys were attracted to a pond on property owned by the railroad. One of the boys drowned in the pond one day while swimming. The court held that the railroad company owed no greater duty to these boys than it did to ordinary trespassers because the use of the pond was not so obvious as to be known by the railroad company.

[11] It is interesting to note that in Pennsylvania, the attractive nuisance doctrine has been extending to livestock. In, Hagey v. Pennsylvania Railroad Company, 6 Pa. D & C 621, (1925), the court allowed the use of the attractive nuisance doctrine when a farmer's cattle were attracted to poison laid down by defendant railroad company to kill weeds. The court reasoned that the railroad company knew that this particular poison was peculiarly attractive to cows and that there is no reason why the attractive nuisance doctrine should not apply to livestock.

[12] See ***Ashman v. Sharon Steel Corp.***, 302 Pa. Super. 305, (1982), for description of a licensee and the duty of care that is owed to individuals categorized as licensees.

[13] See ***Ashman v. Sharon Steel Corp.***, 302 Pa. Super. 305, (1982), for description of an invitee and the duty of care that is owed to individuals categorized as invitees.

[14] See ***Champ v. Butler County***, 18 Pa. D. & C. 3d 282, (1981). See this case for a thorough history and description of the *Recreation Use of Land and Water Act*. Further, the court held in

this case that the availability of the limited statutory immunity provided by the *Recreation Use Act* must be derived solely from the provisions of the statute (the state, as defendant, claimed governmental immunity in this case).
See also, ***Ithier v. City of Philadelphia***, 137 Pa. Commw. 103, (1991). In this case, a young boy suffered lacerations when swimming in a community swimming pool. The boy's mother filed a civil action against the city alleging that the city was negligent in knowingly allowing a dangerous condition to exist at the swimming pool and failing to take any measures to protect children from possible injury. On appeal, the Commonwealth Court held that the city could not seek the protection of the *Recreation Use Act* because a swimming pool is considered an improvement to the land and the protections of the Act do not extend to improvements made upon the land.
See also, ***Friedman v. Grand Central Sanitation, Inc.***, 524 Pa. 270, (1990). In this case, the Supreme Court of Pennsylvania held that 68 P.S. § 477-3 granted immunity to the owner of land without reference to whether the owner invited or permitted others onto his or her property. The court held that if it ignored the plain language of the Act and held that the Act as a whole applied only to landowners that invited or permitted others to recreate on the land, § 477-3 would be reduced to mere surplusage. The court held that there was no principle of statutory construction that would permit it to ignore the plain language of § 477-3.

[15] *Id.* at 244.

[16] *Id.*at 244.

[17] Kauffman Insurance Agency. HCR 63 Box 65 Mifflintown, PA 17059. Phone: (717) 436-8257. Millville Mutual Insurance Company. P.O Box 280 Millville, PA 17846. Phone: (717) 458-5517.

[18] John D. Copeland, *Recreational Access to Private Lands: Liability Problems and Solutions*, Natural Resources Income Opportunities for Private Lands Conference, April 5-7, 1998, p. 237-250, 247.