Introduced: 3/17/89
Referred: Judiciary

6-0667A

IN THE SENATE BY DUNCAN

SENATE BILL NO. 229

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to liability for damage or injury resulting from hazardous recreational activities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. An [HOWEVER, NO] action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment,

false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(4) is an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity conducted on property owned, managed, or leased by the state.

* Sec. 2. AS 09.50.250 is amended by adding new subsections to read:

(b) The provisions of (a)(4) of this section do not limit liability that would otherwise exist for an act of gross negligence by the state or an employee of the state that is the proximate cause of the damage or injury.

(c) Nothing in this section limits the liability of an independent concessionaire, or a person or organization other than the state or an employee, whether or not the person or organization has a contractual relationship with the state to use the property owned, managed, or leased by the state, for injury or damage suffered as a result of a hazardous recreational activity operated by the concessionaire, person, or organization on property owned, managed, or leased by the state.

(d) In this section,

(1) "hazardous recreational activity" means a recreational activity that creates a substantial risk of injury to a participant;

(2) "participant" means

(A) a person directly involved in the activity in question at the time of the injury or damage;

(B) a person who assists another to participate in the activity; or

(C) a spectator who

(i) knew or reasonably should have known that the activity created a substantial risk of injury to the spectator; and

(ii) was voluntarily in the place of risk or, having the ability to do so, failed to leave.

* Sec. 3. AS 09.65.070(e) is repealed and reenacted to read:

(e) In this section

(1) "hazardous recreational activity" and "participant" have the meanings given in AS 09.50.250(d);

(2) "municipality" has the meaning given in AS 01.10.060 and includes a public corporation established by the municipality;

(3) "nonprofit entity" means an entity

(A) incorporated under AS 10.20; or

(B) exempt from taxation under 26 U.S.C. 501(c)(3) (Internal Revenue Code of 1954);

(4) "village" means an unincorporated community where at least 25 people reside as a social unit.

* Sec 4. AS 09.65.070 is amended by adding new subsections to read:

(f) A person may not bring an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity if the action is against

(1) a municipality, or an agent, officer, or employee of a municipality, and the activity was conducted

(A) by the municipality; or

(B) on property owned, managed, or leased by the municipality; or

(2) a municipality, or a nonprofit entity whose recreational activities are cosponsored by a municipality under the terms of an ordinance adopted by the municipality for a period of not more than five years, or an agent, officer, or employee of the municipality or nonprofit entity, and the activity was conducted by the nonprofit entity, or jointly by the municipality and the nonprofit entity, on

property owned, managed, or leased by the municipality.

(g) The provisions of (f) of this section do not limit liability that would otherwise exist for an act of gross negligence by a municipality, a nonprofit entity, or an agent, officer, or employee of a municipality or nonprofit entity that is the proximate cause of the damage or injury.

* Sec. 5. This Act takes effect July 1, 1989.

SENATE BILL 229 BY SENATOR DUNCAN

CHANGES FROM SB 229 TO PROPOSED CSSB 229

Section 2, page 2, line 12, after "state":

Insert "or an employee of the state"

This makes the language in subsection (c) consistent with that in section 2, page 2, subsection (b), line 9.

6-0667E ✓
Ford
4/14/89

Original sponsor: Duncan

IN THE SENATE

CS FOR SENATE BILL NO. 229 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to liability for damage or injury resulting from hazardous recreational activities; and providing for an effective date."

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* Section 1. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. An [HOWEVER, NO] action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment,

false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(4) is an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity conducted on property owned, managed, or leased by the state.

* Sec. 2. AS 09.50.250 is amended by adding new subsections to read:

(b) The provisions of (a)(4) of this section do not limit liability that would otherwise exist for an act of gross negligence by the state or an employee of the state that is the proximate cause of the damage or injury.

(c) Nothing in this section limits the liability of an independent concessionaire, or a person or organization other than the state or an employee of the state, whether or not the person or organization has a contractual relationship with the state to use the property owned, managed, or leased by the state, for injury or damage suffered as a result of a hazardous recreational activity operated by the concessionaire, person, or organization on property owned, managed, or leased by the state.

(d) In this section,

(1) "hazardous recreational activity" means a recreational activity that creates a substantial risk of injury to a participant;

(2) "participant" means

(A) a person directly involved in the activity in question at the time of the injury or damage;

(B) a person who assists another to participate in the activity; or

(C) a spectator who

(i) knew or reasonably should have known that the activity created a substantial risk of injury to the

spectator; and

(ii) was voluntarily in the place of risk or, having the ability to do so, failed to leave.

* Sec. 3. AS 09.65.070(e) is repealed and reenacted to read:

(e) In this section

(1) "hazardous recreational activity" and "participant" have the meanings given in AS 09.50.250(d);

(2) "municipality" has the meaning given in AS 01.10.060 and includes a public corporation established by the municipality;

(3) "nonprofit entity" means an entity

(A) incorporated under AS 10.20; or

(B) exempt from taxation under 26 U.S.C. 501(c)(3) (Internal Revenue Code of 1954);

(4) "village" means an unincorporated community where at least 25 people reside as a social unit.

* Sec. 4. AS 09.65.070 is amended by adding new subsections to read:

(f) A person may not bring an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity if the action is against

(1) a municipality, or an agent, officer, or employee of a municipality, and the activity was conducted

(A) by the municipality; or

(B) on property owned, managed, or leased by the municipality; or

(2) a municipality, or a nonprofit entity whose recreational activities are cosponsored by a municipality under the terms of an ordinance adopted by the municipality for a period of not more than five years, or an agent, officer, or employee of the municipality or nonprofit entity, and the activity was conducted by the nonprofit

entity, or jointly by the municipality and the nonprofit entity, on property owned, managed, or leased by the municipality.

(g) The provisions of (f) of this section do not limit liability that would otherwise exist for an act of gross negligence by a municipality, a nonprofit entity, or an agent, officer, or employee of a municipality or nonprofit entity that is the proximate cause of the damage or injury.

* Sec. 5. This Act takes effect July 1, 1989.

BY SENATOR DUNCAN

Senate Bill 229

"An Act relating to liability for damages or injury resulting from hazardous recreational activities."

Section 1.

Adds another exception to 09.50.250, ACTIONABLE CLAIMS AGAINST THE STATE. The new paragraph provides that legal action may not be taken if the claim, (4) is an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity conducted on property owned, managed, or leased by the state.

Section 2.

Adds a new section with exceptions to section 1. Suit could be filed against the state for an act of gross negligence by the state or an employee of the state that is the proximate cause of the damage or injury. In addition, liability is not limited for an independent concessionaire, or a person or organization other than the state, even if the concessionaire, person or organization has a contractional relationship with the state to use the property under state control.

"Hazardous recreational activity" means a recreational activity that creates a substantial risk of injury to a participant.

"Participant" means a person directly involved in the activity in question; a person who assists another to participate; or a spectator who knew or should have known of the potential risk; and voluntarily placed himself at risk or, failed to leave.

Section 3.

Adds reference to "hazardous recreational activity" and "participant," defined in section 2 and, location of "municipality" and "nonprofit entity" definitions to the AS 09.65.070 (e) paragraph in the Suits Against Incorporated Units of Local Government section.

Section 4.

Adds new sections to apply the provisions of section 1 of this bill to:

municipalities,

nonprofit entities whose recreational activities are cosponsored by a municipality, and their

agents, officers, and employees.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 229
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: 12-Apr-89
Agency Affected: Natural Resources
Title: An Act relating to liability for injury; hazardous activity.
BRU: Land & Water Mgmt
Sponsor: Senator Duncan
Components: Land & Water Mgmt
Requestor: Senate Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0					

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessa

Prepared by: Larry Ostrovsky
Phone: 465-2400
Division: Commissioner's Office
Date: 12-Apr-89

Approved by Commissioner: Lennie Gorsuch
Date: 12-Apr-89
Agency: Department of Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: SB 229
Publish Date: 3/89

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act relating to liability for damage injury resulting from hazardous recreational activities
BRU: Trial Courts
Sponsor: Duncan
Components:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 04/10/89

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 04/10/89
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: SB 229
Publish Date:

FISCAL NOTE

REQUEST:

Revision Date:
Title: * see below

Agency Affected: Department of Administration
BRU: Risk Management

Sponsor: Duncan
Requestor: Senate Judiciary

Components:

* An Act relating to liability for damage or injury resulting from hazardous recreation activities.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Fiscal benefit is difficult to project because the State has had very few claims involving these circumstances. However, the exposures are certainly substantial. The fiscal note is zero because the legislation will have little or no effect on our present insurance costs which are based on experience. Certainly passage of this bill may save considerable in defense costs, should future claims occur.

Prepared By: Donald J. Hitchcock
Phone: 465-2180
Division: Risk Management
Date: 4-11-89

Approved by Commissioner: John M. Andrews
Date: 4/11/89
Agency: Department of Administration

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

6/9D1/041104-9

Rev: 12/21/88

Resolution of the Alaska Municipal League

Resolution No. 89-55

A RESOLUTION RECOMMENDING ADOPTION OF AN ACT RELATING TO GOVERNMENT LIABILITY FOR DAMAGE OR INJURY RESULTING FROM HAZARDOUS RECREATIONAL ACTIVITIES

WHEREAS, the Alaska Municipal League urges the State to exercise its responsibility to provide a broad spectrum of recreation opportunities for all Alaskans, and

WHEREAS, certain common recreational activities have an inherent risk of injury, which under current state statutes limits the State and its local governments in their ability to provide recreational opportunities to Alaska's citizens, and

WHEREAS, municipalities are having to reduce or close recreational services because liability insurance is either unavailable or too expensive, and

WHEREAS, voluntary organizations help provide communities with a broad spectrum of recreational activities not being offered by the public sector, and establishing a cooperative relationship under the local government would enable them to provide programs they might not otherwise be able to provide, and

WHEREAS, the President's Commission on Americans Outdoors has recommended that the standard of care for which an organization or government should be responsible in providing recreational opportunity be shifted from "mere negligence" to "gross negligence";

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the Alaska State Legislature to adopt an act relating to government liability for damage or injury resulting from hazardous recreational activities.

Adopted this 18th day of November 1988 in Fairbanks, Alaska.

Heather Flynn, President

ATTEST:

Scott A. Burgess, Executive Director

DATE: April 12, 1989

TO: Senate Judiciary Committee

FROM: James G. Dumont
Alaska Recreation and Park Association

SUBJECT: Senate Bill 228 and Senate Bill 229

I would like to introduce myself. I am James G. Dumont, a member of the Alaska Recreation and Park Association (ARPA), representing that body. ARPA represents approximately 130 members statewide who work in or volunteer their time to park and recreation departments regardless of the size of the community.

ARPA, as a member of the Alaska Municipal League, has been deeply involved in the question of tort reform and the increasing number of claims filed each year against the recreation and park operators.

As you know, recreation and leisure activities have never been more important to the American public. It is paradoxical that record numbers of citizens are visiting parks and participating in recreation, sports, and leisure activities and are also suing the providers of these services for all types of injuries. Litigation has become the nation's secular religion and it is practiced regularly against public and private park, recreation, sports, and leisure enterprises. As a result, law and liability have become synonymous terrors to the managers of these services. In the last few years, providers of recreation and leisure services have experienced a dramatic increase in the numbers and seriousness of legal liability claims against them, their directors, administrators, employees, and elected officials.

The nation-wide problem of recreation and sports litigation is a signal of changes in our society. Today's lawsuits, as described by one author is "a reflection that individuals are loosing a sense of community feeling and are moving from a 'we' to a 'me' attitude". Thus, the attitude the users have taken is that if an injury occurs, it is the fault of the sponsor and staff, never the fault of the user.

The same time that people are more willing to sue, they are also more willing to participate in high-risk sports. Recreational activities with greater risk, such as hang gliding, rock climbing, and sailboarding, are increasing in popularity. While there are more risks that people are willing to "take", there are fewer risks that they are willing to "accept". As recreation and park providers, we recognize our obligation to provide safe facilities and programs for Alaskans. The passage of these bills will not deter our responsibility to the public.

ARPA wants to maintain the variety and uniqueness of recreation and park programs within the communities of Alaska. Thus, ARPA has worked with the National Recreation and Park Association on training statewide providers, has brought to Alaska nationally recognized leaders to instruct our members in the safe operation of our parks, facilities, and programs; and has taken a small part in the efforts to bring before you the bills presented today by Senator Duncan.

In your packets you will find copies of the resolutions passed by the Alaska Recreation and Park Association and the Alaska Municipal League on January 29 in support of these bills and have been working with local elected officials to generate community support for them.

ARPA is standing ready to assist you, the Legislature, in the formation and passage of recreation bills that will guarantee the continuation of inexpensive recreation and park programs in Alaska. Without the passage of these bills, or bills like these, recreation and park programs will soon be too expensive to offer because of increased insurance costs or not provided by communities at all because of the risk they pose to our limited resources. The President's Commission on "Americans Outdoors" endorses that state governments enact or improve recreational use statutes to provide greater protection to governmental entities and provide providers who allow the public to use their land for recreation.

In closing, ARPA would like to thank Senator Duncan for his efforts with these bills and for you, the members of this committee, for considering them. We again offer our assistance to you if you so require.

Alaska Recreation and Park Association

P.O. Box 102664
Anchorage, Alaska 99510-2664

A RESOLUTION RECOMMENDING ADOPTION OF SENATE BILL 229
AN ACT RELATING TO GOVERNMENT LIABILITY FOR DAMAGE OR INJURY
RESULTING FROM HAZARDOUS RECREATIONAL ACTIVITIES

WHEREAS, the Alaska Recreation and Park Association urges the State to exercise its responsibility to provide a broad spectrum of recreation opportunities for all Alaskans, and

WHEREAS, certain common recreational activities have an inherent risk of injury which under current state statutes limit the State and its local governments in their ability to provide recreational opportunities to its citizens; and

WHEREAS, municipalities are having to reduce or close recreational services because liability insurance is either unavailable or too expensive, and

WHEREAS, voluntary organizations help provide communities with a broad spectrum of recreational activities not being offered by the public sector and establishing a cooperative relationship under the local government would enable them to provide programs they might not otherwise be able to provide; and

WHEREAS, the President's commission on Americans Outdoors has recommended that the standard of care for which an organization or government should be responsible in providing recreational opportunity be shifted from "mere negligence" to "gross negligence".

NOW, THEREFORE, BE IT RESOLVED that the Alaska Recreation and Park Association urges the Alaska State Legislature to adopt an act relating to government liability for damage or injury resulting from hazardous recreational activities.

Section
101. Vacancies
106. Quorum of directors
111. Executive committee
116. Place and notice of directors' meetings
121. Officers
126. Removal of officers
131. Books and records
136. Shares of stock and dividends prohibited
141. Loans to directors and officers prohibited

Sec. 10.20.005. Purposes. Corporations may be organized under this chapter for any lawful purpose, including, but not limited to, one or more of the following: charitable; religious; benevolent; eleemosynary; educational; civic; cemetery; patriotic; political; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial, or trade association purposes. Trade unions and other labor organizations may also be organized under this chapter, but cooperative corporations, electric and telephone cooperatives, and organizations subject to state insurance or banking laws may not be organized under this chapter. (§ 1 ch 99 SLA 1968)

Opinions of attorney general. — There is nothing in this chapter which would prevent a nonprofit corporation organized thereunder from owning a public utility which was not operated or managed as a cooperative. June 7, 1976, Op. Att'y Gen.

An electrical utility owned and operated by a regional electrical authority would continue to qualify for the broad exemption from the Alaska Public Utilities Commission Act, AS 42.05.010 — 42.05.721, available to political subdivisions under AS 42.05.711(b) once the regional electrical authority had completed its proposed organization as a nonprofit corporation pursuant to this chapter. June 7, 1976, Op. Att'y Gen.

Although there is no other express language in the Electric and Telephone Cooperative Act, AS 10.25.010 et seq., which purports to make it the exclusive means of organizing nonprofit cooperative associations for the development of utility services, this would certainly be a reasonable inference based upon AS 10.25.620 and upon the exclusionary language of this section which eliminates the nonprofit corporation as an alternative. June 7, 1976, Op. Att'y Gen.

Collateral references. — 18 Am. Jur. 2d, Corporations, § 32.

Sec. 10.20.007. Corporations organized under Alaska Native Claims Settlement Act. A village corporation organized under 43 U.S.C. 1601 — 1628 (Alaska Native Claims Settlement Act) may be incorporated under and subject to this chapter except the name of the corporation may not contain the word "village" or otherwise imply that the corporation is a municipal corporation; however, the name of a village may be the corporate name. (§ 3 ch 193 SLA 1972)

TITLE 26

INTERNAL REVENUE CODE

SUBTITLE A—INCOME TAXES—Continued

CHAPTER 1—NORMAL TAXES AND SURTAXES—Continued

SUBCHAPTER F—EXEMPT ORGANIZATIONS

Part

I. General rule.
II. Private foundations.
III. Taxation of business income of certain exempt organizations.
IV. Farmers' cooperatives.
V. Shipowners' protection and indemnity associations.
VI. Political organizations.
VII. Certain homeowners associations.

1976 Amendment. Pub.L. 94–455, Title XXI, § 2101(d), Oct. 4, 1976, 90 Stat. 1899, added part VII heading.

1975 Amendment. Pub.L. 93–625, § 10(3), Jan. 3, 1975, 88 Stat. 2119, added part VI heading.

1969 Amendment. Pub.L. 91–172, Title I, § 101(j)(58), Dec. 30, 1969, 83 Stat. 532, added part II heading, and redesignated former parts II, III and IV as parts III, IV and V, respectively.

PART I—GENERAL RULE

Sec.

501. Exemption from tax on corporations, certain trusts, etc.
502. Feeder organizations.
503. Requirements for exemption.
504. Status after organization ceases to qualify for exemption under section 501(c)(3) because of substantial lobbying.
505. Additional requirements for organizations described in paragraph (9), (17), or (20) of section 501(c).

1984 Amendment. Pub.L. 98–369, Title V, § 513(b), July 18, 1984, 98 Stat. 865, added item 505, applicable to years beginning after Dec. 31, 1984.

1976 Amendment. Pub.L. 94–455, Title XIII, § 1307(d)(3)(B), Oct. 4, 1976, 90 Stat. 1728, added item 504.

1969 Amendment. Pub.L. 91–172, Title I, § 101(j)(61), Dec. 30, 1969, 83 Stat. 532, struck out item relating to section 504.

§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) **Exemption from taxation.**—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) **Tax on unrelated business income and certain other activities.**—An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II, III, and VI of this subchapter, but (notwithstanding parts II, III, and VI of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) **List of exempt organizations.**—The following organizations are referred to in subsection (a):

(1) any[1] corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation—

(A) is exempt from Federal income taxes—

(I) under such Act as amended and supplemented before July 18, 1984, or

(II) under this title without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act, or

(B) is described in subsection (*l*).

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(5) Labor, agricultural, or horticultural organizations.

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder.

(8) Fraternal beneficiary societies, orders, or associations—

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

(9) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(11) Teachers' retirement fund associations of a purely local character, if—

(A) no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and

(B) the income consists solely of amounts received from public taxation, amounts received from assessments on the teaching salaries of members, and income in respect of investments.

(12)(A) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists

Sec. 01.10.060. Definitions. In the laws of the state, unless the context otherwise requires,

(1) "action" includes any matter or proceeding in a court, civil or criminal;

(2) "daytime" means the period between sunrise and sunset;

(3) "month" means a calendar month unless otherwise expressed;

(4) "municipality" means a political subdivision incorporated under the laws of the state that is a home rule or general law city, a home rule or general law borough, or a unified municipality;

(5) "nighttime" means the period between sunset and sunrise;

(6) "oath" includes affirmation or declaration;

(7) "peace officer" means any officer of the state troopers, members of the police force of any incorporated city or borough, United States marshals and their deputies, and other officers whose duty it is to enforce and preserve the public peace;

(8) "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person;

(9) "personal property" includes money, goods, chattels, things in action, and evidences of debt;

(10) "property" includes real and personal property;

(11) "real property" is coextensive with land, tenements, and hereditaments;

(12) "signature" or "subscription" includes the mark of a person who cannot write, with the name of that person written near the mark by a witness who writes the witness's own name near the name of the person who cannot write; but a signature or subscription by mark can be acknowledged or can serve as a signature or subscription to a sworn statement only when two witnesses so sign their own names to the sworn statement;

(13) "state" means the State of Alaska unless applied to the different parts of the United States and in the latter case it includes the District of Columbia and the territories;

(14) "writing" includes printing. (§ 4 ch 62 SLA 1962; am § 2 ch 66 SLA 1965; am § 10 ch 117 SLA 1968; am § 19 ch 74 SLA 1985)

Revisor's notes. — Reorganized in 1985 to alphabetize the defined terms.

Effect of amendments. — The 1985 amendment added paragraph (4).

NOTES TO DECISIONS

Cited in Foltz-Nelson Architects v. Kobylk, Sup. Ct. Op. No. 3273 (File No. S-2050), P.2d (1988).

Applied in Clark v. State, Ct. App. Op. No. 716 (File No. A-1840), 738 P.2d 765 (1987).

Quoted in Hull v. Alaska Fed. Sav. & Loan Ass'n, Sup. Ct. Op. No. 2605 (File No. 6346), 658 P.2d 122 (1983).

Chapter 65. Miscellaneous Provisions.

Section		Section	
70.	Suits against incorporated units of local government	115.	Bad check civil penalties
90.	Civil liability for emergency aid	120.	Definition of death
91.	Civil liability for responding to disaster	132.	[Repealed]
97.	Civil liability for emergency veterinary care	150.	Duty to disabled pedestrians

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Cross references. — For limitation on liability of certain volunteer guardians ad litem, see AS 44.21.450.

Sec. 09.65.070. Suits against incorporated units of local government. (a) Except as provided in this section, an action may be maintained against a municipality in its corporate character and within the scope of its authority.

(b) A municipality may not require a person to post bond as a condition to bringing a cause of action against it.

(c) No action may be maintained against an employee or member of a fire department operated and maintained by a municipality or village if the claim is an action for tort or breach of a contractual duty and is based upon the act or omission of the employee or member of the fire department in the execution of a function for which the department is established.

(d) No action for damages may be brought against a municipality or any of its agents, officers or employees if the claim

(1) is based on a failure of the municipality, or its agents, officers, or employees, when the municipality is neither owner nor lessee of the property involved,

(A) to inspect property for a violation of any statute, regulation or ordinance, or a hazard to health or safety;

(B) to discover a violation of any statute, regulation, or ordinance, or a hazard to health or safety if an inspection of property is made; or

(C) to abate a violation of any statute, regulation or ordinance, or a hazard to health or safety discovered on property inspected;

(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;

(3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning;

to the hourly salary of the highest paid assistant attorney general times the number of hours worked. Atlantic Richfield Co. v. State, Sup. Ct. Op. No. 3096 (File No. S-1064), P.2d (1986).

When a money judgment is recovered, a trial court may award attorney's fees according to the schedule provided in Civ. R. 82(a)(1) it may award a fee "commensurate h the amount and value of legal services rendered" under subsection (a)(2) of that rule. Atlantic Richfield Co. v. State, Sup. Ct. Op. No. 3096 (File No. S-1064), P.2d (1986).

Attorney's actual travel expenses may be recovered under Civ R. 79(b) if they are necessarily incurred. Atlantic Richfield Co. v. State, Sup. Ct. Op. No. 3096 (File No. S-1064), P.2d (1986).

Chapter 63. Oath, Acknowledgment and Other Proof.

Section
40. Verification

Sec. 09.63.040. Verification. (a) When a document is required by law to be verified, the person required to verify it shall certify under oath or affirmation that the person has read the document and believes its content to be true.

(b) The person who makes the verification shall sign it before a person authorized by law to take the person's oath or affirmation.

(c) A verification made under this section may be in substantially the following form:

I _____ say on oath or affirm that I have read the foregoing (or attached) document and believe all statements made in the document are true.

_____
Signature

Subscribed and sworn to or affirmed before me at _____ _____ on _____.
(date)

_____
Signature of Officer

_____
Title of Officer

(d) If the verification is sworn to or affirmed before a notary public of the state, the notary public shall

(1) endorse after the signature of the notary public the date of expiration of the notary's commission;

(2) print or emboss the notary's seal on the document;

(3) comply with AS 44.50.060 — 44.50.080 or other applicable law.

(§ 1 ch 37 SLA 1981; am § 17 ch 85 SLA 1988)

Effect of amendments. — The 1988 amendment, effective June 2, 1988, in the verification form in subsection (c), inserted the first signature line and rewrote the first sentence, which read "_____ says on oath or affirms that he (or she) has read the foregoing (or attached) document and believes all statements made in the document are true."

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be authorized to speak for all and by the execution of a private agreement deprive them of vested rights by attempting to make their interests dependent upon the performance of a legal duty, as by an agreement that the use of the alley might be refused to any adjoining property owner declining to pay the proportional share of any tax, assessment, or upkeep expense. Crease v. Jarrell (1924) 224 P. 702, 65 C.A. 554.

7. —— Cost of improvements, maintenance and repair

Under grant of easement providing that if grantee should "desire to use said easement," the cost of "improving same" should be borne equally by owners of dominant and servient tenement, "use" of the easement meant development of easement by constructiug roadway thereon and hence grantee, by recording "declaration of election to use easement," agreed to construction of roadway and to obligation to pay half of its cost. McManus v. Sequoyah Land Associates (1966) 49 Cal. R. tr. 592, 240 C.A.2d 348, 20 A.L.R.3d 1015.

Some of owners of private easement over and along a dirt road did not have right, without consent of all abutting property owners, who were co-owners in the easement, to cut trees, install culverts, regrade, widen, and pave the road and enforce contribution from the dissenting owners toward cost of such improvements. Holland v. Braun (1956) 294 P.2d 51, 139 C.A.2d 626.

Under provision of this section that, if easement in nature of private right of way is owned by more than one person, "cost of maintaining it in repair" should be shared by each owner, paving of dirt road, which run along a private easement, was not "maintaining it in repair". Id.

8. Actions and proceedings

In action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land and to enjoin defendants from asserting any claim therein, judgment, which provided that defendants did not have any estate, right, title, or interest in easement and were forever joined in and restrained from asserting any claim therein, but which also provided that defendants owned servient estate in fee simple, did not unreasonably restrain defendants from use of such estate. Herzog v. Grosso (1953) 259 P.2d 429, 41 C.2d 219.

9. Judgment

Judgment holding that defendant had easement in road was not ambiguous or conditional because judgment failed to specify whether defendant's right to use road was conditioned on his payment of his share of maintenance expense and, if so, what that share was and to whom it should be paid. Taormino v. Denny (1970) 83 Cal.Rptr. 359, 463 P.2d 711, 1 C.3d 679.

10. Judicial review

Where plaintiff had not applied to court for appointment of arbitrator in accordance with this section to apportion costs of easement maintenance and did not comply with other provisions of the section, he could not complain that court in his action for declaratory judgment refused to give him relief under such section. Whitson v. Goudeseune (1955) 290 P.2d 590, 137 C.A.2d 445.

§ 846. Permission to enter for recreational purposes

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picknicking, nature study, nature contacting, recreational gardening, gleaning, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

Hang gliding (see attached supplement)

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An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(Added by Stats.1963, c. 1759, p. 3511, § 1. Amended by Stats.1970, c. 807, p. 1530, § 1; Stats.1971, c. 1028, p. 1975, § 1; Stats.1972, c. 1200, p. 2322, § 1; Stats.1976, c. 1303, p. 5859, § 1; Stats.1978, c. 86, p. 221, § 1; Stats.1979, c. 150, p. 347, § 1; Stats.1980, c. 408, § 1.)

Historical Note

The 1970 amendment substituted "fishing, hunting" for "taking of fish and game" and added "riding" in the first [now, the second] paragraph; substituted "for entry or use for the above purposes" and "such purposes" for "to take fish and game, camp, hike or sightsee" and "such purpose" in the second [now, the third] paragraph; and substituted "to enter for the above purposes" for "to take fish and game, camp, hike or sightsee" in the third [now, the fourth] paragraph.

The 1971 amendment inserted the words "rock collecting" in the first [now, the second] paragraph.

The 1972 amendment included "animal and all types of vehicular riding" in the first [now, the second] paragraph.

The 1976 amendment added "spelunking" to the activities listed in the first [now, the second] paragraph.

The 1978 amendment rewrote the first paragraph which had read:

"An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for fishing, hunting, camping, water sports, hiking, spelunking, riding, including animal and all types of vehicular riding, rock collecting, or sightseeing or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in this section."; added the second paragraph; and added in the fourth paragraph "or where consideration has been received from others for the same purpose".

The 1979 amendment included "sport parachuting" in the second paragraph.

The 1980 amendment inserted in the first and third paragraphs the words "or any other interest" and "whether possessory or nonpossessory."

Forms

See West's California Code Forms, Civil.

Cross References

Wilful acts of negligence, contributory negligence, Tort liability, see § 1714.

Law Review Commentaries

Background and general effect of 1963 addition. (1963) 38 S. Bar J. 647.

Tort liability of agricultural landowners to recreational entrants: Legal problems to agriculture symposium. (1978) 11 U.C.D. Law Rev. 367.

Library References

Negligence ⇐32.
C.J.S. Negligence §§ 63(56), 63(118) et seq.

Pleading—Civil Actions, Grossman and Van Alstyne, § 943.

Notes of Decisions

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1. Validity

This section limiting liability of landowners opening their property to public for recreation does not violate equal protection. Simpson v. U. S. (C.A.1981) 652 F.2d 831.

Provision of this section exempting property owner from tort liability to motorcyclists who are trespassers or nonpaying licensees did not violate equal protection. Parish v. Lloyd (1978) 147 Cal. Rptr. 431, 82 C.A.3d 785.

This section did not deny equal protection of law on theory that it was underinclusive in that it irrationally omitted from class of persons deprived of benefit of ordinary care on part of landowner persons engaged in certain nonspecified recreational activities, or because it was overinclusive in that it granted exemption not only to owners of lands suited for recreation, but also those whose premises were generally unsuited for recreation. Lostritto v. Southern Pacific Transp. Co. (1977) 140 Cal.Rptr. 905, 73 C.A.3d 737.

2. Construction and application

Health & S.C. § 24050 et seq. placing upon operators of resort on a river the obligation to locate and warn swimmers of sunken logs, rocks, and obstructions in the water was not repealed by this section that a property owner owes no duty of care to keep its premises safe for injury or use by others for any recreational purpose. Donaldson v. U. S., (C.A.1981) 653 F.2d 414.

Whatever public policy analysis supreme court may have made in justifying its rejection of the traditional common-law distinctions that had theretofore determined a landowner's liability for injuries to persons upon his land under § 1714 making every person responsible for injury occasioned to another by his want of ordinary care or skill in the management of his property or person, supreme court had no power to and did not attempt to invalidate this section. English v. Marin Municipal Water Dist. (1977) 136 Cal. Rptr. 224, 66 C.A.3d 725.

This section constitutes an exception to § 1714 making everyone responsible for injury occasioned to another by his want of ordinary care or skill in management of his property or person and, hence, is not in conflict with decision of supreme court rejecting traditional common-law distinctions determinative of a landowner's liability under latter statute. Id.

This section is not in conflict with modern tort law because it requires a determination of circumstances of an injured person's entry and purpose thereof. Id.

3. Purpose of law

This section, which severely restricts liability of landowners who permit general public to use their land for recreation, was intended to encourage landowners to allow members of general public to use their land for recreational purposes, including vehicular riding, without incurring liability for permitting that use. Thompson v. U. S. (C.A.1979) 592 F.2d 1104.

Where injury occurred on part of terminal occupied by defendant pursuant to tideland use and occupancy permit granted by port district, fact that underlying purpose of injured party's trip was to go fishing could not absolve occupant of liability for injuries if entry by injured party on occupant's premises was not within purposes of this section absolving occupant from duty to persons who enter for recreational purposes. Smith v. Scrap Disposal Corp. (1979) 158 Cal.Rptr. 134, 96 C.A.3d 525.

Purpose of immunizing a landowner from liability for injuries received by trespassers and licensees while engaged in certain specified activities was to encourage landowners to keep their property open to public for recreational activities by limiting their liability for injuries sustained in course of those activities; legislature did not intend to immunize landowners from liability for all permissive and nonpermissive use of their properties, but only those uses which could justifiably be characterized as "recreational" in nature. Gerkin v. Santa Clara Valley Water Dist. (1979) 157 Cal.Rptr. 612, 95 C.A.3d 1022.

This section is indicative of a legislative policy to reduce growing tendency of landowners to withdraw land from recreational access by removing risk of gratuitous tort liability that a landowner might run unless he can successfully bar any entry to his property for enumerated recreational uses. English v. Marin Municipal Water Dist. (1977) 136 Cal.Rptr. 224, 66 C.A.3d 725.

4. Express invitation

In action brought pursuant to Federal Tort Claims Act (28 U.S.C.A. § 2761 et seq.) for injuries sustained in national forest recreation area when ground gave way beneath plaintiff, tossing him into hot water pool, fact issue existed as to whether sign bearing invitation to public to enter recreational area coupled with provision of public facilities could constitute an "express invitation" as contemplated by exception contained in this section limiting liability of landowners who open their property to public for recreation, precluding summary judgment. Simpson v. U. S. (C.A.1981) 652 F.2d 831.

Promotional literature published by forest service did not constitute "express invitation" to general public to hike in advertised national park, within purview of provision of this section excepting express invitees from general immunity enjoyed by real property owners who allow persons to use their property for recreational purposes. Phillips v. U. S. (C.A.1979) 590 F.2d 207.

5. Consideration

Where bureau of land management charged association which sponsored motorcycle race on federal land $10 application service fee, where bureau, as one of conditions of permit, required association to pay minimum rental charge of $10, and where association charged participant an entry fee of $6, permission to enter government land was "granted for a consideration" for purposes of provision of this section providing that limitation of liability for landowners who permit general public to use their land for recreation does not apply when permission is "granted for a consideration." Thompson v. U. S. (C.A.1979) 592 F.2d 1104.

For purposes of this section which declares that landowner has no duty to keep his premises safe for named recreational entry or use or to warn against hazards thereon even where permission was given unless injured user had directly paid "consideration" to the owner for the entry, "consideration" means some type of entrance fee or charge for permitting person to use specially-constructed facilities; bicyclist whose parents paid taxes to support municipal facilities in city park had not paid "consideration" for use of the park at time when he was injured when he sought to negotiate wooden jumping ramp, which had been placed in the park by other children, lost control, and landed on his head. Moore v. City of Torrance (App.1980) 166 Cal.Rptr. 192.

6. Sightseers

Plaintiff was "sightseer" where sole purpose of plaintiff and friends in driving up to cliff was to look at view, and thus state, under this section, owed no duty to warn of or make safe dangerous conditions on its property, and the state was not liable for injuries sustained by plaintiff when pushed off the cliff during fight with others at the top of the cliff. Blakley v. State (1980) 167 Cal.Rptr. 1, 108 C.A.3d 971.

7. Trespassers

Landowners could not be held liable for injuries sustained by motorcyclist while riding uphill on a path or trail across properties where motorcyclist admitted that he had entered properties for recreation, that neither landowner had expressly invited him to enter, that he had paid no money or other consideration for his use of properties, and that failure of landowners to take precautionary or warning measures was neither wilful nor malicious. English v. Marin Municipal Water Dist. (1977) 136 Cal.Rptr. 224, 66 C.A.3d 725.

8. Hiking

Walking does not fall within scope of "hiking" as that term is used in this sec-

tion. Gerkin v. Santa Clara Valley Water Dist. (1979) 157 Cal.Rptr. 612, 95 C.A.3d 1022.

9. Ownership of estate

Bicyclist who was using city park property for recreational purposes at a time when it was closed to the public with no supervisory personnel present, who was not an invitee nor did he pay consideration for using the facilities, and who made no allegation against city of willfulness or malicious failure to guard or warn, could not recover from city for injuries he sustained when he sought to negotiate wooden jumping ramp, which had been placed there by some other children, lost control, and landed on his head. Moore v. City of Torrance (App.1980) 166 Cal.Rptr. 192.

For purposes of this section protecting owners of estates in real property from liability for injuries to recreational users of their land, agreement providing for temporary stockpiling of defendant's dirt on property of another was a "license," not a "lease," where agreement did not provide for rent, specify stockpiling area, give defendant exclusive possession of property, or indicate intention to establish relationship of landlord and tenant, but provided that landowner would furnish temporary stockpile area only in event defendant was unable to dispose of dirt and expressly declared defendant intended to remove dirt at earliest possible date. O'Shea v. Claude C. Wood Co. (1979) 159 Cal.Rptr. 125, 97 C.A.3d 903.

Where, as a matter of law, defendant's interest in bridge from which plaintiff dove and was injured was nonpossessory, such interest did not amount to an estate in real property and, therefore, defendant was not entitled to nonsuit dismissing personal injury action based on this section which effectively relieves an "owner of any estate in real property" of liability for injuries resulting from recreational activities including water sports. Darr v. Lone Star Industries, Inc. (1979) 157 Cal.Rptr. 90, 94 C.A.3d 895.

10. Governmental entities

This section did not, in light of provisions of the Tort Claims Act (Gov.C. § 830 et seq.) applicable to government entities, confer immunity on municipality from liability for injuries sustained by motorcyclist when he struck a cable stretched across a city-owned paved road. Nelsen v. City of Gridley (1980) 169 Cal. Rptr. 757, 113 C.A.3d 87.

11. Supervision

Where bureau of land management granted association permission to hold European-style scrambles motorcycle race on federal land, where bureau did not supervise race and it was clear from provisions of permit that association had full responsibility for public safety and supervision of race, and where neither participants nor spectators relied upon bureau employees to supervise race nor were any bureau employees even present, bureau had not assumed duty to supervise safety of race, despite internal instruction memorandum requiring on-site inspections and requiring permittees to obtain liability insurance. Thompson v. U. S. (C.A.1979) 592 F.2d 1104.

12. Duty of property owners, in general

Declaration of vice-president of corporate owner of pile of dirt, which had been placed upon land of another, that corporation did not know that motorcyclist was using property and did not willfully or maliciously fail to guard or warn motorcyclist of danger was sufficient to negate willful or malicious conduct such as would impose liability upon corporation for injuries sustained by plaintiff motorcyclist when he drove off "blind sheer end" of dirt pile, thus corporation would not be liable if it were found that it was owner of estate in real property within this section to effect that such owner owes no duty to persons entering or using property for specified activities, including use made by plaintiff of dirt pile. O'Shea v. Claude C. Wood Co. (1979) 159 Cal.Rptr. 125, 97 C.A.3d 903.

Where injury giving rise to suit occurred on property of occupant pursuant to tideland use and occupancy permit of port district, this section abrogating any duty of owner of estate in real property to keep premises safe for entry or use by persons who enter for recreational purposes would apply if entry was for the protected recreational purpose. Smith v. Scrap Disposal Corp. (1979) 158 Cal. Rptr. 134, 96 C.A.3d 525.

Defendant railroad, in personal injury action brought by 16-year-old plaintiff who broke his neck and was rendered quadriplegic after diving into river off railroad's trestle, could not be held liable for failure to use ordinary care in keeping of premises or in matter of warning. Lostritto v. Southern Pacific Transp. Co. (1977) 140 Cal.Rptr. 905, 73 C.A.3d 737.

13. Hidden peril or hazardous conditions

Where any negligence claim resulted from faulty design of motorcycle racecourse or lack of control of spectators after lessee, sponsor of motorcycle race, took possession of federal land, there was no basis for finding negligence on the part of any federal employee because of failure to warn of hidden peril or to note hazardous condition of the land. Thompson v. U. S. (C.A.1979) 592 F.2d 1104.

14. Practice and procedure

Material issue of genuine fact existed as to whether party who was injured when she fell from bridge which was allegedly in dangerous condition at time she was walking her bicycle over bridge in order to use a telephone at a nearby market and to procure a candy bar was "hiking" within meaning of that term as employed in this section precluding summary judgment in favor of landowners. Gerkin v. Santa Clara Valley Water Dist. (1979) 157 Cal.Rptr. 612, 95 C.A.3d 1022.

Where, in personal injury action brought against railroad by 16-year-old plaintiff who broke his neck after diving into river off railroad's trestle, trial court granted railroad's motions for new trial on issue of willful misconduct, and for judgment notwithstanding verdict on negligence count on finding existence of contributory negligence as matter of law, but where court of appeal determined that plaintiff could not recover on negligence count because of exemption provided in this section, proper disposition would be to order dismissal of negligence cause of action leaving willful misconduct cause to proceed to one final judgment. Lostritto v. Southern Pacific Transp. Co. (1977) 140 Cal.Rptr. 905, 73 C.A.3d 737.

§ 846.5. Surveyors; right of entry and use of boundary evidence; freeways

(a) Right of entry to investigate and utilize boundary evidence is a right of surveyors legally authorized to practice land surveying and it shall be the responsibility of the owner or tenant who controls property to provide reasonable access without undue delay for making surveys with respect to property affected by the monuments or control stations of record needed.

(b) The requirements of subdivision (a) do not apply to monuments within access-controlled portions of freeways.

(c) When required for a property survey, monuments within a freeway right-of-way shall be referenced to usable points outside the access control line by the agency having jurisdiction over the freeway when requested in writing by the registered civil engineer or licensed land surveyor who is to perform the property survey. The work shall be done within a reasonable time period by the agency in direct cooperation with the engineer or surveyor and at no charge to him.

(Added by Stats.1973, c. 435, p. 903, § 1.)

Law Review Commentaries

Surveyors' right to enter land; comment. (1974) 5 Pacific L.J. 465.

Library References

Boundaries ⇐26. C.J.S. Boundaries §§ 96, 99.

Any owner of the easement, or any owner of land to which the easement is attached, may apply to any court where the right-of-way is located and that has jurisdiction over the amount in controversy for the appointment of an impartial arbitrator to apportion the cost. The application may be made before, during, or after performance of the maintenance work. If the arbitration award is not accepted by all of the owners, the court may enter a judgment determining the proportionate liability of each owner. The judgment may be enforced as a money judgment by any party against any other party to the action.

* * *

(d) The provisions of this section do not apply to rights-of-way held or used by railroad common carriers subject to the jurisdiction of the Public Utilities Commission * * *.

(Amended by Stats.1985, c. 985, § 1.)

Historical Note

1985 Amendment. Rewrote the section, which formerly read:

"The owner of any easement in the nature of a private right of way, or of any land to which any such easement is attached, shall maintain it in repair.

"If the easement is owned by more than one person, or is attached to parcels of land under different ownership, the cost of maintaining it in repair shall be shared by each owner of the easement or the owners of the parcels of land, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose. In the absence of an agreement, the cost shall be shared proportionately to the use made of the easement by each owner.

"In the absence of an agreement, any owner of the easement, or any owner of land to which the easement is attached, may apply to the superior court where the right of way is located for the appointment of an impartial arbitrator to apportion such cost. If the arbitration award is not accepted by all of the owners, the court may determine the proportionate liability of the owners, and its order shall have the effect of a judgment.

"If any one of the owners of the easement or parcels of land fails, after demand in writing, to pay his proportion of the expense, an action may be brought against him in a court of competent jurisdiction by the other owners, either jointly or severally, for contribution.

"The provisions of this section shall not apply to rights of way held or used by railroad common carriers subject to the jurisdiction of the Railroad Commission of the State of California."

Notes of Decisions

5. —— Joint rights and duties, maintenance and repair

Among factors for arbitrator to consider when apportioning cost of maintenance of private right-of-way among coowners, arbitrator may [illegible] property owner to contribute only to maintenance of that segment of right-of-way lying between his driveway and public road and distinction must be made between parcel having occupied residence and one which is unimproved. Healy v. Onstott (App. 6 Dist.1987) 237 Cal.Rptr. 540, 192 C.A.3d 612.

7. —— Cost of improvements, maintenance and repair

Since respondent owners, who had acquired 20-foot wide prescriptive easement over paved roadway, had not obtained exclusive easement, and since method for apportioning costs if no agreement is reached among owners of easement is provided by this section, remand was unnecessary for consideration of contention that respondent should be required to pay reasonable compensation for acquisition of right to use property. Applegate v. Ota (1983) 194 Cal.Rptr. 331, 146 C.A.3d 702.

§ 846. Permission to enter for recreational purposes

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Asterisks * * * indicate deletions by amendment

Nothing in this section creates a duty of care or ground of liability for injury to person or property. (Amended by Stats.1988, c. 129, § 1.)

Historical Note

1988 Legislation

The 1988 amendment inserted "hang gliding" in the activities included by "recreational purpose".

Law Review Commentaries

Public access to lands annually flooded: A constitutional analysis of section 2016 of the California fish and game code. (1984) 16 Pacific L.J. 353.

Public trust after Lyon and Fogerty: Private interests and public expectations—a new balance. (1983) 16 U.C.D.Law Rev. 631.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

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1. Validity

Simpson v. U.S. (C.A.1981) 652 F.2d 831 [main volume] on remand 564 F.Supp. 945.

2. Construction and application

Utility, which owned land under artificial lake on which plaintiff was sailing when boat mast came into contact with power lines overhanging water, was not entitled to immunity under this section since injury took place not on land underneath lake or poles and wires affixed thereto, but on navigable waters of lake. Pacific Gas and Elec. Co. v. Superior Court of Shasta County (1983) 193 Cal.Rptr. 336, 145 C.A.3d 253.

Civ.C. § 846 which limited duty of care owed by "owner of any estate or any other interest in real property" to persons using property for designated recreational purposes was not applicable to public entities; disapproving English v. Marin Mun. Water Dist., 66 Cal.App.3d 725, 136 Cal. Rptr. 224, Gerkin v. Santa Clara Valley Water Dist., 95 Cal.App.3d 1022, 157 Cal.Rptr. 612, and Moore v. City of Torrance, 101 Cal.App.3d 56, 166 Cal.Rptr. 192. Delta Farms Reclamation Dist. No. 2028 v. Superior Court of San Joaquin County (1983) 190 Cal.Rptr. 494, 660 P.2d 1168, 33 C.3d 699, certiorari denied 104 S.Ct. 277, 464 U.S. 915, 78 L.Ed.2d 257.

This section did not bar suit brought against lessor and lessee of shopping center premises by a child who was injured while jumping over an open trench in a temporary construction project near the loading dock of a market in the shopping center. Paige v. North Oaks Partners (1982) 184 Cal.Rptr. 867, 134 C.A.3d 860.

3. Purpose of law

This section was enacted to encourage property owners to allow general public to recreate free of charge on privately owned property, and has no application to land graded for development and sale. Domingue v. Presley of Southern California (App. 2 Dist. '88) 243 Cal.Rptr. 312, 197 C.A.3d 1060.

4. Express invitation

Simpson v. U.S. (C.A.1981) 652 F.2d 831 [main volume] on remand 564 F.Supp. 945.

National Forest Service literature, signs, publicity of any other type, and provision of public facilities, either singly or in combination, did not render individual expressly invited, rather than merely permitted, to enter national forest premises upon which individual was injured when he dove into creek, within meaning of this section, providing that section's limitations on duty to keep premises safe for recreational purposes do not apply to persons who are expressly invited by landowner. Chidester v. U.S., C.D.Cal.1986, 646 F.Supp. 189.

4.2. Recreational use

Fact that minor was riding his bicycle to his friend's house did not make his trip across property owner's land on occasion of bicycle accident a "recreational use" within meaning of this section. Domingue v. Presley of Southern California (App. 2 Dist.1988) 243 Cal.Rptr. 312, 197 C.A.3d 1060.

4.5. Premises

Term "premises" as used in this section refers to a tract of land suitable for recreation. Colvin by Colvin v. Southern California Edison Co. (App. 2 Dist.1987) 240 Cal.Rptr. 142, 194 C.A.3d 1306.

5. Consideration

Federal government was not shielded from liability for injuries sustained when plaintiff was injured as he dove off cabana into river under this section, where cabana was located on property leased from government and consideration was given in exchange for permission to camp on property. Graves v. U. S. Coast Guard (C.A.1982) 692 F.2d 71.

Fact that persons who used designated camping site in national forest paid a fee did not provide basis for imposing liability on Government to injured diver who was not camping and did not pay a fee to enter the park under this section where consideration has been paid for use of the land. Judd v. U.S., S.D.Cal.1987, 650 F.Supp. 1503.

8.4. Motorcyclists

Land was suitable for recreational purposes, for purpose of this section, where testimony showed property had been used by motorcyclists for a long time, regardless of whether land contained man-made structures or whether prior accidents had occurred on land. Nazar v. Rodeffer (App. 2 Dist.1986) 229 Cal.Rptr. 209, 184 C.A.3d 546.

8.5. Sunbathers

Landowner, who allegedly opened her beach to the public while keeping cliff overlooking ocean closed, was entitled to immunity from negligence liability to sunbather on beach who was injured when piece of gunite, a concrete-like substance sprayed on cliffs to prevent erosion, broke off cliff and fell on him. Collins v. Tippett (App. 4 Dist.1984) 203 Cal.Rptr. 366, 156 C.A.3d 1017.

8.7. Electrical transmission lines

Although power company's physical facilities were not designed or suitable for recreational use, land under suspended transmission and guy wires and area needed to gain access and to do required maintenance and repairs was suitable for recreation within meaning of this section where it was an area of natural terrain open to anyone for hiking,

cycle riding, exploring, and roaming. Colvin by Co Southern California Edison Co. (App. 2 Dist.198 Cal.Rptr. 142, 194 C.A.3d 1306.

9.2. Easements

Accident which occurred on land which power co was given a temporary right to use for siting of its line poles outside of original right-of-way and which company was making reasonable use of to support i and guy wires constituted the "premises" for purp this section. Colvin by Colvin v. Southern Californ son Co. (App. 2 Dist.1987) 240 Cal.Rptr. 142, 194 1306.

9.5. Rivers and streams

Private owner of land bordering navigable river is to protection of this section when person enters or for access to river for recreational purpose and is while using the river if landowner had done not obstruct or impede that use. Charpentier v. Von (App. 3 Dist.1987) 236 Cal.Rptr. 233, 191 C.A.

There is no legal obligation on part of landowner to public trust doctrine to inspect or warn of hazards in navigable waters which abut the property subject to recreational use or to make such water recreational uses by trespassers or those on the w means other than access over the abutting land. Ch er v. Von Geldern (App. 3 Dist.1987) 236 Cal.Rp 191 C.A.3d 101.

Landowner was entitled to immunity of this sec spite injured swimmer's claim that, at the time of h he dove in the river, not for recreational reasons, bu "cool off." Charpentier v. Von Geldern (App. 3 D 236 Cal.Rptr. 233, 191 C.A.3d 101.

10. Governmental entities

United States was not liable to plaintiff for in suffered when he fell into scalding water at site o hot springs, because United States did not wilfully ciously fail to guard against dangerous condition entry by plaintiff upon portion of property in exceeded its scope of Government's consent to re use of national forest land by public, so that pla trespasser, and Government's warning signs of ex danger in area and construction of fence surrou was good-faith, appropriate, reasonable and ad sponse to dangers existing in area. Simpson v. U 1982) 564 F.Supp. 945.

In determining whether, under exception to th government could be held liable to person injure mobile accident which occurred on federal prop injured person was engaged in recreational use allegedly resulted from government's failure to e rail or warning sign at dangerously sharp curve, on government's actual or constructive knowledg and probability of injury at time of accident, an accident reports postdating accident were irrele Tagen By and Through Von Tagen v. U.S. (D.C F.Supp. 256.

Civ.C. § 846 which limited duty of care owed of any estate or any other interest in real p persons using property for designated recreation was not applicable to public entities; disappro v. Marin Mun. Water Dist., 66 Cal.App.3d 7 Rptr. 224, Gerkin v. Santa Clara Valley Wat Cal.App.3d 1022, 157 Cal.Rptr. 612, and Moo Torrance, 101 Cal.App.3d 56, 166 Cal.Rptr. Farms Reclamation Dist. No. 2028 v. Superior

§ 846.2. Invitees on land to glean

No cause of action shall arise again to any person who has been expressly

cycle riding, exploring, and roaming. Colvin by Colvin v. Southern California Edison Co. (App. 2 Dist.1987) 240 Cal.Rptr. 142, 194 C.A.3d 1306.

9.2. Easements

Accident which occurred on land which power company was given a temporary right to use for siting of its power line poles outside of original right-of-way and which power company was making reasonable use of to support its poles and guy wires constituted the "premises" for purposes of this section. Colvin by Colvin v. Southern California Edison Co. (App. 2 Dist.1987) 240 Cal.Rptr. 142, 194 C.A.3d 1306.

9.5. Rivers and streams

Private owner of land bordering navigable river is entitled to protection of this section when person enters onto land for access to river for recreational purpose and is injured while using the river if landowner had done nothing to obstruct or impede that use. Charpentier v. Von Geldern (App. 3 Dist.1987) 236 Cal.Rptr. 233, 191 C.A.3d 101.

There is no legal obligation on part of landowner subject to public trust doctrine to inspect or warn of natural hazards in navigable waters which abut the property and are subject to recreational use or to make such water safe for recreational uses by trespassers or those on the water by means other than access over the abutting land. Charpentier v. Von Geldern (App. 3 Dist.1987) 236 Cal.Rptr. 233, 191 C.A.3d 101.

Landowner was entitled to immunity of this section despite injured swimmer's claim that, at the time of his injury, he dove in the river, not for recreational reasons, but only to "cool off." Charpentier v. Von Geldern (App. 3 Dist.1987) 236 Cal.Rptr. 233, 191 C.A.3d 101.

10. Governmental entities

United States was not liable to plaintiff for injuries he suffered when he fell into scalding water at site of natural hot springs, because United States did not wilfully or maliciously fail to guard against dangerous conditions, rather, entry by plaintiff upon portion of property in question exceeded its scope of Government's consent to recreational use of national forest land by public, so that plaintiff was trespasser, and Government's warning signs of existence of danger in area and construction of fence surrounding area was good-faith, appropriate, reasonable and adequate response to dangers existing in area. Simpson v. U.S. (D.C. 1982) 564 F.Supp. 945.

In determining whether, under exception to this section, government could be held liable to person injured in automobile accident which occurred on federal property while injured person was engaged in recreational use and which allegedly resulted from government's failure to erect guardrail or warning sign at dangerously sharp curve, focus was on government's actual or constructive knowledge of danger and probability of injury at time of accident, and therefore accident reports postdating accident were irrelevant. Von Tagen By and Through Von Tagen v. U.S. (D.C.1983) 557 F.Supp. 256.

Civ.C. § 846 which limited duty of care owed by "owner of any estate or any other interest in real property" to persons using property for designated recreational purposes was not applicable to public entities; disapproving English v. Marin Mun. Water Dist., 66 Cal.App.3d 725, 136 Cal.Rptr. 224, Gerkin v. Santa Clara Valley Water Dist., 95 Cal.App.3d 1022, 157 Cal.Rptr. 612, and Moore v. City of Torrance, 101 Cal.App.3d 56, 166 Cal.Rptr. 192. Delta Farms Reclamation Dist. No. 2028 v. Superior Court of San Joaquin County (1983) 190 Cal.Rptr. 494, 660 P.2d 1168, 33 C.3d 699, certiorari denied 104 S.Ct. 277, 464 U.S. 915, 78 L.Ed.2d 257.

12. Duty of property owners, in general

Owner of gravel quarry was properly held to objective standard for purposes of determining whether his failure to warn motorcyclists about 20-foot cliff was "willful and malicious" within meaning of Civil Code section 846, immunizing landowners from liability to nonpaying recreational users except where landowner's conduct is willful or malicious. New v. Consolidated Rock Products Co. (App. 2 Dist.1985) 217 Cal.Rptr. 522, 171 C.A.3d 681.

Statute immunizing landowners from liability to nonpaying recreational users except where landowner acts willfully or maliciously, by using phrase "willful or malicious," does not impose liability for something more than ordinary willful misconduct. New v. Consolidated Rock Products Co. (App. 2 Dist.1985) 217 Cal.Rptr. 522, 171 C.A.3d 681.

This section did not bar inquiry into alleged negligence of owner in maintaining his construction site leading to injury of plaintiff, who entered one of the buildings on the site and was injured while walking across two loose boards connecting roofs of buildings, since owner who had begun to erect private dwelling units had already withdrawn that portion of land from public recreational access by making it unsuitable for such purposes. Potts v. Halsted Financial Corp. (1983) 191 Cal.Rptr. 160, 142 C.A.3d 727.

12.5. Willful misconduct

United States was liable under this section to national forest visitor, who was injured as passenger in pickup truck with camper shell attached when he was impaled on extending piece of steel road closure gate as it entered passenger's side of truck; gate was in violation of known safety regulations, Forest Service employees knew of bent condition of gate and of its danger to motorists, and Forest Service consciously failed to act to avoid the peril because of other priorities. Rost v. U.S., C.A.9 (Cal.) 1986, 803 F.2d 448.

Failure to post warning signs near falls in national forest was not willful or malicious so as to provide basis for imposing liability on Forest Service under this section where Forest Service personnel knew that people swam in the area but did not know that people actually dove or jumped from high rocks into small pool and where dangerousness of such an attempt was obvious. Judd v. U.S., S.D.Cal 1987, 650 F.Supp. 1503.

Landowner established that she was not liable to trespassing recreational user for injuries sustained while swimming in adjoining river by submitting declarations and deposition testimony that she had not personally viewed the property, had no knowledge that property was used by the trespasser or anyone else for swimming and diving, had no knowledge that use of the property or the bordering river was dangerous, had no knowledge of the depths of the river or any submerged objects, and did not willfully or maliciously fail to guard or warn against dangerous use of her property. Charpentier v. Von Geldern (App. 3 Dist.1987) 236 Cal.Rptr. 233, 191 C.A.3d 101.

Allegations of complaint that landowner willfully and maliciously failed to guard or warn against dangerous condition of river bordering the land in that the river was too shallow for swimming and diving and had submerged objects was insufficient to state cause of action for willful or malicious misconduct by landowner. Charpentier v. Von Geldern (App. 3 Dist.1987) 236 Cal.Rptr. 233, 191 C.A.3d 101.

§ 846.2. Invitees on land to glean food for charitable purposes; liability; limited immunity

No cause of action shall arise against the owner, tenant, or lessee of land or premises for injuries to any person who has been expressly invited on that land or premises to glean agricultural or farm

Nevada

emergency care or assistance, or as a result of any act or failure to act, not amounting to gross negligence, to provide or arrange for further medical treatment for the injured or ill person.

5. Any person who is employed by or serves as a volunteer for a public firefighting agency and who is authorized under chapter 450B of NRS to render emergency medical care at the scene of an emergency must not be held liable for any civil damages as a result of any act or omission, not amounting to gross negligence, by that person in rendering that care or as a result of any act or failure to act, not amounting to gross negligence, to provide or arrange for further medical treatment for the injured or ill person.

(Added to NRS by 1963, 359; A 1965, 674; 1973, 433, 1432; 1975, 403; 1985, 1702, 1753)

41.505 Physicians and nurses; exception.

1. Any physician or registered nurse who in good faith gives instruction to an advanced emergency medical technician-ambulance, as defined by NRS 450B.193, at the scene of an emergency, and the advance emergency medical technician-ambulance who obeys the instruction, is not liable for any civil damages as a result of any act or omission, not amounting to gross negligence, by him in rendering that emergency care.

2. Any person licensed under the provisions of chapter 630, 632 or 633 of NRS, who renders emergency care or assistance in an emergency, gratuitously and in good faith, is not liable for any civil damages as a result of any act or omission, not amounting to gross negligence, by him in rendering the emergency care or assistance or as a result of any failure to act, not amounting to gross negligence, to provide or arrange for further medical treatment for the injured or ill person. This section does not excuse a physician or nurse from liability for damages resulting from his acts or omissions which occur in a licensed medical facility relative to any person with whom there is a preexisting relationship as a patient.

(Added to NRS by 1973, 610; A 1975, 37, 404, 405; 1985, 1754)

LIABILITY OF OWNERS, LESSEES AND OCCUPANTS OF PREMISES TO PERSONS USING PREMISES FOR CROSSING OVER TO PUBLIC LAND OR FOR RECREATIONAL PURPOSES

41.510 Imposition of liability for malicious acts, when consideration is given or other duty exists.

1. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public

land, hunting, fishing, trapping, camping, hiking, sightseeing, or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes, except as provided in subsection 3.

2. When an owner, lessee or occupant of premises gives permission to another to cross over to public land, hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities, upon his premises:

(a) He does not thereby extend any assurance that the premises are safe for that purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted, except as provided in subsection 3.

(b) That person does not thereby acquire any property rights in or rights of easement to the premises.

3. This section does not limit the liability which would otherwise exist for:

(a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(b) Injury suffered in any case where permission to cross over to public land, hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities, was granted for a consideration other than the consideration, if any, paid to the landowner by the state or any subdivision thereof.

(c) Injury caused by acts of persons to whom permission to cross over to public land, hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

4. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(Added to NRS by 1963, 799; A 1971, 192; 1973, 898; 1981, 157)

ACTIONS BY SHAREHOLDERS AGAINST CORPORATIONS AND ASSOCIATIONS TO ENFORCE SECONDARY RIGHTS

41.520 Contents and verification of complaint; motion to require plaintiff to furnish security; order; recourse of corporation or association to security.

1. As used in this section "corporation" includes an unincorporated association, and "board of directors" includes the managing body of an unincorporated association.

2. In an action brought to enforce a secondary right on the part of one or more shareholders in a corporation or association, incorporated

ANNOTATION

EFFECT OF STATUTE LIMITING LANDOWNER'S LIABILITY FOR PERSONAL INJURY TO RECREATIONAL USER

by

Robin Cheryl Miller, J.D.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

4 Am Jur 2d, Amusements and Exhibitions §§ 62, 68; 57 Am Jur 2d, Municipal, School, and State Tort Liability §§ 156-160; 59 Am Jur 2d, Parks, Squares, and Playgrounds § 38; 62 Am Jur 2d, Premises Liability §§ 37, 75, 87, 269, 270

Annotations: See the related matters listed in the annotation.

15 Federal Procedural Forms, L Ed, Tort Claims Against United States §§ 63:21 et seq.

18 Am Jur Pl & Pr Forms (Rev), Municipal, School, and State Tort Liability, Form 93; 19 Am Jur Pl & Pr Forms (Rev), Parks, Squares, and Playgrounds, Forms 1, 3, 3.1, 4, 5, 11, 14, 15; 20 Am Jur Pl & Pr Forms (Rev), Premises Liability, Forms 132, 143, 162, 168, 169

15 Am Jur Legal Forms 2d, Premises Liability § 208:7

2 Am Jur Proof of Facts 247, Attractive Nuisance; 6 Am Jur Proof of Facts 527, Invitees

7 Am Jur Trials 643, Swimming Pool Accidents; 16 Am Jur Trials 1, Attractive Nuisance Cases

US L Ed Digest, Amusements, Exhibitions, Shows, and Resorts § 1; Claims § 12; Infants §§ 1, 16; Trespass §§ 1-5

L Ed Index to Annos, Amusements; Attractive Nuisance Doctrine; Parks; Recreation; Trespass

ALR Quick Index, Amusements, Exhibitions, Shows, and Resorts; Attractive Nuisance; Parks and Playgrounds; Premises Liability; Recreational Activities; Trespass

Federal Quick Index, Amusements and Exhibitions; Attractive Nuisance Doctrine; Parks; Premises Liability; Recreational Areas; Trespass

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Consult POCKET PART in this volume for later cases

Effect of statute limiting landowner's liability for personal injury to recreational user

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I. Preliminary matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the state and federal cases in which the courts have discussed or decided the effect[1] on liability for personal injury of a statute, commonly referred to as a "recreational use" statute, immunizing a landowner under some or all conditions from liability for personal injury suffered by a person[2] using his land recreationally.[3] This annotation also extends to cases discussing or deciding the related question whether a federal or state governmental defendant receives the protection of the applicable recreational use statute through the interplay between that statute and a governmental tort claims act.

1. The scope of this annotation extends to the creation, the limitation, and the extinguishment of liability.

2. A person on the land of another is referred to as an "entrant" in this annotation.

3. Cases discussing this question are within the scope of this annotation regardless of whether the particular facts presented are such as to render the statute applicable.

Since relevant statutes are included only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the latest enactments of pertinent jurisdictions.

[b] Related matters

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 ALR4th 294.

Liability of urban redevelopment authority or other state or municipal agency or entity for injuries occurring in vacant or abandoned property owned by governmental entity. 7 ALR4th 1129.

Liability of swimming facility operator for injury to or death of trespassing child. 88 ALR3d 1197.

Liability of operator of nonresidential swimming facility for injury or death allegedly resulting from failure to exercise proper supervision. 87 ALR3d 1032.

Liability of operator of swimming facility for injury or death allegedly resulting from absence of or inadequacy in rescue equipment. 87 ALR3d 380.

Duty to take affirmative action to avoid injury to trespasser in position of peril through no fault of landowner. 70 ALR3d 1125.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk. 35 ALR3d 230.

Comment Note.—Duty of possessor of land to warn child licensees of danger. 26 ALR3d 317.

Liability for injury or death of child social guest. 20 ALR3d 1127.

Private owner's liability to trespassing children for injury sustained by sledding, tobogganing, skiing, skating, or otherwise sliding on his land. 19 ALR3d 184.

Liability of private owner or operator of picnic ground for injury or death of patron. 67 ALR2d 965.

Duty of a possessor of land to warn adult licensees of danger. 55 ALR2d 525.

Liability of landowner for drowning of child. 8 ALR2d 1254.

Liability of United States, under Federal Tort Claims Act (28 USCS §§ 1346, 2671 et seq.), for death or injury sustained by visitor to national park or national forest. 66 ALR Fed 305.

Federal Tort Claims Act: Liability of United States for injury or death resulting from condition of premises. 12 ALR Fed 163.

§ 2. Summary and comment

[a] Generally

Most states have enacted a statute that limits or eliminates a landowner's liability for personal injury suffered by a person using his land recreationally, although usually only if that use is without charge. Many of these statutes are patterned after suggested legislation, promulgated in 1965 by the Council of State Governments, entitled "Public recreation on private lands: limitations on liability." See 24 Suggested State Legislation 150 (Council of State Governments, 1965) (hereafter, Model Act). Some

statutes, however, embrace an approach different from that of the Model Act, and a few predate it. The Model Act generally provides that a landowner owes, to one using his property for recreational purposes and without charge, neither a duty of care to keep the property safe for entry or use, nor a duty to give any warning of a dangerous condition, use, structure, or activity on the property. The act further provides that, under these circumstances, a landowner neither extends to a recreational user any assurance that the property is safe, nor confers on a recreational user the legal status of an invitee or licensee to whom a duty of care is owed. The act does, however, retain a landowner's liability for a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

The principal question addressed by the courts in personal injury or wrongful death litigation involving the defense of a recreational use statute is whether the statute applied under the facts as they existed at the time of the injury or death. If the facts are such as to bring the case outside the statute, or within one of its exceptions, then the landowners' liability will be determined in accordance with the principles of the common law. Statutes employ a variety of terms to designate the class of landowners protected by the statute. Courts have held that a defendant's interest in or relationship to the property on or adjacent to which the injury or death occurred was sufficient to bring him within the ambit of a statute extending to, in varying language, an "owner" (§ 3[a, c]), an "owner of any estate" in real property (§ 4[a]), an owner opening land to public access (§ 5[a]), an "owner of land" (§ 6), or another specified term (§ 7). However, there is other authority holding that, under the particular language of the statute, a defendant was not an "owner" (§ 3[b]), an "owner of any estate" in real property (§ 4[b]), an owner opening land to public access (§ 5[b]), or an "owner of land" (§ 6), or within another specified term (§ 7). Some courts, in construing a statute as a whole so as to determine whether the defendant was a landowner protected by the statute, have held, under the particular facts presented, that the defendant was (§ 8[a]), or was not (§ 8[b]), a covered landowner.

Recreational use statutes utilize a variety of terms to describe the property of a landowner to which the statute applies. Courts have held that the landowner's property on or adjacent to which the entrant's injury or death occurred was (§ 9[a]) or was not (§ 9[b]) encompassed by the term "premises" to which the statute applied, or was (§ 11[a]) or was not (§ 11[b]) encompassed by another specified term defining in whole or in part the property to which the statute applied. Other courts, construing the statute as a whole, have held that the property was (§ 12[a]) or was not (§ 12[b]) sufficiently open to public access to permit the application of the statute, or was (§ 13[a]) or was not (§ 13[b]) of a type to which the statute was intended to apply. Some but not all courts have concluded that the landowner's property was not "commercial" property within the

meaning of an exception in the statute that, in varying language, preserved liability for injury occurring on "commercial" property (§ 10).

Courts are often called on to determine whether the activity in which the entrant had been engaged at the time of his injury or death was a recreational activity. Thus, in construing a statute that employed the term "recreational purposes" to define the activities to which it applied, courts have generally held, under the particular facts presented, that the entrant had been engaged in a "recreational purpose," although there is contrary authority (§ 14). Under a statute extending to "sport and recreational activities," courts have also reached divergent conclusions based on the particular facts presented (§ 15). Where the issue presented was whether the entrant had been engaged in a particular recreational activity specified by the statute, courts have held that he had (§ 16[a]) or had not (§ 16[b]) been engaged in the particular activity at issue. Where an entrant's activity was allegedly covered by an omnibus "other" recreational purposes clause, some but not all courts have held that the activity came within the clause (§ 17).

At times questions of construction invoke the status of the entrant. In applying a recreational use statute using the term "recreational user," or a similar expression, to define the category of entrants to which it applied, courts have generally, but not always, held that the injured entrant came within this term (§ 18). Other courts, in construing the statute as a whole, have held that the statute applied to entrants who were minors (§ 20[a]), although in one jurisdiction there is a conflict of authority on this question (§ 20[b]). A few courts, also construing the statute as a whole, have held that the statute applied to an entrant who was allegedly an invitee (§ 21[a]), or did not apply to an entrant who was on the property in connection with the defendant's business (§ 21[G]). There is also authority that an entrant had not been a person "expressly invited" to the property within the meaning of a statute preserving a landowner's liability to such a person (§ 19).

On occasion, courts have determined whether the circumstances of the entrant's injury were such as to be comprehended by the statute. There is authority that the statute, construed as a whole, was applicable although the injury was allegedly caused by an artificial, rather than a natural, condition or structure on the property (§ 27[a]), although there is contrary authority (§ 27[b]). Courts, construing the statute as a whole, have held that it applied to injuries allegedly caused by the defendant's active negligence (§ 28). Where the statute provided that it encompassed injuries of a specified nature, there is authority that the entrant's injury came within the statutory definition (§ 26).

Recreational use statutes generally preserve a landowner's liability for egregious conduct of some specified nature. Many statutes, following the Model Act, preserve

liability for a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Applying such a provision, courts have held that this exception was (§ 22[a]) or was not (§ 22[b]) applicable under the particular facts presented. A defendant has also been held guilty of a reckless failure to guard or warn against a dangerous condition, use, structure, or activity, so as to preserve his liability (§ 23). Other courts, in construing a provision preserving a defendant's liability for "gross negligence or wilful and wanton misconduct," have held that this exception was (§ 24[a]) or was not (§ 24[b]) applicable. Where a statute preserved a defendant's liability for an injury caused by a "known dangerous or artificial latent condition," courts have generally, but not always, concluded that such a condition had not been present (§ 25, infra). There is also authority that a statutory provision preserving a defendant's liability under other circumstances was not applicable (§ 26, infra). Where a statute contained no express preservation of a defendant's liability for egregious conduct of some nature, courts have reached differing conclusions whether an exception preserving liability for such conduct was implied in the statute construed as a whole (§ 29).

Recreational use statutes generally preserve a defendant's liability if he received a payment for the recreational use of his land. Where the statute preserves liability in the case of the receipt of "consideration" or "valuable consideration," authority is, for the most part, evenly divided on the question whether, under the particular facts presented, such consideration was given (§ 30[a, b]). However, where a statute preserves liability if a defendant receives a "charge" or a "fee," courts have generally, although not always, concluded that this exception did not apply (§ 31).

The question sometimes arises whether the statute, construed as a whole, negates particular causes of action. Courts have held that the statute negated (§ 33[a]) or did not negate (§ 33[b]) a separate cause of action for nuisance. Courts have also held that the statute did negate a cause of action arising under a mining statute (§ 34), or for wrongful death (§ 35), although there is authority that the statute did not negate the doctrine of liability for a voluntary undertaking of a duty (§ 35).

Courts have also construed a variety of miscellaneous specified terms in recreational use statutes (§ 32), or, construing a statute as a whole while addressing miscellaneous issues, have held that the statute barred either the entire action or the plaintiff's negligence count (§ 36).

[b] Practice pointers

Recreational use statutes generally contain an exception preserving a landowner's liability for injury or death resulting from a type of egregious conduct specified in the statute. For example, statutes commonly preserve liability for a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. If the facts warrant doing so, counsel for the plaintiff should be aware of

the possibility of alleging the applicability of such an exception.[4]

Counsel for the defendant, on the other hand, should consider the possibility that the defense of a recreational use statute is an affirmative defense that is required to be pled specially.[5]

If an action is brought against a landowner's liability insurer in a jurisdiction permitting a direct action, counsel for the insurer should consider whether the defense of the recreational use statute is available to the insurer as well as to the landowner.[6]

Counsel representing a landowner should consider, in advance of any litigation, the nature and number of warning signs that the landowner could place on his property so as to best take advantage of the protection from liability afforded by a recreational use statute. A landowner who seeks to deny public access to his land, possibly through the posting of explicit "keep out" signs, may find that a court will later determine that the statute was inapplicable because the land was not open to the public.[7] On the other hand, if the landowner fails to post warning signs or guard against a dangerous condition, the landowner's liability may be preserved on the ground of a willful or malicious failure to warn or guard.[8] Counsel could consider advising his client to post

4. See, for example, Otteson v United States (1980, CA10 Colo) 622 F2d 516, 66 ALR Fed 297 (applying Colorado law), wherein the court, after finding that the statute applied to the landowner, the United States, granted a summary judgment for the United States where the plaintiff's claim for relief was couched solely in terms of negligence by the government. The court stated that the complaint on its face created no issue of willful or malicious governmental conduct.

5. As to the pleading of affirmative defenses generally, see 61A Am Jur 2d, Pleading §§ 152-168.

6. See, for example, McCain v Commercial Union Ins. Co. (1983, WD La) 592 F Supp 1, ques certified (CA5 La) 719 F2d 1271 (applying Louisiana law), wherein the court held that the defense of the statute was available to the insurer of the recreational district that owned the swimming pool in which the plaintiff had been injured while diving from the high-diving board. The plaintiff sought to recover for his injuries from both the district and the insurer. The plaintiff contended that the limitation of liability provided by the statute was a purely personal defense of the district, and that the protection afforded by the statute was similar to the doctrine of interspousal immunity, under which a person was not permitted to sue his or her spouse, but was permitted to sue the spouse's insurer. Disagreeing, the court replied that the doctrine of interspousal immunity merely limited a right of action, whereas the recreational use statute eliminated the plaintiff's cause of action. The court particularly stressed the portion of the statute providing that an owner of land who permitted a person to use his land for recreational purposes did not extend any assurance that the premises were safe, nor constitute that person an invitee or licensee to whom a duty of care was owed, nor incur liability for any injury incurred by that person. Granting the district's and the insurer's motion for summary judgment, the court held the action barred by the statute.

7. See the cases treated in § 12[b].

8. See the cases treated in § 22[a].

signs that warn of the danger but do not bar entry, such as one advising entering "at your own risk."[9]

II. Landowners comprehended by statute[10]

§ 3. "Owner"

[a] Governmental entities or employees—statute applicable

In actions to recover for the injury or death of an entrant on property admittedly or apparently owned, operated, or occupied by a governmental entity or governmental employees, the courts in the following cases explicitly or apparently held that the entity or the employees were an "owner" of the property within the meaning of a state recreational use statute applying to an "owner" of land.

See Ostergren v Forest Preserve Dist. (1984) 104 Ill 2d 128, 83 Ill Dec 892, 471 NE2d 191, where the court, in holding that a statute which limited the liability of landowners' whose property was used by snowmobilers who paid no fee for the use of the property did not unconstitutionally infringe on the snowmobilers' right to due process or equal protection, reinstated the trial court's judgment dismissing an action brought by a snowmobiler against the county forest preserve board as barred by the statute.

The court in Sublett v United States (1985, Ky) 688 SW2d 328, held that the United States was the owner of a park controlled by the Army Corps of Engineers for purposes of a statute limiting the liability of owners of park land made available to the public without payment of fees. Noting that as used in the statute the word "owner" meant the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises, the court determined that the Federal Government had jurisdiction and control of the premises in question.

In a wife's action to recover from the state for the alleged wrongful death of her husband, the court, in Rushing v State (1980, La App 1st Cir) 381 So 2d 1250, held that the state recreational use statute applied to the action because the state owned the premises on which the husband had been hunting at the time of his death. The statute applied to an "owner" of premises used for hunting. The husband had been electrocuted while hunting for frogs on a lake located on the grounds of a state hospital. Holding the state immunized from liability by the statute, the court reversed a judgment for the wife and dismissed her complaint.

Affirming summary judgments for the defendants, the state and a parish "police jury," in a wrongful death and survival action to recover for a drowning at a recreational area maintained by the de-

9. Thus, in Johnson v Stryker Corp. (1979, 1st Dist) 70 Ill App 3d 717, 26 Ill Dec 931, 388 NE2d 932, § 12[a], the state recreational use statute was held to immunize the landowner where a sign posted at the defendant landowner's pond stated "Swim at your own risk—we are not responsible."

10. The Model Act (see § 2[a]) states that "'Owner' means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises."

fendants, the court, in Pratt v State (1981, La App 3d Cir) 408 So 2d 336, cert den (La) 412 So 2d 1098, held that each of the defendants was an "owner" to which the state recreational use statute applied. The statute defined "owner" as the possessor of a fee interest, a tenant, a lessee, an occupant, or a person in control of the premises. Responding to the plaintiff's contention that the statute did not apply to governmental entities, the court replied that, since the immunity conferred by the statute was not based on sovereign status, the statute did not violate the state constitutional prohibition against sovereign immunity. The court also pointed out that, by the statute's terms, the grant of immunity was made to any landowner who had made his land available for certain recreational purposes. The state, the court continued, stood in the same position as would any private litigant. Considering the "police jury" only, the court also stressed that the trial court had found that the jury exercised control over the facility to some degree, and that the plaintiff's complaint had alleged that the jury exercised control over the area. The court did not describe the relationship between the plaintiff and the decedent.[11]

In an action to recover for injuries sustained by the plaintiff at a public playground in an accident whose nature the court did not describe, the court, in Rodrigue v Firemen's Fund Ins. Co. (1984, La App 5th Cir) 449 So 2d 1042, held that the state recreational use statute applied to governmental entities, including the parish recreation department whose insurer was the defendant. The plaintiff alleged a failure by the department, which apparently operated the playground, to maintain safe bleachers there. Apparently construing the term "owner," which the statute defined as the possessor of a fee interest, a tenant, a lessee, an occupant, or a person in control of the premises, the court pointed out that Pratt v State (1981, La App 3d Cir) 408 So 2d 336, cert den (La) 412 So 2d 1098, this subsection, had stated that the statute, which applied to an "owner," extended to "any" landowner who had made his land available for certain recreational purposes. The court simply stated that, although it did not necessarily agree with the Pratt court's statutory interpretation, it could not overlook it. Holding the insurer protected by the statute, the court affirmed a summary judgment in its favor.

In an action to recover for injuries suffered by the plaintiff while diving into a swimming pool operated by the defendant recreational district, the court, in McCain v Commercial Union Ins. Co. (1983, WD La) 592 F Supp 1, ques certified (CA5 La) 719 F2d 1271 (applying Louisiana law), granting the district's and its insurer's motion for summary judgment, held that the district was the "owner" of the pool, to which the Louisiana recreational use statute applied, since the district had undisputed control over the pool area. The statute defined "owner" as the possessor of a fee interest, a tenant, a lessee, an occupant, or a person in control of the premises. The court held the action barred by the statute.

In an action brought against a government agency by the passenger of an off-the-road vehicle who was injured when the vehicle tipped over when being driven at a state park, the court in McNeal v Department of Natural Resources (1985) 140 Mich App 625, 364 NW2d 768, held that the agency could not be held liable because a recreational use statute relieving landowners from liability for injuries to persons using the landowner's property for recreational purposes was applicable to state-owned property. Observing that there was support for the position that the statute applied to municipally owned lands, the court stated that it saw no reason to distinguish between lands owned by a local government and lands owned by the state.

In a father's action to recover from a city for a fractured leg suffered by his daughter when she fell from a slippery slide in a public park owned and operated by the defendant city, the court, in Watson v Omaha (1981) 209 Neb 835, 312 NW2d 256, held that the state recreational use statute applied to cities. Observing that the statute applied to the "owner" of land, and that "owner" included tenant, lessee, occupant, or person in control of the premises, the court declared that the term "owner" was sufficiently broad to cover a public entity. The court stated that nothing on the face of the statute indicated in any way an intention by the legislature to limit the statute to privately owned land. Holding the city protected by the statute, the court reversed a judgment for the father and dismissed the action.

In three consolidated wrongful death actions to recover from the United States under the Federal Tort Claims Act for the deaths of three recreational users of a national recreational area in Nevada during a flash flood, the court, in Ducey v United States on other grounds (1981, DC Nev) 523 F Supp 225, affd in part and revd in part on other grounds (CA9 Nev) 713 F2d 504[12] (applying Nevada law), held without further discussion that the United States was an "owner" within the meaning of the Nevada recreational use statute, which applied to the "owner" of land used recreationally. Holding the United States protected by the statute, the court rendered judgment for it.

In a trail bike operator's action to recover from the state department of transportation, and from two road construction contractors, for injuries suffered when he rode into a barbed wire fence at the end of a highway under construction on land owned by the Bureau of Land Management (BLM) of the United States, the court, in Denton v L. W. Vail Co. (1975) 23 Or App 28, 541 P2d 511, held that the state and

11. The court, in Rodrigue v Firemen's Fund Ins. Co. (1984, La App 5th Cir) 449 So 2d 1042, this subsection expressed some reluctance in following the Pratt Case.

12. The court, in Ducey v United States (1983, CA9 Nev) 713 F2d 504 (applying Nevada law), § 30[a], held that the payment-of-consideration exception applied and deprived the United States of statutory protection.

the two contractors were each an "owner" within the meaning of the state recreational use statute. The two contractors were the general contractor and the contractor doing the grading work on the highway project. The statute applied to the "owner" of land and defined "owner" as the possessor of a fee title interest in, or a tenant, a lessee, an occupant, or another person in possession of, "any" land. The court simply stated that BLM land, although owned by the federal government, was covered by the statute, and the state and the two contractors were persons "in possession of" the land. Holding that the defendants owed no duty to the operator, the court affirmed a directed verdict in their favor.

The court, in Hogg v Clatsop County (1980) 46 Or App 129, 610 P2d 1248, held that the state recreational use statute applied to the defendant county in a swimmer's action to recover for injuries suffered when he allegedly struck a submerged stump while swimming in a lake in a county park. Apparently construing the term "owner," to which the statute applied, the court stated that the statute applied to public bodies as well as to private landowners. However, on the ground that the complaint stated a cause of action for the county's alleged recklessness, the court reversed an order sustaining the county's demurrer.

In an action to recover from the United States under the Federal Tort Claims Act for injuries suffered when the plaintiff allegedly fell into a manmade hole in a Pennsylvania state park, which was on land leased from the United States, the court, in Hahn v United States (1980, MD Pa) 493 F Supp 57, affd without op (CA3 Pa) 639 F2d 773 and affd without op (CA3 Pa) 639 F2d 773 and affd without op (CA3 Pa) 639 F2d 777 (applying Pennsylvania law), apparently held that the United States was an "owner" to which the Pennsylvania recreational use statute applied. Stating that the United States had no obligation to make this land available to the public, the court rejected the plaintiff's contention that the public had a preexisting right to enter United States land and would receive no benefit from the statute's relieving the United States of liability so as to encourage it to open its lands to the public. In pointing out that the United States, unlike the state, had waived its sovereign immunity to some extent at the time of the passage of this statute, the court apparently distinguished Hahn v Commonwealth (1980) 18 Pa D & C3d 260, § 3[b], the plaintiff's parallel action against the state, from which the facts are taken in part. The court held the United States protected by the statute.[13]

In an action in which a minor son and his parents sought to recover, from state employees sued in their individual capacities, for injuries suffered by the boy when the "trail bike" that he was riding struck a cable stretched across a roadway used by the public on recreational land owned by the state, the court, in Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d

13. This case was distinguished in Watterson v Commonwealth (1980) 18 Pa D & C3d 276, § 8[b].

140, held that a state employee sued in his individual capacity was an "owner" to whom the state recreational use statute applied, and thus was protected by the statute. The employees worked for the state agency that administered the land. The court construed an amendment to the statute that had redefined "owner" to include state employees "for purposes of liability under" a second statute, which specified the conditions under which the state would pay a judgment against a state official.[14] The court declared that the amendment applied to situations in which a state official would have been held unprotected by the recreational use statute and therefore liable for injuries occurring on public lands, and in which the state would then have been liable for the judgment under the second statute. Now, the court continued, the employee was protected by the recreational use statute, and thus there would be no judgment for which the state would be liable under the second statute.

[b] —Statute not applicable

In an entrant's action to recover for injuries suffered on property owned by a governmental body, the courts in the following cases held that the body was not an "owner" to which the state recreational use statute applied.

In an action to recover for paralyzing injuries suffered by the plaintiff when he made a running dive into shallow (18 to 24 inches) water from a dock at a beach owned and operated by the defendant city, the court, in Hovet v Bagley (1982, Minn) 325 NW2d 813, affirming the lower court's denial of the city's motion to dismiss for failure to state a claim, held that the term "owner" in the state recreational use statute did not extend to cities. The statute, which applied to an "owner," stated that the term meant the possessor of a fee interest or a life estate in, or a tenant, a lessee, an occupant, or a person in control of the premises. The court observed that the titles to both the first enactment of the statute and the present enactment had referred to "privately owned" land. The court also pointed out that the present enactment stated, in its statement of purpose, that it was the policy of the state to encourage the use of privately owned lands and waters by the public. The court stressed that the legislature had reenacted the statute in 1971, some 8 years after the abrogation of sovereign immunity, and had not altered the language relating to "privately owned" land. The court also ob-

14. The court, in Cords v Anderson (1978) 82 Wis 2d 321, 262 NW2d 141, stated that the statute had been amended so as to define "owner" as any private citizen, municipality, state, the United States government, and, for purposes of liability under this second statute, any employee of these governmental bodies. For cases decided under the recreational use statute prior to the amendment and holding governmental or governmental employee defendants not owners within the meaning of the statute, see Goodson v Racine (1973) 61 Wis 2d 554, 213 NW2d 16 (city); Cords v Ehly (1974) 62 Wis 2d 31, 214 NW2d 432 (state employees); and Cords v Anderson (1978) 82 Wis 2d 321, 262 NW2d 141 (state employees).

served that in 1982, subsequent to the accident, the legislature had amended the definition of "land" in the statute to limit it explicitly to privately owned land.

In an action in which a husband sought to recover from the state for injuries suffered when he allegedly fell into a manmade hole in a state park, and in which his wife sought to recover for her loss of companionship, the court, in Hahn v Commonwealth (1980) 18 Pa D & C3d 260, held that the state was not an "owner" to which the state recreational use statute applied. The state leased the land from the United States. The statute defined "owner" as the possessor of a fee interest in, or a tenant, a lessee, an occupant, or a person in control of, the premises. Observing that, when the statute was enacted in 1966, the state possessed sovereign immunity to the type of action to which the statute applied, the court declared that the legislature could not have believed the statute necessary to protect the state. To hold otherwise, the court continued, would result in the statute's either being surplusage or reaching an absurd result. Holding the state not protected by the statute, the court denied its demurrer.[15]

For Wisconsin cases, see § 3[a].

[c] Nongovernmental parties

In actions to recover for the injury or death of entrants on property to which the defendant had varying relationships, the courts in the following cases explicitly or apparently held that the defendant was an "owner" of the property within the meaning of a state recreational use statute applying to an "owner" of land.

In a mother's action to recover for the alleged wrongful death of her son, who drowned while attending a church Sunday school picnic at a lake resort, the court, in Bourn v Herring (1969) 225 Ga 67, 166 SE2d 89, conformed to 119 Ga App 226, 166 SE2d 607, later app 225 Ga 653, 171 SE2d 124, transf to 121 Ga App 373, 173 SE2d 716, app dismd 400 US 922, 27 L Ed 2d 183, 91 S Ct 192, held without further discussion that a dairy that had made the picnic grounds and lake resort available to the church, and the dairy's general manager, were each an "owner" of the picnic grounds and lake resort within the meaning of the state recreational use statute. The statute defined an "owner," to which it applied, as the "possessor of a fee interest, a tenant, lessee, occupant or persons in control of the premises." Grounds occupied and apparently owned by the dairy included a large dairy farm, a milk processing plant and distribution facilities, along with the picnic grounds and lake resort.[16] The court did not

15. This case was apparently distinguished in Hahn v United States (1980, MD Pa) 493 F Supp 57, affd without op (CA3 Pa) 639 F2d 773 and affd without op (CA3 Pa) 639 F2d 773 and affd without op (CA3 Pa) 639 F2d 777 (applying Pennsylvania law), § 3[a], the husband's parallel suit against the United States.

16. Some of the facts of this case are taken from the intermediate appellate court decision, Herring v R. L. Mathis Certified Dairy Co. (1968) 118 Ga App 132, 162 SE2d 863, affd in part and revd in part 225 Ga 67, 166 SE2d 89.

specify the statutory category into which it believed the general manager fell. On other grounds, however, the court in effect denied summary judgment motions submitted by the dairy and the general manager, who along with the church and the superintendent of the Sunday school were defendants.

In two estates' consolidated wrongful death actions to recover for the deaths of two brothers in a snowmobile accident, the court, in Estate of Thomas v Consumers Power Co. (1975) 58 Mich App 486, 228 NW2d 786, affd in part and revd in part on other grounds 394 Mich 459, 231 NW2d 653, held that one defendant, a power company that held an easement on the property on which the accident occurred, was an "owner" within the meaning of the state recreational use statute, which applied to the "owner, tenant or lessee of . . . premises." The brothers were killed when the snowmobile they were operating collided with a guy wire anchoring one of the power company's utility poles. The company's easement allowed the presence of its several utility poles and supporting guy wires. The court pointed out that an easement was an interest in land that was required to be recorded with the register of deeds in the same manner as a fee simple estate to give notice to future purchasers. The estates contended that the power company was not protected by the statute because it could not accept valuable consideration for the use of the property, within the meaning of a section of the statute preserving a landowner's liability where the injured recreational user had paid a valuable consideration to enter the property. Disagreeing, the court pointed out that the statute did not specifically condition its availability on a defendant's ability to accept consideration. Holding the defendants, the power company and the owner of the land on which the accident occurred, immunized by the statute, the court granted them summary judgment.

In two consolidated actions to recover for the electrocution death of one sister, and mental distress suffered by a second sister, who viewed the first sister's partially burned body, the court, in Crawford v Consumers Power Co. (1981) 108 Mich App 232, 310 NW2d 343 (disapproved on other grounds Burnett v Adrian, 414 Mich 448, 326 NW2d 810), apparently held that the defendant power company was an "owner" within the meaning of the state recreational use statute. The first sister was killed when, on foot in a wooded area, she came into contact with a downed electric wire of the power company. The statute applied to the "owner, tenant or lessee" of "premises." The power company apparently did not own the land on which the accident occurred, but held only an easement for its powerlines. The court stated that an easement holder was a sufficient owner of the land under the statute to invoke its protection. Affirming the dismissal of the plaintiffs' ordinary negligence, gross negligence, and trespass counts, and reversing the dismissal of the nuisance count, the court held the ordinary negligence count precluded by the statute.

In Denton v L. W. Vail Co.

(1975) 23 Or App 28, 541 P2d 511, § 3[a], a trail bike operator's action to recover from two road construction contractors for injuries suffered when he rode into a barbed wire fence at the end of a highway under construction, the court held that the contractors were each an "owner" within the meaning of the state recreational use statute.

§ 4. "Owner of any estate" in real property

[a] Statute applicable

In an action to recover for personal injury suffered by an entrant on property owned or occupied by the defendant, the courts in the following cases explicitly or apparently held that the defendant was an "owner of any estate in real property" within the meaning of a state recreational use statute applying to such an owner.

Apparently construing the term "owner of any estate in real property," the court, in Lostritto v Southern Pacific Transp. Co. (1977, 1st Dist) 73 Cal App 3d 737, 140 Cal Rptr 905 (disagreed with on other grounds Potts v Halsted Financial Corp. (2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160), dismissed a negligence count in the complaint of the plaintiff, who broke his neck diving from a railroad trestle into a shallow river below, against the defendant railroad. The statute provided that "an owner of any estate in real property" had no duty of care to keep the premises safe for entry or use by others for "water sports" and other specified recreational activities, nor to give any warning of hazardous conditions. The court concluded without further discussion that since the railroad was the owner of the estate—it owned both the trestle and the subjacent river bottom the statute precluded the railroad's liability for failure to use ordinary care in the keeping of the premises or in the matter of warning.[17] The court stated that the statute comprehended premises generally unsuited for recreation, such as the trestle, in addition to rural lands, woodlands, and the like.[18]

In an action seeking recovery for injuries suffered when the plaintiff fell from a bulldozer on the defendant scrap disposal corporation's property, the court, in Smith v Scrap Disposal Corp. (1979, 4th Dist) 96 Cal App 3d 525, 158 Cal Rptr 134, held that the state recreational use statute applied to the corporation's property, which was located on a portion of a marine terminal and which the corporation controlled under a use and occupancy permit issued by the unified port district. Noting that the statute applied to an "owner of any estate in real property," the court

17. This case was distinguished in Pacific Gas & Electric Co. v Superior Court (1983, 3d Dist) 145 Cal App 3d 253, 193 Cal Rptr 336, § 32.

It should also be noted that in Darr v Lone Star Industries, Inc. (1979, 3d Dist) 94 Cal App 3d 895, 157 Cal Rptr 90, § 4[b], involving a similar dive off a bridge into a river, a bridgeowner who did not own the riverbed was held not protected by the statute.

18. The court, in Potts v Halsted Financial Corp. (1983, 2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160, § 13[b], declined to embrace this statement.

was apparently construing that term. The plaintiff and two friends had been fishing on another part of the terminal and, leaving to go home, had driven along a road that was on a common area of the terminal. One of the plaintiff's friends jumped out of the car and entered the corporation's property. The plaintiff then entered the property also, allegedly to prevent the friend from riding the bulldozer situated on it. Since the injury took place where the corporation had control, the duty of maintenance, and the right to bar ingress, declared the court, invoking the protection of the statute served its purpose. On the ground, however, that there existed a question of fact as to the plaintiff's recreational intent, the court reversed a summary judgment for the corporation.

In an action in which one who was injured while sunbathing on a beach sought to recover from the owner of beachfront property, the court, in Collins v Tippett (1984, 4th Dist) 156 Cal App 3d 1017, 203 Cal Rptr 366, affirming a judgment for the property owner, held that she was an "owner of any estate in real property" to whom the state recreational use statute applied. The owner's property included the beach and a cliff that extended down to the beach. The sunbather was injured when a piece of gunite, a concretelike substance sprayed on cliffs to prevent erosion, broke off the cliff and fell on him. The court declared that, although the property had become subject to a public easement for recreational use as a beach, the landowner could properly invoke the statute's protection because she remained the owner of the underlying fee. The court held the landowner protected by the statute.

See Simpson v United States (1981, CA9 Cal) 652 F2d 831, on remand (CD Cal) 564 F Supp 945 (applying California law), an action in which a person who was walking in a national forest sought to recover under the Federal Tort Claims Act (FTCA) from the United States for injuries suffered when the ground underneath him gave way and he fell into an underground hot-water pool, and in which the court stated that the California recreational use statute applied to private persons. The statute provided that an "owner of any estate in real property" owed no duty of care to keep the premises safe for entry or use by others for any recreational purpose. The court declared that the United States was therefore entitled to the protection of the statute, since under the FTCA the United States was liable for negligence in the same manner and to the same extent as a private individual would be in similar circumstances. However, on other grounds the court reversed a summary judgment for the United States.

See also Von Tagen v United States (1983, ND Cal) 557 F Supp 256 (applying California law), an action in which an automobile driver sought to recover under the Federal Tort Claims Act (FTCA) from the United States for injuries suffered in an automobile accident while he was driving in a federal recreational area in California, and in which the court held that the California recreational use statute applied to private individuals. By its terms the statute comprehended

the "owner of any estate or any other interest in real property." Therefore, said the court, the United States was entitled to the protection of the statute since under the FTCA the United States was liable for negligence in the same manner and to the same extent as a private individual. Acting in part on other grounds, the court granted in part and denied in part the United States motion for summary judgment.

For disapproved California cases holding or assuming that state governmental entities came within the expression "owner of any estate in real property" in the California recreational use statute, see § 4[b].

[b] Statute not applicable

In actions to recover for injury or death suffered by an entrant on, or in a body of water adjoining, property in which the defendant had an interest, the courts in the following cases held that the defendant did not come within the term "owner of any estate in real property," nor the term "owner of any estate or any other interest in real property," or that it had not been established that the defendant did come within one of these terms, in a state recreational use statute applying to such an owner.

Holding that the state recreational use statute, which applied to "an owner of any estate or any other interest in real property," did not encompass public entities as owners, the court, in Delta Farms Reclamation Dist. v Superior Court (1983) 33 Cal 3d 699, 190 Cal Rptr 494, 660 P2d 1168, cert den 464 US 915, 78 L Ed 2d 257, 104 S Ct 277, denied a petition for writ of mandate by which a reclamation district sought to direct the trial court to sustain the district's general demurrer to a complaint seeking damages for the wrongful death of two 15-year-old girls who drowned in a canal owned by the district and for personal injuries, including emotional distress, suffered by family members who witnessed the drownings. The court stated that, had the legislature intended to bring public entities under the umbrella of the statute, it would have expressly said so. Pointing out that the statute and the state tort claims act had gone through the legislative process of consideration and passage jointly, the court said that the two should be construed so as to produce harmony rather than dissonance. Harmony between the two could be obtained only if the statute was construed as not applying to public entities, the court declared, since (1) the statute, unlike the act, preserved the then prevailing distinctions between trespassers, licensees, and invitees, and (2) application of the statute to public entities would lead to patently absurd results and would eviscerate large portions of the act.[19]

19. The court disapproved contrary results reached in Blakley v State (1980, 1st Dist) 108 Cal App 3d 971, 167 Cal Rptr 1 (holding that statute applied); Moore v Torrance (1979, 2d Dist) 101 Cal App 3d 66, 166 Cal Rptr 192 (holding that statute applied); Gerkin v Santa Clara Valley Water Dist. (1979, 1st Dist) 95 Cal App 3d 1022, 157 Cal Rptr 612 (assuming that statute applied); and English v Marin Municipal Water Dist. (1977, 1st Dist) 66 Cal App 3d 725, 136 Cal Rptr 224 (assuming that statute applied). At the time of its application in each of these cases, the statute applied to the "owner of any estate in real property."

In an action in which a motorcyclist sought to recover from an earth removal company for personal injury suffered when he drove off a "blind shear end" of a pile of dirt, the court, in O'Shea v Claude C. Wood Co. (1979, 3d Dist) 97 Cal App 3d 903, 159 Cal Rptr 125, reversing a summary judgment for the company, held that a triable issue of fact existed concerning whether the company was an "owner of any estate in real property" to which the state recreational use statute applied. Under a written agreement with the landowner, the company agreed to excavate ponding basins and remove the dirt from the land. The agreement permitted the company to stockpile dirt on the land temporarily if it could not be removed at once. The court stated that, if a contract gave a party exclusive possession of the premises against all the world, it was a lease, whereas if the contract merely conferred a privilege to the party to occupy the premises under the owner, it was a license. Pointing out that the earth removal company's contract did not specify the specific area in which the stockpiled dirt was to be stored, and did not purport to give the company exclusive possession of the property, the court held that the agreement conferred a license rather than a lease. Describing the purpose of the recreational use statute as encouraging landowners or possessors to open up their land to recreational users, the court declared that the statute applied to landowners or possessors who had a possessory interest in the land. The court held, therefore, that the determinative issue was whether the company had a right of possession as against the motorcyclist.[20]

In an action in which a diver attempted to recover, from the owner of a private bridge, for injuries suffered when he dived off the bridge into the river underneath and apparently hit a submerged steel culvert or concrete piling, the court, in Darr v Lone Star Industries, Inc. (1979, 3d Dist) 94 Cal App 3d 895, 157 Cal Rptr 90, reversing a judgment of nonsuit and remanding the matter for further proceedings, held that the bridgeowner was not an "owner of any estate in real property" within the meaning of the state recreational use statute, which applied to such landowners. The bridgeowner employed the bridge to haul gravel across the river. The property on which the bridge was built, the riverbed, was owned by the state; the bridgeowner used the bridge under a "Right of Entry Permit" granted by the state. The court held that the permit granted the bridgeowner an easement in the riverbed. The court stated that the use of the words "leased for two years" in the permit did not render the bridgeowner's interest a leasehold, since the term "lease" merely described the length, not

20. In Pacific Gas & Electric Co. v Superior Court (1983, 3d Dist) 145 Cal App 3d 253, 193 Cal Rptr 336, the court noted that the state recreational use statute had been amended in 1980 to include not only owners of estates in real property, but also owners of any other interest in real property, whether possessory or nonpossessory.

the nature, of the interest conveyed. Declaring that the term "estate" in the statute was confined to those interests in land that were or could become possessory, the court held that the bridgeowner's easement was nonpossessory and thus not an "estate." Therefore, the court concluded, the statute did not bar the diver's action.[21]

In an action in which a motorcyclist sought to recover from the city for injuries sustained when he struck a cable stretched across a city-owned paved road, the court, in Nelsen v Gridley (1980, 3d Dist) 113 Cal App 3d 87, 169 Cal Rptr 757, reversing a summary judgment for the city, held that the state recreational use statute did not apply to public landowners. The statute by its terms covered an "owner of any estate in real property." The court declared that applying the statute's broad immunity to all types of public properties made little sense. If the publicly owned property in question were a city park intended solely as a public recreational facility, the court pointed out, a statutory grant of immunity for such property would not further encourage recreational usage; or, the court continued, in the case of a public road, the very purpose of which was to provide an avenue for public travel, there would be no rational basis for granting immunity based on the injured person's use of the road for a recreational purpose as opposed to some other purpose. The court further held that the statute's conflict with the state tort claims act revealed that the statute was not intended to apply to public landowners. The court said that, where general and specific statutory provisions conflicted, the specific provision, in this case the act, prevailed over the general one.[22]

See Smith v Scrap Disposal Corp. (1979, 4th Dist) 96 Cal App 3d 525, 158 Cal Rptr 134, an action brought to recover for injuries suffered when the plaintiff fell off a bulldozer on property occupied by the defendant scrap disposal corporation, in which the court stated that, had the injury occurred on a common area adjacent to the corporation's property, the state recreational use statute probably would not apply. Noting that the statute applied to an "owner of any estate in real property," the court

21. In Pacific Gas & Electric Co. v Superior Court (1983, 3d Dist) 145 Cal App 3d 253, 193 Cal Rptr 336, the court noted that the state recreational use statute had been amended in 1980 to include not only owners of estates in real property, but also owners of any other interest in real property, whether possessory or nonpossessory. The court stated that the amendment manifested a legislative intent to abrogate the decision in the Darr Case declining to extend the immunity of the statute to nonpossessory interests such as easements.

It should also be noted that, in Lostritto v Southern Pacific Transp. Co. (1977, 1st Dist) 73 Cal App 3d 737, 140 Cal Rptr 905 (disagreed with Potts v Halsted Financial Corp. (2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160), § 4[a], involving a similar dive off a trestle into a river, a railroad that owned the bridge was held protected by the statute where the railroad also owned the riverbed.

22. The court disagreed with the cases that the state supreme court disapproved in the Delta Farms Case, this subsection.

was apparently construing that term. The plaintiff and two friends had been fishing for the day on a marine terminal that the corporation occupied in part. When they left they drove home along a road on the common area of the terminal. One of the plaintiff's friends jumped out of the car and entered the corporation's property; the plaintiff did also, and his injury later ensued. The court observed that the corporation held an easement for ingress and egress over the common area. However, pointed out the court, the corporation had only a minimal property interest in, and had no duty of maintenance or control over, that common area. On the ground that there existed a question of fact as to the plaintiff's recreational intent, the court reversed a summary judgment for the corporation.

§ 5. Owner opening land to public access[23]

[a] Statute applicable

Applying a state recreational use statute defining the landowners to which it applied as those "who allow members of the public to use" the land, or through use of a similar expression, the courts in the following cases, involving actions to recover for an entrant's injury or death on property owned or occupied by the defendant, explicitly or apparently held that the defendant came within the quoted expression, or that it had not been established that he did not come within the expression.

In an action in which a passenger on a power company's private railway sought to recover from the company for injuries suffered when he fell off the flatcar he was riding and was run over, the court, in State ex rel. Tucker v District Court of Thirteenth Judicial Dist. (1970) 155 Mont 202, 468 P2d 773, held that the company was a "tenant" within the meaning of the state recreational use statute, which applied to a "landlord or tenant who permits by act or implication, any person to enter upon any property in the possession or under the control of such landowner or tenant." The railway ran for 2-½ miles from the company's "hoist house" to its dam. The United States owned the real estate on which the dam, railway, and hoist house were located. The company's rights were defined in a document entitled "Order Issuing License." The court stated that the document gave the company the occupation, possession, and use of the land for a fixed term of years, for which the company paid the government an annual fee. The court held that the document created both a lease and a license. Finding the company protected by the statute, the court in effect permitted the company to assert an affirmative defense of the statute.

Construing the expression "any public or private landowners or others in lawful possession and control of agricultural or forest lands . . . who allow members of

23. This section collects those cases involving the construction of a recreational use statute explicitly incorporating the requirement of opening land to public access in the expression defining the landowners to which the statute applies. Most if not all statutes effectively apply only to such landowners.

the public to use" the lands, to which landowners the state recreational use statute applied, the court, in McCarver v Manson Park & Recreation Dist. (1979) 92 Wash 2d 370, 597 P2d 1362, two parents' action to recover for the alleged wrongful death of their daughter, held that the defendant park and recreation district came within the terms of the statute. The daughter fell or was pushed from the diving tower in a public swimming area operated by the district. Observing that the act that had amended the statute to include public landowners had stated that the amendment's purpose was to grant authority to local governments to maintain a system of all-terrain vehicle trails, the parents contended that the statute applied to public landowners only insofar as all-terrain vehicle operation was involved. The court rejected this argument as well as the parents' contentions that the application of the statute to public parks defeated a public policy in favor of providing the public with safe facilities, and that the statutory purpose of encouraging the opening of land to public recreational use did not apply to the state. Holding the district protected by the statute, the court affirmed the dismissal of the action.

In Power v Union P. R. Co. (1981, CA9 Wash) 655 F2d 1380 (applying Washington law), a mother's action to recover from a railroad for her daughter's allegedly wrongful death, the court reversed a judgment for the mother and remanded the case for further consideration of whether the railroad was an owner within the meaning of the Washington recreational use statute. The statute applied to "any public or private landowners or others in lawful possession and control of any lands . . . who allow members of the public to use" the land for outdoor recreation. The daughter was hit by a train while standing on the tracks. The court held that the railroad was in lawful possession and control of the land in Washington on which the tracks were located. Its conclusion followed, the court said, from an interpretation of a 999-year contract signed in 1911 by the railroad and the owner of the tracks and right-of-way. The court stressed that, under the contract, the railroad could not be ousted, and it was permitted to improve the facilities and make needed repairs. The court declared, however, that a remand was necessary because the lower court had failed to address adequately whether the railroad allowed the public to use the land. The lower court's finding that the railroad's employees had "actual knowledge" of the use of the land "on a frequent basis" was insufficient, the court said.

In a mother's action to recover under the Federal Tort Claims Act from the United States for severe injuries suffered by her daughter while "snow sliding" on an inner tube in a national park within Washington, the court, in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), held that the United States was a "recreational landowner" within the meaning of the Washington recreational use statute. Although the statute, which applied to "any public or private landowners or others in lawful possession and control of agricultural or forest lands . . . who allow members of the public to use" the lands for outdoor recreation, did not use the term "recreational landowner," the court was apparently referring to the landowners described by the statute as included within it. While not contending that the government's status as a political entity precluded its protection by the statute, the mother argued that the statute applied only to landowners who as a result of the statute gave up their right to keep the public from the land. She pointed out that the national park was established some 30 years prior to the enactment of the statute. The court stressed, however, that federal regulations permitted the government to close the park, or a part thereof, or restrict its use. Holding the United States protected by the statute, the court affirmed a judgment in its favor.

In Morgan v United States (1983, CA9 Wash) 709 F2d 580 (applying Washington law), a wrongful death action to recover from the United States under the Federal Tort Claims Act for the accidental electrocution of the plaintiff's decedent in an electrically charged lake within a national recreation area in Washington, the court apparently held that the United States was a "recreational landowner" within the meaning of the Washington recreational use statute. Observing that the statute applied to "any public or private landowners or others in lawful possession and control of any lands . . . who allow members of the public to use" the lands for recreational purposes, the court apparently intended the term "recreational landowner" to refer to this class of landowners to whom the statute applied. Holding the United States protected by the statute, the court affirmed summary judgment in its favor.

[b] Statute not applicable

In actions to recover for injuries suffered by an entrant on a land or water area allegedly or admittedly owned or controlled by the defendant or its insured, the courts in the following cases expressly or apparently held that the defendant or the insured did not come within, or that it had not been established that the defendant did come within, an expression defining, in varying language, the landowners to whom the state recreational use statute applied as landowners who permitted public access to their land, or who provided the public with a park.

In an action in which a "john boat" passenger, who was injured when the boat collided with a diving dock while operating in a lake, sought to recover from a lakefront property owner who allegedly owned, controlled, or maintained the dock, the court, in Arias v State Farm Fire & Casualty Co. (1983, Fla App D1) 426 So 2d 1136, reversing a summary judgment for the property owner, stated that there existed a factual issue unresolved by the record whether the property owner was an "owner or lessee who provides the public with a park area for outdoor recreational purposes," within the meaning of the state recreational use statute, which immunized such owner or lessee from liability. The

court pointed out that the record did not disclose whether the property owner's property completely enclosed the lake. The court questioned whether there were other abutting property owners who had access to the lake, or who provided access to others. The court stated that, in order "to provide" the lake as a park area, it was obvious that the property owner was required first to have had the right to exclude others from ingress to the lake. Additionally, continued the court, even if the record demonstrated that the landowner's ownership of the land was such as to permit him to provide access, it was unclear from the record whether the property owner provided access to all members of the public or only to a restricted class of persons.

Apparently applying a section of the state recreational use statute stating that the statute applied to an "owner of land . . . who permits . . . any person to use his land for recreational purposes," the court, in Lacombe v Greathouse (1981, La App 3d Cir) 407 So 2d 1346, a father's action to recover for injuries suffered by his minor son when the son fell into a bed of hot coals during land-clearing operations on a 20-acre tract on which the son was playing, held that the statute did not apply to the action since any previous permission by the landowner for the son to use the property for recreational purposes had been withdrawn after the clearing operation had begun. This was true, the court said, although it appeared that the landowner had previously allowed children in the neighborhood to use his property for impromptu play activity. However, finding as a fact, within its appellate jurisdiction, that the landowner had not been negligent, the court affirmed a directed verdict for the landowner's liability insurer.

§ 6. "Owner of land"

In the following cases, involving actions to recover for the death of an entrant on land owned by the defendant, the courts apparently held that the defendant was an "owner of land" within the meaning of a state recreational use statute applying to an "owner of land."

Apparently construing the term "owner of land" to which the Colorado recreational use statute applied, the court, in Otteson v United States (1980, CA10 Colo) 622 F2d 516, 66 ALR Fed 297 (applying Colorado law), affirming a summary judgment for the United States in an action brought under the Federal Tort Claims Act (FTCA) to recover for the death of a passenger when a jeep left the road in a national forest within Colorado, held that the United States was covered by the statute. Pointing out that the purpose of the statute was to encourage landowners to open their land to the public for recreational purposes, the plaintiff, the administrator of the passenger's estate, argued that this purpose would not be served by applying the statute to the United States because the United States was under an independent duty to maintain the national forests as public recreational areas. The court replied by observing that forest service regulations allowed each forest supervisor, among others, to close or restrict the use of forest areas and roads. If liability were imposed on the government in cases such as this one, the court continued, the forest service might well choose to close the forests to public use rather than to bear the heavy burden of maintaining logging roads as public thoroughfares. The statute was enacted to prevent precisely this result, the court observed. The court also declared that, although recreation was one of the uses for the national forest road system, the roads were intended primarily to facilitate the harvesting, removal, and management of timber.

Apparently construing the term "owner of land," to which the Oregon recreational use statute applied, the court, in McClain v United States (1976, DC Or) 445 F Supp 770 (applying Oregon law), held that the term included the defendant United States. The plaintiff, the personal representative of a woman who died after an automobile accident on government land that was apparently in Oregon, brought the action pursuant to the Oregon wrongful death act. The court acknowledged that there might earlier have been some doubt about the applicability of the statute to government-owned land, since the statute was passed to encourage private landowners to open their land to public recreational use. Holding the United States protected by the statute, the court granted its motion for summary judgment.

However, in three consolidated trespass actions to recover from a museum association for injuries allegedly suffered by the plaintiffs as a result of the explosion of a ceremonial cannon fired at a state park by an organization created and sponsored by the museum association, the court, in Borgen v Ft. Pitt Museum Associates, Inc. (1984) 83 Pa Cmwlth 207, 477 A2d 36, held that the state did not come within the expression "owner of land" to which the state recreational use statute applied. The state had been joined as a third-party defendant in each action, and sought to interpose the defense of the statute through an amendment to its answer and new matter. Observing that the statute explicitly stated its purpose as encouraging owners to make their land available for the recreation of others, the court declared that surely the legislature had understood that the state always acquired, and usually held, its lands for the use of the public. It was also unlikely that the legislature, the court continued, would have chosen to confer immunity on the state by such an imprecise, indefinite, and indistinctive vehicle as a statute limiting the liability of the "owners of land." Additionally, the court stressed, the doctrine of sovereign immunity barred suits against the state at the time of the statute's enactment in 1966. The court affirmed a trial court order refusing the state leave to amend.

§ 7. Other specified terms

In the following cases, involving actions to recover for injuries suffered by an entrant on land owned or occupied by the defendant, the courts explicitly or apparently held the defendant to come within a provision of the state recreational use statute defining, through use of a specified term other than those

considered in §§ 3-6, in whole or in part, the landowners to whom the statute applied.

In an action to recover for injuries suffered by the plaintiff while sledding in a park operated by a municipal park district, the court, in Marrek v Cleveland Metroparks Bd. of Comrs. (1984) 9 Ohio St 3d 194, 9 Ohio BR 508, 459 NE2d 873, apparently held that the district came within the expression "owner, lessee, or occupant of premises" to whom the state recreational use statute applied. The court stated that public landowners were liable to the same extent as private landowners under the statute. Holding the defendant, the district's governing board, protected by the statute, the court affirmed the dismissal of the action.

However, in an action in which the plaintiff sought to recover for an ankle injury from a city, the city's historic preservation board, and an arts council, the court, in Pensacola v Stamm (1984, Fla App D1) 448 So 2d 39, review den (Fla) 456 So 2d 1181 and review den (Fla) 456 So 2d 1181, affirming a judgment against the city and the board, held that a governmental entity was not a "person" within the meaning of the state recreational use statute, which applied to "persons." The court stated that the statute was intended to encourage private persons to make their property available to the public for recreation without being subject to liability for unknown hazardous conditions. A governmental body, on the other hand, needed no such encouragement, the court continued, because its principal purpose for owning public parkland was to make the park available for public use. The plaintiff was injured when, in walking across a strip of grass while attending an arts festival at a public park, she stepped into a concealed hole. The city owned the property while the board held a long-term lease on the park. The court held both the city and the board unprotected by the statute.

§ 8. Statute as whole

[a] Statute applicable

In actions to recover for injury or death suffered by an entrant on a land or water area owned or occupied by a governmental defendant, the courts in the following cases, explicitly or apparently construing as a whole a state recreational use statute, held that the statute applied to governmental landowners, including the defendant, or that the defendant was entitled to the protection of the statute through the interplay of the statute and an act regulating the sovereign's tort liability.

In Mandel v United States (1983, CA8 Ark) 719 F2d 963 (applying Arkansas law), an action in which a swimmer sought to recover from the United States and the insurer of a private fraternal organization for injuries suffered when he dived off an exposed rock in a swimming hole in a national park in Arkansas and struck his head on a submerged rock, the court stated that there was no question that a private individual could take advantage of the immunity provided by the Arkansas recreational use statute. The court was apparently construing the statute as a whole. Therefore, declared the court, the

United States was protected by the statute since the swimmer's action against it was brought under the Federal Tort Claims Act (FTCA), and under the FTCA the government's liability was the same as that of a private individual under like circumstances. Although affirming a summary judgment for the insurer, the court, on the ground that the statutory exception for willful and malicious conduct might apply, reversed a summary judgment for the United States.

In an action in which a husband and a wife sought to recover for injuries suffered by the wife when she fell while walking on a mountain in a park apparently maintained by the defendant memorial association, the court, in Stone Mountain Memorial Asso. v Herrington (1969) 225 Ga 746, 171 SE2d 521, conformed to 121 Ga App 20, 172 SE2d 434, apparently construing the state recreational use statute as a whole, held that the statute applied to the park, and was not intended to apply merely to privately owned lands such as farmland. The association was apparently a public entity. The court pointed out that the statute defined "owner" as "the possessor of a fee interest, a tenant, lessee, occupant or persons in control of the premises." "Land" was defined in the statute, the court observed, as "land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to the realty." The court stated that the mere fact that no decided case, other than one that the court described only as involving a dairy farmer, had been found made no difference, since the determining factor in interpreting a statute was the legislative intent in its enactment. The court declared that nothing on the face of the statute indicated in any way a legislative intention to limit the statute's coverage to privately owned lands. Holding the association protected by the statute, the court in effect granted the association's motion for summary judgment.

In a father's action to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered by his daughter in a diving accident at a national park within Hawaii, the court, in Proud v United States (1984, CA9 Hawaii) 723 F2d 705, cert den (US) 82 L Ed 2d 841, 104 S Ct 3536 (applying Hawaii law), affirming the dismissal of the action, held that under the Hawaii recreational use statute, construed as a whole, a private landowner would not be liable for the daughter's injuries, and therefore neither was the United States liable, since under the FTCA the government's tort liability was coextensive with that of a private individual under state law. Observing that the recreational use statute defined "land," to which it applied, as "land, roads, water, water courses . . . other than lands owned by the government," the father contended that the statute did not extend to land owned by governments, including the United States. Replying, the court stressed that in enacting the FTCA, Congress, not the Hawaii legislature, determined the tort liability of the United States.

In an action to recover for the drowning of the plaintiff's decedent while swimming in a gravel

pit located on property owned and operated by the defendants, a county and its board of commissioners, the court, in Graham v County of Gratiot (1983) 126 Mich App 385, 337 NW2d 73, apparently construing the state recreational use statute as a whole, stated without further discussion that the statute was applicable to publicly owned lands. Holding the defendants protected by the statute, the court affirmed a summary judgment in their favor.

In a college student's action to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered in falling down a vertical shaft within an abandoned mine on federal property in Nevada, the court, in Gard v United States (1979, CA9 Cal) 594 F2d 1230, cert den 444 US 866, 62 L Ed 2d 90, 100 S Ct 138 (applying Nevada law), affirming a summary judgment for the United States, held that the Nevada recreational use statute applied to and protected the United States. The court apparently construed the statute as a whole. The student was driving through Nevada and decided to explore abandoned mines. The student contended that the rationale of the statute, to encourage landowners to open up their land to recreational use, did not apply to the government. Disagreeing, the court pointed out that the student did not suggest that the government could not completely close federal land to public use if it felt that its potential tort liability was too great.

Affirming a summary judgment for a city in a 14-year-old plaintiff's action to recover from the city for injuries suffered while diving into an abandoned city-owned lake, the court, in Magro v Vineland (1977) 148 NJ Super 34, 371 A2d 815, declared without further discussion that the immunity granted the landowners under the state recreational use statute was equally available to a public entity and to a private individual or corporation. The court apparently construed the statute as a whole.

Affirming a judgment for the state in an action in which the administrators of the estates of two men who disappeared while boating on a reservoir owned and controlled by the state sought to recover for the two men's deaths, the court, in Trimblett v State (1977) 156 NJ Super 291, 383 A2d 1146, held that the state recreational use statute, construed as a whole, applied to the state. Rejecting the contention that the state tort claims act had preempted the field of state tort liability, the court pointed out that the act explicitly preserved to a public entity any defenses that would be available to a private person under the same circumstances. It would be an unreasonable construction of the two enactments, the court stressed, to conclude that the state or other public entity had a greater tort liability than a private landowner.[24]

In an action in which an employee who was seriously injured while attending a company picnic at a county park sought to recover from the county park commission for his injuries, the court, in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, held that public entities, including the county park commission, were entitled to the protection of the state recreational use statute, which the court apparently construed as a whole. The employee dived into a river that flowed through the center of the park, and he struck a partially submerged, 55-gallon, blue oil drum that was apparently a trashcan. The court held that the state tort claims act was not exclusive authority for a public entity's immunity in tort actions. The court noted that the claims act specifically reserved to public entities any defense available to private persons. The claims act, the court continued, did not prevent a public entity from seeking additional or alternative grounds for immunity in the recreational use statute. However, holding the drum an artificial hazard not covered by the statute, the court denied the park commission's motion for a summary judgment under the statute.[25]

In a consolidated appeal of two recreational users' actions to recover from the state for injuries suffered on state land, the court, in Sega v State (1983) 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174, affirming a judgment for the state in one case and reversing a judgment for the user in the second case, held that the state recreational use statute applied to state land as well as to private land. The court apparently construed the statute as a whole. The court pointed out that the statute referred to any "owner, lessee or occupant of premises" without limiting the scope of that clause to private landowners. In addition, the court observed, the statute referred to a second statute that pertained to lands acquired by the state. The court commented that this reference confirmed that the legislature intended to provide protection to the state as well as to private landowners. The court went on to hold both users' actions barred by the statute.

In a mother's action to recover for the drowning of her son in a lake within a state park, the court, in McCord v Ohio Div. of Parks & Recreation (1978) 54 Ohio St 2d 72, 8 Ohio Ops 3d 77, 375 NE2d 50, reinstating the dismissal of the action, held that the state recreational use statute, construed as a whole, was a rule of law "applicable to suits between private parties." Therefore, declared the court, the defendant, a state authority that employed lifeguards for the lake, was, under an act consenting to the state's being sued in accordance with such rules of law, entitled to the protection of the statute.

24. This case was distinguished in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, § 27[b].

25. It should be noted that the court in Labree Millville Mfg., Inc. (1984) 195 NJ Super 575, 481 A2d 286, disagreed with the decision in Diodato, supra, to the extent that the court in Diodato held that artificial debris submerged in a lake could defeat immunity. The mention of "condition of the land" in the statute is an additional immunity separate and apart from the general immunity relieving a landowner of a duty to keep the premises safe for entry or use by others for sport and recreational purposes, the court declared.

In Moss v Dept. of Natural Resources (1980) 62 **Ohio** St 2d 138, 16 Ohio Ops 3d 161, 404 NE2d 742, a consolidation of two actions to recover for an entrant's injury or death at a state park, the court, affirming the dismissal of both actions, reiterated the reasoning and conclusion of McCord v Ohio Div. of Parks & Recreation (1978) 54 **Ohio** St 2d 72, 8 Ohio Ops 3d 77, 375 NE2d 50, this subsection.

In a fisherman's action to recover from a federal authority under the Federal Tort Claims Act (FTCA) for injuries suffered during a rockslide at a dam in Tennessee at which the fisherman was fishing, the court, in Shaver v Tennessee Valley Authority (1982, ED Tenn) 565 F Supp 12 (applying Tennessee law), granting summary judgment for the authority, held that the Tennessee recreational use statute, apparently construed as a whole, clearly applied even if it did not apply to municipalities on similar facts. Under the FTCA, which allowed claims only when a private person would be liable under state law, the court said, the federal authority, which operated the dam, was protected by the statute.

In an action to recover from the United States under the Federal Tort Claims Act (FTCA), and from other defendants, for injuries sustained by the plaintiff in a motorcycle accident that occurred on federal land within Utah, the court, in Ewell v United States (1984, DC Utah) 579 F Supp 1291 (applying Utah law), construing the Utah recreational use statute as a whole, held that the statute applied to the United States. Observing that the statute broadly defined the term "owner," to which it applied, and that it stated that its purpose was to encourage owners of land to make and and water areas available to the public for recreation, the court stated that this language did not limit the statute's application to private landowners. Had the legislature intended such a restriction, the court observed, it could easily have inserted "private" or "nongovernmental" into the statute. Secondly, the court said, the policy of encouraging landowners to open land for recreational use applied to the federal government as well as to other landowners. Furthermore, continued the court, under the FTCA, the United States was liable only to the extent that a private person would be, and the statute, the court stated, certainly applied to private persons. Holding the United States protected by the statute, the court granted its motion for summary judgment and dismissed the claims against the other defendants.

[b] Statute not applicable

In actions to recover for an entrant's injury or death on a land or water area owned by a governmental defendant, the courts in the following cases held that the state recreational use statute, apparently construed as a whole, did not extend to the governmental body involved.

The court, in McPhee v Dade County (1978, **Fla** App D3) 362 So 2d 74, apparently construing as a whole the state recreational use statute[26] in an action to recover for

26. Without stating the text of the statute, the court described the statute only by citation.

a swimmer's death by drowning at a county beach, stated without further discussion that the statute did not apply to a county. However, on other grounds the court affirmed a summary judgment for the county and its insurer.

Apparently construing as a whole the state recreational use statute,[27] the court, in Metropolitan Dade County v Yelvington (1980, **Fla** App D3) 392 So 2d 911, petition den (Fla) 389 So 2d 1113, an action in which a woman and her husband sought to recover for injuries suffered by the woman in slipping on a boat launching ramp at a county recreational facility, held without further discussion that the statute did not apply to a county. The court declared that, although a similar statement in McPhee v Dade County (1978, **Fla** App D3) 362 So 2d 74, this subsection, could be considered dictum, the court in this case was expressly holding that the statute did not apply to a county. The court affirmed a judgment for the plaintiffs.

In a wrongful death action to recover for the drowning of the plaintiff's 6-year-old daughter in a lake at a county park, the court, in Chapman v Pinellas County (1982, **Fla** App D2) 423 So 2d 578, reversing a summary judgment for the county, held that the state recreational use statute did not apply to counties. Apparently construing the statute as a whole, the court stated that the obvious legislative intent of the statute was to encourage private owners and lessees to open their land to the public for recreational use. Noting that private parties were required to pay for their maintenance expenses to secure the liability afforded by the statute, since the statute did not apply if any charge was made for using the property, the court pointed out that, on the other hand, a county generally maintained its parks from available tax funds. The court also declared that it was logical to conclude that the statute was not designed to immunize counties since, at the time of the statute's enactment, counties were afforded sovereign immunity by the state constitution. Continuing, and noting that counties' sovereign immunity from tort liability had been waived since the enactment, the court stated that there was no reason to conclude that counties should now be accorded immunity by a recreational use statute. Acknowledging the county's argument that, if held to a duty of care to all persons using its parks, it would be required either to levy an admission charge or to close some of its facilities, the court replied that this was a policy matter for the judgment of the local authorities.

In an action in which a husband sought to recover from the state for injuries suffered when he struck a concrete post while operating a bicycle on a bicycle trail in a state park, and in which his wife also apparently sought to recover on a ground unspecified by the court, the court, in Watterson v Commonwealth (1980) 18 **Pa** D & C3d 276, apparently construing the

27. Giving only the citation of the statute, the court did not describe its text.

state recreational use statute as a whole, held that the state was not covered by the statute. The court pointed out that (1) the state possessed general sovereign immunity at the time of the enactment of the statute, (2) both the title of the statute and a section articulating the purpose of the statute stated that the statute was intended to encourage owners of land to make their facilities available for recreational purposes, and (3) a section of the statute specifically included land leased to the state or any subdivision thereof for recreational purposes. The court stressed that, because of the special character of state-owned property and of the state as owner, it would be contrary to public policy to deprive by implication recreational users of state-owned property of protection against dangerous conditions on the property. Stating that Hahn v United States (1980, MD Pa) 493 F Supp 57, affd without op (CA3 Pa) 639 F2d 773 and affd without op (CA3 Pa) 639 F2d 773 and affd without op (CA3 Pa) 639 F2d 777 (applying Pennsylvania law), § 3[a], which involved federally owned land, was neither applicable nor controlling, the court denied the state's motion for summary judgment.

In an action in which a minor plaintiff sought to recover for serious injuries suffered when she attempted to dismount from a horizontal ladder at a county park, the court, in Champ v Butler County (1981) 18 Pa D & C3d 282, apparently construing the state recreational use statute as a whole, held that the defendant county was not entitled to the protection of the statute. Observing that a provision of the county code required that all recreation places be kept in good order and repair, the court declared that the duty imposed on counties by this section would be severely circumscribed if the statute were available to counties. The court also observed that the language of the statute appeared to relate to private, rather than to governmental, landowners. Noting that Hahn v Commonwealth (1980) 18 Pa D & C3d 260, § 3[b], had held that the state was not an "owner" within the meaning of the statute, the court stressed that it seemed appropriate to adopt a similar line of reasoning with respect to counties, although the interaction in the present case was between the statute and governmental, rather than sovereign, immunity. The court struck an answer and new matter in which the county asserted the statute as an affirmative defense.

III. Property comprehended by statute[28]

§ 9. "Premises"

[a] Statute applicable

The courts in the following cases, involving actions to recover for the injury or death of an entrant on property, or in a body of water adjoining property, owned or controlled by the defendant, explicitly or apparently held that the property came within the term "premises" to which the state recreational use statute applied.

In a 14-year-old minor's action to recover for injuries described by the court only as suffered in diving off an abandoned barge in a body of water on the defendant construction material company's property, the court, in Scheck v Houdaille Constr. Materials, Inc. (1972) 121 NJ Super 335, 297 A2d 17 (disagreed with on other grounds Magro v Vineland, 148 NJ Super 34, 371 A2d 815), apparently held that the property came within the meaning of the term "premises" in the state recreational use statute. The statute applied to an owner, a lessee, or an occupant of "premises," but apparently did not define that term. Without further describing the nature of the property, the court said that the test whether the statute applied was the reasonableness of the expectation that a landowner would, without extraordinary effort, maintain a supervision of his property that would be expected to reveal whether any persons had entered the land for recreational purposes and whether any artificial conditions existed that might pose a danger to these interlopers. Thus, the court pointed out, a farmer could not be expected to patrol his land on a regular basis to observe possible interlopers. Likewise, continued the court, a company could own a large tract of land on which extensive stretches would be almost totally unoccupied, whereas other sections, such as where there were buildings, would be subject to relatively regular scrutiny by the company. However, on the ground that the statute might not apply because of the minor's age, the court granted the minor's motion to vacate an earlier order dismissing two counts of the complaint.[29]

A frozen pond, on land owned by an estate of which the defendant bank was trustee, was held, in Odar v Chase Manhattan Bank (1976) 138 NJ Super 464, 351 A2d 389, certif den 70 NJ 525, 361 A2d 540, to come within the term "premises" to which the state recreational use statute applied, and the court affirmed a summary judgment for the bank in a wife's action for the death of her husband, who drowned while attempting to rescue their daughter after she had fallen through the ice while skating on the pond. It was clear to the court that the statute was intended to apply to nonresidential,[30] rural, or semirural land whereon the sports and recreational activities enumerated in the statute were conducted, and skating, the court said, was one of the enumerated activities. Moreover, the court stressed, both the pond and the ice thereon were natural conditions; neither one was created or maintained by the bank. The property was apparently rural or semirural, since the court noted that it was bounded on the north by a shallow river and on the south by a state

28. The Model Act (see § 2[a],) states that " 'Land' means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."

29. This case was distinguished in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, § 27[a].

30. The court, in Tallaksen v Ross (1979) 167 NJ Super 1, 400 A2d 485, this subsection, stated that the requirement of "nonresidential land" was required to be interpreted as meaning land not developed and used for residential purposes.

highway. The court held the bank protected by the statute.[31]

Apparently construing the term "premises," to which the state recreational use statute applied, the court, in Magro v Vineland (1977) 148 NJ Super 34, 371 A2d 815, held that an abandoned lake owned by the defendant city was property to which the statute applied. The 14-year-old plaintiff was injured when he dived into the lake from a makeshift diving board. The lake had been formed by the natural seepage of water into a "sandwash" and was acquired by the city for ultimate development as a park. At the time of the accident the land was "predominantly rural . . . undeveloped, unoccupied, and unimproved." The court declared that the immunity granted by the statute applied to nonresidential rural or semirural land. Holding the city protected by the statute, the court affirmed a summary judgment in its favor.[32]

Apparently construing the term "premises" to which the state recreational use statute applied, the court, in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, held that a county park at which a company employee was seriously injured came within the purview of the statute. Attending a company picnic at the park, the employee was injured when he dived into a river in the middle of the park and struck a partially submerged, 55-gallon blue oil drum that was apparently a trashcan. Acknowledging that the statute applied only to nonresidential, rural, or semirural unimproved lands, the court declared that the nature of the park itself was such as to be within the statute. The court declared that the park was not "improved" property, as contended by the employee, despite its "man-made" quality in having come into existence out of tidal swamplands through a large project of dredging, land clearance, irrigation, and damming. The court also rejected what it described as the employee's most persuasive argument with regard to the character of the land, namely, that the various "improvements" thereon—fireplaces and docks—removed the property from the category of unimproved, rural, or semirural land. The court characterized all the "improvements" mentioned as mere conveniences or facilities incident to the recreational use of the park as part of the true outdoors. The court concluded that the statute should be given its broadest interpretation to include all lands bearing a resemblance to the "true outdoors." However, on the ground that the drum was an artificial rather than a natural hazard, the court denied the county's motion for summary judgment.[33]

31. This case was distinguished in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, § 27[b].

32. This case was distinguished in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, § 27[b].

33. It should be noted, however, that the court in Labree Millville Mfg., Inc. (1984) 195 NJ Super 575, 481 A2d 286, disagreed with the decision in Diodato, supra, to the extent that the court in Diodato held that artificial debris submerged in a lake could defeat immunity. The court stated that immunity was applicable whether the injury or death was caused by a natural or an artificial condition on the premises.

Apparently construing the term "premises" to which the state recreational use statute applied, the court, in Tallaksen v Ross (1979) 167 NJ Super 1, 400 A2d 485, an action to recover for injuries suffered when the infant plaintiff fell while ice-skating on the defendant landowner's tract, held that the 70.58-acre tract of undeveloped land was covered by the statute. The plaintiff was apparently engaging in horseplay while skating and fell on her back, landing on a tree stump. The frozen swamp on which the plaintiff had been skating was formed from the discharge from several drainage pipes leading to the tract. The court said that nothing in the statute suggested that the tract's proximity to developed residential areas, nor its zoning classification as residential land, rendered the statute inapplicable. The court commented that the tract could not legitimately be compared to the private swimming pool on developed residential property that, in Boileau v De Cecco (1973) 125 NJ Super 263, 310 A2d 497, affd 65 NJ 234, 323 A2d 449, § 9[b], was ruled outside the ambit of the statute. The court also stated that the reference in Odar v Chase Manhattan Bank (1976) 138 NJ Super 464, 351 A2d 389, certif den 70 NJ 525, 361 A2d 540, this subsection, that the statute applied only to "nonresidential land" was required to be interpreted as land not developed and used for residential purposes. It was uncontradicted, the court pointed out, that the tract was not so developed and used. Holding the landowner protected by the statute, the court affirmed a summary judgment in his favor.

Apparently construing the term "premises" in the state recreational use statute, which applied to the owner, lessee, or occupant of "premises," the court, in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, held that a tract of land that was leased by the defendant city and on which the plaintiffs, a jeep operator and one of his passengers, were injured came within the ambit of the statute. The plaintiffs were injured when the jeep struck a steel cable strung along posts on the tract. The court stressed that the tract, which the city had leased for the purpose of erecting and operating a police training and practice pistol range, was described by the trial judge as wholly unimproved except for the pistol range, in that the surrounding area was mostly woodland. The steel cable enclosed the pistol range on two sides. The court stated that the trial judge had correctly concluded that the 35-acre tract was clearly located in a rural and woodland area so that the activities of people entering the tract could not be controlled. The court distinguished Harrison v Middlesex Water Co. (1979) 80 NJ 391, 403 A2d 910, § 9[b], on the ground that the tract in that case was surrounded by a heavily populated area containing a high school, an athletic field, social clubs, and private homes. Holding the city protected by the statute, the court

reversed judgments for the plaintiffs.

In an action to recover for injuries suffered by the plaintiff when he dived off a bulkhead into the bay in which he was fishing and hit his head on the bottom, the court, in Orawsky v Jersey Cent. Power & Light Co. (1977, ED Pa) 472 F Supp 881 (applying New Jersey law), apparently construing the term "premises," to which the New Jersey recreational use statute applied, held that the property on which the bulkhead was located came within the statute. The property was owned by the defendant utility. The court pointed out that, to reach the bulkhead, it had been necessary for the plaintiff (1) to turn off a paved road and to travel about 250 yards down a sandy road bounded on either side by swamps; (2) to walk across a wooden bridge that was in a state of disrepair; and (3) to walk another 50 yards to the water's edge. There were no buildings or other structures, the court observed, that could be seen from the site of the accident. Clearly, declared the court, the "residential property exception" announced in Boileau v De Cecco (1973) 125 NJ Super 263, 310 A2d 497, affd without op 65 NJ 234, 323 A2d 449, § 9[b], was not applicable. Holding the utility protected by the statute, the court granted its motion for summary judgment.

In an action in which the parents of an 11-year-old girl sought to recover from the owners of the property adjoining the parents' lot for injuries suffered by the girl when she was walking a horse on the owners' property, the court, in Crabtree v Shultz (1977, Franklin Co) 57 Ohio App 2d 33, 11 Ohio Ops 3d 31, 384 NE2d 1294, apparently construing the term "premises" to which the state recreational use statute applied, held that the owners' property came within this term. The horse was scared by an approaching minibike and severely injured the girl by dragging her a distance. The owners maintained some horses, a barn, pasture land, and a small horsetrack on their property. Acknowledging that the statute had generally been considered to be applicable primarily to more remote areas for the sports of hunting and fishing, the court nonetheless stated that it seemed reasonable to apply the statute to the owners' property. Apparently holding the owners protected by the statute, the court affirmed a summary judgment in their favor.

In an action in which a husband sought to recover from the state for injuries suffered when he was walking towards a beach within a state park and slipped and fell on a mud slick, the court, in Fetherolf v State, Dept. of Natural Resources, Div. of Parks & Recreation (1982) 7 Ohio App 3d 110, 7 Ohio BR 142, 454 NE2d 564, affirming a summary judgment for the state, held that the state recreational use statute applied to the state, since state-owned land was within the definition of the statutory term "premises." The statute applied to the owner, lessee, or occupant of "premises." The court held the state protected by the statute.

In an action in which a minor son and his parents sought to recover from state employees for injuries suffered by the son when the "trail bike" that he was riding struck a cable stretched across a roadway used by the public on recreational land owned by the state, the court, in Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d 140, affirming the dismissal of the action, held that the recreational area in which the accident occurred came within the meaning of "premises" to which the state recreational use statute applied. The road was a service road encircling a pond in a fishery area open to the public for fishing and recreational purposes. The statute defined "premises" as including lands, private ways and buildings, and structures and improvements thereon. The court declined to embrace the plaintiffs' contention that the statute applied only to remote and uncontrolled areas. The court held the employees protected by the statute.

[b] Statute not applicable

In actions to recover for an entrant's death on property owned or occupied by the defendant, the courts in the following cases explicitly or apparently held that the property did not come within the term "premises," to which the state recreational use statute applied.

In a wife's action to recover from a water company for the alleged wrongful death of her husband, who drowned while attempting to rescue two boys who had fallen through the ice while ice-skating on the water company's frozen reservoir, the court, in Harrison v Middlesex Water Co. (1979) 80 NJ 391, 403 A2d 910, reversing an involuntary dismissal, held that the reservoir did not come within the term "premises," to which the state recreational use statute applied. The reservoir was located on an improved tract within a highly populated suburban community. It was surrounded by both private homes and public recreational facilities. In view of the fact that the designated recreational activities normally occurred on large tracts of natural and undeveloped land located in thinly populated rural or semirural areas, or on property having all or most of the characteristics of such rural and semirural lands, particularly as to size, naturalness, and remoteness, or insulation from populated areas, the court stressed that there was nothing to suggest that the statute was intended to extend immunity to all property without limit. The court also pointed out that the statute's reference to a second statute, which apparently only applied to rural or semirural land, indicated that the recreational use statute had similar application. Finally, the court stated that it had to assume that the legislature was mindful that immunity from liability for the negligent infliction of injury to others was not favored in the law. The court held the company unprotected by the statute.[34]

In a wife's action to recover from a suburban homeowner for her husband's death following his div-

34. This case was distinguished in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, § 9[a], and Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, § 27[b].

ing into the shallow end of a pool in the homeowner's backyard, the court, in Boileau v De Cecco (1973) 125 NJ Super 263, 310 A2d 497, affd without op 65 NJ 234, 323 A2d 449, reversing a summary judgment for the homeowner, held that a suburban backyard did not come within the meaning of "premises" in the state recreational use statute, which applied to the owner, lessee, or occupant of "premises," and therefore was not protected by the statute. Pointing out that the statute referred to a second statute that applied only to rural or semirural tracts of land, the court stated that this internal reference suggested that the recreational use statute applied to similar property. Furthermore, reviewing the enumerated recreational activities to which the statute applied, the court observed that these activities were for the most part those conducted in the true outdoors, not in someone's backyard. The court stressed that, although "swimming" was included in this list, it should be considered in context. The court declared that it was a fundamental rule in the construction of statutes that associated words explained and limited each other. Observing that the statute replaced a prior statute that had applied only to agricultural lands or woodlands, the court held that the enactment of the present statute was not intended to enlarge the protected class of landowners to suburban homeowners.[35]

Apparently holding that the parking lot at a racetrack did not come within the term "premises" in the state recreational use statute, the court, in Michalovic v Genesee-Monroe Racing Asso. (1981, 4th Dept) 79 App Div 2d 82, 436 NYS2d 468, in effect struck the racetrack owner's affirmative defense of the statute in an action in which a father sought to recover for the death of his son, who was killed while riding a motorbike in the parking lot. The motorbike suddenly stopped short, apparently as a result of hitting a curb or a chain, and the son was thrown off. The statute provided that an owner, a lessee, or an occupant of "premises" owed no duty to keep the premises safe for entry or use by one involved in "motorized vehicle operation for recreational purposes." Noting that the activity of motorized vehicle operation had been added by the state legislature 15 years after the enactment of the first version of the statute, the court held that the parking lot was not of the nature contemplated by the legislature as within the protective scope of the amendment on motorized vehicle operation. The court stated that the legislative intent in the amendment was to open up property of a relatively undeveloped nature. The amendment's coverage, the court continued, did not extend to an asphalt parking lot designed with equipment to control and restrict the free movement of traffic.

§ 10. "Commercial" property

In actions to recover for an entrant's injury or death on property

35. This case was distinguished in Tallaksen v Ross (1979) 167 NJ Super 1, 400 A2d 485, and Orawsky v Jersey Cent. Power & Light Co. (1977, ED Pa) 472 F Supp 881 (applying New Jersey law), both in § 9[a].

owned or maintained by the defendant, the courts in the following cases held that the property was not "commercial" property within the meaning of an exception in the state recreational use statute that, in varying language, preserved liability for injury occurring on "commercial" property.[36]

In an action in which a boater who slipped and fell on a boat ramp sought to recover from the owner of the ramp, the court, in Sea Fresh Frozen Products, Inc. v Abdin (1982, Fla App D5) 411 So 2d 218, petition den (Fla) 419 So 2d 1195, reversing a judgment for the boater, and remanding for entry of a judgment for the rampowner, held that the boater did not introduce sufficient evidence that the ramp was being used for commercial activity to avoid a directed verdict. The court held that the rampowner was protected by the state recreational use statute, which did not apply to property being used for "commercial or other activity for profit." The court did not describe the boater's evidentiary showing. However, the court distinguished a prior appeal in the action, Abdin v Fischer (1979, Fla) 374 So 2d 1379, later app (Fla App D5) 411 So 2d 218, petition den (Fla) 419 So 2d 1195,[37] infra, on the ground that that case had held that the boater had made a sufficient showing to avoid a summary judgment. In the present case, the court stressed, it was the evidence adduced at trial that was legally insufficient to prove the rampowner liable.

Affirming a summary judgment for the defendants, the state and a parish "police jury," in a wrongful death and survival action to recover for a drowning at a recreational area maintained by the defendants, the court, in Pratt v State (1981, La App 3d Cir) 408 So 2d 336, cert den (La) 412 So 2d 1098, held that the recreation area was not a "commercial recreational development or facility," within the meaning of the state recreational use statute, which preserved the liability of the owner of such a commercial facility. The court did not describe the relationship between the plaintiff and the person who drowned. The court declared that reference to standard dictionary definitions of the word "commercial" convinced it that, under the facts presented, profit as a primary objective of the operation of the recreational area was essential

36. For a case holding that a state recreational use statute, construed as a whole, did not apply to property used as a commercial enterprise, see Danaher v Partridge Creek Country Club (1982) 116 Mich App 305, 323 NW2d 376, app dismd (Mich) 325 NW2d 2, § 13[b]. And for a case holding that a state recreational use statute, construed as a whole, did not apply to an entrant on the property in connection with the defendant's business, see Baroco v Araserv, Inc. (1980, CA5 Ala) 621 F2d 189, reh den (CA5 Ala) 627 F2d 239 (applying Alabama law), § 21.

37. Some of the facts are taken from this opinion. It may be noted that, whereas the present opinion describes the defendant as the "owner" of the ramp, the supreme court opinion describes it as the "lessee" of the ramp. The present opinion also states that the president of the owner/lessee, who was a defendant in the supreme court case, was not a party to the present appeal.

to render it commercial. The court did not describe the dictionary definitions that it consulted. Stressing that a second statute, although permitting the collection of fees for the use of the recreational area, required that the funds collected be used exclusively for the maintenance and operation of the area, the court concluded that the area was not a commercial enterprise. The court therefore held that the recreational use statute immunized the defendants from liability.

In an action to recover for personal injuries and property damage suffered by the plaintiffs when a live hickory tree fell onto their pickup truck as they were waiting to launch a boat onto a lake in a park, the court, in Thomas v Jeane (1982, La App 3d Cir) 411 So 2d 744, reversing a judgment against the defendant state, and dismissing the suit as to the state, held that the park was not a "commercial" recreational development of the state. The state recreational use statute preserved a landowner's liability if the recreational area was a "commercial recreational development or facility." The park within which the lake was situated was located on state land and operated by a private lessee. The court declared that the park was not a commercial enterprise of the state since the state's primary objective in running the park was to provide a recreational facility for the public rather than to realize a profit. The court stressed that (1) the only consideration paid the state by the lessee was the lessee's obligation to maintain the park as a public recreational area, (2) the lease expressly prohibited the lessee from charging fees for the use of the boat ramp on which the plaintiffs were injured, (3) the state did not receive any funds from the administration of the park, and (4) the lease's permitting the lessee to charge a nominal admission fee, to operate a concession stand, and to retain any excess of revenues over maintenance expenditures, were necessary incentives to induce private parties to enter into the lease. The court held the state protected by the statute.

Construing the expression "commercial recreational developments or facilities," in the state recreational use statute, which preserved the liability of the owner of such a development or facility, the court, in Keelen v State (1984, La App 1st Cir) 454 So 2d 147, a mother's action to recover for the drowning of her 8-year-old son in a swimming pool in a state park, held that the park was not such a development or facility. The court declared that a development or facility was commercial only if it was run for a profit, regardless of whether an admission fee was charged. The court stated that the affidavit of a state officer clearly showed that the state anticipated no profit in the running of the park, in that the state took in less than $70,000 per year in admission fees while expending more than $240,000 per year in running the facility. Holding the state protected by the statute, the court affirmed a summary judgment in its favor.[38]

38. It should be noted, however, that the decision in Keelen was reversed, in a decision reported at (La) 463 So 2d 1287, on the ground that a swimming pool was not the type of instrumentality to which immunity extended. For a discussion of this point, see § 27[b].

In an action to recover for injuries suffered by the plaintiff while diving into a swimming pool maintained by the defendant recreational district, the court, in McCain v Commercial Union Ins. Co. (1983, WD La) 592 F Supp 1, ques certified (CA5 La) 719 F2d 1271 (applying Louisiana law), granting the district's and its insurer's motion for summary judgment, held that the pool was not a "commercial recreational development or facility," within the meaning of the Louisiana recreational use statute. The statute preserved the liability of the owner of such a development or facility. Pointing out that the statute, aside from this exception, applied to an owner who permitted with or without charge a person to use his land for recreational purposes, the court stated that the mere charging of some admission price would not necessarily render a facility commercial. The appropriate test, the court said, was whether the facility was run primarily for a profit. Observing that the district charged an admission fee of 25 to 50 cents for the use of the pool, the court concluded that the district did not run the pool with the intention of generating a profit. The court held the action barred by the statute.

However, in an action in which a boater who slipped on a boat ramp and injured himself sought to recover from the ramp's lessee and the lessee's president, the court, in Abdin v Fischer (1979, Fla) 374 So 2d 1379, later app (Fla App D5) 411 So 2d 218, petition den (Fla) 419 So 2d 1195, reversing a summary judgment for the lessee and its president, held that a jury could reasonably infer that commercial activity was taking place on the ramp. The state recreational use statute did not apply if "commercial or other activity for profit" was being conducted on the land. The court did not describe the factual showing the boater had made in the trial court.[39]

§ 11. Other specified terms

[a] Statute applicable

The courts in the following cases, involving actions to recover for an entrant's injury or death on property owned or maintained by the defendant, held that the property came within a term, other than "premises," that the state recreational use statute employed to define some or all of the property to which the statute applied.[40]

In an action to recover for injuries suffered by the plaintiff while diving into a swimming pool maintained by the defendant recreational district, the court, in McCain v Commercial Union Ins. Co. (1983, WD La) 592 F Supp 1, ques certified (CA5 La) 719 F2d 1271

39. This case was distinguished in Sea Fresh Frozen Products, Inc. v Abdin (1982, Fla App D5) 411 So 2d 218, petition den (Fla) 419 So 2d 1195, this section.

40. For a case holding that land owned by the Bureau of Land Management of the United States was encompassed by the expression "any land" within the definition of "owner" in a state recreational use statute, see Denton v L. W. Vail Co. (1975) 23 Or App 28, 541 P2d 511, § 3[a].

(applying Louisiana law), granting the district's and its insurer's motion for summary judgment, held that a swimming pool fell within the definition of "land" to which the Louisiana recreational use statute applied. Noting that the statute defined "land" as including structures, the court stated that the pool was a "structure." The court held the action barred by the statute.

In an action in which a passenger on a power company's private railway sought to recover from the company for injuries suffered when he fell off the flatcar he was riding and was run over, the court, in State ex rel. Tucker v District Court of Thirteenth Judicial Dist. (1970) 155 Mont 202, 468 P2d 773, held that the term "property," in the state recreational use statute, comprehended personal property, including the private railway, as well as real property. The real property underlying the railway, which connected the company's "hoist house" with its dam, was owned by the United States. The man was with a group that was on its way to a recreational campsite. The statute applied to a landlord or tenant who permitted any person to enter "any property" in his possession or control. Stressing that the statute was not by its terms limited to real property, the court stated that to impose such a limitation would be to ignore the overall intent of the statute, which was to give relief from any and all conceivable liability from any act, conduct, or omission to any person gratuitously present for any recreational purpose. The court also observed that a second statute, enacted as a guide to the interpretation of the state code in general, provided that the term "property" included both real and personal property. Finding the company protected by the statute, the court in effect permitted the company to assert the statute as an affirmative defense.

In a mother's action to recover under the Federal Tort Claims Act from the United States for serious injuries suffered by her daughter while "snow sliding" on an inner tube in a national park within Washington, the court, in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), held that the park was "forest land," within the meaning of the Washington recreational use statute, which applied to "agricultural or forest lands." The court suggested that three factors bore on the scope of the statute: (1) the amount of land; (2) the arrangement of the land and its improvements; and (3) the relative proximity of the land to a population center. Applying these factors, the court pointed out that the park covered 1,350 square miles and was at least 70 miles from a metropolitan area that was apparently the nearest such area. Focusing solely on the ridge area where the accident occurred, the mother urged that it was similar to an "urban park" because of the improvements, patrol, and accessibility. Stating, however, that the national park was in no sense similar to a city urban park, the court distinguished Kucher v County of Pierce (1979) 24 Wash App 281, 600 P2d 683, § 11[b], which had involved a wooded area in a city park administered by a city park

district. Holding the United States protected by the statute, the court affirmed a judgment in its favor.

[b] Statute not applicable

Property that was owned by the defendant and on which an entrant was injured did not come within a term, other than "premises," defining a portion of the property to which the state recreational use statute applied, the courts held in the following cases.[41]

A 3.5-acre parcel of land owned by the defendant church was not "agricultural land," within the meaning of the state recreational use statute, held the court, in Tijerina v Cornelius Christian Church (1975) 273 Or 58, 539 P2d 634, affirming a judgment for a softball player in his action to recover for injuries suffered when he apparently stepped in a hole and fell while playing softball at a softball field on the parcel. The statute provided that the "land" to which it applied was agricultural land, rangeland, forest lands, and lands adjacent or contiguous to the ocean shore. The court stated that the legislature intended, by the restrictive definition of "land," to limit the statute's application to landholdings that tended to have recreational value but were not susceptible to adequate policing or correction of dangerous conditions. The court pointed out that the statute as originally proposed had applied to all land open to recreation, and that the present definition of "land" was introduced by amendment. The court also pointed out that the parcel was not farmed, and that, while some grain did grow on the tract, the grain was volunteer and intermixed with weeds. The fact that the tract could be farmed, the court continued, did not distinguish it from most of the land in the state. Although the grain had been mowed by a third person, the court stressed that this cutting was for the purpose of complying with fire regulations. The court therefore held that the church was not protected by the statute.

In an action to recover for injuries suffered when the plaintiff fell while using a ropeswing in a park, the court, in Kucher v County of Pierce (1979) 24 Wash App 281, 600 P2d 683, reversing a summary judgment for the defendants, held that the park was not "forest land" within the meaning of the state recreational use statute, which applied to "agricultural or forest lands or water areas or channels and rural lands adjacent to such areas or channels." The park, which was a steeply sloped wooded area, was owned in part by each of the defendants, a county, a city, and a municipal park district. The court declined to follow the definition of "forest land" in a statute

41. See Hovet v Bagley (1982, Minn) 325 NW2d 813, a case in which the court construed the term "owner" in the state recreational use statute, but noted that, subsequent to the occurrence of the accident for which recovery was sought in that case, the legislature had amended the definition of the term "land" in the statute so as to limit it explicitly to privately owned land. The court stated that the legislature had thereby determined not to grant immunity to municipalities in cases arising after the effective date of the amendment.

dealing with taxation of property. The court declared that the use of the word "rural" in describing land adjacent to "agricultural or forest" lands indicated that the legislature conceived the agricultural and forest lands covered by the statute to be themselves rural. Also, continued the court, the use of the word "agricultural," a word of distinctively rural connotation, in parallel with the word "forest" further corroborated the notion that the word "forest" referred to rural land. The court further pointed out that the land involved was improved, routinely inspected, and susceptible to adequate policing. The court held the defendants not protected by the statute.[42]

§ 12. Statute as whole—openness to public access

[a] Statute applicable

The state recreational use statute, apparently construed as a whole, applied to property that the defendant owned and on which an entrant suffered injury or death, the courts held in the following cases, although the defendant permitted less than unrestricted access to the property.

In an action in which a person injured while sunbathing on property used as a public beach sought to recover from the owner of the property, the court, in Collins v Tippett (1984, 4th Dist) 156 Cal App 3d 1017, 203 Cal Rptr 366, affirming a judgment for the landowner, held that the state recreational use statute, construed as a whole, applied to the property. The landowner's property included both the beach area and a cliff that extended down to the beach, on which the public held an easement. The sunbather was injured when a piece of gunite, a concretelike substance sprayed on cliffs to prevent erosion, broke off the cliff and fell on him while he was sunbathing at the base of the cliff. The sunbather contended that the statute did not apply because the landowner allowed public use only of the beach, but not of the cliff, and because the dangerous condition existed on the cliff, rather than on the beach. The court replied that this interpretation of the statute was unreasonable in light of the statutory purpose of encouraging property owners to allow free recreational use of their land. Adopting this contention, the court continued, would in effect require beachfront property owners either to open their entire parcel to public use or to close their entire parcel to avoid any liability for injuries. The court held the landowner protected by the statute.

In an action in which the administrator of a decedent's estate sought to recover from a landowner for the decedent's wrongful death, allegedly resulting from injuries suffered when he dived into a pond on the landowner's property, the court, in Johnson v Stryker Corp. (1979, 1st Dist) 70 Ill App 3d 717, 26 Ill Dec 931, 388 NE2d 932, apparently construing as a whole the state recreational use statute, held that the statute applied to those who permitted their open land to be used recre-

42. This case was distinguished in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), § 11[a].

ationally on a casual basis, and was not limited to those who opened their land to all members of the public. The administrator alleged that children generally understood that they were supposed to ask for permission to use the pond. It was apparently admitted that signs stated "No swimming on holidays" and "Swim at your own risk." The court pointed out that many landowners were farmers who could hardly afford to open their land up to everyone at all times of the year, although they might be able to open it up during one season or on certain days of the week. If the narrower construction of the statute were adopted, the court continued, doubts would always exist whether a landowner's imposition of limitations on the use of the property would prevent him from claiming the benefit of the statute. Holding the landowner protected by the statute, the court remanded the case with directions to dismiss the two counts against him.

[b] Statute not applicable

In actions to recover for injury or death to an entrant on property, or in a body of water adjoining property, owned or maintained by the defendant, the courts in the following cases, explicitly or apparently construing the state recreational use statute as a whole, held that the statute did not apply since the defendant had not opened his property to public access to a sufficient degree.

The state recreational use statute was not applicable where the defendant power company, posting "keep out" signs in the area, expressly denied the use of the land to the plaintiff's 10-year-old son, held the court, in Georgia Power Co. v McGruder (1972) 229 Ga 811, 194 SE2d 440, apparently construing the statute as a whole in an action in which the plaintiff sought to recover for the alleged wrongful death of her son, who was trapped and drowned inside a drainage pipe leading from a pool of water on the power company's property to a lower lying pool 20 feet away. The pool of water in which the son drowned was located below the power company's dam and power plant. Two large warning signs located on the power plant and dam stated: "Danger. For your own safety please keep out. Rough waters. Gates at dam operate automatically." The court pointed to a section of the statute stating that the statute's purpose was to encourage owners of land to make land and water areas available to the public for recreational purposes. The court also relied on a section of the statute that referred to an owner of land who directly or indirectly invited or permitted without charge any person to use his property for recreational purposes. The court reversed an intermediate appellate court decision that, while reversing a summary judgment for the company, had held the action governed by the statute.

In an action in which a 13-year-old boy sought to recover for injuries suffered when he dived into a backyard plastic pool belonging to the defendant, the court, in Herring v Hauck (1968) 118 Ga App 623, 165 SE2d 198, apparently construing the state recreational use statute as a whole, declared that a landowner received the protection of the statute only if he

#7

Resolution of the Alaska Municipal League

Resolution No. 89-36

A RESOLUTION URGING THE LEGISLATURE TO PASS A SUPPLEMENTAL APPROPRIATION FOR FULL FUNDING OF THE RAW FISH TAX PROGRAM

WHEREAS, under the provisions of AS 43.75.130, the State of Alaska annually remits a share of raw fish tax revenues to the municipalities from which the tax was collected, and

WHEREAS, the amount of these revenues, as provided in the statute, is based on the actual raw fish taxes collected from processors located within a given municipality, and

WHEREAS, the State of Alaska has failed to return the full amount to the municipalities as provided in the statues, and

WHEREAS, the State Legislature failed to appropriate sufficient monies to fund the Raw Fish Tax Program;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the Alaska State Legislature to pass a supplemental appropriation fully funding the Raw Fish Tax Program and TO authorize prompt remittance of the balance due the affected municipalities.

BE IT FURTHER RESOLVED that the Alaska Municipal League requests the State to adopt legislation, regulations, and policies that will ensure the appropriation of the full share of Raw Fish Tax revenues due municipalities by August 1 of each year.

Adopted at Annual Business Meeting o November 18, 1988 o Fairbanks, Alaska

- RESOLUTIONS OF SUPPORT

RECEIVED FEB 10 1989

Southwest Alaska Municipal Conference
Putting Resources to Work For People
1007 West 3rd Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-7555

RESOLUTION NO. 89-01

A RESOLUTION SUPPORTING THE TIMELY DISTRIBUTION OF FISHERIES BUSINESS TAX TO MUNICIPALITIES.

WHEREAS, the current system of allocating Alaska Business Fisheries Tax requires annual legislative appropriation; and

WHEREAS, if the Department of Revenue underestimates the amount of shared tax revenue and the legislature then appropriates a lesser amount than actually due, such as occurred in FY 1988, local governments must wait until the following legislative session to receive funding; and

WHEREAS, this delay in revenues causes an unnecessary burden for communities expecting these revenues.

NOW, THEREFORE, BE IT RESOLVED THAT the Southwest Alaska Municipal Conference, representing cities in Bristol Bay, the Aleutians, the Pribilof Islands, and Kodiak urges the Alaska State Legislature to immediately appropriate funds to reimburse local governments for FY 1988 state shared Fisheries Business Taxes.

BE IT FURTHER RESOLVED, THAT the Southwest Alaska Municipal Conference requests the Alaska Legislature to amend State statute to allow the appropriation of 50% of fisheries business taxes collected to municipalities and boroughs no later than August 1 of the year following the year in which it was collected, according to the formula outlined in AS 43.375, without direct legislative approval.

PASSED THIS 22nd DAY OF January, 1989.

James M. Selby
President

Mary Ann Weidema
Attest

FY 85 RAW FISH

SHARED REVENUE - CITIES AND BOROUGHS

		TOTAL # AMT POP FY85 SHARING	AMT SHARED	TOTAL # [illegible]
MUA 635	Anchorage Municipality	[illegible]	[illegible]	70,475.03
CBJ 496	Juneau	29 469.22	[illegible]	6,909.32
CIS 599	Sitka	216 [illegible]	[illegible]	93,773.68.
BBB 699	Bristol Bay Borough	1 407 777.62.	999 [illegible]	414,002.32
FNS 462	North Star Borough	412 20	[illegible]	174.06.
HAB 944	Haines Borough	[illegible]	102 [illegible]	42 952.39
KPB 465	Kenai Peninsula Borough	1 474 562.05	1,037,744 93	434,410.72
KGB 466	Ketchikan Gateway Borough	159 154.79	107 [illegible]	45 349.72
KIB 128	Kodiak Island Borough	1, 149 261.79	809 [illegible]	340,474 02
MAB 586	Matanuska-Susitna Borough	93.34	[illegible]	24.38
NSB 460	North Slope Borough			
NAB 168	NORTHWEST ARCTIC BOROUGH	10.36	7.29	3.07
AEB 138	ALEUTIANS EAST BOROUGH	9,523.58	6,[illegible]01	3,344.57
	TOTAL BOROUGHS	4,920,136.14	3,462,499.57	1,457,636.71
CIA 323	Akhiok			
CIA 322	Akiachak			
CIA 321	Akiak			
CIA 072	Akutan	376,494.36	244,269.54	132,224.82
CIA 693	Alakanuk			
CAL 596	Aleknagik			
CAL 597	Allakaket			
CIA 143	Ambler			
CAP 063	Anaktuvok Pass			
CIA 275	Anderson			
	Subtotal this page	[illegible]	[illegible]	132,224.82

SHARED REVENUE - CITIES AND BOROUGHS

CIA 461	Angoon			
CIA 062	Aniak	236.46	166.44	70.02
CIA 057	Anvik	904.08	636.38	267.70
CIA 565	Atmautluak			
COA 027	Atqasuk			
CIB 781	Barrow			
CIB 819	Bethel	30,055.48	21,156.05	8,999.43
CBM 320	Brevig Mission			
CBU 595	Buckland			
CIC 132	Chauthbaluk			
CIC 319	Chefornak			
CIC 202	Chevak			
COC 272	Chignik	288,144.27	202,824.77	85,319.50
CCP 269	Clark's Point	44,117.73	31,054.65	13,063.33
CCB 210	Cold Bay			
CIC 801	Cordova	810,732.13	570,574.35	240,157.78
CIC 492	Craig			
CID 317	Deering			
CDJ 475	Delta Junction			
CID 836	Dillingham	1,470.69	1,035.22	435.47
CID 072	Diomede			
CEA 594	Eagle			
CIE 061	Eek			
CIE 316	Ekwok			
CIE 593	Elim			

Subtotal this page 1,175,661.11 827,447.96 348,213.15

SHARED REVENUE - CITIES AND BOROUGHS

CIE 322	Emmonak			
CIF 635	Fairbanks	7.19	[illegible]	[illegible]
CFY 463	Fort Yukon			
CIF 201	Fortuna Ledge	9,411.44	6,624.71	2,786.73
CIG 271	Galena	1,633.87	1,149.26	483.61
CIG 231	Gambell			
CIG 315	Golovin			
CGB 110	Goodnews Bay			
CIG 200	Grayling			
CIH 871	Haines	297.71	209.56	88.15
CHC 590	Holy Cross			
CIH 724	Homer	169,922.24	119,509.26	50,412.98
CIH 254	Hoonah	47,310.71	33,308.00	14,002.71
CHB 589	Hooper Bay			
CIH 520	Houston			
CIH 314	Hughes			
CIH 852	Huslia			
CIH 230	Hydaburg			
CIK 111	Kachemak			
CIK 464	Kake	24,124.93	16,999.99	7,124.94
CIK 313	Kaktovik			
CIK 197	Kaltag			
CIK 927	Kasaan			
COK 301	Kasigluk			
CIK 891	Kenai	[illegible]	[illegible]	107,441.25

Subtotal this page [illegible] 462,204.03 182,373.09

SHARED REVENUE - CITIES AND BOROUGHS

CIK 709	Ketchikan	135,453.22	98,306.52	37,146.70
CIK 060	Kiana			
CKC 059	King Cove	574,007.31	372,415.94	201,591.37
CIK 196	Kivalina			
CIK 229	Klawock	9,266.04	6,522.37	2,743.67
CIK 312	Kobuk			
CIK 916	Kodiak	580,678.22	319,909.40	260,768.82
CIK 311	Kotlik			
CIK 679	Kotzebue	10.36	7.29	3.07
CIK 195	Kovuk			
CIK 228	Kovukuk			
CIK 088	Kupreanof			
CIK 133	Kwethluk			
CLB 218	Larsen Bay	5,042.56	3,449.46	1,593.10
CIL 199	Lower Kalskag			
CIM 310	Manokotak			
CMC 599	McGrath			
CIM 109	Mekoryuk	62.68	44.12	18.56
CMV 111	Mountain Village	26,827.35	18,883.77	7,943.58
CIN 309	Napakiak			
CIN 308	Napaskiak			
CIN 291	Nenana	836.00	588.46	247.54
CNS 226	New Stuyahok			
CIN 521	Newhalen			
CIN 194	Newtok			
	Subtotal this page	1,332,183.74	[illegible]	512,056.41

SHARED REVENUE - CITIES AND BOROUGHS

CIN 853	Nightmute			
CIN 085	Nikolai			
CIN 936	Nome			
CIN 174	Nondalton			
CIN 227	Noorvik			
CNP 676	North Pole			
CNU 598	Nuiqsut			
CIN 314	Nunapitchuk			
NCC 026	Nulato	545.51	393.79	151.72
COH 108	Old Harbor			
CIO 469	Ouzinkie			
CIP 644	Palmer			
CIP 470	Pelican	124,091.58	87,341.02	36,750.56
CIP 181	Petersburg	566,134.03	392,401.74	167,732.29
CIP 194	Pilot Station			
CIP 307	Platinum			
CPH 224	Point Hope			
CPA 471	Port Alexander			
CPH 306	Port Heiden			
CPL 107	Port Lions			
CIO 193	Quinhagak			
CIR 225	Ruby			
CRM 305	Russian Mission			
CSG 054	Saint George			
CSM 472	Saint Marys			
	Subtotal this page	690,741.12	496,136.74	204,604.38

SHARED REVENUE - CITIES AND BOROUGHS

CIS 192	Saint Michael	3,111.57	2,190.23	921.34
CSP 331	Saint Paul	144,729.91	101,917.52	42,812.39
CSP 978	Sand Point	167,222.23	109,529.08	57,693.15
CIS 106	Savoonga			
CIS 583	Saxman			
CIS 191	Scammon Bay			
CIS 058	Selawik			
CIS 624	Seldovia	12,500.00	8,798.75	3,701.25
COS 266	Seward	320,692.30	155,345.21	165,346.09
CIS 190	Shageluk			
CIS 189	Shaktoolik			
CSP 522	Sheldon Point			
CIS 105	Shishmaref			
CIS 188	Shungnak			
CIS 396	Skagway			
CIS 564	Soldotna			
CIS 187	Stebbins			
CIT 855	Tanana			
CIT 473	Teller			
CTS 272	Tenakee Springs	147.92	104.16	43.92
CTB 301	Thorne Bay			
CIT 854	Togiak	73,513.77	57,522.56	15,991.21
CTB 223	Toksook Bay	141.12	89.33	51.79
CIT 305	Tuluksak			
CIT 186	Tununak			
	Subtotal this page	401,331.32	273,513.31	127,817.51

SHARED REVENUE - CITIES AND BOROUGHS

CIU 258	Unalakleet			
CIU 215	Unalaska	744,291.94	464,687.10	279,604.8
CIU 198	Upper Kalskag			
CIV 401	Valdez	165,388.23	116,418.01	49,971.2
CIW 222	Wainwright			
CIW 185	Wales			
CIW 159	Wasilla			
CWM 304	White Mountain			
CIW 474	Whittier	24,537.46	17,268.09	7,269.59
CIW 559	Wrangell	38,058.89	26,788.65	11,269.24
CIW 479	Yakutat	134,717.41	94,776.63	39,941.78

CITIES	Subtotal - Page 7	1,306,425.68	919,625.37	386,800.31
	Page 6	601,921.33	414,513.80	187,407.53
	Page 5	690,761.12	486,126.74	204,634.38
	Page 4	1,622,103.74	1,110,127.33	512,976.41
	Page 3	615,576.12	433,204.03	182,372.09
	Page 2	1,175,661.11	827,447.26	348,213.85
	Page 1	376,490.26	244,269.54	132,220.72
	Total Cities	[illegible]	[illegible]	[illegible]
	Total Boroughs	[illegible]	[illegible]	[illegible]
	GRAND TOTAL	[illegible]	[illegible]	[illegible]