OCCUPIERS AND LIABILITY TO RECREATIONAL USERS

Queensland Outdoor Recreation Federation

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Q O R F

Queensland Outdoor Recreation Federation Inc.

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Getting more people active through sport and recreation

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Executive Summary

All outdoor recreation or outdoor adventure activities involve inherent risks. Many of the places in which people participate in those outdoor activities have natural hazards. Many of these natural hazards are essential, and even deliberately sought after characteristics of the places in which people routinely choose to participate in particular outdoor activities.

People participating in outdoor adventure activities with inherent risks in places with natural hazards may be injured or killed. The people or organisations that own or manage the places in which people participate (ie, occupiers[1]) may be exposed to the risk of litigation should participants be injured or killed. One of the easiest ways for occupiers to manage and minimise this risk of litigation is to deny access for outdoor adventure activities.

Participation in outdoor adventure activities provides many benefits to Queenslanders and to the Queensland economy. The challenge is to balance the economic, social, personal and environmental benefits of this participation with other trends and external influences, including:

- the increasing range of activities in which people are participating and the evidence of increasing numbers of participants in these activities;
- questions of risk management and the potential exposure to litigation of occupiers (both public land managers and private landholders) and their employees brought about by the increased participation; and
- the capacity of recreational participants to understand and accept the inherent risks of their activity as an integral part of the experience.

These trends and influences present a range of issues for occupiers in relation to people accessing land for recreation. Solutions such as limiting or denying access to land will have a negative effect on the benefits of outdoor adventure participation and ultimately decrease participation as well as diminish the quality and diversity of outdoor experiences. If persons injured in recreational situations bring proceedings (successful or otherwise) against occupiers then occupiers are less inclined to grant access for these activities.

Whilst the High Court in *Romeo v Conservation Commission (1998) 72 ALJR 208* pointed out that land managers are not, and have never been, liable for all accidents on their land and that there is no legal duty to provide risk-free recreational opportunities, there is still uncertainty amongst land managers as to the extent of their duty of care. Negligence is a dynamic area of law dependant to a great degree on considerations of public policy and is therefore flexible to take into account special facts and circumstances. More visible protection for occupiers, in the form of statutory protection, is desirable to reduce the fear of litigation and to ensure ongoing access to sufficient recreation areas, across a diversity of settings.

[1] Throughout this Report, the term ‘occupier’ is used to include both landowners, land managers and landholders (which can include lessees, tenants, etc). Where required, when discussing specific legislation in some jurisdictions, differentiation between these terms is made.

Current Forces

There is a perception that the liability of occupiers for injuries that occur on areas they control is almost certain. There is also political pressure to make recreation "safe". Consequently, occupiers seek to reduce their exposure to outdoor adventure injury-related risks as effectively as they can. However, occupiers and participants often have different views on what is appropriate risk management. Unfortunately, the circumstances surrounding some outdoor recreation/outdoor adventure incidents (especially those involving children) can invoke considerable community outrage even where those circumstances are not well understood. These isolated incidents influence perceptions that outdoor adventure activities are dangerous and that the participants are foolhardy.

There is also an apparent mindset of "blame" within the community with (possibly) increasing litigation against occupiers. In addition, the public has an expectation of responsibility by occupiers with respect to the technical safety of facilities. However, one commentator summed up the practical effect of *Romeo v Conservation Commission* in the following broad terms: "The comfort that this case provides is the willingness of the court to engage in some degree of pragmatism. The court recognised the constraints, budgetary and otherwise, upon authorities charged with managing and controlling large tracts of land whose physical attractions include various perils and dangers. It acknowledged the absurdity of requiring the erection of barricades or warning signs regarding those perils and dangers that are integral to the very environment that encourages the public to visit". [Dixon (1998) 6 AJAL 67 (at 70)].

The nature of the place influences expectations of risk management and is not dependent upon the tenure of the area concerned. This presents another dilemma as there are participants who seek out experiences in natural settings that require them to apply self- reliance and competence in their chosen activity and this aspect is a major motivation for them. However, there is an inconsistent application of a culture of self-reliance amongst the range of people seeking outdoor adventure experiences.

Participation in an outdoor adventure activity involves acceptance of all the risks inherent in the activity itself (but not the risk that someone else may be negligent). Whilst a level of personal responsibility is also still accepted by both the community at large and the courts, the current legal position and community perception appear to disagree in instances where major injuries are sustained in outdoor adventure accidents. There is a strong feeling of social responsibility for those injured (existence of a social safety net) and the consequent compensation for victims imposes a severe strain both financially and emotionally on landholders.

Another consequence is fear in the minds of employees of occupiers, of being personally sued and of the consequent costs. The difficulty for the occupiers, as outlined in cases within this Report, is to determine the extent of their duty of care, particularly where they manage large areas of wild, natural or uncontrolled terrain. The attitude of insurance companies is shaped by their perception of their risk exposure and their need for profit. Hence, they are drivers rather than allies of land managers and participants. The media also plays a significant role in influencing the public's perception of outdoor adventure, its current appeal or "sexiness" and the acceptable level of risk.

Possible Future

Ultimately, the long term goal is to change social attitudes about recreating in natural and/or uncontrolled environments to better inform and shape government policy and

subsequent legal reform packages. In order to achieve this, some fundamental changes need to occur, including:

- changing the legal basis upon which decisions are made with respect to risk in natural environments;
- an acceptance of the right of persons to an outdoor lifestyle which incorporates risk;
- acceptance of "no blame" within certain well-defined parameters;
- acknowledgement of and respect for the culture associated with participation in particular outdoor recreation activities and the important element of outdoor adventure (as more than simply a recreational activity) in these lifestyles.

In the short term, possible strategies to address the situation include:

- a shift to a culture of self reliance in participation as a consequence of education;
- legislation to protect occupiers including statutory protection for occupiers against risks arising from natural hazards and/or inherent risks; and
- insurance options for outdoor adventure accident victims.

The Overseas Experience

Occupier's liability legislation has been introduced in both Common Law countries (eg, USA, United Kingdom, United States, Canada, Republic of Ireland) and Civil Law countries (eg, Germany, Norway, Sweden). In fact fifty state jurisdictions within the USA have enacted legislation to protect landowners and occupiers from liability for injuries suffered by those entering their land specifically for recreation. The United Kingdom, Irish and Canadian models are based on a statutory law of occupier's liability involving the incorporation of protective provisions within the framework of wider legislation not specific to recreation. In all jurisdictions the legislation has been developed to reduce the liability of landowners in specified circumstances.

There are four major considerations common to all legislation developed in Common Law countries:

1. Definition of "owner" of the land to which the legislation applies. That is, does the legislation apply to both public and/or private land owners? Does the legislation apply to land owners or to lessees and other land holders as well?
2. Definition of "property" covered by the legislation. All jurisdictions provide for a limited range of property types which trigger a potential immunity from liability, although the manner in which the property types is described differs considerably between jurisdictions.
3. Recreational use versus recreational activity – specific outdoor adventure activities to which legislation might apply can be defined within the statute. Alternatively, the applicable activities can remain unspecified, provided the intent of the activity is recreational. Both approaches have been used and both have their limitations and advantages.
4. Exceptions – Absolute immunity was not granted in any of the jurisdictions examined. All jurisdictions provide for exceptions where occupiers are not protected.

Recommendations:

Good reason exists for protecting occupiers from the reach of negligence liability to recreational entrants. The law as presently applied:

- Is a component of a liability system for personal injuries that is at risk of being unaffordable.
- Causes difficulty in predicting legal outcomes and therefore managing risk, particularly as there is still uncertainty amongst occupiers as to the extent of their duty of care.
- Strikes the wrong balance between personal responsibility in outdoor adventure participants and the responsibility of others.
- Reduces access to land for recreation.

Due to the high inherent difficulty in determining issues of negligence, particularly in cases of occupier's liability, it is recommended that the current situation be clarified through statute law. Such statute law must define the type of place to which the legislation applies, the requirements to satisfy the occupier's duty of care in those areas, and the instances where the occupier's liability to recreational users excludes naturally occurring hazards and/or the risks inherent in participation in outdoor adventure activities.

To implement such statutory protection, the most appropriate model for consideration in Queensland is provided by the American recreation user laws because the United Kingdom, Irish and Canadian models are based on a framework of wider legislation that is not specific to recreation.

Development of any draft legislation in Queensland to protect occupiers should involve careful consideration of the four issues outlined above ("owner", "property", recreational use, exceptions). These issues are the subject of considerable discussion within this Report (refer Appendix 7).

Finally, a suite of other strategies needs to be developed and implemented, including:

- Education of outdoor adventure participants to understand and accept the inherent risks of their activity as an integral part of the experience
- Improvement of risk analysis and risk management skills in recreational participants and leaders.

Introduction

The Queensland Outdoor Recreation Federation (QORF) was established in 1996 to be the peak body representing the interests of outdoor recreation in Queensland. QORF has, over the past six years, developed positive professional relationships with state activity associations (eg, Qld Association of Four Wheel Drive Clubs), community groups/clubs (eg, Scouts Qld), government agencies (state and local) and individuals. Through this interaction, it has become evident that issues relating to risk management, litigation and access affect all of these stakeholders.

QORF facilitated a workshop in October 2000 for all relevant stakeholders to discuss the potential exposure of landholders and their employees to litigation as a result of providing access to natural sites for outdoor recreation. In addition, associated concerns, such as the financial costs to landholders of insurance and compensation, restriction in access to sites and the resultant reduction in the quality and diversity of participant experiences were addressed.

The recommendations to QORF from the workshop in response to concerns about current litigation trends involving recreational use of land, were to facilitate the investigation of:

- Legislation to protect occupiers from liability to recreational users of their land in defined circumstances, in particular where recreational users are injured by naturally occurring hazards.
- Establishment of an insurance scheme to provide compensation to outdoor adventure accident victims as a replacement for common law liability.
- Development by education of a culture of self-reliance in participation in outdoor adventure activity.

The recommendations although related are not interdependent.

A Steering Committee was established by QORF to progress in particular the first recommendation, that is, investigation of legislation to protect occupiers from liability to recreational users where injury arises from naturally occurring hazards.

This report is the result of the Committee's investigation of this recommendation. This report includes:

- A description of interstate and international (USA, United Kingdom, Canada, Republic of Ireland) statutory and other approaches to risk management in the use of land for recreational purposes
- An analysis of interstate and international statutory and other approaches to risk management in the use of land for recreational purposes and their potential application in the Queensland environment
- Recommendations, based on the above analysis, of the most appropriate approaches for consideration in Queensland.

The report therefore contains statements of fact, such as specific legislation and cases, as well as discussion relevant to the issues raised by the legislation and associated cases. The intent of the discussion and the conclusions drawn from that discussion is to focus debate in order to determine the relevant factors for consideration in the Queensland context.

Section
1

1 Occupier's Liability for Accidents

1.1 General principles of negligence

Liability for accidents of any description is governed by the law of negligence. The law imposes a general duty of care on persons to take reasonable care for the safety of others across all aspects of human behaviour.

The occupation of land, whether as an owner, tenant or statutory responsible authority gives rise to a duty to take reasonable care for the safety of entrants on the land. This applies with equal force to a private landowner and a statutory or Crown authority. If the occupier breaches this duty to an entrant, resulting in personal injury and/or property damage, the occupier will be liable for damages.

If the occupier does not have insurance against this liability risk, the costs of any damages awards and the costs of litigation have to be funded by the occupier.

The law of negligence states as a matter of general principle that:

- A person who can foresee that another, who is proximate to them in time, place or circumstance, is likely to be injured by their acts or omissions owes a duty of care to that person. (called the "neighbour principle", or Donoghue v. Stevenson principle" after the case in which it originated.)
- The duty is take reasonable care based on all the circumstances so as not to injure the other person.
- If the duty is breached and the other person suffers injury or damage as a result, then there is liability for the injury or damage.

These principles of negligence liability are common law, or judge made law and govern the liability of persons for most injury or damage producing accidents.

1.2 Special rules of liability for occupiers

Until 1987, the general principles of negligence liability were not applied universally to the liability of occupiers for accidents happening on their land. Instead, complex rules historically developed by judicial precedents in United Kingdom and Australian courts, applied to the negligence liability of occupiers. The law divided entrants into a number of classes and specified a duty of care owed to each class of entrant. The duties varied in stringency, depending on the class of entrant. Entrants were classed as follows in descending order of legal protection:

- A contractual entrant - This was a person whose entry to land was paid for and therefore governed by a contract. A person paying to use a camping ground or paying to enter a theme park are examples. The occupier was

obliged to ensure the premises were safe as all proper care could make them for the purpose of the agreed entry.

- An entrant as of right – This was a person who had a right to enter the land for some purpose. An example is a person entering a public playground or park, or a reserve or national park under some statutory authorisation. The occupier was obliged to take reasonable care to keep the premises safe having regard to the purpose of the permitted entry.
- An invitee – This was a person who with the occupier's permission entered the land on some matter of material or business interest to the occupier. An example is a person entering a shop or calling at the occupier's request to carry out some work. The occupier had to use reasonable care to prevent damage from unusual dangers of which the occupier knew or ought to have known.
- A licensee – This was a person permitted or invited to enter the land. A bushwalker permitted to walk across farmland, a dinner guest, a religious canvasser or the neighbour permitted to use the swimming pool are examples. The occupier had to take reasonable care to guard against concealed traps of which the occupier was aware.
- A trespasser – This was a person who entered land without the occupier's express or implied permission. A person ignoring a no entry sign or a burglar are examples. The occupier had to do what a humane person would in all the circumstances to guard against harm.

This law of occupier's liability based on categorising entrants was very much the product of 19th century judicial decision making, embodying the then laissez faire attitude towards accidents and the protection of private property ahead of most other interests. There was truth in the notion that an Englishman's home was his castle and therefore an entrant had to take the property as he found it, unless some very good reason could be found for making an occupier responsible for the care of the entrant.

The rules were complex and capricious in their operation. The outcome of damages claims could turn on fine distinctions and technical determinations as to whether at the relevant time the entrant was an invitee, licensee or some other type of entrant. A well-known English judge in one case referred to the situation of the now disappearing door to door salesman who would enter land as a licensee, would leave dejectedly in the same capacity if the door was closed in his face, would leave as an invitee if he made sale, but would leave as a trespasser if he overstayed his welcome.

In addition, where it was thought that the entrant's injuries resulted in substance from some act of the occupier, rather than from the condition of the land, a court could refuse to apply the specific occupancy duties and apply the general principles of negligence instead. Thus in **Hackshaw v. Shaw** (1984) 155 CLR 614, the High Court of Australia held that the ordinary principles of negligence were to be used to decide a case where a farmer had at night shot at a car containing a fleeing petrol thief. The thief's girlfriend was also in the car and was injured by the shot. Although both were trespassing on the farmer's land, their status as trespassers was irrelevant. The farmer was liable in negligence for his dangerous act of shooting at the car.

1.3 Reform of special rules by legislation

In various state jurisdictions in Australia and throughout the Commonwealth, including England and Scotland, legislation generally called Occupier's Liability Acts, has been enacted to replace the complex old rules with a simpler rule. The thrust of the legislation has been to replace the categories of entrant and specific duties with the ordinary rules of negligence.

There is no occupier's liability act in Queensland. This means the common law continues to apply.

1.4 Removal of special rules and application of general principles of negligence liability

In 1987 the High Court in **Australian Safeway Stores Pty Ltd v. Zaluzna** (1987) 162 CLR 479 replaced the old occupier's liability rules with the ordinary principles of negligence liability. A majority of the High Court stated:

> "Does a theory of concurrent general and special duties, giving rise as it does to complications that raise some intricate and possibly confusing arguments …. serve any useful purpose as the law of negligence is now understood? Is there anything to be gained by striving to perpetuate a distinction between the static condition of the land and dynamic situations affecting the land as a basis for deciding whether the special duty is more appropriate to the circumstances than the general duty? … There remains neither warrant nor reason for continuing to search for fine distinctions between the so called special duty … and the general duty established by **Donoghue v Stevenson.**"

With the exception of contractual entrants, the liability of an occupier for injuries happening on their land is now determined by whether in the circumstances a duty of care was owed to the entrant and, if so, whether the occupier had, having regard to all the circumstances, taken reasonable care to guard against injury. This applies to both lawful entrants and trespassers.

In **Calin v. Greater Union** (1991) 173 CLR 33, the High Court preserved the distinction between contractual entrants and other entrants onto land. Two arguments supported this conclusion:

- The duty owed to contractual entrants was in several respects higher than the general duty of care in negligence and the purpose of the reform in Zaluzna was to increase, not lessen, the legal protection afforded to entrants.
- The duty was contractual as well as arising under negligence principles and the reform in Zaluzna was not intended to affect contractual obligations.

This means that in relation to a contractual entrant, the terms of the contract allowing entry continue to apply and, subject to any express terms, the occupier must make the premises as safe as reasonable care can make them for the purpose contemplated by the contract.

1.5 When will an occupier be negligent?

The duty of care will be breached when the occupier fails to take reasonable care to protect an entrant from injury. What is reasonable care depends on the circumstances of the particular case and involves balancing a number of factors.

The basic principle is stated by the High Court in **The Council of the Shire of Wyong v**. **Shirt** (1979) 146 CLR 40 as follows:

> "In deciding whether there has been a breach the duty of care the Tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have." (Mason J)

In this case an employee of the Council was found to have been negligent in erecting an ambiguous sign stating "deep water". The sign was erected in a generally shallow lake to warn of a deep channel leading to a jetty. An inexperienced water skier was injured when his head struck the lake bottom. He claimed the sign misled him into thinking the lake was generally deep.

This test contemplates that an occupier is entitled to take into account a variety of considerations in determining whether to take any steps to guard against harm. The expense and utility of precautions can clearly be taken into account. The test does, however, call for a pro-active approach to risk management in relation to hazards. If there is evidence that an occupier did not consider the existence of a risk of harm, or having realised there was some risk, did not further consider what to do, there is a real probability that liability will be found.

1.6 Limiting legal liability for injuries and damage caused to entrants

A number of different situations may arise:

(a) Voluntary assumption of risk

An entrant on to land might impliedly agree to assume the risk of any harm that should befall him or her whilst on the land. This is known as voluntary assumption of risk, or *volenti non fit injuria*. Where established it is a complete defence to any claim for damages. It is, however, very difficult to establish this defence. It must be shown that:

- The entrant had full and informed knowledge of the actual danger being confronted
- With that knowledge the entrant agreed to incur that risk

(b) Exclusion notices

By an appropriately worded agreement or condition imposed on entry and brought to the attention of an entrant, an occupier can exclude liability to an entrant who suffers injury or damage.

The efficacy of such a contractual term or condition is, however, limited. Such attempted exclusions are strictly construed by the courts against the party seeking to rely on them. This means that if there is any ambiguity in the term or condition, the benefit of such ambiguity goes to the injured person. Such a condition will not be enforceable against a person who was unaware of its terms. Further, it cannot be enforced, at least if it is a contractual term against a minor.

(c) Warning notices

An appropriately worded sign may be sufficient to ensure that an entrant so informed is then able to avoid harm by taking reasonable care for their own safety. In such circumstances, the occupier has not contracted out or excluded the duty to take care for an entrant's safety, but has discharged the duty. The notice amounted to taking reasonable care.

There are a substantial number of recreational accidents and subsequent claims for injuries where liability has turned in part on the necessity or otherwise for proper warning signs. These cases are reviewed later in the paper.

As the decision in **The Council of the Shire of Wyong v**. **Shirt** shows, a sign, which is ambiguous, might itself involve an act of carelessness.

(d) Contributory negligence

A person must take reasonable care for their own safety. Where a person is injured due to a combination of the negligence of the occupier of land and the claimant's own failure to take care, any damages recoverable are reduced to the extent that the Court thinks fair having regard to the claimant's responsibility for the damages.

As a general rule courts impose a higher expectation that landowners will take care for the safety of entrants than entrants will take care for their own safety. This limits the effectiveness of the defence as a serious impediment to claims.

Section
2

2 Where is the present Law heading?

The assimilation of occupier's liability to the general principles of negligence by the High Court in **Zaluzna** was sensible and perhaps inevitable. It removed an unnecessary complication from the law that had long run its course.

The decision, however, has consequences beyond sensible rationalisation of legal principle. Its effect is to structure legal principle more favourably for the injured at the expense of rules that helped serve to protect the occupier. To that extent it lowers the barrier of legal difficulty to be crossed by an injured entrant suing an occupier of land. It acts both as an encouragement to sue and increases the likelihood of successful claims. This relaxation of principle should be considered in determining where the balance is best struck in other ways between the interests of landowners and the concerns of entrants to be safe from unreasonable risk of injury.

The decision in **Zaluzna** can be seen as part of a legal and social trend favouring wider circumstances of negligence liability across all facets of ordered life. It is an undeniable reality that we live in a more litigious society. There is a heightened level of consciousness as to the existence of legal remedy and an increased willingness to sue for personal injury, financial loss or property damage. A number of factors can be identified as relevant:

- Heightened standards and expectations of safety consciousness
- Widespread indemnity insurance and knowledge of its existence
- Broadly drawn liability principles favourably structured for claimants
- Substantial compensation awards
- A concern for the well-being of the injured and their dependents
- Recognition of financial loss as a legitimate type of damage in its own right
- Wider knowledge of legal rights and access to legal assistance
- "No win no fee" litigation opportunities offered by lawyers
- A culture of blame rather than personal responsibility.

Fundamental policy issues arise as to whether the present liability outcomes and opportunities offered by the law of negligence and a compensation motivated legal system are appropriate and sustainable.

Attention has been more sharply and necessarily focussed on the subject in the last six months in Australia because of a combination of events including:

- Collapse of major Australian insurers holding extensive liability insurance portfolios

- The World Trade Centre disaster with consequential insured losses estimated at A$120 billion.
- Massive escalation in liability insurance premiums.
- Refusal of some insurers to renew liability insurance policies.
- Media attention to more unusual negligence claims.

The Queensland Liability Insurance Taskforce in its Report of February 2002 records that the number of claims made in Australia against liability insurers increased from 48,000 in 1996 to 88,000 in 2000. Over the same period the total claims expenses increased by an average rate of 22% per annum. By 2000, claims expenses funded by insurers exceeded gross premium revenue by almost $300 million. These figures are plainly indicative of a disturbing general trend in the outcomes of negligence liability claims. Although there is no statistical evidence available to separate out the types of claims being made, by anecdote and search of decided cases, it is plain that claims against occupiers by recreational users injured because of the natural condition of the land and its associated hazards are part of this trend.

The existence of a compensation motivated legal system has recently been eloquently identified and questioned by Mr Justice Thomas in the Queensland Court of Appeal decision of **Lisle v. Brice and MIM General Insurance** [2001]QCA 271. His Honour concurred in a decision that a motorist and his insurer were liable to pay damages for the support of the wife and children of a man who committed suicide three years after an accident in which he suffered relatively minor injuries and where there were various other significant stressors in the deceased's life apart from the accident. His Honour considered himself constrained by authority to uphold the award of damages to the deceased's family, but offered the following insight into the present law of negligence:

> "I hope I may be pardoned however for drawing attention to some considerations that are sometimes overlooked by courts when making rulings in cases involving damages for personal injuries.
>
> The rules currently embraced by our system include:
>
> 1. A reduced level of causation necessary to sustain a claim.
> 2. The rule … that a defendant "must take his victim as he finds him" and pay damages accordingly.
> 3. Relaxation of control devices such as remoteness of damage to stem the arguable endlessness of the consequences of every human act.
> 4. Common use of hindsight, despite frequent disavowal, in concluding that virtually anything that has happened was reasonably foreseeable.
> 5. Ever-increasing levels of damages, aided by the methodology of economic rationalism, unalleviated by collateral benefits actually received, and aggravated by the inclusion of heads of damage that a claimant does not suffer assessed at "commercial" rates.
>
> These are some of the tools that increasingly permit unrealistic results in such cases, in both liability and quantum. Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community both economic and social.
>
> In a compensation-conscious community citizens look for others to blame. The incentive to recover from injury is reduced. Self-reliance becomes a scarce commodity. These are destructive social forces. Also much community energy is wasted in divisive

and non-productive work. A further consequence is the raising of costs of compulsory third party, employer's liability, public risk and professional indemnity insurance premiums. These costs are foisted upon sectors of the public and in the end upon the public at large. I would prefer that these problems be rectified by the development of a more affordable common law system, but in recent times its development has been all in one direction – more liability and more damages."

Section
3

3 The Outdoor Adventure Context

3.1 Benefits of outdoor adventure activities

Recreation is what people like to do in their spare time. Many recreation participants prefer the outdoor adventure activity they personally identify as recreation ahead of work. In a large measure it identifies who they are, how they see themselves and with whom they socialise. It motivates what choices they make across a wide range of activities.

Outdoor recreation involves a wide range of outdoor adventure activities, which may or may not include intrinsic risks, but it will almost inevitably take participants onto land under the control of another where there are likely to be hazards whether natural or otherwise. Outdoor adventure activities, in addition to providing recreational opportunities, provide the basis for adventure tourism, outdoor education, some ecotourism ventures as well as components of adventure therapy and corporate adventure training programs.

Therefore, apart from the personal benefits for those who engage in some form of outdoor recreation, such outdoor adventure activities provide a wide range of more generalised community and economic benefits:

- By acting as a catalyst for tourism - through participant investment in services, commodities, food, equipment and professional leadership.
- By motivating both business and residential choices – through the increase in residential and business development around natural resources.
- By encouraging investment in environmental protection - participation frequently leads to the investment of both time and money in the protection, conservation and/or maintenance of these places.
- As a preventative health measure – outdoor recreation encourages individuals to become active and fit, reducing the economic strain on the community for health services.
- By increasing workforce productivity – through increased output due to attitudinal and motivational changes as character and quality of life is impacted by positive leisure experiences.
- By reducing the cost of crime – through increased feelings of self worth and self-esteem gained through adventure experiences matched to suit the individual's needs and competency.
- By direct expenditure - on equipment, travel, as well as food and accommodation within the communities close to the outdoor recreation site.
- By building social capital – providing opportunities for people to learn, to experience, to achieve and to engage with others, thereby gaining greater self confidence, a greater sense of their own worth, higher self esteem. All of these are critical for motivated and highly engaged citizens. An engaged citizenry is a critical determinant of the health of a nation's stock of social capital.

3.2 Outdoor adventure activities, hazards and liability

In managing the interest of substantial sections of the community involved in or using outdoor adventure activities and in ensuring economic, social, personal and environmental benefit outcomes, access to areas suitable for particular activities is of fundamental concern. Without access there is nothing. In dealing with access, a number of issues need be balanced:

- The suitability of areas for particular activities.
- The appropriate use of areas.
- The increasing range of activities in which people are participating and the evidence of increasing numbers of participants in activities.
- Private property, native title and public rights.
- Management of environmental, social and safety issues.
- Management of legal liability.

Liability for hazards naturally occurring on the land is of course an aspect of management of safety issues and legal liability. It is an appropriate matter for some differentiated consideration for the following reasons:

- A distinction might sensibly be drawn between hazards naturally occurring on property and those hazards created by the acts of an occupier or other human intervention.
- Users of land for outdoor adventure activities might more willingly regard themselves as taking personal responsibility for their safety in relation to naturally occurring hazards rather than those resulting from human intervention.
- In respect of a wide range of outdoor adventure activities, challenge is an intrinsic part of the experience being sought and naturally occurring hazards constitute problems which participants identify and solve to undertake the activity.
- Occupiers might more understandably feel aggrieved at the prospect of being held legally responsible for injuries resulting from naturally occurring hazards on land where no effective control/safety mitigation is exercised (eg, due to policy decisions, financial constraints, practicality)
- Risks from naturally occurring hazards are more difficult to anticipate and manage than those created by human intervention.
- There are heightened prospects for legal liability risks which result from naturally occurring hazards to be managed by the simple expedient of a denial of access.

Naturally occurring hazards occur in a range of circumstances:

- In wild and natural places where the naturally occurring hazards are uncontrolled or unmanaged – either through a policy decision not to do so or because it is not practical or feasible or affordable or because of the potential negative effects on other values or uses of the area. People voluntarily choose to visit / actively seek these places, at least in part, because of the wild and natural attributes of such places. For example, lightning is a naturally occurring hazard. Lightning can occur anywhere clouds occur including remote deserts, forests, rivers, seas, clifflines, etc. Usually, there are no on-site management staff in wild and natural places. Visitor and recreational users expect to rely on their own skill, judgement, experience, fitness, strength and equipment to identify and manage the risks they encounter.
- In built, designed, developed, contrived places where recreational visitors could reasonably expect that the naturally occurring hazards are controlled and/or managed. For example, lightning occurs on golf courses. Again, lightning is a naturally occurring hazard. Golfers may be exposed to the possibility of being

struck by lightning when storms are near the golf course but golf courses have staff on site to manage and administer the golf course. Golfers may reasonably expect to be warned of approaching storms and the consequent threat of lightning strikes.

Therefore, it may be more appropriate to refer to risks that arise as a consequence of participating in a particular outdoor adventure activity in a particular type of place. For example, climbers on a wild, remote and naturally occurring rock face must respond to the circumstances in that climb in the conditions at the time of the climb. The risk and the occupier's liability to address the risk in this outdoor adventure activity in this type of place is completely different from a situation where a person is rockclimbing at a quarry or similar site in a residential area where the local council has encouraged its use for rockclimbing and in fact has provided facilities and enhanced the area to attract climbers.

Similarly, there is a degree of unpredictability in bushwalking in relatively undisturbed native forests (regardless of the tenure of the land) because many of the components of natural bushland (eg. terrain, animal behaviour, presence or absence of various species, weather, climate, etc) cannot be controlled or precisely predicted by humans. Unpredicted events and discoveries to which the bushwalker must react or respond are part of the intrinsic value of the experience of bushwalking

The difficulty for the occupier, as outlined in cases within this Report, is to determine the extent of their duty of care, particularly where they manage large areas of remote/wilderness terrain. The area of negligence is a dynamic area of law dependant to a great degree on considerations of public policy and is therefore flexible to take into account special facts and circumstances. More visible protection for occupiers, in the form of statutory protection, is desirable to reduce the fear of litigation and to ensure ongoing access to sufficient areas for outdoor activities, across a diversity of settings.

3.3 Recreational settings

In the Queensland context, statutory protection for occupiers could extend to planning and policy decisions not to intervene to mitigate or remove risks where this changed the wild and natural character of the place where the activity occurred and consequently reduced participant satisfaction, rather than to cover all situations where natural hazards occur. Problems might well arise, however, in drawing some workable distinction for legal purposes between liability for risks arising from a naturally occurring hazards and those arising from a constructed environment or other human intervention. However, there are well established tools which can assist in the differentiation of the type of place or area (and therefore the associated risk due to naturally occurring hazards). These tools include the Landscape Classification[2] system.

Outdoor adventure activities occur within a specific context or recreational setting. A recreational setting is defined through the particular biophysical, social, cultural and managerial attributes of a place in which recreation takes place. These attributes determine the type of recreational opportunity that is afforded by a setting (Opportunity = activity x setting). For example, swimming in a rock pool is one type of recreation opportunity; swimming at a surf beach is another outdoor recreation opportunity. A diversity of recreation opportunities needs to be provided to meet the variety of demands.

[2] Clark and Stankey (1979)

A Landscape Classification system was developed in order to describe the degree of naturalness of recreational settings. The Classification system currently used by the Queensland Parks and Wildlife Service (Refer Appendix 1) employs nine settings, ranging from “Wild, Natural, Remote” (Landscape Class 1) to “Urban, Developed, Built” (Landscape Class 9). For example, a suburban quarry used for rockclimbing could be a Class 7 or 8, whilst a rockclimbing site in a national park with road access and some facilities could be a Class 3. The scale does vary somewhat between agencies, states and other countries that use this system. The Outdoor Recreation Inventory System (ORIS) is a pilot project established in Queensland to identify and record recreation opportunities using the Landscape Classification system. A similar Inventory System could be used to define areas in which the occupier’s liability is reduced for risks arising from naturally occurring hazards.

Section
4

4 Liability of Occupiers for Naturally Occurring Hazards

4.1 Some basic principles

Two basic principles are:

- The ownership or occupation of land on which an accident occurs is not of itself sufficient to make the owner or occupier liable. There must be some failure by the occupier amounting to a breach of the duty to take reasonable care which has caused the accident.
- Participation in a sport or some recreational activity implies acceptance of the risks inherent in the activity, but not the risk that someone else might be negligent. This was made plain by the High Court in a case relating to a water skiing accident, Rootes v. Shelton (1967) 116 CLR 383:

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime." Barwick CJ at 385
>
> "There can be no doubt that a participant in a sport or game voluntarily assumes such risk of injury as is inherent in the sport itself. His participation in a sport or game precludes him from asserting otherwise." Taylor J at 391.

It was further emphasized in **Agar v. Hyde** [2000] HCA 41:

> "People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports." Glesson CJ

Despite these principles, an analysis of Australian case law reveals that by application of the general principles of negligence, an occupier of land can be liable for failing to protect a recreational entrant against harm from some hazard, even where that hazard is obvious and risks have been taken by the entrant.

4.2 The leading cases

The leading case is the decision of the High Court in **Nagle v. Rottnest Island Authority** (1993) 177 CLR 423. Nagle suffered quadriplegia when he misjudged the depth and dived into shallow water striking a rock ledge at a well-known West Australian beach reserve. The defendant authority was charged with a statutory duty to manage the reserve and did so actively by the construction of facilities at the beach area where the accident happened. The authority was found to owe a duty of care to Nagle, expressed as:

> "… the board (authority) by encouraging the public to swim in the Basin, brought itself under a duty of care to those members of the public who swam in the Basin. As

> occupier under the statutory duty … the board, by encouraging persons to engage in an activity, came under a duty to take reasonable care to avoid injury to them and the discharge of that duty would naturally require that they be warned of foreseeable risks of injury associated with the activity so encouraged."

The High Court upheld a decision that the authority had breached its duty of care to Nagle by failing to have signs at the Basin warning of the dangers of submerged rocks to those entering or diving into the sea. The Court accepted evidence that a sign would have made a difference and deterred Nagle from his fateful dive, even though he had local knowledge of the coastline and the presence of rocks. In its recognition of the duty owed by the authority to Nagle and other such recreational users, the case is unexceptionable. The conclusion that the authority was negligent in failing to warn by signage of an obvious danger and that it would have made a difference, is another matter. Because of this the decision has rightly attracted criticism.

The High Court in **Nagle**, with Brennan CJ dissenting, rejected the more narrow test of liability in **Aikin v. Kingborough Corporation** (1939) 62 CLR 179, where it was said in respect of persons coming onto property, at least pursuant to a common right, that the public authority as occupier was:

> "… under an obligation to take reasonable care to prevent injury to such a person through dangers arising from the state or condition of the premises which are not apparent and **are not to be avoided by the exercise of reasonable care**." Dixon J 210 (emphasis added)

This test allowed the occupier to assume entrants would exercise reasonable care for their own safety. In **Nagle** the High Court no longer permitted the occupier the benefit of such an assumption. In determining what an occupier might do by way of reasonable care to protect entrants from harm, it was necessary to take into account:

> "the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety." **Nagle** at 431

This formulation of liability shifts primary responsibility for lapses of judgment from the person making the mistake to another who might have anticipated it. In **Nagle** it shifted responsibility for an unfortunate momentary error of judgment on the part of a swimmer to a land occupier who, by having developed facilities at the Basin for the enjoyment of visitors, found itself fixed with a further responsibility to try and protect against the obvious. The decision in **Nagle** has been the single most powerful influence in the institution, if not success, of recreational accident claims where injured claimants have blamed occupiers for not warning of risks. Several of these cases are outlined in the next section of the paper.

The authority of **Nagle** was affirmed by the High Court in **Romeo v. Conservation Commission of the Northern Territory** (1998) 192 CLR 330. The Commission argued that the decision should be reconsidered and if necessary overruled. The High Court, with Brennan CJ disagreeing, considered **Nagle** to have been correct in principle and result. The facts in **Romeo** were, however, different and the High Court upheld the trial judge's decision that the Commission had not been negligent. The claimant was an inebriated teenager who sustained high level paraplegia when late at night she fell down an unfenced cliff in a public reserve. Her case was that the Commission should have fenced the cliff top, or at least put up warning signs. A majority of the Court considered that the danger presented by the cliff was obvious to visitors in the area. The plaintiff knew the area and a warning sign would not have made any difference to her behaviour. Although the risk of an accident happening involving a fall, including skylarking or drunkenness could be foreseen, the

Commission had acted reasonably in not clearing vegetation at the top of the cliff and in not putting up fencing or signs:

> "In determining what risks the defendant was required by law to respond to, it is necessary to have regard to what acts the defendant may have reasonably anticipated in the circumstances. Given the prominence of the danger, past usage of the site and accident experience it was not reasonable to expect the inadvertence of the plaintiff in this case. So far as her complaint about the clearing of the vegetation and its appearance as a path is concerned, that appearance would not have deceived her … but for her alcohol affected state. It is true that the Commission, acting reasonably, would have to anticipate a variety of visitors, including children, the elderly, the short-sighted, the intoxicated and the exuberant. However, because the risk was obvious and because the natural condition of the cliff was part of their attraction, the suggestion that the cliffs should have been enclosed by a barrier must be tested by the proposition that all equivalent sites for which the Commission was responsible would have to be so fenced. The proposition that such precautions were necessary to arrest the passage of an inattentive young woman affected by alcohol is simply not reasonable. The perceived magnitude of the risk, the remote possibility that an accident would occur, the expense, difficulty and inconvenience of alleviating and other proper priorities of the Commission confirm the conclusion that the breach of the Commission's duty of care to the appellant was not established" (Kirby J)

The decision in **Romeo** provides a necessary correction to the far reach of the principles in **Nagle**. It is not the case that an occupier must always take steps to guard against some foreseeable risk of harm to entrants. Taking no precautions can be consistent with reasonable care. Even if the failure to display warning signs might be regarded as negligence, such negligence will only be relevant where it is accepted that a sign would have made a difference to the claimant's behaviour. The singular difference of fact between **Nagle** and **Romeo** was that the danger to Nagle was hidden, while it was obvious, or should have been, to Romeo. This should have been enough to keep her safe. Reasonable minds can, however, differ on this. It is a matter of common sense that human lemmings will fall over unfenced cliffs for all manner of inadvertence other than being alcohol affected and a Court might equally apply the principles in **Nagle** to find a land manager, with knowledge of visitors to the area, liable if no precautions are taken. One can only speculate what the result in **Romeo** would have been if the disastrous inadvertence was that of one of the possible visitors mentioned by Kirby J, such as a child or the short-sighted.

Conclusion:

The outcome in **Romeo** is, therefore, not sufficient to dissuade others from litigation. Whether an occupier has been careless in managing a risk of injury to recreational entrants turns on the circumstances of the individual case. Occupiers are still required to take into account that entrants might fail to take proper care for their own safety. It is hardly surprising then that the absence of any warning signs, even those stating the obvious, is a sure invitation to litigate.

4.3 Attacking the barriers

The proposition that the present law offers an invitation for recreational users of property to litigate might be examined against the following recent cases. Many of these claims might be regarded as startling. Although often unsuccessful, they constitute a continuing attack on the barriers of legal protection for occupiers.

4.3.1 Cases where a claim was not successful

Scarf v. the State of Queensland 1998 SCQld 1272/93

The claimant sustained tetraplegia after diving from a highway bridge located near a popular Gold Coast beach into shallow water. He had dived from the bridge about 100 times previously over a number of years. The claimant sued the Department of Transport which owned the bridge and the local council which controlled an adjoining recreation area. Both defendants knew people dived from the bridge. The allegation of negligence was in failing to have guardrails of a sufficient height to deter diving and in not having warning signs.

The Supreme Court held the local authority was not liable because it had no control over the bridge. The Department of Transport was also held not liable. Although the Department was under an obligation to exercise care in relation to those using the bridge, including those choosing to use it as a diving platform, signs would not have deterred the claimant from diving. Medical evidence showed Scarf was at the time affected by both drugs and alcohol from a heavy previous night. He also had a string of continuing criminal convictions throughout his teenage and adult life which, together with his previous history of diving from the bridge, helped justify the view that he was not likely to respect a sign.

If Scarf had been a "first time diver", or considered a person more likely to respect the authority of any sign, the outcome would in all likelihood have been different and the Department would have been liable. The Department as owner and occupier of the bridge was found to be well aware of the longstanding practice of people diving from the bridge and therefore came under an obligation to take care for their safety. Signs should therefore have been erected. The judge was persuaded that:

> " … the obligation to a person in the position of the plaintiff would be discharged by the erection on the bridge of signs prohibiting diving … perhaps with the addition of the word "DANGER". Such a sign would remind those who have been diving from the bridge without incident in the past and/or who had seen others doing it, or those contemplating doing so for the first time, that it was an activity that ought not to be engaged in."

Mountain Cattlemen's Association of Victoria Inc v. Barron [1998] 3 VLR 302

The Association organised a weekend horse-riding event attended by some 3000 people including the claimant, an experienced horsewoman, who had been handling horses almost daily for 17 years. She was injured whilst leading her horse across some small slippery rocks to the water's edge near a camping area. The horse slipped and injured her. The trial judge found the Association negligent in failing to have signs directing participants to safer areas of the river or in failing to have water troughs as an alternative to the river. The Victorian Court of Appeal allowed the Association's appeal. The injury was simply part and parcel of attending a bush riding event. No inference could be drawn that even if a sign directing riders elsewhere was in place, the claimant would have followed the sign.

Secretary to the Department of Natural Resources v. Harper (2000) 1 VLR 133

An entrant to a reserve which was part of a national park was seriously injured and her companion killed when a tree fell during a period of high winds. She was staying at a camping area in the reserve and, at the time of the accident, had gone to a creek some 100 metres from the camping area. The trial judge found the Department was liable in negligence for failing to have signs in the Park warning of hazardous trees,

particularly in conditions of high wind. The Victorian Court of Appeal overturned the decision. The risk of a tree fall was a natural hazard which was unlikely to be averted by the erection of signs. There was nothing in the nature or condition of the area where the accident occurred to have caused the Department to think that any special protective measures might have been necessary.

Critchley v. Cross [2000] NSWSC 6

The claimant suffered serious personal injury when he walked from a river up a steep embankment on a privately owned 51 hectare rural property to relieve himself. Whilst descending another way, after heading off to look at some cattle, he crossed through a rough bush area and fell down a crevice at the edge of a small cliff. The owner had put signs at the river edge saying the land was privately owned and prohibiting entry. The cliff line was unfenced. The claimant alleged the owner was negligent in failing to put up warning signs, or to fence, or fill in, or barricade the crevice. The Court found the owner had not been negligent. Reasonable attempts had been made to deter trespassers. There was no reason why a reasonably careful owner of the land would install fencing at a then cost of some $15,000 to $20,000 to guard against the risk of a trespasser harming himself in an area of rough bushland the owner had never herself entered in her seventeen years of ownership.

Borland v. Makauskas [2000] QCA 521

The Queensland Court of Appeal overturned a jury decision that the owners of premises were liable when a friend of the owners' son dived from a fence at the rear of the property into shallow canal water and suffered serious injuries. The plaintiff was a young adult. He had stayed at the property before, he knew the canal water was shallow at the edge. He had been drinking all night until he fell asleep at the house about 6.30 am. He was woken by his friends at 9.30 am and after skylarking in the swimming pool for 15 minutes climbed onto the fence and dived into the canal. The jury found the owners negligent in failing to have a warning sign stating the canal water was shallow and in having a fence with a broad top which might serve as an invitation to a person to jump or dive into the canal. The Court of Appeal concluded it was unreasonable to require a property owner to put up a sign against the risk of "someone ignoring the obvious" and that a fence, even if its top rail was flat, could not "sensibly" be described as an invitation to do something "so obviously dangerous". The Court of Appeal described the plaintiff's conduct as foolhardy in the extreme.

Prast v. Town of Cottesloe (2000) 22 WAR 474

The claimant sustained tetraplegia when he was dumped by a wave whilst body surfing at Cottesloe Beach. He had body surfed for years, and had swum at Cottesloe Beach six times in the previous year. He claimed the defendant local authority was negligent in failing to place signs on the beach warning of the dangers of body surfing and in particular the risk of spinal injury. The West Australian Supreme Court upheld a decision that the authority had not been negligent. There were no particular dangers associated with the beach. The risk of injury from being dumped by a wave was so obvious that the authority was not obliged to give any warning.

Waverley Council v. Lodge [2001] NSWCA 439

The claimant was injured when he fell on moss and algae covered rocks while walking between a rock pool and a bathing pool. The Council controlled a beachside promenade near the rocks. The trial judge found the Council was negligent in failing to have signs warning of the danger of slipping on the rocks. The New South Wales Court of Appeal held the Council was not liable because it did not have control over the area where the accident happened and therefore was not obliged to warn of dangers associated with the rocks.

4.3.2 Cases where the claim was successful

Manly Municipal Council v. Boylan 1995 Court of Appeal NSW 40737/93

The claimant executed a shallow dive into water in the Manly dam, striking a submerged rock. The accident happened in an area where recreation and swimming had been encouraged, including the dumping of sand to create an artificial beach. There were no signs warning as to the danger of submerged rocks. The New South Wales Court of Appeal considered the principles in **Nagle** governed the situation. Glesson CJ saw the facts as stronger than Nagle's claim, in that Boylan sprang forward in a shallow dive after wading out into the water, rather than engaging in the more obviously dangerous act of a "full-on" dive into water in a rocky area.

Western Australia v. Dale (1996) 15 WAR 464

The claimant was injured when diving into an abandoned open-cut mine used as a swimming hole. The State, as occupier of the abandoned mining area, had not actively encouraged the use of the mine as a swimming hole but was aware of such use. The swimming hole was inconsistent in depth and had murky blue water that gave no real idea of actual depth. Dale dived in after seeing others doing the same. The State was held negligent in not having depth indicators and notices prohibiting diving. Perhaps somewhat idiosyncratically, the local authority, which had graded the carpark access, provided rubbish bins, encouraged recreational use including swimming and made some attempt to monitor water quality, was held not responsible. The Council had done nothing to indicate it had accepted responsibility for diving hazards in the water hole.

Northern Territory of Australia v. Shoesmith (1996) 5NTLR 155

The claimant slipped on a log extending over a waterhole and fell onto a ledge, suffering injury. A tree had fallen across the water hole and the local council had pruned it rather than removing it. Both the Territory and the local council were found to have been negligent. The Territory was the owner and occupier of the area and knew of its recreational use as a swimming area centred on a hot water spring. The local council had carried out improvements to the area, encouraged its recreational use and had pruned the tree in question. Both were negligent in failing to erect appropriate warning signs prohibiting people from going on to the log, or in failing to remove the log or at least the part extending over the rock ledge. The Court of Appeal for the Northern Territory upheld the finding of negligence, at least on the basis that the part of the log extending over the rock ledge might have been easily removed and this was not done.

City of Rockingham v. Curly [2000] WASCA 202

The claimant suffered quadriplegia when he dived into shallow water from a jetty, following two of his friends who dived first. He had dived from the jetty on many previous occasions over the years. He had lifesaver training and as part of his training knew that a check should be made for depth before diving. The Freemantle Port Authority, which had control of the jetty, was held negligent in failing to have signs prohibiting diving or warning of the danger. The trial judge accepted the claimant's evidence that a prohibition sign would have stopped him diving, or at least caused him to check the depth of the water and to have jumped rather than dived. The West Australia Court of Appeal upheld this decision. At the same time, the Court of Appeal set aside a decision that the local council, which controlled a popular swimming area adjoining the jetty, had also been negligent. The council had no control over the jetty and could not prohibit diving.

Shorten v. Grafton District Golf Club Ltd [2000] NSWCA 58

The New South Wales Court of Appeal, setting aside the decision of the trial judge, held the golf club liable in negligence for an attack by an aggressive kangaroo on a golfer. The claimant had gone into long grass adjoining a fairway to search for a wayward golf ball when he was attacked. The golf club was aware that there had been four previous attacks by kangaroos at the course but had not warned golfers of any risk of injury.

4.4 A summary of the current position

From the cases outlined, it is evident that the allegations of negligence generally asserted or established relate to the failure to warn of the obvious. The absence of signs is readily latched onto as a basis for liability. The fact that the claimant is in the best position to care for his or her own safety and deliberately incurs risks intrinsic to the activity itself is given little weight or ignored. Certain of the cases must be seen as having had minimal prospects of success from the outset. Others needed the necessary correction of an appeal hearing. They all involve a highly attenuated idea of what constitutes reasonable care with conclusions arrived at with the benefit of pedantic examination and hindsight.

It is suggested that the case law reflects a willingness for persons sustaining serious injuries in recreational activities to litigate against land occupiers that is prompted more by the confident expectation that such occupier has liability insurance or other capacity to pay, rather than by any real belief that the occupier failed to exercise reasonable care. In a real sense, occupiers continue to be at risk of being held liable for the consequences of the claimant's own unfortunate acts and the natural presence of hazard in the environment, rather than for any actual failing by the occupier.

This is the legacy of **Nagle.**

Section
5

5 Problems with the Law

It is suggested that the present law affecting liability for recreational accidents where natural hazards occur is unsatisfactory for a number of reasons:

- It is a component of a negligence liability system for personal injuries which is at risk of being unaffordable
- It is difficult to predict legal outcomes and therefore manage risk
- It strikes the wrong balance between personal responsibility and the responsibility of others
- It impedes access to land for recreation.

Each of these is discussed in turn.

5.1 The economics

Litigation against landowners is predicated on the existence of a defendant with public liability insurance or a defendant such as government or local authority with personal capacity to pay an award of damages. For reasons identified earlier in the paper, the system of insurance underpinning legal liability is a system at present under grave threat. The impact of recreational accidents is part of a broader problem of too much potential liability at too high a cost.

The cost of liability insurance for private landowners in respect of injury risk to entrants has not been afflicted by the premium rises identified in the Report of the Liability Insurance Task Force. The major impact is in relation to the availability of insurance at economic rates, or if at all, for the activities of outdoor recreation organisations, whether non-profit or commercial. Premium increases between 40% and 900% have been identified as well as a reduction in the number of insurers willing to provide insurance cover against perceived risk activities. In some circumstances landowners will, not unreasonably, only allow access to land to some recreational interest organisation on the basis of the organisation having adequate public liability insurance.

In relation to entities that self-insure, the potential financial exposure can be massive. Many of the recreational accident cases involve serious permanent injury, such as quadriplegia or tetraplegia, to young persons with an obviously long life and work expectancy at the time of the accident. In **State of Queensland v. Scarf**, the Court assessed Scarf's damages as $2.5 million if he was successful. Amounts in this order are not uncommon for permanently disabling injuries to young persons on an economic analysis of their loss.

The potential amount might be much higher. A Queensland holiday resort and Sunshine Coast local authority face a claim reported as being in the order of $120

million in negligence proceedings brought by the widow of a Pepsi senior executive who drowned off a Queensland beach in circumstances where it is alleged the beach was dangerous and there were no warning signs. The Queensland Supreme Court has yet to hear the matter.

Where claims are not successful, the cost of defending proceedings is a substantial and unreasonable impost on occupiers. Legal proceedings are not cheap. Even where costs are ordered against an unsuccessful claimant, the probability of recovery is often nil. The more speculative claims are generally brought by claimants who had no assets to start with, or who have, on advice, transferred assets before the commencement of proceedings. The defence costs therefore tend to remain with the insurer or the defendant. These costs include not only legal costs in the narrow sense of paying the lawyers but the costs of investigation, documentation, expert reports and opportunity costs in relation to time devoted to court and other attendances.

The economic reality of defending proceedings acts as a commercial incentive to the settlement of claims. It can be cheaper to settle a claim than fight. An unknown number of claims are in all probability settled for this reason alone rather than because of some clear view as to liability. Confidentiality of settlement terms does not assist obtaining accurate information as to such matters. Only the more questionable claims, especially where linked to significant potential damages, find their way to court. Plaintiff lawyers are well aware of this reality in formulating and pressing claims.

5.2 Predicting legal risk

The nature of the test of negligence determined by the High Court in **Nagle** means there is a high inherent difficulty in determining issues of negligence. It is suggested that this difficulty is more pronounced in occupier's liability cases than in most other areas of negligence. This is because liability is not generally found in the acts of the defendant, but in the more diffuse failure of the defendant to protect the claimant from the consequences of the claimant's own acts. Outcomes are therefore difficult to predict, encouraging speculative litigation, the settlement of claims on a commercial rather than liability basis and the implementation of risk management procedures for landowners based on extreme caution.

Whilst some might argue that since the High Court decision in **Romeo v Conservation Commission**, the risk that occupiers of land will be held liable for recreational user accidents is perhaps far more imagined than real, if persons injured in recreational situations do bring proceedings against occupiers (irrespective of legal merits) then occupiers as a group will be less inclined to grant access. In these circumstances, more visible protection in the form of statutory provisions may be desirable.

5.3 Personal responsibility versus the responsibility of others

The law of negligence as recognised in **Nagle** has slipped between recreational activity and the concept of personal responsibility. Personal responsibility in a recreational context might involve incurring significant risks. With certain recreational activities, the application of personal skill to situations of high risk is an essential aspect of the experience. A law of negligence which in part requires landowners to guard others from harm in activities of their own choice impacts in an aggressive and negative way on the opportunities allowed for "risk takers" to pursue these activities. Our legal system values individual liberty. As an aspect of personal autonomy,

interferences with individual choice as to personal risk in recreation should be minimized.

Personal responsibility in recreation should be recognised and promoted as an important value. The present negligence laws are too solicitous of the injured at the expense of this principle. Personal autonomy has been lost to the preferred higher principles of assisting the injured and encouraging safe practices.

5.4 Access to land for recreation

A disastrous consequence of the present negligence laws is the closure of lands for general recreational use, or the denial of access for particular purposes.

Concerns about possible liability result in risk management by the simple expedient of denying access. Private landowners in particular adopt this position and under present laws and the pressure of insurance costs, their stance is not unreasonable. No landowner can take any comfort from the decision in **Nagle**, despite its careful explanation in **Romeo**. Cases such as **Borland** in Queensland have received widespread publicity. Under the impetus of the media, community note is taken of the fact that such proceedings are brought rather than that they might ultimately have been unsuccessful. All this adds to a climate of justifiable concern about lawsuits, and gates are then closed.

This is a particular problem for what might be seen as more high risk activities such as rockclimbing, abseiling, hang gliding, horse riding, mountain biking and trailbike riding, where the higher level personal risk is identified, even if incorrectly, with higher legal liability risk.

Where landowners not unreasonably require entrants to have their own insurance as a condition of entry, such insurance will most often not be in place, not be available or be uneconomic. There is no culture of personal accident insurance in Australia covering recreational accidents as there is in other jurisdictions such as the United Kingdom.

The Queensland Government as the state's major landowner has itself sometimes managed legal liability by the simple expedient of closure. In 1999 fear of injury associated with potential rockfall and consequent litigation resulted in the closure of Mt Coonowrin, more popularly known as Crookneck, in the Glasshouse Mountains National Park.

5.5 Conclusion

Due to the high inherent difficulty in determining issues of negligence, particularly in cases of occupier's liability, it is recommended that the current situation be clarified using appropriate legislation which defines the type of place, location or Landscape Class to which the legislation applies, the requirements to satisfy the occupier's duty of care in those areas or Classes, and the instances where the occupier's liability is limited for naturally occurring hazards to recreational users in those places.

Section
6

6 The Australian Experience – Some recent risk management initiatives

In seeking to respond to uncertainties with the Law affecting liability for recreational accidents where natural hazards occur, a range of risk management strategies (both statutory and non-statutory) have been implemented by Australia states and territories.

6.1 New South Wales

(a) Statutory

A controversial new Regulation has been drafted to replace existing Regulations governing various activities under the *National Parks and Wildlife Act 1974*.

The proposed Regulation known as the National Parks and Wildlife Regulation 2001 will replace the former National Parks and Wildlife (Land Management) Regulation 1995, the National Parks and Wildlife (Administration) Regulation 1995 and the National Parks and Wildlife (Fauna Protection) Regulation 2001. The proposed Regulation covers a number of matters including the regulation of use of national parks and other areas administered by the National Parks and Wildlife Service. Of particular relevance to risk management is Part 2 Division 3 Section 21 of this draft Regulation which states that:

> "(1) A person must not without the consent of the park authority and in accordance with any conditions to which the consent is subject, or in accordance with the plan of management for a park, in a park:
>
> …(d) engage in any activity or recreational pursuit that involves risking the safety of the person or the safety of other persons.
>
> (2) Without limiting the generality of subclause (1) (d), the activities and recreational pursuits to which that paragraph applies include abseiling, base jumping, bungy jumping, rock climbing, caving, parachuting, white water boating, paragliding, parasailing and hang gliding."

The concern of recreational groups is that the Regulation will be used to prohibit established and future access to national parks for certain recreational activities, in particular rock climbing in the Blue Mountains.

Prohibition or denial of access forms a blunt instrument of risk management. It might act to reduce liability, but only at the expense of all or certain targeted recreational activities and the ability of individuals to choose to incur risk in recreation.

(b) Non statutory

Additionally, and more constructively, throughout 2000/2001 the Outdoor Recreation Industry Council of New South Wales, with financial assistance from the New South Wales Department of Sport and Recreation, has developed an Organisation Accreditation Scheme (recently accredited by the Australian Tourism Accreditation Association) and a Risk Management Document which details operating procedures for a range of outdoor activities. The Accreditation Scheme, together with the Risk Management Document, provide a tool for use by organisations to meet minimum standards of operation.

6.2 Victoria

(a) Non statutory

The Victorian Government has provided a $100,000 assistance program to help adventure tourism operators affected by spiralling public liability insurance costs. The funds are to be used to assist adventure tourism operators prepare risk management plans. Tourism Victoria has worked with the Office of Regulation Reform under the Minister for Small Business and Consumer Affairs to develop this program. The funding is provided on a dollar-for-dollar basis to undertake risk audits and initiatives to minimise risk exposure. The program is jointly administered by Tourism Victoria and the Victorian Tourism Operators Association.

Another pilot project, jointly funded by Sport and Recreation Victoria and Parks Victoria has seen the development of minimum activity standards (or minimum operating procedures) in a number of outdoor adventure activities. This project is to be expanded to encompass a broader range of outdoor adventure activities.

6.3 South Australia

(a) Statutory

Under the *Recreational Greenways Act 2000*, provision is made for the creation of a system of trails for defined recreational purposes. The recreational purposes are:

- Recreational walking
- Cycling
- Horse riding
- Skating; or
- Other similar purpose

Greenways also include land established as a camping ground and land on which a hut, hostel or other facility is established for use in conjunction with a trail. The public, for non-commercial purposes, has a free right of access to greenways.

Liability risk management receives limited attention under the Act and does not affect the operation of the negligence laws.

- Section 12 of the Act provides for the closure of a greenway in certain circumstances including public safety and emergency.
- Sections 14 to 17 of the Act provide for access agreements with private landowners to facilitate the creation of greenways. An access agreement may

in relation to liability include indemnities, waivers or exclusions, acknowledgments or disclaimers of liability. The obvious thrust of such an agreement would be to shift financial responsibility for the liability risk to greenway users from private landowners to the government.

The *Volunteers Protection Act* which came into affect in South Australia on January 15th 2002 provides members of volunteer organisations with qualified immunity from personal liability for negligence with the onus being put back on the organisation they were volunteering for.

Under a regulation within the *National Parks and Wildlife Act 1972*, persons seeking to conduct rockclimbing and abseiling activities within National Parks in South Australia must hold appropriate permits and must have completed training conducted by the South Australian Rockclimbing Education Association (SAREA).

6.4 Tasmania

(a) Non statutory

A State Government Insurance Steering Committee has been established and they are seeking outdoor recreation input. During 2001 Quality Assurance and Safety Management became a major focus as part of a statewide, whole of industry project. This is a multi-stage project with Stage 1 currently being undertaken. Stage 1 is looking at current risk management practices used within the sport and recreation industry and hence is primarily information gathering to determine what is happening across all sectors to identify differences/gaps and to summarise key findings. Stage 1 will also include an assessment of risk management practices within the relevant Government Agencies. A consultant has been employed to undertake the surveys of industry, whilst the Office of Sport and Recreation is undertaking the work with government agencies.

In 1999 the Office of Sport and Recreation, Tasmania produced a resource, *A Sporting Chance,* which is a risk management document for sport and recreation organisations.

6.5 Western Australia

(a) Non statutory

In January 2001 the Department of Education, acting on the advice of Risk Cover, changed their excursion policy to require operators to hold $20 million in public liability insurance. The policy was not very well advertised and most principals and teachers were either not aware of, or ignored the policy or started cancelling excursions because they were becoming too hard. The policy was not equally enforced, with bus drivers being offered a dispensation and only required to have $5 million in cover. Following intense industry lobbying, the Education Department changed their policy on 31st October 2001.

This could have set an interesting precedent for other state and federal government departments to follow. The quotes that outdoor adventure operators were receiving for premiums for $20 million coverage were 3 times greater than $10 million cover which has already been dramatically increased by 400% in most cases in the last twelve months.

In Western Australia, the Ministry of Sport and Recreation has for some years overseen the Abseiling Instructor's Board and the establishment and delivery of a training course for abseiling instructors following several accidents within the industry in that state.

6.6 Queensland

Queensland has implemented a range of risk management strategies to deal with risk associated with recreational activities.

(a) Statutory

There are currently three Codes of Practice applicable to recreation activities in Queensland:

- The Compressed Air Recreational Diving and Recreational Snorkelling Industry Code of Practice 2000 replaced the advisory standard entitled Code of Practice for Recreational Diving and Recreational Snorkelling at a Workplace which commenced on 26 May 1995. The new Code of Practice was made on 9 November 1999 and commenced on 1 February 2000.
- The Horse Riding Schools, Trail Riding Establishments and Horse Hiring Establishments Industry Code of Practice 2002 states ways to manage exposure to risks identified as typical in horse riding schools, trail riding establishments and horse hiring establishments. The Code was made on 15 January 2001 and was implemented from 1 January 2002.
- The Recreational Technical Diving Industry Code of Practice gives practical advice about ways to manage exposure to risks identified as typical when conducting recreational technical diving. It came into effect on February 1 2002.

In addition, diving has also been addressed in the Workplace Health and Safety Regulation 1997, with Part 12 dealing with Underwater Diving Work and Part 12A focussed on Conducting Recreational Snorkelling.

Land management agencies in Queensland have dealt with risk management issues in a number of ways:

(i) Public liability cover is required for all activities granted a commercial or group activity permit under the *Forestry Act 1959.* The usual minimum value of cover required is $10 million for any one incident.

(ii) Public liability cover is required for all activities granted a group activity, commercial activity or special activity permit under the *Nature Conservation Act 1992.* The usual minimum value of cover required is $10 million for any one incident.

(iii) As mentioned previously in this Report, access to sites in Queensland used by recreational participants has been restricted by Qld Parks and Wildlife Service in accordance with provisions within the *Nature Conservation Act 1992*

(b) Non statutory

In 1998 the Office of Sport and Recreation produced a resource, *Playing it Safe,* which is a risk management document for sport and recreation organisations.

Currently, Sport and Recreation Queensland provides financial assistance to clubs through its Community Sport and Recreation Development Program in a range of different categories including risk management.

Section
7

7 The Overseas Experience

The Australian experience with negligence laws is not unique. Similar to the situation in Australia, using the traditional Common Law approach the scope of the liability was perceived as being too broad since the landowner was required to warn entrants of every possible danger. In addition. this led to uncertainty for landowners with respect to the general requirements to avoid or substantially limit liability by erecting warning signs and the like. Accordingly, the general tendency was to close off land for public use.

In a move to make more land accessible for the public, various jurisdictions outside Australia, have made specific attempts through legislation to strike a different balance between recreational freedom and negligence liability in order to ensure access to lands and acceptance of personal responsibility for recreation choices. Approaches taken by both Common Law countries (eg, USA, Canada, United Kingdom, Ireland) and Civil Law countries (eg, Germany, Sweden) have been researched and are outlined within this Report, with more detailed case law and discussion contained within appendices.

7.1 Common Law countries

7.1.1 The United Kingdom

Following a public consultation paper which recommended a new right of public access to land, colloquially known as the "right to roam", the *Countryside and Rights of Way Act* 2000 (CRoW 2000) was enacted in November 2000. The Act is a complex piece of legislation covering a wide range of land management issues but with a central objective of creating a statutory public right of access on foot to certain lands being mountains over 600 metres, moorland, heath, downland and registered common land.

The Act addresses the liability of land occupiers to entrants exercising this right of access by modification of the existing laws. Under the existing English laws, entrants on property are divided into two categories, visitors and trespassers. The duty owed to visitors is governed by the Occupiers Liability Act 1957 and is broadly equivalent to the duty recognised in Australia as owing to entrants in **Zaluzna.** The liability owed to trespassers is governed by the Occupier's Liability Act 1984 and is conceived as being more restrictive, being a duty to do what is reasonable in all the circumstances when it is known or should have been known that a trespasser might come into the vicinity of a danger.

Where a person exercises their "right to roam" over access land under the Countryside and Rights of Way Act, the entrant is not a visitor for the purposes of the Occupier's Liability Act 1957. The duty owed by the occupier is similar to the duty

owed to a trespasser under the Occupier's Liability Act 1984 but with specific exclusions. There is no liability in respect of:

- Risk of injury resulting from a natural feature of the landscape or of any river, stream, ditch or pond whether natural or not. Additionally, all plants, shrubs or trees of whatever origin are regarded as natural features.
- Risk of injury from passing over, under, or through any wall, fence or gate except by proper use of a stile or gate.

The occupier still owes a duty where the danger is due to anything done by the occupier with the intention of creating a risk or was reckless as to whether a risk was created.

A more comprehensive discussion of the *Countryside and Rights of Way Act* 2000 is contained in Appendix 2.

Issues and Conclusions:

The legislation is very convoluted and difficult to access. Furthermore, it is a package of provisions and regulations, the implementation of which will take place over the next five years. A complex mapping process needs to be undertaken in which the different types of land comprising the "access land" will be assessed and catalogued by countryside authorities, which compile their results in maps showing the area accessible and excluded from public access. From this point of view, it appears that a scheme similar to this should not be contemplated at this stage. However, this legislation identifies and addresses four key issues that are also addressed in legislation in other jurisdictions and will be discussed later in this Report. Furthermore, this legislation provides an example where a mapping or classification system is used to identify those areas which are to be accessible for recreational users and to which the legislation applies and this concept may have applicability and appeal in the Queensland context.

7.1.2 The United States

Fifty state jurisdictions have enacted legislation to protect landowners and occupiers from liability for injuries suffered by those entering their land specifically for recreation.

This legislative scheme originated with a draft Model Act in 1965 prepared by the Council of State Governments. In recommending the enactment of the draft legislation, the Council noted that every encouragement should be given to private owners who were willing to make their land available to the general public. This indicates the intent underlying the legislation and its limits. If access to land is provided on a business or commercial basis, then the landowner's liability protection does not apply. A further model act was prepared on behalf of the National Association of Conservation Districts in 1979 but the scheme of laws enacted by most states remains modelled on the 1965 act.

The public policy underlining such legislation is well expressed in an article dealing with the Wisconsin legislation:

> "The concept of recreational use legislation is, in national public policy terms, fairly new. Changes in lifestyle and the environment over the last thirty to forty years appear to be the impetus for new legislation intended to encourage public recreational use of private land. These changes include increases in the material wealth and leisure time of urban residents enabling people to spend more time on recreation, a decline in the

> amount of public recreational space available to urban residents, an increased awareness of the health and fitness benefits of recreation, a concern to provide the public with opportunities to enjoy the benefits of modern environmental control, and a response to increased private tort litigation of recreational accidents." Ford S.J. "Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges." [1991] Wisconsin Law Review 491 at 492

An example of current legislation, The Hawaii Code, Chapter 520, is set out in Appendix 3 to this Report.

The most important feature of American state occupiers' liability Acts is that, in certain circumstances, the landowner is granted a broad immunity from liability, which could arise as a result of either personal or property damage while people use the landowner's property for recreational use. This immunity, however, is limited through certain legislated exceptions and the Courts' interpretation of ambiguous legislative terms. The immunity from liability is qualified because it only applies when the entrant is on the property for recreational purposes. The Acts do not cover any other purpose. The broad scheme of the legislation is as follows:

- The act applies between owners and occupiers of land and those entering the land for a recreational purpose
- An owner or occupier of land owes no duty of care to keep premises safe for entry or use by others for recreational purposes
- Recreational activities are broadly defined by an inclusive definition
- There is liability only where injury is caused to a entrant by the wilful or malicious failure to guard or warn against a dangerous condition on the property
- The act does not apply where there is a charge for entry to the property
- Other specific exclusions from the protection of the Act may apply, for example entry on urban property or the presence of house guests.

Such legislation has generally been held to protect the Crown as well as private landowners and occupiers. A substantial body of case law evidences the preparedness of the courts to broadly interpret the legislation to confirm its intent and deny liability (refer Appendix 3).

Issues and conclusions:

Under such legislation different outcomes would occur on the facts of the various Australian diving cases considered earlier. Nagle would only have succeeded in his claim if he could establish that the Rottnest Island Authority had wilfully or maliciously failed to put up warning signs. In **Klepper v. City of Midford** (1987) 825 F 2d 1440, the claimant dived head first from a boat into shallow water and suffered quadriplegia. He sued the local authority claiming signs should have been erected warning of the water depth. His claim was dismissed as the failure to erect signs was not wilful:

> "Kansas law directs the conclusion that unless the defendants intended to injure the plaintiff or otherwise had a designed purpose or intent to do wrong, they were not guilty of wilful failure to guard … wilful failure to warn is more than mere reckless or a knowing failure to warn with awareness of the possible consequences; it is a purposefully designed failure to warn with the intent to do wrong or cause injury." (at 1447)

Such legislation would seemingly mean that a claim such as Scarf's, if it was still brought, might be determined by a short preliminary hearing as to liability, rather than as happened, by an eight day Supreme Court trial.

An instructive example relevant to Queensland's love of beach recreation is **Covington v. United States** (1997) 119 F.3d 5. Covington sued in respect of the drowning of his young son, Joshua, off a beach at Oahu, Hawaii. Lifeguards had posted a "safe to swim" sign. Joshua was knocked down by a wave while playing with other children and did not surface. It was contended by his father that the government, by having an insufficient number of lifeguards, not providing adequate training for them and putting up the "safe to swim" sign, made the natural condition of the ocean more dangerous and failed to warn about it. The Court rejected the allegation of insufficient lifeguards and inadequate training. Further, any failure to guard or warn was not wilful or malicious:

> "It may be that the government had actual or constructive knowledge of the peril of drowning. But we find no evidence that the injury was probable, as opposed to merely possible. Conditions were fairly calm on the day of the accident, and there was no history of drownings at this beach that would have put the government on notice that this sort of accident was probable. The district court correctly found that any failure to warn was not wilful."

An issue under the United States legislation which has attracted substantial attention is the exclusion from protection of landowners charging for entry to their property. The rationale is that where people govern entry to their land by invitation and contract, there is a legitimate expectation that reasonable care will be taken for the safety of the entrants commensurate with the terms of the contract. Difficulties can, however, arise as to what constitutes a charge within the meaning of the exclusion. Recreational user acts divide between those which specify that the protection is lost if "consideration" is received and those limiting the exclusion to where a charge is imposed. Various cases have rightly held that consideration is a broad term which extends beyond actual entry charges to include indirect financial benefits received as a result of entry. Examples are charges for associated matters such as carparking, hire of equipment, storage of goods, or possibly purchasing items in a café located on the site. The more limited concept of a charge has also received some judicial attention. In **Flohr v. Pennsylvania Power & Light Co** (1993) 821 F. Supp 301, the claimant paid a fee to camp overnight at a camp area on the landowner's property. The next day he was injured near the camp area whilst on a fishing excursion. The landowner remained protected from liability because the area where the accident happened was open to all, not just the campers. If the accident had happened in the actual camping area, the statutory protection would have been lost.

The issue of whether payment of an entry fee can be implied to guarantee safety to an entrant is important. As a consequence of charging an entry fee, a landowner may owe a higher duty of care. This issue needs careful consideration, particularly as one desired outcome from any legislation introduced in Queensland would be to encourage private landowners to allow access for recreation. Is the fee an "entry" fee to cover costs for use of facilities such as carpark, lookout and toilets or is it an entry fee to the entire area owned and managed by the landowner? The payment of an entry fee does not reduce the inherent risk associated with some activities, or the risk associated with natural hazards that may be encountered whilst recreating. In the Queensland context, any legislation would need to be carefully drafted with consideration of the issues raised through the United States experience.

7.1.3 Canada

The Canadian Provinces' jurisdictions chose to create Occupiers Liability Acts which, unlike their American counterparts, not only regulated the liability with respect to recreational user, but codified the law with respect to people entering a property generally. The recreational user is one of the categories of entrants set out and the duty owed is defined. One impetus has been acceptance of the view that the normal rules of negligence would significantly impede the development of the Trans Canada Trail as a primary outdoor recreation resource. A further impetus has been the 1994 report of the Law Reform Commission of British Columbia, **Recreational Injuries: Liability and Waivers in Commercial Leisure Activities**. The Commission's report responded to concerns that fear of liability caused restriction of access to land for recreation and recommended the general protection of landowners against negligence claims.

The Occupier's Liability Act 1996 (BC) limits the duty owed to a person whose entry is for the purpose of a recreational activity to a duty not to:

- Create a danger with intent to do harm or damage to the person, or
- Act with reckless disregard of the safety of the person or their property.

The recreational entrant is deemed to have assumed all other risks of harm.

There are limitations on the landowner's protection. It will not apply where payment or other consideration is received, or the person harmed is actually living on the premises. The land covered by the provision is also limited to primarily farm land, undeveloped land, wilderness areas and recreational trails. Similarly worded provisions protect occupiers in Ontario, Prince Edward Island and Nova Scotia.

Refer to Appendix 4 for a more comprehensive description of the Canadian legislation.

7.1.4 Republic of Ireland

Similar to the Canadian provisions outlined above, the Occupiers Liability Act 1995 specifies a more limited duty owed to recreational users of land compared to other entrants. The legislation is not explicitly limited to the category 'recreational user' but appears to provide general liability standards for people entering certain properties. The duty is limited to intentional injury or reckless disregard of the entrant. These protective provisions were the result of a campaign by landowners, farmers in particular, who sought to remove a perceived vulnerability to litigation and obtain some certainty in the law. (Refer Appendix 5)

Conclusion:

There is a clear trend in the examined Common Law countries to open properties for recreational use by shifting liability traditionally lying with the occupier to the recreational user. The motivation for this trend is twofold. First, its is acknowledged that recreational use is becoming more and more popular and that to satisfy the market and the needs of the population, all efforts have to be undertaken to make more land available. Second, it is further acknowledged that occupiers would not open their properties for recreational use until there were mechanisms in place reducing the exposure to liability for injuries sustained by recreational entrants. The legislator stepped in and effected legislative changes to accommodate the needs of

the occupiers on the one hand, at the same time trying to achieve the satisfaction of the community's demand for more recreational areas.

7.2 Civil Law countries

Legal solutions to the question of occupiers' liability in Germany, Sweden and Norway were examined. Sweden and Norway were chosen because vast areas of those countries are unpopulated and outdoor recreation is traditionally a major form of recreation for both citizens and tourists. Germany was chosen because it is densely populated and outdoor recreation is only a new form of recreation. Since this area of law is very specific and legal resources available for those countries are therefore rather limited, the examination of these jurisdictions is kept to a brief outline, only highlighting obvious similarities to common law jurisdictions. (Refer Appendix 6)

7.3 Inherent risk provisions

In various Canadian and American jurisdictions, legislation has been enacted to deal with risk situations in the skiing industry. The concern of such specialist legislation is more to do with the regulation of commercial ski operations and problems with contractual exclusions of all liability than with ensuring ski access or protection of landowners. Such acts invariably contain a provision that participants accept the risks inherent in the activity.

Of wider significance, in some acts the inherent risk principle is expressed to apply to all recreational activity. Participants in any recreational activity are deemed to have assumed the risks inherent in their chosen activity.

In America, assumption of inherent risk is called 'primary assumption of risk' and the idea that sportspeople accept by their participation all risks inherent in the particular activity is part of the common law. It appears inherent risk provisions in America evolved from perceived inadequacies in the 'primary assumption of risk' doctrine. But that doctrine has been shown to provide more adequate protection from lawsuits than had previously been thought - **Stimson v Carlson** (1993) 14 Cal Rep 670, **Knight v Jewett** (1992) 834 P 2d 696. **Morgan v New York** (1997) NY Int 138, a unanimous decision of a seven member appeal bench, illustrates how effective the doctrine now is in American jurisdictions. Four sports accident cases were heard together, the court dismissing three on 'primary assumption of risk' grounds. cf **Ridge v Kladnick** (1986) 713 P 2d 1131. In the fourth case, a torn tennis net was not regarded as an inherent risk of the game and a plaintiff who tripped on it should not have had summary judgment awarded against him. This was not a finding of liability against the defendant, merely a decision not to throw the case out immediately. It may be doubted that the argument for inherent risk provisions in America is as strong as it once may have been.

Conclusions:

In Australia, participation in a sport or recreational activity involves acceptance of all the risks inherent in the activity itself (but *not* the risk that someone else may be negligent). This is illustrated by **Rootes v Shelton** (1967) 116 CLR 383, where Barwick CJ said (at 385) - 'By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime'. Taylor J said (at 391) - 'There can be no doubt that a participant in a sport or game voluntarily assumes such risk of injury as is inherent in the sport itself. His participation precludes him from asserting otherwise'. When the High Court recently considered

the liability of sports administrators in *Agar v Hyde* (2000) 201 CLR 552, the position was put in these words - 'The decision to participate is made feely. That freedom, or autonomy, is not to be diminished. But with autonomy comes responsibility' - cf **Canterbury Bankstown Rugby League Football Club v Rogers** (1993) ATR ¶81-246 (at 546).

In any case, the law in Australia in this respect is settled and provides substantial protection. It is true that whatever constitutes an inherent risk is a matter of fact in each case, but the same principle applies under the statutory regimes. It may be doubted that the enactment of inherent risk provisions in Australia would add much to the law as it presently stands, or increase to a worthwhile degree the amount of protection already enjoyed by landowners or managers.

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8

8 Recreational User Provisions – Some considerations

Recreational User Provisions within legislation developed overseas have been shown to reduce litigation against occupiers and as a consequence could have a positive impact on the availability of land for recreational purposes. However, it is of utmost importance to develop a precise concept. Ambiguity and inconsistency may in fact increase the amount of litigation and therewith uncertainty, which finally leads to the increased closure of, or access to, sites for recreation.

Legislation developed within the Common Law countries consistently addresses four main issues. The four issues are basic elements of United States recreational use legislation however the research conducted for this Report revealed that other legal systems with similar legislation have corresponding key issues and problems. These key issues are dealt with below under the respective heading, primarily from the United States legislative perspective but with similarities and differences from other countries identified. A more comprehensive discussion of these four issues is contained within Appendix 7. The issues are:

8.1 Definition of "owner" of the land to which the legislation applies

If the legislation expressly provides for the inclusion of public entities than there are rarely any problems. However, when left to the court, the outcome can be somewhat different and depends strongly on the court before which the case is heard. Some jurisdictions do not distinguish between public and private landowners. Others, however, decide on a case by case basis taking several factors into consideration. In those decisions the threshold is generally whether the legislative intent is advanced. The rule of thumb is: If the landowner is encouraged by the legislation to open his/her property to the people for recreational use, then the owner can expect protection under the Act.

8.2 Definition of "property" covered by the legislation

All jurisdictions examined provide for a limited range of property types, which trigger a potential immunity from liability. The statutory language used to prescribe this issue is a broad range of phrases and terms, but it appears that courts have the tendency to determine the scope of the term by looking at the express provision within the Act, which can be supported by the legislative intent underlying the Act.

Essentially, in order to determine whether a certain property may qualify as property within the meaning of the respective Act, two questions may be asked:

- What terminology is used?
- What characteristics does the encompassed property have?

One possible option is the 'multi-factor approach' developed by the Pennsylvanian Supreme Court in **Rivera v Philadelphia Theological Seminary of St. Charles Borromeo** [3] This test considers five factors in order to determine whether a property qualifies for protection under the Pennsylvania Recreational Use of Land and Water Act[4]. Those factors are:

- Use
- Size
- Location
- Openness
- Extent of improvement

Each factor considers a certain aspect of property characteristics and assesses its potential qualification to fall within the ambit of the Act's provision on a sliding scale.

The legislation in the United Kingdom has adopted a completely different approach, using the term "access land" which can be described as any land which is shown as open country on a map in conclusive form issued by the agencies, which is not excepted land according to Schedule 1 of the Act and is not land accessible to the public apart from the Act according to s15(1) CRoW 2000.[5]. Use of this definition however requires extensive mapping to be undertaken to identify "access land".

8.3 Recreational Use versus Recreational Activity

It is fair to say that the question as to what constitutes a recreational purpose or activity is the paramount question upon which many cases turn and the issue for which courts are faced with the most detailed legal analysis. This is understandable, keeping in mind that many of the activities which people consider now as recreational were at the time the legislation was drafted not even contemplated as being or becoming possible. Modern technology and materials allow people to pursue formerly extremely dangerous or even impossible activities.

Most of the statutes considered during this research contained more or less detailed ostensive definitions, with the scope of these lists varying from broad definitions, providing that the Act encompasses any activity undertaken for conservation, resource management, exercise education, relaxation, or pleasure on land owned by another, to those Acts containing detailed, express listings of activities.[6] In addition, when a statute provides for a detailed list, these lists are usually not conclusive, but open to amendment/interpretation in order to cover recreation activities which were not considered or even not known at the time of legislating the Act. Typically, phrases such as "… outdoor recreation, which term includes, but is not limited to, the …" are used to establish this open list.[7]

However, there is a considerable debate about the "how" to determine whether a particular activity, which was not included into the list, is indeed covered by the Act,

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3 *Rivera* v *Philadelphia Theological Seminary of St. Charles Borromeo* 510 Pa 507 A.2d (1986)

4 *Rivera* v *Philadelphia Theological Seminary of St. Charles Borromeo* 510 Pa 507 A.2d (1986); For a discussion of this decision, see Czap, D P at 128

5 Halsbury, January 2001, 01/164

6 For the first option see: Illinois 745 ILCS 65/2 (2001); for the latter option, see: Pennsylvania 68 P.S. § 477-2 (2000)

7 example taken from Washington Rev. Code Wash. (ARCW) § 4.24.210 (1)

therefore bringing the defendant within the ambit of the statutory protection. In essence, this debate turns upon the weighing up of two subjective points of view. The first approach is a determination concentrating on the user's subjective assessment of the activity he/she was performing at the time of the incident and the value this activity had for the entrant. The alternative approach is that the question should rather be answered by focussing upon an examination of the landowner's intention for the use of the property when he/she opened the property for recreational use.

The United Kingdom legislation on the other hand, in particular, Schedule 2 of the CRoW 2000 provides in paras 1(a) – 1(c) that the use of any vehicle (including bikes) crafts (including on water) and horse riding is excluded.[8] In effect, it appears that this leaves only activities, which can be performed by foot-walking activities.

8.4 Exceptions

In none of the examined jurisdiction was the immunity granted under the recreational use statutes absolute. All jurisdictions provide for one or the other exception. The mechanism for these exceptions is fairly simple. Certain activities do expose the landowner to liability, even if he/she otherwise would fall under the protection of the Act.

The main exceptions which provided that nothing should limit in any way any liability which otherwise exists,

(i) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; and

(ii) When a charge was imposed for admission to the premises, a fee in return for the permission to enter.[9]

These exceptions raise some questions in the Queensland context, particularly when private landholders are increasingly encouraged to provide access to their land (for a fee) for recreational purposes.

Research to clarify, address and resolve difficulties associated with all four of the above issues would form a major component of any process to draft recreation user legislation in Queensland.

8 CRoW 2000, Explanatory Notes, para 16; CRoW 2000 Factsheet 1, "Part I: Acceess"

9 §6 Model Act 1965

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9 Conclusions

Good reason exists for protecting landowners from the reach of negligence liability to recreational entrants. As previously stated, the law as presently applied:

- Is a component of a liability system for personal injuries which is at risk of being unaffordable
- Causes difficulty in predicting legal outcomes and therefore managing risk
- Strikes the wrong balance between personal responsibility in recreational activity and the responsibility of others
- Impedes access to land for recreation.

To implement such protection, the most appropriate model for consideration in Queensland is provided by American recreation user laws.

The United Kingdom, Ireland and Canadian models are based on a statutory law of occupier's liability involving the incorporation of protective provisions within the framework of wider legislation. There is no occupier's liability act in Queensland and, since the decision of the High Court in **Zaluzna**, no real reason for the enactment of such legislation.

The inherent risk provisions, whether industry specific or general, do not advance the matter but simply restate in a statutory form what the Australian courts have accepted as being the law.

This paper has concentrated on concern with risks in the natural environment. The American model for statutory protection draws no distinction between the risks arising from natural hazards and those resulting from a built environment. It could be suggested that no policy or practical distinction can be drawn between the two situations and that the issues addressed in this paper apply with equal force to each. One view is that in many circumstances the question of liability will arise out of circumstances where the distinction is not easily drawn between the risks arising from natural hazards and those resulting from a built environment. The case of a person diving from a built structure, such as a bridge, into water is an obvious example of one type of place; a person diving from a log over a waterhole in a wild, natural area is another type of place. The test of appropriate discharge of duty of care should reflect this.

In instances such as these, a system by which the type of place can be classified could be useful. Therefore, in the Queensland context, consideration should be given to clear articulation of the intent and application of any proposed legislation, particularly where mechanisms exist to classify different types of landscapes.

The clear trend in the law of negligence has been the steady assimilation of specialist duties of care into the framework of the general principles of negligence. The decision in **Zaluzna** is an obvious example of this process. Legislation protecting occupiers from a particular category of entrant, such as a recreational user, would run counter to this trend. Purity of principle is not, however, a reason for inaction. The limits of common law principle are appropriately to be set by statutory prescription where sound reasons of policy exist for such limitation.

The public interest in protecting landowners from unreasonable imposition of liability and ensuring access to land for recreational use must be balanced against the public interest in protecting entrants from harm and compensating the injured. The personal tragedy underlying many of the cases referred to in this paper must be acknowledged. The concept of fault based liability, however, sits most uneasily as a rational system for ensuring compensation for victims of recreational accidents, just as it does for the victims of all other types of accident. The concern to provide compensation for the injured is not a justification for the present laws. Such concern poses a more searching and broader question as to whether the law of negligence should be supplemented or replaced by some accident insurance scheme such as exists in New Zealand.

Section
10

10 Recommendations

It is a popular belief that Australians, in becoming litigation conscious and more willing to sue, “are becoming like the Americans”. The belief is generally couched in pejorative terms, it is offered as something to be avoided. Because of recreational user legislation throughout the United States, it is in fact easier to sue in Australia for a broad range of recreational accidents than it is in the United States.

This paper has identified a recreational user statute as one way forward in dealing with the management of liability risk arising from recreational accidents. It can help avert the present crisis of unaffordable insurance and litigation costs, as well as facilitating recreation options and encouraging landowners to leave land open for recreational use. It embodies the salutary and appropriate public policy principle that injury risk should remain with those who choose to incur it.

Although the United States laws demonstrate a united consensus in favour of recreational user statutes, there are differences in the detail and scope of legislation between states. The more significant differences are:

- Whether private and/or public landowners are protected
- Whether the protection extends to rural and/or urban lands
- Whether the protection applies to natural and/or built environments
- Whether the protection is lost if some payment is received from the recreational entrant
- Whether the protection does not apply in respect of certain types of entrants, such as house guests or children
- Whether all or some recreational activities are covered
- Whether wilful or other questionable landowner’s behaviour will cause the protection to be lost.

These matters need be addressed in the formulation of any suitable legislation.

The following steps are necessary to further the proposal for a recreational user act in Queensland:

- Clear definition of future preferred situation by all relevant stakeholders
- Formulation of a draft model act based on the detailed analysis of the various United States recreational user laws, applicable case law and literature in order to frame suitable legislation
- A consultative process with all stakeholders and in particular with the primary stakeholders being recreational interest groups and landowners and managers to seek a consensus as to a model act.

From a recreation/outdoor adventure stakeholder perspective, the preferred outcomes of statutory protection for occupiers would:

- minimise occupier liability
- be applicable to naturally occurring hazards associated with the type of activity undertaken in a particular type of place
- be applicable to both private and public owned land
- be applicable even where there is a payment of an entry fee
- not remove the right of occupiers to exclude certain activities
- would include specific exceptions (such as wilful or malicious failure to warn against a dangerous condition, use, structure, or activity).

Statutory protection forms part of a suite of strategies to achieve the following outcomes:

- increased access for outdoor adventure activities/outdoor recreation activities
- reduced occupier liability for injuries/deaths arising from risks inherent in the type of activity undertaken in a particular type of place
- increased safety of participants by increasing their capacity to manage risk (through education)
- increased culture of self-reliance by participants
- increased certainty of legal situation relevant to private and public landholders
- decreased injuries/deaths
- decreased negligent behaviour
- decreased public liability insurance costs
- provision of reasonable care for injured parties/or dependants of deceased persons

Section
11

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Appendix
1

Appendix 1- Landscape Classification system

Physical	Wild-natural-remote 1	2	3	4	5	6
Prevalence and permanence of recreation impacts:	No impact on natural condition.	Minimal evidence of recreation impacts. Impacts which have occurred recover quickly. (eg. temporary loss of local native vegetation, scuffing of leaf litter, etc. in small areas which recover to pre-impact condition seasonally).	Temporary to minor recreation impacts evident. (eg. temporary loss of local native vegetation, scuffing of leaf litter, minor soil disturbance, etc.). Impacts not permanent, However, recover to pre-impact condition unlikely.	Moderate recreation impacts evident in heavily used areas. Some permanent loss of local native vegetation (eg. herbs and forbs), loss of leaf litter, soil disturbance evident. Impacts persist at nodes and along walking tracks. Sensitive local native fauna may be displaced as a result of use. Behaviour of other local native fauna is occasionally modified. Native fauna population changes are noticeable.	Physical changes as a result of recreation use are obvious and widespread with little chance of recovery. Some altering of vegetation characteristics/structure. A significant proportion of the local native fauna displaced. Local native fauna behaviour and population changes are obtrusive.	Physical changes as a result of recreation use are obvious, widespread and permanent - little chance of recovery. Vegetation characteristics and floral structure altered. Native fauna behaviour and population changes are obtrusive. The natural condition is unlikely to recover.
Viewscape (360^{o}):	0% of visual landscape modified from natural condition.	<1% of visual landscape modified from natural condition.	1 - 5% of visual landscape modified. Some structures may be evident.	5 - 10% of visual landscape modified. Some structures are evident.	10 - 25% of visual landscape modified. Structures are evident.	25 - 50% of visual landscape modified. Structures are plainly evident.
Indicative appearance (360°):	A totally natural site or landscape that has not been affected by modern technological use. A wild, natural, remote area.	An almost totally natural site or landscape with very few modifications. Modifications are temporary, small/minor and very dispersed.	A very natural site or landscape. Modifications are semi-permanent, small/minor and restricted to a few dispersed nodes. Natural elements dominate away from nodes.	A very natural appearing site or landscape. Modifications are permanent, small/minor and restricted to a few dispersed nodes. Natural elements dominate outside these nodes. Built structures are very rare unobtrusive and rustic (eg. graded walking tracks, narrow infrequently used vehicle tracks, timbered picnic tables).	A somewhat natural appearing site or landscape. Modifications may be permanent, moderately large and obvious. Large blocks of native vegetation interspersed with small areas of cleared land. Built structures are dispersed but readily apparent (eg. walking tracks with hardened surfaces, well maintained unsealed roads, timbered picnic areas, unobtrusive facilities)	A somewhat natural appearing site or landscape. Natural elements just dominate over other elements in the landscape. For example, rural areas with large areas of remnant native vegetation separated by grassland. Built structures may be obvious and quite common (eg. roads are sealed, picnic areas paved and facilities are in harmony with surroundings)
Prevalence and durability of impacts from non-recreation land uses:	Totally natural landscape. No history of modern, technological land use.	Predominantly natural landscape with some evidence of past modern, technological land use limited to a few isolated small sites that are	Predominantly natural landscape with evidence of past modern, technological land use limited to some small sites that are regenerating.	Regenerating natural landscape with obvious evidence of past land use (eg. regenerating mineral exploration, selective logging, grazing, flower harvesting). Some of these land uses may be still active	Regenerating natural landscape with obvious evidence of past and present land use. Current land uses (eg. small scale mineral exploration, quarrying, selective logging, grazing,	Part natural landscape. Land uses (eg. mineral exploration, quarrying, selective logging, grazing, flower harvesting, apiculture) currently active in a large proportion (20-50%) of the

		regenerating. None of these land uses are active.	None of these land uses are active.	(covering up to 5% of the area).	flower harvesting, apiculture) currently active in a small proportion (5-20%) of the landscape.	landscape.
Naturalness of overstorey:	100% of natural vegetation intact.	97 - 100% of natural vegetation intact. <3% regenerating.	90 – 97% of natural vegetation intact. <7% cleared or regenerating.	85 - 90 % intact or regenerating. Remainder cleared or non-endemic spp.	70 - 85% intact or regenerating. Remainder cleared or non-endemic spp.	50 - 70 % intact or regenerating. Remainder cleared or non-endemic spp.
Naturalness of understorey:	100% of natural vegetation intact.	97 - 100% of natural vegetation intact. <3% cleared or regenerating.	90 – 97% of natural vegetation intact. <7% cleared or regenerating.	85 - 90 % intact or regenerating. Remainder cleared or non-endemic spp.	70 - 85% intact or regenerating. Remainder cleared or non-endemic spp.	50 - 70 % intact or regenerating. Remainder cleared or non-endemic spp.
Water quality:	Completely natural aquatic ecosystem.	No detectable effect/change in water quality or aquatic ecosystem.	Short term and relatively minor changes to natural stream dynamics or marine ecosystem and/or water chemistry (eg. increased turbidity, nutrient load or sediment load). Aquatic ecosystem is substantially natural.	Short term and relatively minor changes to natural stream dynamics or marine ecosystem and/or water chemistry (eg. increased turbidity, nutrient load or sediment load). Aquatic ecosystem is substantially natural.	Long term and/or permanent changes to natural stream dynamics or marine ecosystem and/or water chemistry (eg. increased turbidity, nutrient load or sediment load). Aquatic ecosystem is substantially modified.	Long term and/or permanent changes to natural stream dynamics or marine ecosystem and/or water chemistry (eg. increased turbidity, nutrient load or sediment load). Aquatic ecosystem is substantially modified.

Physical	7	8	Urban - commercial – industrial - 9
Prevalence and durability of recreation impacts:	Physical changes as a result of recreation use are obvious, widespread and permanent. Vegetation characteristics and floral structure completely altered. Native fauna dominated by one or two species. Fauna behaviour may be intimidating. Some species may display signs of aggressiveness. The natural condition exists only in very small remnant areas.	Physical changes as a result of recreation use are obvious, widespread and permanent. Vegetation characteristics and floral structure completely altered. Native fauna dominated by one or two species. Introduced species common. Fauna behaviour interfering. Some species may display signs of aggressiveness. The natural condition exists only in very small remnant areas.	Physical changes as a result of recreation use are obvious, widespread and permanent. Vegetation characteristics and floral structure completely altered. Introduced species compete with native fauna. Some species may display signs of aggressiveness. The natural condition is non-existent.
Viewscape (360^{o}):	50 - 75% of visual landscape is modified. Structures are clearly evident in landscape but do not dominate.	76 - 99% of visual landscape is modified. Structures may or may not dominate the visual landscape.	100% of visual landscape is modified. Structures dominate the visual landscape.
Indicative appearance:	Managed parkland with small to large areas of open space. Built structures and other modifications to the natural landscape dominate. Natural elements exist as scattered remnants, some of which may be quite large.	Managed urban parkland with large areas of open space/playing fields. Built structures and other modifications to the natural landscape dominate. Natural elements exist only as small scattered remnants.	Managed urban parkland with playing fields. Built structures and other modifications to the natural landscape dominate. Natural elements are more-or-less non-existent.
Prevalence and durability of impacts from non-recreation land uses:	A wide range of land uses that modify the natural landscape are active. Impacts are widespread, pervasive and permanent. Part of the natural landscape remains but most of this is modified to some extent.	A wide range of land uses that modify the natural landscape are active. Impacts are widespread, pervasive and permanent. Very small areas of the natural landscape remains but most are obviously modified.	Impacts are widespread, pervasive and permanent. Land use has completely changed the natural landscape.
Naturalness of overstorey:	25 - 50 % intact or regenerating. Remainder cleared or non-endemic spp.	10 - 25% intact or regenerating. Remainder cleared or non-endemic spp.	<10% intact or regenerating. Remainder cleared or non-endemic spp.
Naturalness of understorey:	25 - 50 % intact or regenerating. Remainder cleared or non-endemic spp.	10 - 25% intact or regenerating. Remainder cleared or non-endemic spp.	<10% intact or regenerating. Remainder cleared or non-endemic spp.
Water quality:	Permanent changes to natural stream dynamics or marine ecosystem, structures and/or water chemistry (eg. increased turbidity, nutrient load, channelisation or sediment load). Aquatic ecosystem is substantially modified.	Permanent changes to natural stream dynamics or marine ecosystem, structures and/or water chemistry (eg. increased turbidity, nutrient load, channelisation or sediment load). Aquatic ecosystem is substantially modified.	Permanent changes to natural stream dynamics or marine ecosystem, structures and water chemistry (eg. increased turbidity, nutrient load, channelisation or sediment load). Aquatic ecosystem is completely modified.

Social	1	2	3	4	5	6
Evidence of use by other people (eg. sights, sounds and smells):	Non existent. No evidence present	Short term and relatively minor evidence at nodes and along main routes. Nodes small, low impact and dispersed. No evidence (sights, sounds, smells) elsewhere.	Minor permanent evidence at nodes and along main routes. Nodes small low impact and dispersed. Negligible evidence (sights, sounds, smells) of use elsewhere.	Substantial permanent evidence at nodes and along main routes. Nodes may be moderate in size and concentrate activities and people. Some evidence (sights, sounds, smells of people) elsewhere.`	Readily apparent evidence of use (ie. sights, sounds, and smells) pervades use of nodes, main routes and their surrounds. Nodes may be extensive with heavy concentrations of people and activities.	
Sense of isolation and opportunity for solitude:	Total	High	Moderate	Moderate to low	Low	Very low
Interparty* encounters while at nodes and destinations:	Non existent. Chance encounters with others are rare and usually avoidable.	Low. Users are most often alone and should be surprised to have to share locations with others.	Low to moderate. Frequent opportunities for solitude. Contact with others should be expected, however, it may be avoided.	Moderate to high. Frequent opportunities for solitude. Contact should be expected and usually cannot be avoided.	High. Infrequent opportunity for solitude during the day. Frequent contact should be expected and unlikely to be avoided.	Very high. Almost no opportunity for solitude during the day. Frequent and unavoidable contacts should be expected.
Interparty* encounters while travelling:	Very few. <1 group per day	Low. < 5 groups per day	Low to Moderate, 5 - 10 groups per day	Moderate to high 10 - 20 groups per day.	High. 20 - 50 groups per day	Very high >50 groups per day
Dependence upon outdoor skills:	Total	Very high	High	Moderate	Moderate to low	Low
Density/ha PAOT:**	< 1	1 - 2	3 - 5	5 - 10	10 - 60	60 - 150

* A group constitutes, on average, 4 people or the equivalent to one car.

** Persons At One Time.

Social	7	8	9
Evidence of use by other people (eg. sights, sounds and smells):	Clearly apparent evidence of other people at nodes, along main routes and their surrounds except in relatively small remnant areas. Open areas may be extensive with heavy concentrations of people and activities.	Widespread, all-encompassing and permanent.	Widespread, pervasive and permanent.
Sense of isolation and opportunity for solitude:	Infrequent and usually short opportunities for solitude during daylight hours.	Rare opportunities for solitude	No or very rare opportunities for solitude
Interparty* encounters while at nodes and destinations:	No opportunity for solitude during the day. Frequent and unavoidable contacts should be expected.	Continuous and unavoidable contacts should be expected.	Continuous and unavoidable contacts should be expected.
Interparty* encounters while travelling:	Usually constant.	Always constant	Always constant
Dependence upon outdoor skills:	Very low	No specialised outdoor skills required	No specialised outdoor skills required
Density/ha PAOT:**	150 – 250	>250	Unlimited

* A group constitutes, on average, 4 people or the equivalent to one car.

** Person's At One Time.

Management	1	2	3	4	5	6
Access:	No motorised access what-so-ever. No tracks or roads. Some unmarked trails may exist.	Trails exist. Some formed and maintained trails may exist. Some evidence of vehicle tracks may exist but these are regenerating.	Rough, unsurfaced and infrequently maintained vehicle roads may exist. Formed trails present. Some unformed tracks may be present.	Well maintained roads and tracks. Gravel roads following natural features with some steep grades and tight corners. Some formed tracks may be present.	Unsealed roads with engineered and modified alignments. Mostly one lane, however, some two lane sections may exist. Some narrow sealed roads may be present. Formed tracks present.	Most roads and tracks are sealed and regularly maintained. Two lane roads are common.
Evidence of management personnel:	Infrequent, usually only to monitor resource conditions.	Minimum management presence - only as necessary to achieve minimum management obligations.	Minimum management presence. Infrequent construction and maintenance activity. Infrequent patrols by enforcement staff.	Some management presence. Occasional construction and maintenance activity. Occasional patrol by enforcement staff.	Management presence active. Common construction and maintenance activity. Regular patrol by enforcement staff.	
Presence and extent of signage:	None	Unlikely, however, signs may be present for resource protection - few and dispersed.	Minimum road and track names, regulatory notices and directional signage.	Regulatory and directional signs located at key points. Minimum interpretation signage.	Interpretation , regulatory or advisory notices, boundary, and directional signs sufficient to orientate and inform all visitors.	
Rules, regulations and law enforcement:	Communicated off site. Users not confronted by management.	Communicated off site. Infrequent patrol for sustainability monitoring and life preservation. Users mostly unaware of management.	Predominantly communicated off site. Minimum patrol for sustainability monitoring and life preservation. Users occasionally aware of management.	Some on-site communication. Signage and supervision as required for safety and sustainability. Users occasionally aware of management.	A strong and visible management presence. Frequent on-site communication. Users commonly aware of management.	
Presence of management and visitor infrastructure:	None	Only constructed where no other alternative can be found (eg. communication towers). Structures are inconspicuous and widely dispersed.	Only constructed where no other alternative can be found (eg. communication towers). Structures are unobtrusive and dispersed.	Structures are small but apparent. However, they are dispersed and blend into natural background.	Structures are readily apparent and can be quite large but blend in to natural background.	

Management	7	8	9
Access:	Roads and tracks are usually sealed. Some use of paving may be present. Unsealed roads and tracks are maintained at a high standard. Two lane roads are common.	All roads, tracks, and paths are sealed or paved. Motorised access available in all places.	All roads, tracks, and paths are sealed or paved. Motorised access available in all places.
Evidence of management personnel:	Management presence active. Regular construction and maintenance activity. Frequent and regular patrol by enforcement staff.	Management and enforcement personnel are obvious and permanent.	Management and enforcement personnel are obvious and permanent.
Presence and extent of signage:	Interpretation signs and regulatory notices common. Boundary and directional signs at all intersections and along roads and tracks. Advertising signs may be present.	Interpretation signs and regulatory notices frequently encountered. Boundary and directional signs at all intersections and along roads and tracks. Advertising signs present.	Unlimited.
Rules, regulations and law enforcement:	A strong and visible management presence. Frequent and regular on-site communication. Users commonly aware of management, rules and regulations.	Frequent and regular education, reinforcement or enforcement.	Constant education, reinforcement or enforcement
Presence of management and visitor infrastructure:	Built structures are large and readily apparent. They may be designed to blend into the surroundings. However, some may stand out. Some infrastructure may be provided as a focus for recreational activity.	Built structures are readily apparent and often designed to stand out. Infrastructure is usually provided in all public spaces and may be the focus of recreational activity.	Large, obvious and attention grabbing. Built structures dominate all senses. Unavoidable.

Appendix
2

Appendix 2 - United Kingdom

The traditional legal situation in the UK, a complex weave of different Acts, has been modified, yet not really simplified. With the introduction of the Countryside and Rights of Way Act 2000[10] many Acts already in force for quite some time, were amended.

The new legislation in the UK encompasses five parts covering:

- Access to the countryside
- Public rights of way and road traffic
- Nature conservation and wildlife enforcement
- Areas of Outstanding Natural Beauty
- Miscellaneous and supplementary

With respect to occupiers' liability, the first part of the Act has the greatest significance.

In general, the Act creates a general right for the public to explore the countryside by creating pursuant to s2(1) CRoW 2000 a statutory right of access for the purpose of open-air recreation.[11]

The new legislation however tries to keep a balance between both interested parties: Landowners and ramblers.[12] This balance is the right to access land as defined in the CRoW 2000 on the one hand, while protecting the landowner from liability in return for requiring him/her to make the land available. Accordingly, in order to achieve this balance between the new statutory right of access and the needs and concerns of landowners, the latter were recognized and implemented into the legislation as well.

The CRoW 2000 deals with the issue 'liability' in ss12-14 CRoW 2000.

S12(1) CRoW 2000 provides that the right of access as newly created through s2(1) CRoW 2000, does not increase the liability of a person interested in the land in respect of the state of the land or things done on it. The Act also provides through s12(2) CRoW 2000 that persons interested in the land will not be liable for the breach of any covenant restricting the use of the land, and that the statutory right takes precedence over the covenant.[13]

With respect to the occupiers' liability, the UK parliament introduced two amendments to the existing legislation, modifying the duty of care owed to the persons exercising their new right

[10] Herein after CRoW 2000

[11] It must, however, be noted that this right is subject to certain conditions.

[12] The essence of this balance which had to be achieved became apparent during the debates in the House of Lords as well as in the House of Commons. Criticizing the Minister for delivering an unsatisfactory answer, Lord Peel stated, "As the Bill stands, there are opportunities for an increasing number of litigious cases unless the Government deal with the question of liability. It is a simple matter. **If we are to invite people on to private land it is ridiculous that owners should be left with any liability at all**." Hansard HL, 23 November 2000, at col. 984. On the other hand, see the Minister for the Environment, Rt. Hon. Michael Meacher MP's reply for the Government: "Despite all that we have done to reduce liability to a bare minimum, and given the lack of evidence that there is a problem, the issue of liability will remain a concern unless the Bill eliminates liability totally. For the reasons that I have already given, we do not believe that that can ever be right. **We have gone as far as we reasonably can**. **To remove all liability of occupiers** of access land to those responsibly exercising the right of access, including children, **would be a step too far and could not be justified**." Hansard HC, 28 November 2000, col. 876.

[13] Explanatory Notes – CroW 2000, para 28

of access granted under the new Act. The first modification, introduced by s13(1) CRoW 2000 substituting s1(4) Occupiers' Liability Act 1957 (UK), provides that a person exercising the right to roam or a person exercising rights under an access agreement or under the National Parks and Access of the Countryside Act 1949 is not to count as a visitor for the purposes of the Occupiers' Liability Act 1957 (UK). While creating a new sub-class, the right to roam as granted under s2(1) Occupiers' Liability Act 1957 (UK) effectively does not enlarge the scope of liability as defined under the Occupiers' Liability Act 1957 (UK).

Being therefore a non-visitor, the entrant comes within the scope of the Occupiers' Liability Act 1984 (UK) which deals with the occupiers' duties owed to entrants other than their visitors. Under this Act the occupier only owes a duty to entrants when the occupier knew of the risk [s1(3)(a) Occupiers' Liability Act 1984 (UK)], to anticipated non-visitor entrants [s1(3)(b) Occupiers' Liability Act 1984 (UK)] and this risk is one from which the Occupier, in all circumstances of the case, might reasonably be expected to offer some protection [s1(3)(c) Occupiers' Liability Act 1984 (UK)].[14] The duty of care arising under the legislation amounts to what is reasonable in all the circumstances to see that the person entering the property does not sustain any injury. It is possible for the landowner to discharge the duty and avoid liability by giving appropriate warnings or discouraging people from actually taking a specific risk.[15]

While the old legislation did not provide any guideline for the judicial interpretation of the above-mentioned circumstances, the new scheme does contain a list of risks for which the occupier does not owe any duty at all.[16]

Under the new scheme, s13(2) CRoW 2000 sets out a catalogue of risks for which the Occupier will owe no duty at all to neither people exercising the newly granted right, nor to trespassers.[17] There will be no duty owed to above groups of entrants with respect to risks arising from natural features of the landscape as defined in s13(2) as subs (6) of s1 Occupiers' Liability Act 1984 (UK)], that is with respect to trees, plants or shrubs, rivers, streams or the passage of walls.

In addition, the Act introduces a fall back provision as further guideline for the courts. By enacting s13(3) CRoW 2000 (inserting s1A Occupiers' Liability Act 1984 [UK]), the legislator took precaution for the situation that where the above mentioned list does not cover the case before the court. It provides that when determining the duty owed to a person being on the property exercising the person's right as granted under s2(1) CRoW 2000, the Court must have regard to:

(a) the fact that the existence of that right ought not to place an undue burden (whether financial or otherwise) on the occupier.

(b) the importance of maintaining the character of the countryside, including features of historic, traditional or archaeological interest;

(c) any relevant guidance given in codes of conduct or otherwise by certain agencies.

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14 Sydenham, A (2001) at 233

15 Sydenham, A (2001) at 233

16 However, this provision must still be read in context with the intentional/reckless conduct exception to the immunity. For example, if a landowner would plant plants capable of endangering the entrants, the landowner would be caught through this exception since he/she has done something creating at least recklessly a risk for the entrants. See Explanatory Notes – CRoW 2000, para 29

17 Explanatory Notes – CRoW 2000, para 29

This is a specific construction of the new legislation and it is asserted that by using such a construction, the above-mentioned list creates, on this first level, exhaustive guideline for the courts. It seems it was not intended to leave this list open for extension by judicial interpretation. Where an accident occurred through an incident not covered by the list as set out under s13(2) CRoW 2000, s1(6A), (6B) Occupiers' Liability Act 1984 (UK), the court has to resort to the second tier of the guideline as set out in s13(3) CRoW 2000, s1A Occupiers' Liability Act 1984 (UK).

This new scheme is quite broad equipping the landowner with sufficient immunity from liability. However, the occupier does not enjoy this immunity conferred upon him/her when he/she comes within the intentional/reckless conduct exception to this immunity. According to 1(6C) Occupiers' Liability Act 1984 (UK), in certain circumstances no exemption from liability can be claimed.

In general, the duties owed under the Common Law to trespassers are still applicable. Furthermore, the legislation provides that there will be no applicability of the exemption from liability when the risk flows from anything done by the occupier with the intention of creating a risk or being reckless as to whether a risk was created.

This is a curious phrase since it seems to indicate that only something the occupier has actually done would ultimately lead to a denial of the applicability of the exemption, while the exemption seems still to be applicable when the occupier merely omits something.

Finally, the legislation creates a new offence. S14 CRoW 2000 provides that a landowner will be penalized when displaying false or misleading information likely to deter people from accessing the access land. Such notice may result in fines up to £200. Non-compliance with a court order to remove such a sign may result in fines up to £1000. Again, this is an interesting phrase since this could possibly include erecting signs with very graphic depictions of the danger or the overstatement of a danger in order to deter people from entering the property. It seems that this is an unnecessary complication of the regulations that opens up another contentious point causing uncertainty and possible expensive litigation.[18]

The new scheme in the UK includes most of the features of the American Acts and the four main characteristics, namely owner, property, purpose and exceptions can be distinguished. However, the legislation is very convoluted and difficult to access. Furthermore, it is a package of provisions and regulations, the implementation of which will take place over the next five years. However, it reinforces that there are indeed four key issues which constitute such legislation. Furthermore, it is an example for a scheme, where a mapping system is used to identify those areas which are to be accessible for recreational users.

[18] Explanatory Notes – CRoW 2000, para 30

Appendix
3

Appendix 3 - United States

The most important feature of American state occupiers' liability Acts is that, in certain circumstances, the landowner is granted a broad immunity from liability, which could arise as a result of either personal or property damage while people use the landowner's property for recreational use. This immunity, however, is limited through certain legislated exceptions and the Courts' interpretation of ambiguous legislative terms. The legislation is an attempt to optimize the balance between encouraging landowners to open their land to the public and providing a minimum of protection for the entrant. Under the Model Act, the entrant could never reach the status of an invitee or licensee, to both of whom the landlord would potentially owe a certain duty of care. The entrant was deemed to be legally in the same position as a trespasser. Accordingly, the Acts adopted that mechanism so that the landowner does not owe any duty of reasonable care to the entrant. On the other hand, the Acts do preserve the liability for intentional and/or reckless torts.

However, this protection is qualified because it only applies when the entrant is **on the property for recreational purposes**. The Acts do not cover any other purpose. Accordingly, this kind of legislation was described as an interface between property law and tort law.[19]

As mentioned above, the courts, on federal as well as on state level, play an important role in shaping the applicability of the State legislation. The research revealed that courts follow one of two schools of thought when dealing with this type of legislation. The first school of thought is that the legislation is an abrogation of the common law principle with respect to duty of care. Accordingly, the statute has to be construed narrowly. The other school of thought is based on the assumption that the statute is merely a codified version of the common law duty of care owed by an owner to a licensee. Those courts generally construe the Act liberally in order to comply with the legislative intent.[20] However, in jurisdictions where the statute provides for a clear legislative intent there seems to be a tendency amongst courts to construe terms, which are inevitably ambiguous, in favour of the landowner. Accordingly, it is possible to draw a distinction between jurisdictions with statutes incorporating a legislative intent into the actual Act and jurisdictions, where the intent is only contained in the Statutory Annotations in one or the other form[21].

It is important to note that the Acts do not prevent landowners being sued. They do provide an affirmative defence, which can be raised as a defence after being sued. However, there seems to be an obvious downturn to this type of legislation, undermining, at least to a certain degree, an important issue: minimizing costs for litigation. Legislation drafted this way will inevitably be prone to increase the costs for litigation, in particular for the defendant.

A simple example may illustrate this argument. In a case, the defendant enters a motion for summary judgement. The argument is that the defendant is protected under the State Occupiers' Liability Act. However, the court does not grant summary judgment but finds that there are material facts to answer, transferring the case before a jury. The defendant is now required to argue the case in the next instance. Provided the next instance would find in favour of the defendant and the decision is not appealed, the reality is that two instances were required to establish the immunity, therewith significantly increasing the costs for the legal proceedings, legal representation and the like.
The counter argument, however, must be that in the current situation, an appeal of the first instance decision is a regular occurrence anyway and costs are therefore not necessarily increased.

19 Ford, S J (1991) at 495-496
20 Generally: Becker, J C (1991) at 1596; for Wisconsin: Ford, S J at 510
21 Eg. Kan. Stat. Ann. § 58-3201 (1994)

HAWAII CODE – 2001

DIVISION 3. PROPERTY; FAMILY
TITLE 28. PROPERTY
CHAPTER 520. LANDOWNERS' LIABILITY

§ 520-1. Purpose

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

§ 520-2. Definitions

As used in this chapter:

"Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

"House guest" means any person specifically invited by the owner or a member of the owner's household to visit at the owner's home whether for dinner, or to a party, for conversation or any other similar purposes including for recreation, and includes playmates of the owner's minor children.

"Land" means land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to realty, other than lands owned by the government.

"Owner" means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises.

"Recreational purpose" includes but is not limited to any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

"Recreational user" means any person who is on or about the premises that the owner of land either directly or indirectly invites or permits, without charge, entry onto the property for recreational purposes.

§ 520-3. Duty of care of owner limited

Except as specifically recognized by or provided in section 520-6, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes, or to persons entering for a purpose in response to a recreational user who requires assistance either directly or indirectly, including but not limited to rescue, medical care, or other form of assistance.

§ 520-4. Liability of owner limited

(a) Except as specifically recognized by or provided in section 520-6, an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not:

(1) Extend any assurance that the premises are safe for any purpose;

(2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) Assume responsibility for, or incur liability for, any injury to person or property caused by an act of omission or commission of such persons; and

(4) Assume responsibility for, or incur liability for, any injury to person or persons who enter the premises in response to an injured recreational user.

(b) An owner of land who is required or compelled to provide access or parking for such access through or across the owner's property because of state or county land use, zoning, or planning law, ordinance, rule, ruling, or order, to reach property used for recreation purposes, or as part of a habitat conservation plan, or safe harbour agreement, shall be afforded the same protection as to such access, including parking for such as an owner of land who invites or permits any person to use that owner's property for recreational purposes under subsection (a).

§ 520-5. Exceptions to limitations

Nothing in this chapter limits in any way any liability which otherwise exists:

(1) For wilful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates and for wilful or malicious failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetuates.

(2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a political subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

(3) For injuries suffered by a house guest while on the owner's premises, even though the injuries were incurred by the house guest while engaged in one or more of the activities designated in section 520-2(3).

§ 520-6. Persons using land

Nothing in this chapter shall be construed to:

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

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

§ 520-7. Rights

No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes as provided in this chapter.

§ 520-8. Rules and regulations

The department of land and natural resources shall make rules and regulations pursuant to chapter 91, as it deems necessary to carry out the purpose of this chapter.

Appendix
4

Appendix 4 - Canada

The Canadian Provinces' jurisdictions chose to create Occupiers Liability Acts which, unlike their American counterparts, not only regulated the liability with respect to recreational user, but codified the law with respect to people entering a property generally. The recreational user is one of the categories of entrants set out and the duty owed is defined.
In British Columbia, RSBC 1996, c. 337, especially s3, the Act provides that an entrant is deemed to have willingly assumed all risks of entering the premises when this person enters the premises for recreational purposes or activities [see s3 (3.2)(b)]. The occupier then owes merely a duty to refrain from creating a danger with the intent to harm or damage the person's property or to act with reckless disregard [see s3 (a), (b)]. The British Columbian Act further provides for two situations where the duty owed is different as well: First, the owner received a consideration for the use of the property [see s3(3.2)(b)(i)], and second, he/she provided living accommodation [see s3(3.2)(b)(ii)].

A similar approach was taken by Ontario. Also embedded into the general codification for Occupier's liability, RSO 1990, c.O2, this Act provides for permitted recreational activities. The legislation deems the entrant to have willingly assumed all risks with entering the premises for recreational use.[22] Again, prerequisite is that no fee was charged [see s4(3)(c)(i)] and that no living accommodation was provided [s4(3)(c)(ii)] which would consequentially lead to the ineffectivity of the defence.

The province of Prince Edward Island legislated with RSPEI Ch-O, s4(3) a very similar mechanism as did Nova Scotia with its Occupiers' Liability Act 1996, c. 27, especially s5 of the Act. Indeed, it was suggested that the Acts of Ontario, Prince Edward Island and Nova Scotia are virtually identical to the legislation in British Columbia and that therefore legal questions, which arise can be answered by recourse to the authority of those jurisdictions.[23]

Alberta's Occupiers' Liability Act, RSA 1980, c. O-3 does not distinguish a category of recreational user. It provides generally in s7 that the owner is under no obligation to discharge the common duty of care to entrants willingly assuming risks as their own.
In this respect, the Occupiers' Liability Act, ch 08, enacted in Manitoba is similar. After expressly abolishing the Common Law with respect to the duty of care owed by an occupier of premises to persons entering the premises or to persons, whether on or off the premises, who have property on the premises, as well as the liability for the breach of such duty, it replaced the Common Law with a statutory regulation. The Act also introduces the 'volenti' principle in s3(3) of the Act not distinguishing between certain categories of user . The closest the Manitoban Act gets to outdoor recreation is the provision in s3(4) which provides for immunity of the owner with regards to off-road vehicle driving on his/her premises.
However, there seems to be an inherent problem with the interpretation of the term "willingly assumed" or "willingly accepted". Traditionally, the judicial opinion fell into two schools of thoughts. The first school read this term as representing the codified "volenti" principle, indicating that the occupier has to show that the entrant expressly or impliedly waived the occupier's liability for any injury. The second school of thought considered this term to be less onerous and based its interpretation on the proposition that the entrant had sufficient knowledge of the danger such that they could recognize and appreciate the nature of risks.
It seemed established that the Canadian Supreme Court solved this dispute in **Waldick v Malcolm.** In this case the court stated expressly that the Canadian states jurisdictions, which opted for the above-mentioned model, adopted and legislatively enshrined the Common Law doctrine of 'voluntary assumption of risk'[24]. At issue in this case was the scope of the defence which s. 4(1) Occupiers' Liability Act offered to occupiers. In essence, the Act provided that a landowner will be absolved of liability in those cases where the losses suffered by visitors on their premises come as a result of "risks willingly assumed" by those visitors. The bench

22 This is also the codification of the volenti-principle. See Brookes, J R & Gear, C (1998) at 4
23 Hon. C. McGregor, Hansard, Monday, 11 May 1998 Afternoon, Vol. 9 No. 16, p. 7683
24 Waldick v Malcolm [1991] 2 S.C.R. 456

noted that there were two quite distinct and conflicting trends in the Canadian jurisprudence as to the proper interpretation of this term. That is, two conflicting standards of what "assuming a risk" means. According to the court, the first involved merely the knowing of the risk that one is running, whereas the second involved not only knowledge of the risk, but also a consent to the legal risk, or in other words, a waiver of legal rights that may arise from the harm or loss that is being risked. The latter standard is captured by the maxim *volenti non fit injuria* (the volenti doctrine), a defence which is quite difficult to invoke because the defendant had to establish that the entrant knew about the risks on the property and, in addition, had to demonstrate that, upon entry, the recreational user expressly or impliedly agreed not to hold the owner responsible for possible injuries. The court in **Waldick v Malcolm** held:

> "…Usually more than mere knowledge of the risk is required to invoke s. 4(1) of the Act in the sense suggested. The risks willingly assumed must be known to the plaintiff and from the plaintiff's conduct and circumstances revealed, the plaintiff must have assumed it in the sense of being prepared to accept the entire risk of injury that may result without recourse to any contribution or liability from or of any other party. …"[25]

Accordingly, the mere appreciation was not sufficient to invoke immunity under the Act. The defendant had to establish that the plaintiff expressly or impliedly agreed that the occupier would not be liable with respect to the risk.

In order to avoid or overcome this problem, the modern Acts deem the entrant to have willingly accepted the risks. With the codification of the 'volenti'-principle, therewith clarifying the problems arising after **Waldick v Malcolm**, the owner is burdened only with a duty comparable to the duty owed to a trespasser.

The current position is that the Canadian Supreme Court determined that the volenti principle was codified, requiring the entrant to *actively* assume the risks connected to the recreational use. This led to the situation that on the one hand occupiers' liability legislation was operative, but this legislation was ultimately ineffective because it was very difficult to establish that the entrant *actively* assumed the risks. To counter this interpretation, the modern Canadian Acts *deem* the entrant to have willingly assumed the risks. With this, it becomes irrelevant whether the entrant accepted the risk with some active behaviour such as expressing it towards the landowner or signing a document.

[25] Waldick v Malcolm [1991] 2 S.C.R. 456 at 476

Appendix
5

Appendix 5 - Republic of Ireland

The *Occupiers Liability Act 1995 (Republic of Ireland)* is a new codification overhauling the traditional Common Law with respect to Occupiers' Liability. It was noted that the law relating to occupiers' liability has been radically reformed.[26] The legislation is not explicitly limited to the category 'recreational user' but appears to provide general liability standards for people entering certain properties. According to s2 of the Act, the Common Law rules are replaced by the common duty of care owed towards any visitor. However, within the category 'visitor', essentially as a special sub-class of visitors, the *Occupiers Liability Act 1995 (Republic of Ireland)* defines for the first time a category of visitors to a property described as 'recreational user' [see s4(1) *Occupiers Liability Act 1995 (Republic of Ireland)*]. This Act, too, creates in s4 the same duty owed to the recreational user and the trespasser. The duty owed is a duty to not injure the person or the person's property intentionally [s4(1)(a)] and to not act with reckless disregard for the person [s4(1)(b)].

It replaces the Common law rules relating to occupiers' liability and is similar to the Canadian Acts in its format, especially with respect to the legislation's scope for dealing generally with the problem of occupier's liability.
It does, however, not derive the limitation of such liability through deeming the entrant to have voluntarily assumed a risk or any risk arising from the nature of the premises (the volenti principle), but rather, uses the American approach of deeming the entrant to be legally equal to a trespasser.

[26] Thomas v Leitrim County Council, Supreme Court, Transcript of 7 March 2001

Appendix
6

Appendix 6 - Civil Law countries

Germany

In Germany, rules governing the occupiers' liability with respect to entrants' injuries sustained on a property in pursuit of a recreational activity, are complex and multi-faceted. However, the following norms stand out when assessing the legal situation in this respect.

The Bundesnaturschutzgesetz (Federal Nature Conservation Act)[27] and the Bundeswaldgesetz (Federal Forestry Act)[28], in conjunction with their state equivalents, provide the basis for access to outdoor recreation areas. Those codifications create a right to access unused properties for recreational purposes, therewith corresponding with the acknowledgment of outdoor recreation as direct development of the basic right of liberty of action pursuant to Art. 2 (1) of the German Constitution.[29] While creating such right to access private forests and unused agricultural land, the section further provides that the entrant enters the property at one's own risk. Therefore, by obtaining the privilege to enter the property, the recreational user in turn relinquishes her/his right to commence certain actions against the landowner. Accordingly, those sections provide a mechanism to limit the rights of recreational users to seek compensation arising from accidents, which occurred during the pursuit of recreational activities.

This mechanism is embedded in § 823 BGB[30] which codifies with respect to general liability:

§ 823. [Duty to compensate for damage]

(1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him/her for any damage arising there from.

(2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.

This paragraph is part of complex rules in the German Civil Code (BGB) establishing protection of a single person against the illegal interference with someone's legal sphere. § 823 (1) BGB establishes general liability for illegally inflicted injury or damage of one or several of the basic objects of legal protection as listed. It flows from § 823 BGB that certain Acts or omissions result in a liability to compensate the victim. However, it does not provide protection of specific legal relations, such as created for example by contract. It provides such protection for general legal relations, as they exist between each individual person and which have to be observed by each person. The illegality is objectively determined and the injury or damage can be inflicted by act or omission.

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27 § 27 (1) BNatSchG "Das Betreten der Flur auf Straßen und Wegen sowie auf ungenutzten Grundflächen zum Zwecke der Erholung ist auf eigene Gefahr gestattet." [(1) Entering farmland on roads and ways as well as on unused surface areas for the purpose of recreation is permitted at one's own risk.]; § 27 (2) BNatSchG "Die Länder regeln die Einzelheiten." [(2) The states regulate the details.] For the states see for example: § 49 (Betretungsbefugnis) [Right to Access] LandschG [North-Rhine-Westphalia]

28 § 14 (1) BWaldG "Das Betreten des Waldes zum Zwecke der Erholung ist gestattet. Das Radfahren, das Fahren mit Krankenfahrstühlen und das Reiten im Walde ist nur auf Straßen und Wegen gestattet. Die Benutzung geschieht auf eigene Gefahr; § 14 (2) BWaldG "Die Länder regeln die Einzelheiten". [(1) Entering of the forest for the purpose of recreation is permitted. Cycling, driving a wheelchair and riding in the forest is only permitted on roads and ways. Such use is at one's own risk. (2) The states regulate the details.

29 Eichwald, M at 1

30 Bürgerliches Gesetzbuch [German Civil Code]

Flowing from this paragraph is a general duty of care towards third parties or to maintain safety. The underlying principle is founded in the obligation to implement safety measures when creating a source of danger.[31] Since complete safeguarding of third parties, excluding each accident, is not attainable, taking precautions does not include all conceivable, distant possibilities of harm. Rather only such precautions are to be taken, which within safety expectations of respective third parties and which are in the context of the economically reasonableness suitable to prevent dangers which may threaten third parties. Such precautions should accord with the intended use or, in case of use against this intended use, when such use was not completely uncontemplated.[32]

However, since Bundesnaturschutzgesetz (Federal Nature Conservation Act) and the Bundeswaldgesetz (Federal Forestry Act) provide that the entrant enters the property on his/her own risk, the owner does not owe a special duty of care towards third parties. Accordingly, the owner is not obliged to implement special safety measures with respect to typical dangers arising from the characteristics of the landscape. With respect to climbing, that means that the owner of a property does not owe a special duty of care with respect to rock falls since this is a typical and easily detectable danger in areas of rock faces.

Sweden

Sweden still has a customary law, the “allemansretten”, which can be formulated in the following way.

> You may walk, ride or cycle on all private land with two exceptions: First, one has no access to the area near inhabited buildings, and second, one must not disturb the peace or in any way interfere with the farmers’ rights to use his land for farming or for any kind of production or cause any pecuniary loss or inconvenience to the farmer.[33]

It follows that one has only access to cultivated land when it is covered with snow and ice since the farmer’s right to use the land for farming or production is not disturbed. Furthermore, staying on one’s property for the purpose of camping and picnicking is indeed allowed, but only for short periods of time. This right is subject to several conditions, such as the farmer’s right to peace, a clean area and the condition not to intrude privacy by camping too close to buildings. While people have the right to use waters such as rivers and lakes for transport or hygienic purposes, fishing the waters or hunting on properties is not allowed.

Norway

Like in Sweden, the tradition of the customary “friluftsloven” is founded on the mostly sparsely populated countryside. However, the once customary law was formulated as an Act in 1957, the Act of 28 June 1957 No. 16 Relating to Outdoor Recreation.

The purpose or intent of the Act is twofold. First, it is to protect the natural basis for outdoor recreation and second, to safeguard the public right of access to and passage through the countryside and the right to spend time there.[34]

The Act distinguishes two types of land, cultivated and uncultivated land. While it defines cultivated land as land that is not tilled and that is not considered to be cultivated land, it provides for the latter an ostensive list of criteria to determine whether land is cultivated for

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31 Palandt/Thomas, § 823 at 58
32 Palandt/Thomas, § 823 at 58
33 Wulf, H (1991) at 1643
34 §1 Act of 28 June 1957 No. 16 Relating to Outdoor Recreation

the purpose of the Act. In §§ 2 and 3 the Act determines what rights people have with respect to the two different types of land.

Most importantly, any person is entitled access to and passage through uncultivated land at all times of the year, provided that consideration and due care is shown.[35] The access to cultivated land is restricted to the period between 15 October and 29 April, that is, the period when the ground is frozen or snow-covered.[36] In so far, there is a strong similarity with the Swedish customary law.

There are provisions in place according to which the landowner can impose certain conditions and restrictions for the access to her/his property, in particular with respect to restricting access to young plantations, gardens or autumn-sown field.

§ 9 of the Act makes provision for the right to camp and picnic. Again, the Act distinguishes between cultivated and uncultivated land. Use of sites on cultivated land for picnicking, sunbathing, staying overnight or the like is not permitted without the permission of the owner or user. In uncultivated areas, it is not permitted to use sites for the abovementioned purposes if this unduly hinders or inconveniences others. The Act stipulates that picnicking and camping must not take place if this may cause significant damage to young forest or to regenerating forest and that a tent must not be pitched so close to an inhabited house (cabin) that it disturbs the occupants, and in any case no closer than 150 metres. However, the rules on the distance from habitation do not apply in an area that has been specifically designated for camping.

It furthermore imposes a significant time limitation upon the duration of stay on a property. Camping or any other form of stay is not permitted for more than two days at a time. If a person wishes to stay longer, she/he needs the permission of the owner. However, such permission is nevertheless not required in mountain areas or in areas distant from habitation, unless it is expected that the stay may cause significant damage or inconvenience. The Ministry can prohibit or regulate camping immediately before and during the hunting season for wild reindeer, if this may cause inconvenience for such hunting. With respect to the distribution of risk, the Act provides that camping and other forms of access must take place at the person's own risk as regards damage that animals may cause to persons, tents or other property.

Landowners, according to § 15 of the Act, are entitled to charge for the access to the property, especially bathing beaches, campsites or developed outdoor recreation areas. However, the fee must not be out of proportion to the measures the owner or user has carried out in the area for the benefit of those who use it for outdoor recreation.

Analysing the structure of this Act (similar to the Swedish customary law), it becomes apparent that those laws are not primarily concerned with limiting the landowner's liability for injuries users sustain on their properties. These laws are rather designed to protect an already existing right to access as compared to encourage landowners to open their premises. In so far this is conceptually a different type of legislation. However, it can be noted that at least the Norwegian legislation indicates that the risk of entering premises for recreational purposes lies with the entrant rather than with the landowner. This is a clear indication that landowner shall not be liable for potential risks the entrant faces.

[35] §2 Act of 28 June 1957 No. 16 Relating to Outdoor Recreation
[36] §3 Act of 28 June 1957 No. 16 Relating to Outdoor Recreation

Appendix
7

Appendix 7 - The Key Issues in Recreational User provisions

Issue 1: Owner

United States:

The American Model Act as proposed in 1965 introduced the phrase 'OWNER' and also provided a definition. The Model Act stipulated:

"'OWNER' means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises." [37]

The 1979 Model Act introduced several proposed changes with respect to liability, particularly considering the landowners' need for more certainty and protection. The public authorities' and governmental agencies' need for immunity under such legislation was acknowledged and an owner was defined as including any

"… [I]ndividual, legal entity or governmental agency that has any ownership or security interest whatever or lease or right of possession."[38]

Today, there are a number of different definitions introduced into the American state jurisdictions. In most states the terminology is somehow derived from the above-mentioned Model Acts. Following the Model Act 1965, most states initially followed the proposal by the word and adopted the term "owner". Some states introduced with "owner of any estate in real property" a different phrase. Finally, Florida and Ohio chose a different terminology altogether. Florida is using the term "person" and Ohio is providing immunity for anybody who is "owner, lessee or occupant of premises".

Research indicates that the issue "owner" with respect to private owners is rather uncontroversial. There is uniformity amongst the states in America that private landowners are protected within the framework the Act provides.

There is, however, one controversial area, concerned with the question whether the protection provided by the Acts actually will extend to public entities. This is a very important question considering that those entities are amongst the largest landholders in the United States and this is the object of an intense dispute amongst courts and scholars and leads to confusion and lack of uniformity.

In order to combat this situation, the Model Act 1979 dealt with this very contentious issue, and introduced an according provision. However, this attempt to end this dilemma was not very successful and today, the state jurisdictions can be subdivided into jurisdictions having adopted a wider concept of owner by encompassing public entities as well, and jurisdictions, which did not take this step.[39]

Whether a governmental body or public authority can enjoy protection of the respective Act quickly developed into one of the most important questions with respect to the applicability of Recreational Use Statutes.[40] A review of the case law demonstrated two things. First, the question as to the exemption from liability concerning a governmental body or public authority turns upon the individual review of the relevant Act as well as the respective case law in a particular jurisdiction. Second, within this review special consideration must be given

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37 §2 Model Act 1965; 24 Suggested State Legislation 150 (Council of State Governments, 1965)
38 §2 Model Act 1976; 39 Suggested State Legislation 107 (Council of State Governments, 1978)
39 Such as: Connecticut and Hawai'i
40 Becker, J C (1991) at 1597

to the impact of the special Sovereign Immunity provisions, which can apply to State and Federal governmental bodies or public authorities.[41]

In general, three different situations can be distinguished. First, jurisdictions expressly including governmental bodies or public authorities. Second, jurisdictions that leave the question open for judicial determination where the courts showed a tendency to grant immunity to the governmental bodies or public authorities. And third, jurisdictions that leave the question open, but courts demonstrated a reluctance to grant such immunity.

(1) Acts expressly including Government Authorities

Some of the States opted for the protection of public entities and enacted an express provision including public entities or deeming them to enjoy equal protection with private occupants. In these cases, the courts did not have much difficulty deciding that government entities enjoyed the protection from liability under a Recreational Use Act. Having already a "guideline" in the legislation, the task left to the courts is to define the exact scope of the term with respect to which entities can still be included and to demarcate precisely who is effectively able to invoke the defence.

In Washington (State), an amendment in 1972 expressly extended the scope of the term owner under the Washington Recreational Use Act to both public and private landowners.[42] Looking at the legislation as a whole, the court interpreted this as indication for the legislature's intent to avail the ambit of the Recreational Use Act to all agencies of the state, county and municipality.[43]

In Wisconsin,[44] the court looked at the legislative history of the statute and observed in **Cords v Anderson**, that the statute had been amended so as to define "owner" as any

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41 The issue of this interaction between Recreational Use Acts and Sovereign Immunity is very complex and would go beyond the scope of this research. However, it should be mentioned that this principle is based on the ancient English principle "The King can do no wrong". Accordingly, the Federal and State entities do enjoy a complete (ie. procedural and substantive) immunity from any tort liability, unless the "sovereign" waives the immunity (ie. either of them). Relevant on federal level is the Federal Tort Claims Act (28 U.S.C.A. § 2674 [FTCA]), which determines that the government's liability under this statute is "in the same manner and to the same extent as a private individual [would be] under [the same] circumstances." When dealing with a federal matter, the Federal Courts will then invoke the state legislation to determine the outcome of the case. The federal entity is then in the same way liable or exempt from liability as an individual person would be under the like circumstances. (see: Cardwell, A M (2000) at 250; Becker, J C (1991) at 1597).
State jurisdictions may have similar legislation in place or the immunity is determined by case law (see: Murphy v Ives 196 A.2d 596, at 598 [Conn. 1963]). Municipal Corporations can also enjoy such immunity but this issue is again fairly complex. Rule of thumb seems to be that as long as the corporation merely serves a public good (fire departments), immunity is awarded. If they pursue economic interests, immunity may not be availed to those corporations (See: O'Brien, J M (1995) at 974-976; similar: Birmingham C (1981) at 293ff).

42 McCarver v Manson Park & Recreation District 567 P.2d 1362 (1979)

43 Rev. Code Wash. (ARCW) § 4.24.210:
(1) Except as otherwise provided in subsection (3) of this section, ***any public or private*** *landowners or others in lawful possession and control of any lands*

44 Wis. Stat. §895.52 provides as follows:
895.52 (1) DEFINITIONS. In this section:
(a) "Governmental body" means any of the following:
1. The federal government.
2. This state.
3. A county or municipal governing body, agency, board, commission, committee, council, department, district or any other public body corporate and politic created by constitution, statute, ordinance, rule or order.
4. A governmental or quasi-governmental corporation.

private citizen, municipality, state, or the United States government. Furthermore, for the purposes of liability under this second statute, any employee of these governmental bodies also enjoys protection from liability within the parameters of the legislation as well.[45] Accordingly, in **Cords v Anderson** the sued employee was found to be within the ambit of the Act and enjoyed protection.

A similar approach was taken in **Wirth v Ehly**.[46] The court held that Wisconsin's Recreational Use Statute protected a state employee even though he was sued in his individual capacity. The employee was held to fulfil the criterion "owner", therefore enjoying protection from liability. The Court referred to the above-mentioned amendment that 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.

Wisconsin is a good example of an extremely broad legislative protection. Effectively, it provides protection not only for private landowners and public entities, but also for employees when sued in their individual capacity. This, however, appears to be the extreme end of the scale. Most jurisdictions provided only for a protection of the public entity.

(2) Acts not expressly including Government Authorities

In some States, statutes are completely silent with respect to the protection of public entities. Here, it was left to the courts to determine the scope of the term or phrase without having a "guideline" given by the legislation. Accordingly, the interpretation through the courts varies substantially with the corresponding impact upon landowners. Whether a court will find in favour of immunity for a public entity, or against granting such protection, seems prima facie to depend upon which of the theoretical approaches the Judges take. If they follow the liberal line, derived from the argument that the legislation is merely a codification of a common law duty, than the outcome is generally pro-protection. If they follow the argument that this legislation is a derogation of the common law principle and apply therefore a narrow interpretation, the entities usually are not granted immunity. Furthermore, there seems also an argument, and several authors have suggested, that there is a distinction not only amongst state courts, but also between state and federal courts, with federal courts being more landowner-friendly in their interpretation.[47]

a) Courts approved applicability of Act to Governmental Entities

In Virginia, the statute provided that a landowner owed no duty of care to keep land or premises safe for entry or use by others for recreational use. Considering that the clear legislative intent of the Act is to encourage the opening of private land to public recreational use, the court in **City of Virginia Beach v Flippen** concluded that the city was held to be included in the definition of "landowner".[48] The court argued that the City's action of providing and maintaining stairways on private land for public access to a beach was consistent with purposes of statute and therefore attracted immunity for the City.[49]

The court in **Watson v Omaha** took a similar approach.[50] Here, the Court examined whether there was any indication contrary to the inclusion of governmental entities. It

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5. A formally constituted subunit or an agency of subd. 1., 2., 3. or 4.

45 Cords v Anderson (1978) 82 Wis 2d 321, 262 NW2d 141

46 Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d 140

47 Cardwell, A M (2000) at 251 (get liberal/strict right; maybe introduce landowner-friendly/contra-landowner distinction in paragraph talking about interpretation; Kestenband, J C (1998) at 1110 ff

48 Va. Code Ann.§ 29.1-509

49 City of Virginia Beach v Flippen (1996) 251 Va 358, 467 SE2d 471.

50 Watson v Omaha (1981) 209 Neb 835, 312 NW2d 256

was held that on the face of the statute nothing indicated in any way the legislature's intent to limit the statute to privately owned land. 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. Accordingly, the city came within the scope of the term "owner" and was protected under the Act.

These cases are examples for a line of argument deployed by courts using the legislative intent to demarcate the scope of the term "owner". Again, this intent can be derived from two sources. Several Acts contain the legislative intent as legislative provision. Other Acts do not provide this intent, but courts looked behind the curtain and included the Act's legislative history (debates in parliament etc.) in their consideration.

Besides taking the legislated intent into account or deriving this intent from the legislative history, there is another line of cases where courts invoked the Torts Claim Acts. For example, recent case law in Ohio demonstrates that it has been authoritatively decided that municipalities enjoy immunity given by the Recreational Use Statute to the same extent as private landowners.[51] The Ohio Supreme Court reached this result by considering and applying the Ohio Tort Claim Act.[52] The Ohio Tort Claim Act provides that

> "The state […] waives its immunity from liability and consents to be sued, and have its liability determined, […] with the same rules of law applicable to suits between private parties…".[53]

The Supreme Court concluded that according to this Act, the state is liable to the same extent as a private person. Therefore, the State must be entitled to the same protection under the Recreational Use Act as a private party.[54] The courts take a landowner-friendly approach to the interpretation of the Recreational Use Statute and interpret the Act to include lands owned by states and municipalities.[55]

b) Courts denied applicability

In some cases, however, it was decided that the scope of the Act does not extend to governmental entities.

In Minnesota, the court in **Hovet v Bagley** took a similar approach to the Virginian' court with regards to the interpretation of the term "owner". The court examined the Act and 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. However, 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 provided in its statement of purpose that it was the State's policy to encourage the use of privately owned lands and waters by the public. Accordingly, it was concluded that governmental entities would not be covered by Minnesota's Act. [56]

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51 Brinkman v Toledo (1992, Lucas Co) 81 Ohio App 3d 429, 611 NE2d 380.

52 McCord v Ohio Division of Parks and Recreation 375 N.E.2d 50 (Ohio 1978)

53 Ohio Rev.Code Ann. § 2743.02(A)(1)

54 McCord v Ohio Division of Parks and Recreation 375 N.E.2d 50 (Ohio 1978)at 52

55 R.C. § 1533.181. Ross v Strasser, 116 Ohio App. 3d 662, 688 N.E.2d 1120 (2d Dist. Montgomery County 1996); appeal not allowed, 78 Ohio St. 3d 1457, 677 N.E.2d 816 (1997)

56 Hovet v City of Bagley (1982, Minn) 325 NW2d 813

The New York's courts' position was formulated in **Ferres v City of New Rochelle**.[57] The Court of Appeal stated that it would be

> "… [C]ontrary to reason to assume that the Legislature could have intended that the statute apply in circumstances where neither the basic purpose of the statute, nor, indeed, any purpose could be served – as in the case of the supervised park here where the municipality has already held its recreational facility open to the public and needs no encouragement to do so from the prospective immunity offered by the statute. …"[58]

The court in **Pensacola v Stamm** proposed a similar argument.[59] The court held that the purpose of the Recreational Use Act was to encourage people to open their land to the public. A governmental body, however, would not need such motivation since to keep the land open for recreational use would be within the governmental body's legislative duty anyway.

Other courts followed this opinion with respect to cases where the accidents happened on municipal property, which was according to the evidence adduced. In **Sena v Town of Greenfield**, a person was injured while sledding on a slope in a town park, which was under supervision. The court found that the recreational use provision of the General Obligations Law did not operate to immunize the town from liability for its negligent maintenance or operation of the site.[60]

With similar arguments, the court in **Meyer v County of Orange** denied protection under the recreational use statute to a county, which was responsible for the maintenance of a public park. This park was routinely patrolled, maintained, and supervised by the county.[61]

A Pennsylvanian Court likewise denied a city immunity in an action for injuries sustained by a basketball player.[62] The plaintiff fell in a hole on an inner-city playground incorporated into a recreation centre. The court reiterated the principle that when an improved facility is allowed to deteriorate and that this deterioration causes foreseeable injury to persons using the facility within the scope of its design, the owner of such facility is subject to liability. Accordingly, the court concluded that the Recreational Use Act was not intended to circumvent this principle.

A different set of facts had to be considered in **Bradshaw v State**. The Recreational Use Statute of Louisiana provides that the Department of Wildlife and Fisheries enjoys a special immunity, which is broader than the immunity granted to other "owners". The Department enjoys immunity regardless of the activity the entrant was performing. The court saw that as an indication that the legislator did not generally intend to include public entities, but rather provided for such an entity to be covered expressly. Finding that only the State Department of Wildlife and Fisheries was immune under this statute

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57 Ferres v City of New Rochelle 502 N.E.2d 972 971 (N.Y. 1986)

58 Ferres v City of New Rochelle 502 N.E.2d 972 971 (N.Y. 1986) at 975-976

59 Pensacola v Stamm 448 So. 2d 39 at 41 (Fla. Dist. Ct. App. 1984)

60 Sena v Town of Greenfield, 91 N.Y.2d 611, 673 N.Y.S.2d 984, 696 N.E.2d 996 (1998).

61 Meyer v County of Orange (1987, 2d Dept) 129 App Div 2d 688, 514 NYS2d 450,[appeal dismissed without opinion 70 NY2d 872, 523 NYS2d 497, 518 NE2d 8. The court considered further circumstances which prevented protection, eg. *that the park was held open to the public for the pursuit of some activities which were not specified in the statute.*

62 Walsh v Philadelphia (1991, Pa) 585 A2d 445.

the court held that the Recreational Use Statute did not limit liability of Lake Watershed District, a public entity not linked to the Department.[63]

Conclusion

There are several approaches taken by legislation and the courts. If the legislation expressly provides for the inclusion of public entities then there are rarely any problems.

However, when left to the court, the outcome can be somewhat different and depends strongly on the court before which the case is heard.

Some jurisdictions, for example Idaho, do not distinguish between public and private landowners.

Others, however, do decide on a case to case base taking several factors into consideration. In those decisions the threshold is generally whether the legislative intent is advanced. The rule of thumb is: Is the landowner encouraged by the legislation to open his/her property to the people for recreational use, then the owner can expect protection under the Act.

Legislative intent appears to be the key issue with regards to the second category of Acts (not including express inclusion of government entities)

Consideration should therefore be given, if drafting legislation in the Queensland context, to encompass improved publicly owned land in order to avoid litigation from this point of view. This is necessary to counter the argument that the scope of a Recreational Use Act is not sufficient to cover a public entity which improved the land, therewith inviting (expressly by the improvement, or implicitly) the people to come onto the property.

Furthermore, there is evidence that American courts regularly go beyond the plain meaning of the provision by looking at the special circumstances and the statute as a whole.

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63 Bradshaw v State (1993, La App 2d Cir) 616 So 2d 799, cert den (La) 620 So 2d 841; LSA-R.S. 9:2795 provides as follows:
B. (1) Except for wilful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:
(a) Extend any assurance that the premises are safe for any purposes.
(b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.
(c) Incur liability for any injury to person or property incurred by such person.

…..

E. The limitation of liability provided in this Section shall apply to any lands or water bottoms owned, leased, or managed by the Department of Wildlife and Fisheries, regardless of the purposes for which the land or water bottoms are used, and whether they are used for recreational or non-recreational purposes.

Canada

"As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual."[64]

In Ontario, the standard of care for a municipality with respect to its own property will be the same as other citizens, pursuant to the Occupiers Liability Act.[65]

Republic of Ireland

The Occupiers' Liability Act 1995 uses the term "occupier" and provides a definition of this term in s1(1) of the Act. This definition stipulates:

> "… [O]ccupier", in relation to any premises, means a person exercising such control over the state of the premises that it is reasonable to impose upon that person a duty towards an entrant in respect of an particular danger thereon and, when there is more than one occupier of the same premises, the extent of the duty of each occupier towards the entrant depends on the degree of control each of them has over the state of the premises and the particular danger thereon and whether, as respects each of them, the entrant concerned is a visitor, recreational user or trespasser; …"

64 Brown v British Columbia (Ministry of Transportation & Highways) per Cory J at 435 [check cit]

65 Van Woudenberg, E (1996) at 2

Issue 2: Property

All jurisdictions examined provide for a limited range of property types which trigger a potential immunity from liability. The statutory language used to prescribe this issue is a broad range of phrases and terms, but it appears that courts have the tendency to determine the scope of the term by looking at the express provision within the Act, which can be supported by the legislative intent underlying the Act.

Essentially, in order to determine whether a certain property may qualify as property within the meaning of the respective Act, two questions may be asked:

- What terminology is used?
- What characteristics does the encompassed property have?

The result of question one then leads to a guideline against which the answer of question 2 can be compared.

United States:

(a) The Legislation

The American statutes use a wide range of statutory language. The starting point was the Model Act 1965 which provided with regards to the term 'Land' that it

"… means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."[66]

The proposed changes under the Model Act 1979 with respect to property attempted merely to simplify the language of the Model Act 1965 and provided that "land" includes

> ".. all real property, land, and water, and all structures, fixtures, equipment, and machinery thereon."[67]

Again, most of the states followed this initial template but used a variety of phrases enacting different terms and definitions. Those phrases were often modified through later amendments to the legislation in order to keep up with modern developments.

In Idaho, "private and public land" has been included in the legislation since 1980.[68] With this amendment, the legislature intended to encourage the state and federal landowners to open their land for recreational use.[69] Following this intent, the courts in Idaho developed a very broad scope of the term 'land'. For example the courts found that the term "land" will encompass a playground in a city park as well as a baseball field owned by a School District.[70]

However, there was strong dissent in allowing the immunity to extend to those installations. Based on the legislation's original intent, two Judges concluded with strong arguments that the purpose of the Act is to encourage landowners to open their property for recreational use. Since the city parks, playgrounds and baseball fields are specifically designed for public

66 §2 Model Act 1965
67 §2 Model Act 1979
68 Idaho Code § 36-1604 (1994) (b) (1)
69 Williams, R A (1996) at 208
70 For the city park see: McGhee v City of Glenns Ferry 111 Idaho 921, 729 P.2d 396 (1986); Jacobsen v City of Rathdrum 115 Idaho 266, 766 P.2d 736 (1986); for the baseball field see: Ambrose v Buhl Joint School District No. 412 126 Idaho 581, 887 P.2d 1088 (Ct. Appeal 1994)

recreation and are accordingly already open for the public, the Act should not avail protection for this type of land.[71]

The New Jersey Supreme Court in **Scheck v Houdaille Constr. Materials, Inc** held that the property concerned came within the scope of the term "premises" in the state recreational use statute.[72] Adopting the Model Act 1965 almost literally, the statute granted immunity to an owner, a lessee, or an occupant of “premises”. However, the term was not defined. The court held that the question to be asked in determining whether the statute would apply or not, would be whether it is reasonable to expect that a landowner would, without extraordinary effort, maintain a supervision of his property such that those who enter the premises for recreational purposes would be noticed. Accordingly, the larger the property, the less reasonable it is to expect a landowner to maintain such supervision, and the more likely it is that the property would qualify as property encompassed within the ambit of the Act. Thus, the court pointed out, that a farmer could not be expected to patrol his land on a regular basis to observe possible entrants. The court further described the possibility that 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, were under constant supervision through the employees. While the unoccupied tract may well fall within the scope of the Recreational Use Act, the latter type of land most likely would be outside the ambit since it is subject to relatively regular scrutiny by the owner company.

Also under New Jersey law, the court found in **Odar v Chase Manhattan Bank** that the statute was intended to apply to non-residential, rural, or semi rural land whereon the sport and recreational activities, enumerated in the statute, could be conducted. [73] This case was concerned with a fatal skating accident, with skating being one of the enumerated activities. The court emphasized that both the pond and the ice thereon, were natural conditions. Accordingly, the court held the defendant was protected by the statute.

In a later case, a New Jersey state court stated that the designated recreational activities normally occur on large tracts of natural and undeveloped land located in thinly populated rural or semi rural areas, or on property having all or most of the characteristics of such rural and semi-rural lands, particularly as to size, naturalness, and remoteness, or insulation from populated areas. The bench emphasized that the statute was not broad enough to extend immunity to all types of property without limitation.[74]

The latter cases shifted the focus from a reasonable expectation test and emphasized more the intention of the Act by concluding that the areas concerned are of a particular characteristic to accommodate typical recreational activities. A very similar reasoning was applied by a court in Michigan, stating that the intent of the legislation is to apply to certain activities, which are usually performed in vast, relatively unimproved areas. At no time was it contemplated that urban, suburban or subdivided land should be covered.[75]

This tendency can also be seen in a case decided in New York, where the court declared a country club to be immune from liability under the Recreational Use Act for injuries sustained by a girl tobogganing on the country club’s golf course. The court found that the club neither encouraged nor discouraged any off-season use by the public. There was a great gap

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71 Dissenting judgement of Bistline J in McGhee v City of Glenns Ferry 111 Idaho 921 at 922, 729 P.2d 396 (1986) at 397 with Huntley J concurring

72 Scheck v Houdaille Constr. Materials, Inc. (1972) 121 NJ Super 335, 297 A2d 17

73 Odar v Chase Manhattan Bank (1976) 138 NJ Super 464, 351 A2d 389, certif den 70 NJ 525, 361 A2d 540

74 Harrison v Middlesex Water Co. (1979) 80 NJ 391, 403 A2d 910

75 Wymer v Holmes 429 Mich. 66, 412 N.W.2d 213 at 219

between the intended use of the country club property as private golf course and the entirely different public use during winter months, which was covered by the legislative intention.[76]

In order to determine whether property is covered by the Recreational Use Act, the Pennsylvanian Supreme Court in **Rivera v Philadelphia Theological Seminary of St. Charles Borromeo** developed an interesting test.[77] This test was labelled 'multi-factor approach' and considers five factors in order to determine whether a property qualifies for protection under the Pennsylvania Recreational Use of Land and Water Act[78]. Those factors are:

- Use
- Size
- Location
- Openness
- Extent of improvement

Each factor considers a certain aspect of property characteristics and assesses its potential qualification to fall within the ambit of the Act's provision on a sliding scale:

- with regards to 'Use', the Court looked at a scale with the end-points 'exclusive recreational use' and 'use for business purposes'
- the size factor was assessed against the possibility of reasonable maintenance through the owner. It was held, the bigger the property, the less likely it would allow reasonable maintenance
- the location of the property is assessed by its proximity to developed areas. The argument proposed was that maintenance and monitoring of a property becomes increasingly difficult with growing remoteness
- an open property is easier to access and therefore more likely to qualify within the ambit of the legislation
- re the extent of development on the property, the more the property is developed, the more difficult it is to pass the threshold for protection[79].

This test was subsequently applied in **Lory v The City of Philadelphia**[80] and recently confirmed in **Yanno v Consolidated Rail Corporation**.[81]

It was not possible within the current research to establish whether this test was applied anywhere else than in Pennsylvania.

Some of the American Acts generally preserve liability when the property is used for commercial purposes, while some others refine the term 'commercial' by excluding premises, which are used principally for commercial, recreational enterprise for profits.[82]

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76 Dean v Glens Falls Country Club, Inc. (1991, 3d Dept) 170 App Div 2d 798, 566 NYS2d 104

77 *Rivera* v *Philadelphia Theological Seminary of St. Charles Borromeo* 510 Pa 507 A.2d (1986)

78 *Rivera* v *Philadelphia Theological Seminary of St. Charles Borromeo* 510 Pa 507 A.2d (1986) For a discussion of this decision, see Czap, D P at 128

79 Goldstein, D W at 790 for a discussion of this final proposition

80 Lory v The City of Philadelphia 544 Pa 38, 674 A.2d 673 (1996)

81 *Yanno v Consolidated Rail Corporation A.2d (Pa. Super. 1999)*

82 Louisiana Revised Statutes (2000) 9:2791 B

In those cases it seems that courts look at all relevant circumstances in order to determine whether the premises actually qualify as commercial within the meaning of the Act therefore precluding the owner from immunity under the Act.

In one case, for example, the Louisiana Court of Appeal held that a park, in which an accident occurred, was not a "commercial" recreational development of the state.[83] The park was located on state land but rented out to, and operated by, a private lessee. The court held 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 realise a profit. The court emphasized four points in its finding. First, the only consideration paid to the state was the lessee's obligation to maintain the park as a public recreational area. Second, the lease expressly prohibited the lessee from charging fees for the use of the boat ramp on which the plaintiffs were injured. Thirdly, the state did not receive any funds from the administration of the park and finally, the lessor'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 was protected by the statute.

The flipside of this approach is that a campground, which is operated to generate profit, may be outside the ambit of the Act so that accidents, even if they occur on the premises which usually come within the scope of the legislation, may cause liability of the landowner.[84]

It must be noted though that those considerations already drift into the area of charging fees for the recreational use of properties which is discussed elsewhere in this Report.

Conclusion

Most Acts examined included a list of premises, which qualify as premises under the Recreational Use Acts. However, those lists are rarely conclusive and the determination of whether a property is within the scope of the legislation is often left to the courts. The courts regularly depart from the Actual express provision adding several additional qualifications, often by looking to the legislative intent in order to determine the real scope of the term or phrase.

It is apparent that some states closely follow the intent of the legislation, only including property into the scope of the Act that is clearly suitable for recreational activities. The reasoning varies but seems to be embedded into the realisation of inherent difficulties to supervise such areas.

Other states, however, fully depart from a consideration of the type of land, only looking to the actual activity performed, irrespective of whether the property in fact was suitable for this use. It therefore appears to be difficult to justify this second approach. In essence, such approach would render the criterion “land” (or whatever term is used) completely without any value. The only measure counting under such scheme would be actual activity performed by the entrant. This seems to be an intolerable extension of the immunity unduly burdening the entrant. Furthermore, such an approach could lead to absurd results where entrants enter fully supervised and developed properties for a recreational purpose, facing full liability because the occupier can claim immunity under the according legislation.

The better solution might be an approach giving full weight to the criterion “land”. The model developed by the Pennsylvanian Supreme Court seems to be particularly convincing. The factors introduced allow enough latitude to take unusual circumstances into consideration.

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83 Thomas v Jeane (1982, La App 3d Cir) 411 So 2d 744

84 Jones v Gillen (1987, La App 5th Cir) 504 So 2d 575, cert den (La) 508 So 2d 86

United Kingdom:

The UK legislation bases the scope of properties accessible for recreational activities and providing immunity from liability on the term "access land" which can be described as any land which is shown as open country on a map in conclusive form issued by the agencies, which is not excepted land according to Schedule 1 of the Act and is not land accessible to the public apart from the Act according to s15(1) CRoW 2000.[85]

The term is legally defined in s1(1) CRoW 2000 and comprises five general types of land:

- Open country as shown on a map [specifically prepared under this legislation by the appropriate countryside body].
- Registered common land as shown on a map [specifically prepared under this legislation by the appropriate countryside body].
- Registered common land outside London [not mapped].
- Land above 600 m above sea level [not mapped].
- Property irrevocably dedicated by the landowner to the community for public access in accordance with Part 1 of the Act.

It however does not include land, which is labeled "excepted land" according to Schedule 1 of the Act, even if it may appear on the map as open country or registered common land.[86]

"Open country" is defined in s1(2) CRoW 2000 as land which either appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down. Furthermore it is required that it is not registered common land. s1(2) contains further definitions with respect to registered common land or mountain. Land will not be regarded as coming within the ambit of the scope of the legislation when it is improved or semi-improved grassland.

The different types of land comprising the "access land" will be assessed and catalogued by countryside authorities, which compile their results in maps showing the area accessible and excluded from public access. These maps will be an essential part of the legislation with respect to properties coming within the ambit of this term.

The mechanisms to prepare those maps are set out in ss 4-11 CRoW 2000 and are fairly complex. Before the open access becomes generally available, the Countryside Agency (in England) has to carry out an extensive mapping exercise to clearly identify all the qualifying land, and clarifying the type of access land. The process allows for appeals in two stages, and is estimated by the Agency to be completed by late 2005.[87] The rights of access may correspondingly be introduced in a sequential manner, although this has not yet been decided. Once the final (conclusive) maps have been prepared and published, they will be subject to review every ten years, although that period may be changed by regulation.

However, even if a property qualifies generally as property within the meaning of the Act, there can be a number of reasons why access to properties may be restricted. These include nature conservation concerns, heritage preservation, avoidance of fire, or other danger to the public, defence, or for activities which are incompatible with open access. Some of the

85 Halsbury, January 2001, 01/164
86 CRoW 2000, Explanatory Notes, para 13
87 CRoW 2000 Fact sheet 2 "Access"

restrictions can be requested by the landowner, others will be available on direction from the Countryside Agency or the Secretary of State. The restrictions can be formulated as temporary or permanent restrictions. Most proposed restrictions will be subject to debate by so called “Local Access Fora” and may be revoked or varied at intervals.

Republic of Ireland

The Irish Occupiers’ Liability Act of 1995 distinguishes between the term “premises” and the term “property”. According to s1(1) of the Act, “premises” includes

“…[L]and, water, any fixed or moveable structure thereon and also includes vessels, vehicles, trains, aircraft and any other means of transport; …”

“Property” is defined by s1(1) of the Act as including

“… [I]n relation to an entrant, […] the property of another in possession or under control of the entrant while the entrant is on the premises of the occupier; …”

Issue 3: Recreational Purpose

It is fair to say that the question as to what constitutes a recreational purpose or activity is the paramount question upon which many cases turn and the issue for which courts are faced with the most detailed legal analysis. This is understandable, keeping in mind that many of the activities, which people consider now as recreational, were at the time the legislation was drafted not even contemplated as being or becoming possible. Modern technology and materials allow people to pursue more and more formerly extremely dangerous or even impossible activities. Cliff-jumping, canyoning and other such activities have to be considered by the legislation although not expressly mentioned.

United States: Recreational Use v Recreational Activity?

As mentioned previously, Recreational Use Acts only provide immunity if the activity, which was performed on the property, was performed for a recreational purpose. This limitation excludes a large number of activities, such as commercial (eg, collecting mushrooms for a commercial purpose) or mischievous activities (for example boys crawling around in stacked paper bales, lighting little fires here and there).[88]

Most of the statutes considered during this research contained more or less detailed ostensive definitions, with the scope of these lists varying from broad definitions, providing that the Act encompasses any activity undertaken for conservation, resource management, exercise education, relaxation, or pleasure on land owned by another, to those Acts containing detailed, express listings of activities.[89] Those detailed listings included everything from more traditional recreational activities such as swimming, fishing, hunting or walking, to rather exotic ones, such as snow-mobile riding, hang-gliding, cave exploration or nature study.[90] Some Acts further encompassed the viewing or enjoying of historical, archeological, scenic or scientific sites.

In addition, when a statute provides for a detailed list, these lists are usually not conclusive, but open to amendment/interpretation in order to cover recreation activities which were not considered or even known at the time of legislating the Act. Typically, phrases such as "… outdoor recreation, which term includes, but is not limited to, the …" are used to establish this open list.[91]

However, there is a considerable debate about the "how" to determine whether a particular activity, which was not included into the list, is indeed covered by the Act, therefore bringing the defendant within the ambit of the statutory protection. In essence, this debate turns upon the weighing up of two subjective points of view. The first approach is a determination concentrating on the user's subjective assessment of the activity he/she was performing at the time of the incident and the value this activity had for the entrant. The alternative approach is that the question should rather be answered by focusing upon an examination of the landowner's intention for the use of the property when he/she opened the property for recreational use.

88 For the latter see: Minnesota Fire & Casualty Insurance Co. v Paper Recycling 244 Wis 2d 290, 627 NW 2d 527 (of 14 June 2001)

89 For the first option see: Illinois 745 ILCS 65/2 (2001); for the latter option, see: Pennsylvania 68 P.S. § 477-2 (2000)

90 See; Washingten Rev Code Wash (ARCW) § 4.24.210 (1)

91 example taken from Washington Rev. Code Wash. (ARCW) § 4.24.210 (1)

It can be said with certainty that most of the jurisdictions considered consider the entrant's intention as being relevant but not solely decisive.

A strong example for this proposition can be found in the decisions of **Linville v City of Janesville**. In this case, the court was confronted with the question whether the city could claim immunity under the Recreational Use Act after having been sued by a father for the compensation of injuries his son sustained. The key issue was an accurate classification of the activity in which the plaintiff's son was engaged at the time the accident occurred. The father contended on behalf of his son that the correct interpretation of the legislation would only allow the conclusion that the entrant's subjective motivation to be on the property is the sole conclusive factor for the determination whether an activity would come into the ambit of the Act. However, the majority of the bench held in first instance that it would apply a more objective test, requiring an examination of all aspects of the activity.[92] In the opinion of the majority of the Judges the nature, purpose and consequence of the activity is decisive. It was held that the injured person's intention to recreate may be relevant, but it is not the controlling factor. Therefore, it is not the user's intention that is dispositive.

On appeal, the second instance followed this test, finding that a test, which considers the user's intent as dispositive, would contravene the intent of the statute.[93] However, the appeal instance went even further than the previous instance and developed a strong landowner-friendly construction of the Act stating that

> "… [a] test, which is consistent with the purpose of the statute is one which considers the purpose and the nature of the Activity in addition to the user's intent. … Such a requirement comports with the focus of the statute, which is the user's activity and not the user's state of mind. …".

Furthermore, there is some indication that several courts tend to depart even further from the entrant's intention, answering the question rather more in favour of the occupiers' intent. In particular, the courts in Washington and on a federal level (in the case at hand applying Hawai'ian law) can be used as examples of jurisdictions displaying this attitude.

The Washington Court of Appeal held that in order to determine the user's purpose for coming on the land, the perspective of the landowner as to the use of the land, and not the purpose of the owner, is decisive.[94] The Judges stated at p. 608-609

> "…We find the proper approach in deciding whether or not the Recreational Use Act applies is to view it from the standpoint of the landowner or occupier. If he has brought himself within the terms of the statute, then it is not significant that a person coming onto the property may have some commercial purpose in mind. …"

The Court of Appeal in Washington recently applied this test again. In **Nielsen v Port of Bellingham**, the court made unequivocally clear that, from any reasonably objective view point, the Port authority's purpose for operating a marina was commercial and therefore not

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92 Linville v City of Janesville 174 Wis. 2d 571, 497 NW 2d 465; the majority (Gartzk PJ, Sundby J) applied the decisions in Silingo v Village of Mukwongo 156 Wis. 2d 536 (especially at 544), 458 NW 2d 379 (especially at 382) (Ct. App. 1990); Moua v Nothern States Power Co. 157 Wis. 2d 177 (especially at 185), 458 NW 2d 836 (especially at 839 n.3) (Ct. App. 1990); Stann v Waukesha County 161 Win. 2d 808 (especially at 822-823), 468 NW 2d 775 (especially at 781-782) (Ct. App. 1991)

93 Linville v City of Janesville 184 Wis. 2d 705, 516 NW 2d 427

94 Gaeta v Seattle City Light 54 Wn. App 603, 774 P.2d 1255 (review denied 113 Wn. 2d 1020, 781 P.2d 1322)

within the scope of the Act.[95] It dismissed the proposition that the Port authority's intention to operate the marina was irrelevant since the entrant's subjective intention was to recreate on the property.

Following this line of argument, a similar approach was taken by the Federal District Court for the District of Hawai'i in **Howard v United States**.[96] The court held that courts should not look to the entrant's subjective intent, but should look to the occupier's intent for the use of the land. The court went on to say that focusing on the user's subjective intent would mean that the landowner's duty of care would vary according to the user's motivation to enter the property.

This decision was upheld on appeal with the appeal court finding that it is decisive that the landowner opened the property for recreational use.[97] The plaintiff undertook an activity, which was expressly listed in the ostensive list contained in the legislation. By referring to the legislative intent, namely to encourage the landowners to open the properties to make them available for recreational use, the court dismissed the plaintiff's contention that her "professional" motivation converted her into a non-recreational user.

Applying a line of argument very much like the abovementioned courts, the Kentucky Supreme Court held in **Coursey v Westvaco Corp.** that it is not necessary for occupiers to make a formal Act of dedication of the land to a particular purpose.[98] However, the bench imposed upon the occupier the evidentiary burden to be able to demonstrate that he/she

> "[K]new or condoned the public making recreational use of his property".[99]

The way knowledge and condonation must be evidenced is manifold, but the court insisted that it must be possible to reasonably infer

> "that he intended to permit such use to be made of his property."[100]

Conclusion

There are probably more suggested solutions to define the scope of "recreational" use than states and jurisdictions in the United States. Accordingly, the outcome of such attempts appears to be unpredictable.

It should also be noted that some scholars argued that there is a difference between recreational *activity* and recreational *use*, which would have a bearing on the definition and therewith on the Act's scope. It was said, that recreational use is the actual enjoyment of the activity exercised on the property,

> "…[t]he anticipation of which will cause a recreational participant to forego any right to compensation for injuries caused by the landowner's negligence."[101]

It was argued that this definition could be used as a starting point for an overhaul of the definition of recreational purpose. However, this question seems to be a mere academic one

95 Nielsen v Port of Bellingham 27 P.3d 1242 at 1245
96 Howard v United States No 95-00642, 1997 WL 1119274 (D. Haw. Jan. 3, 1997)
97 Howard v United States of America 7 Ors 181 F.3d 1064 at 1073
98 Coursey v Westvaco Corp. 790 S.W.2d 229, 232
99 Coursey v Westvaco Corp. 790 S.W.2d 229, 232
100 Coursey v Westvaco Corp. 790 S.W.2d 229, 232
101 Ford, S J at 526

with limited if not non-existent practical application. The research did not indicate that any court in any jurisdiction adopted this approach in order to introduce more transparency and therewith precision into the criterion "recreational purpose".

When the courts make a determination of whether an activity falls within the ambit of the term, it may be favourable that they consider the purpose of the Acts and their underlying policy. Further, it seems compelling when courts do find that in order to determine whether an activity falls within the ambit, a solution preferring the intent of the landowner is superior.

However, this may also lead to complications since this is, as it is the entrant's intent, a subjective guideline. There must be some objective component to mitigate the stringency which a purely subjective approach would bring. Such an approach would include the actual use of the premises, which ties this criterion back together with the criterion "land".

United Kingdom: Activity within the meaning of CRoW 2000

As mentioned before, CRoW 2000 attempts to balance the interests and needs of the concerned parties by giving recognition to the needs of the landowners. From this recognition flow severe limitations with respect to the activity, which can be enjoyed on the properties made available. The right granted under s2(1) CRoW 2000 is pursuant to s2(3) CRoW 2000 subject to restrictions set out either by other public legislation or in Schedule 2 of this Act. In particular, Schedule 2 provides in paras 1(a) – 1(c) that the use of any vehicle (including bikes) crafts (including on water) and horse riding is excluded.[102] In effect, it appears that this leaves only activities, which can be performed by foot-walking activities.

However, it must be noted that para 7 of Schedule 2 provides for a possibility to open access to other activities. However, the relevant authority needs the consent from the owner before it is capable of lifting or relaxing the restrictions usually applicable to the access land by virtue of Schedule 2.

Republic of Ireland

The Irish Occupiers' Liability Act of 1995 differentiated between the recreational activity and the recreational user. According to s1(1) of the Act, "recreational activity" is defined as

> "… [A]ny recreational activity conducted, whether alone or with others, in the open air (including any sporting activity), scientific research and nature study so conducted, exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archeological or scientific importance; …"

The definition of "recreational user" is more complex and provided that an entrant is someone

> "… [W]ho, with or without the occupier's permission or at the occupier's implied invitation, is present on the premises without a charge (other than a reasonable charge in respect of the cost of providing vehicle parking facilities) being imposed for the purpose of engaging in recreational activity, including an entrant admitted without charge to a national monument pursuant to s 16(1) of the national Monuments Act, 1930, but not including an entrant who is so present and is – (a) a member of the occupier's family who is ordinarily resident on the premises, (b) an entrant who is present at the express invitation of the occupier or such a member, or (c) an entrant who is present with the permission of the occupier or such a member or social reasons connected with the occupier or such a member; …

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102 CRoW 2000, Explanatory Notes, para 16; CRoW 2000 Factsheet 1, "Part I: Acceess"

Issue 4: Exceptions

In none of the examined jurisdictions was the immunity granted under the recreational use statutes absolute. All jurisdictions provide for one or the other exception. The mechanism for these exceptions is fairly simple. Certain activities do expose the landowner to liability, even if he/she otherwise would fall under the protection of the Act.

United States

The main exceptions were already introduced into the Model Act 1965, which provided that nothing should limit in any way any liability which otherwise exists,

- For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; and

- When a charge was imposed for admission to the premises, a fee in return for the permission to enter.[103]

This idea was continued in the Model Act 1979. It provided for an exception of the immunity in case of a malicious, but not merely negligent, failure to warn or guard against ultra-hazardous conditions, structures, personal property or activities actually known to the owner or occupier to be dangerous. Furthermore, the Act suggested that immunity should not be available to owners charging for the entry to the premises.

In addition to those two exceptions, which were in essence already included in the Model Act 1965, the Model Act 1979 suggested that no immunity should exist with respect to accidents that happen to children under the age of 12 years. This suggestion followed and incorporated the traditional "*attractive nuisance doctrine*".[104] However, it must be noted that this exception was limited to accidents that occurred on properties in urban/residential settings.

a) Egregious Conduct

It seems to be common sense that the landowner must still be liable for actions harming the entrant and which are done intentionally and/or negligently to a certain degree. Accordingly, statutes visited denied the landowner protection in such situation. There is, however, considerable uncertainty as to the scope of this exception. This uncertainty is mainly due to the various terms chosen, their inherent ambiguity and imprecision, as well as the combination of terms and phrases chosen by the legislators, which do vary significantly. As a result this creates substantial difficulties defining a demarcation line between where the protection of the statute is still available and where the occupier is liable for respective

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103 §6 Model Act 1965

104 This doctrine can be found incorporated into certain jurisdictions such as Colorado: CRS §33-41-104(c) or Texas: Tex Civ. & Rem. code § 75.003(b). Furthermore in some jurisdictions, the courts kept the doctrine alive by stating that the traditional common law doctrine is not abrogated by the legislation. The underlying policy consideration is that human safety is of far greater concern than unrestricted freedom in the use of land. See eg O'Connell v Forrest Hill Field Club 291 A.2d 386 (N.J. Super. Ct. Law Div. 1972); This line of argument can also be seen in Leibson J's dissenting judgement (with Combs J and Lambert J concurring) in Coursey v Westvaco Corp. 790 S.W.2d 229, 233. According to his Honour, the doctrine is a longstanding "humanitarian doctrine", which is "designed to protect children from "unreasonable risks" created by landowners when their injury is foreseeable and the likelihood of injury far outweighs the "burden of eliminating the danger." The majority in this case, however, held that the legislator did not intend to import such implied exception into the according Kentucky Act since the legislator did not opt to expressly introduce such exception, such as other jurisdictions did.

injuries.[105] Furthermore, it was noted that in several States, the courts used this ambiguity to deliberately broaden the scope of negligence, therewith reducing the element of intentional wrongdoing, to a degree that the ordinary Common Law duty of care was almost re-established.[106]
In general, the Acts distinguish four sanctioned forms of conduct failing to limit liability: Wilful, malicious, wonton and/or reckless conduct. These terms are then used, as mentioned above, in several combinations. There is, however, one common feature which can be nevertheless extracted: All terms and combinations try to describe and establish a duty of care which is raised in relation to the ordinary duty of care.
The following observations are included to demonstrate the difficulties that arose in essentially all jurisdictions. They are not exhaustive and are limited to some more obvious points, in particular the demarcation between "wilful" and "malicious". For the purposes of this research it could be argued that all terms and combinations used describe various levels of conduct in relation to the state of mind this conduct was performed. It reaches from the level of conduct connected to the most culpable state of mind (the intentionally conducted action) to lesser degrees of culpable conduct, such as "malicious" and "wanton" conduct which are arguably members of the same "group" or level.
Those states using the phrase

> "Wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity … ",

adopted the exception directly from the Model Act 1965 which provided that:

> "Nothing in this Act limits in any way any liability which otherwise exists: (a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."[107]

As mentioned above, there is a great deal of inconsistency amongst the courts with regards to interpreting this term. However, there are certain features which can be gathered from several court decisions, on Federal as well as on State level.

First, and this is almost a common sense statement, it was held that there is a gradual increase in seriousness between wilful and wanton, with 'wilful' being the more serious level because it contains a component of intention.

In Kansas, the court considered the definition of 'wilful' in **Klepper v The City of Milford, Kansas**. The City, together with the co-defendant, the United States government, claimed immunity under the Recreational Use Act (Kansas) in a negligence case.[108] The defendants denied any liability, submitting that they did not commit any wilful conduct pursuant to Kan. Stat. Ann. section 58-3206, which would have precluded their immunity. The plaintiff submitted that wilful conduct would include reckless or wanton conduct or disregard as well. The court, however, rejected this argument. Relying on the definition used in the Pattern Jury Instructions,[109] the Judges concluded that wilful conduct is more extreme than wanton conduct.[110] It only will be fulfilled when the defendant intentionally caused an injury, not if he/she intentionally acted in a way allowing a wrong to occur.[111]

From this case, it follows also that 'wilful' misconduct is based upon the 'intention' to harm.

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105 See eg. Byrd, E H (1988) at 1383 ff
106 Judges, D P at 96-97
107 § 6 Model Law Act 1965
108 Klepper v The City of Milford, Kansas, 825 F.2d 1440 (10th Cir 1987)
109 Pattern Instructions of Kansas 2d, Civil, § 3.03 (1977)
110 Advisory Committee of the Kansas Judicial Council, Pattern Instructions of Kansas 3rd, Civil, § 103.04 (1997) defines 'willful' as: "An Act performed with the designed purpose or intent on the part of a person to do a wrong or to cause an injury to another."
111 Pike, J G & Neill S C (1999) at 839

Second, the landowner must in addition know about the danger or the probability of injuries, and must consciously fail to Act to avoid the danger.

This was established by the court in **Von Tagen v United States**.[112] On the issue of whether the affirmative defence would equip the US with immunity, the court held that in the case at hand, a material issue of fact concerning the government's alleged "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity, …" would indeed exist. Therefore, the case would fall within the ambit of the California Recreational Use Statute, which potentially could preserve the landowner's liability under such circumstances. The court concluded that three essential elements must be present in order to find wilful misconduct:

(1) Actual or constructive knowledge of the peril to be apprehended; and

(2) Actual or constructive knowledge that injury was a probable, as opposed to a possible, result of the danger; and

(3) Conscious failure to act to avoid the peril.

In **Krevics v Ayars**, the New Jersey Supreme Court held that the statute did not apply to a landowner who created or knowingly permitted the creation of the hazard causing the injury.[113] The decision was based on the exception in the statute for a landowner's "wilful or malicious failure to guard, or warn against, a dangerous condition, use, structure or activity."

Recently, the District Court in Maine held that the mere existence of unsafe conditions in combination with the occupier's knowledge that people would use the area for recreation, does not in itself amount to wilful or malicious conduct under Maine's Recreational Use Statute.[114]

The Michigan Supreme Court attempted to refine the definitions for wilful and wanton.[115] While wilful conduct in the court's opinion required an actual intent to harm, 'wanton' involves intent inferred from reckless conduct. The court furthermore pointed out that the construction 'wilful *and* wanton' misconduct is unfortunate. In consequence it would require both states of mind, that is the intent to harm and recklessness to a degree that intent could be inferred must be present in one mind at the same time. To resolve those inconsistent standards, the court concluded that the "and" must be interpreted as an "or" in order to achieve a satisfactory outcome.

This result must be contrasted with the finding in **Mandel v United States**.[116] The court reversed a summary judgment for the United States.[117] The court did not discuss the problem with regards to the construction of the Act and concluded that 'wilful and wanton' conduct was conduct showing an utter indifference to, or conscious disregard for, the safety of others.

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112 Von Tagen v United States (1983, ND Cal) 557 F Supp 256 (applying California law)

113 Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 844

114 Menear, et al. v United States, No 00-23-P-DMC (D. Me. 10/27/00)

115 Jennings v Southwood 446 Mich. 125, 521 N.W.2d 230 at 237; This case was concerned with the Michigan Emergency Medical Services Act. However, since this Act provides a similar immunity, which is only destroyed when a defendant acted with gross negligence or wilfully and wantonly, an analogy to the Michigan Liability of Landowners Act can be drawn. The Michigan Supreme Court in this case made references to cases held under the Michigan Liability of Landowners Act; 446 Mich. 125at 138 and N.W.2d 230 236; see also Monte, J (1995) at 1405 arguing that the Michigan Supreme Court effectively adopted those definitions as the Common Law definitions arising in Michigan statutory schemes

116 Mandel v United States (1983, CA8 Ark) 719 F2d 963 (applying Arkansas law)

117 Although affirming a summary judgment for the insurer in this matter

It appears, however, that this interpretation reads those two terms together, thereby creating one term which must be described as some kind of hybrid between wilful and wanton. Such an approach may only achieve the weakening of the original standard and further confuses the problem.

It should also be noted that especially with respect to this phrase it was argued that it essentially has the result of defying the effects of the respective Recreational Use Acts in several jurisdictions. On several occasions, the courts in those jurisdictions interpreted the omission to warn as exaggerated wrongfulness, falling within the ambit of the section barring immunity under the Act. Accordingly, the Michigan Court of Appeal held in **Lucchesi v Kent County Road Commission** that a landowner could be guilty of wilful or wanton misconduct because he did not fence off his property or erect warning signs.[118] Another example, involving Federal Law and decided in the same year as **Lucchesi v Kent County Road Commissioner**, is **Simpson v United States**.[119] Here, the Ninth Circuit concluded that the United States Forest Service's attempts to warn the tourists of hot water pools in a National Park were 'feeble' and therefore could amount to wilful and wanton misconduct.[120]

Judges, D P described this situation with the following words:

> "… In many of these cases [Judges, D P listed numerous examples in fn. 331], defendants' conduct cannot fairly be characterized as 'malicious' in the ordinary sense of the word. At worst, defendants simply failed to look out for the safety of recreational users – an obligation that the recreational use statute ostensibly was intended to remove. …".[121]

A further, frequently used terminus technicus establishes "gross negligence or wilful and wanton misconduct". The states using this concept legislated recreational use statutes containing phrases such as:

> "… unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner…"[122]

while again others use for example

> "… wilful, wanton or reckless conduct…"[123]

With respect to the latter provision, the Supreme Judicial Court of Massachusetts proposed a definition of reckless conduct. It found that conduct which

> "… involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result in another…" would amount to reckless conduct, when based upon "… a high degree of risk that death or serious bodily injury will result from a defendants action or inaction when under a duty to Act."[124]

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118 Lucchesi v Kent County Road Commission 312 N.W.2d 86 (Mic. Ct. App. 1981)

119 Simpson v United States 652 F.2d 831 (9th Cir. 1981)

120 The plaintiff, well off the actual footpath, fell into the scalding hot water after the earth caved in underneath him. However, it is of importance for this decision to note that the court took into consideration that similar accidents happened earlier and USFS was aware of those earlier accidents.

121 Judges, D P (1993) at 98

122 For example: Michigan Statutes Annotated (Reed Elsevier Inc. 2000) MSA § 13Aa.73301; sec 73301.(1)

123 Massachusetts

124 Sandler v Commonwealth 419 Mass. 334 at 336-337; 644 N.E2d 641 (1995)

The Superior Court of Massachusetts in **Stewart v Town of Hudson** followed this definition.[125]

Conclusion

As seen above, the problems stemming from the attempt to draft this exception by using ample language are manifold and presented the legislators with several problems.[126] It was argued that the enacted statutes would attempt to reinstate the original Common Law position with regards to trespassers.[127] Accordingly, the landowner would owe absolutely no duty to the entrant except for the duty 'to refrain from more grievous types of wrong'.[128]

The very idea of recreational use statutes is to create a scheme under which occupiers are granted immunity from tortious liability so that they make their properties more readily available for people who want to enjoy recreational activities. It is almost a common sense argument that this immunity cannot be granted without any limitation. Accordingly, limitations such as a denial of protection for egregious conduct are inevitably necessary to still account for the entrant's need for protection. The degree of protection availed to the entrant then becomes less a legal, but rather a political question and opens up leeway for negotiations with, for example, the community and plaintiff lawyers.

(b) Gratuitous Use v Paying Valuable Consideration

Most of the American statutes provide for an exception linked to the landowner receiving consideration for the use of the land. However, they usually do not follow the 1965 Model Act, which barred landowner from immunity when receiving a 'charge'. This 'charge' was defined as:

> "… [T]he admission price or fee asked in return for invitation or permission to enter or to go upon the land. …"

In general, when occupiers charge money for the use of the land, he/she cannot claim immunity under the recreational use statutes. However, there are certain differences amongst the jurisdictions. Some Acts provide for consideration, some for charges, and some only for moneys. Others allow a certain sum to be earned or provide that the landowner loses protection when having made a profit.

This exception is important for landowners who allow the use of their land but require, for example, a fee for camping. Furthermore, in some jurisdictions, the fee has not to stem from the use of the land directly, but can incidentally result from the use of the land. Examples are refreshments sold to gratuitous users of the land. An analysis of the case law in the US reveals that predominantly two categories can be distinguished. First, jurisdictions providing

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125 Stewart v Town of Hudson (2000) 2000 Mass. Super. LEXIS 549 at 6-7 (per Bohn Jr. J)

126 See for example: The State Idaho, where the statute created a potential problem since conflicting language chosen within the Act actually blocked liability even for egregious conduct. However, it was held in Jacobsen v City of Rathdrum 115 Idaho 266, 766 P.2d 736 (1988) that an owner owed the same duty of care to both, a trespasser and a recreational user, ie. to refrain from wilful or wanton conduct. Although not expressly included into the Act, the Idaho Supreme Court followed a rule of statutory construction to reach this conclusion. See eg. Williams, R A (1996) at 203-204. In a later decision the Court of Appeal followed this conclusion so it can be regarded as certain that a landowner owes above-mentioned duty of care to the recreational user.

127 Barrett, J C at 7-8

128 James, at 146

for an exception based on "consideration" and second, jurisdictions basing the exception on "fee" or "charge".[129]

(i) Consideration/Valuable Consideration

Recreational use statutes passed using the term "consideration" do not extend immunity to landowners where the permission to use the land has been given for consideration. There is widespread evidence that the term "consideration" or "valuable consideration" is given a broad interpretation through the courts in many of the American State jurisdictions. As a matter of fact, it seems apparent that the term "consideration" in these statutes was deliberately chosen in order to give this exception a wider meaning. The research revealed that the occupier might not come within the protective ambit of the legislation where they received some kind of consideration as a result of the entrant entering the property. This is most obvious in cases where an entrant pays money to enter a particular property for recreational purposes. However, it is not limited to those situations. The loss of immunity under this scheme can even be triggered where the owner receives a less obvious benefit from the use of the land. Under the statutes using the term "consideration", almost any form of benefit to the landowner will act to trigger the immunity exception.

In **Ducey v United States**, the court denied the United States the immunity under the Act on the grounds that the deceased paid valuable consideration for the use of the recreational area. While the deceased did not pay the consideration in the form of money for the admission to the area itself, the court acknowledged that the monetary payments made for the use of a boat slip in this area and trailer space rentals were sufficient to trigger the exception ultimately denying immunity. The court went even further, and considered that moneys tendered for goods in a café/shop were sufficient to trigger the exception. It must be emphasized again that the actual access to the area was free.

There is considerably more authority from other states to support this contention.[130]

However, there are limits to this broad interpretation and not every consideration given in return for the right to enter a property was held to be connected closely enough to trigger the exception. Recently, a New York Court concluded that tuition fees paid to a University were not consideration within the meaning of the recreational use statute.[131]

Furthermore, there is opinion that taxes paid by citizens in general are usually not considered to fall within the ambit of those exceptions, although the moneys might be used for the maintenance etc. of the recreational area. In **Moore v Torrance**, applying Californian law, the plaintiff argued that he paid consideration by virtue of the fact that his parents pay taxes to support the municipal facilities.[132] The court held that the

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129 See eg. Chester v United States, 1996 U.S. App. LEXIS 20595 at 4

130 See eg. New Hampshire: Collins v Martella 17 F.3d 1 at 5 (1st Cir. 1994); California: Casas v United States 19 F Supp 2d 1104 at 1105-1108 (C.D.Cal 1998)

131 Powderly v Colgate University, 248 A.D.2d 365, 669 N.Y.S.2d 640 (2d Dep't 1998). the decision was submitted to appeal but the leave to appeal was denied [92 N.Y.2d 811, 680 N.Y.S.2d 457, 703 N.E.2d 269 (1998)]. The NY CLS Gen Oblig § 9-103 (2001): 2.b. for injury suffered in any case where permission to pursue any of the activities enumerated in this section was granted for a consideration other than the consideration, if any, paid to said landowner by the state or federal government …

132 Moore v Torrance (1979 2d Dist) 101 Cal App 3d 66, 166 Cal Reptr 192. The Cal. Civ. Code § 846 provides that a 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, independently of its terms, the owner was otherwise liable (a)… or (b) the injured user had directly paid a consideration to such owner for the entry; or (c) ….

legislation did not consider this indirect type of payment of recreational areas when enacted. The real intention was a consideration given for the use of amusement facilities or government owned parks. Therefore the court concluded that a direct fee that was imposed in direct connection with the admission to the land would trigger the exception.

(ii) "Charge" or "Fees"

It is possible to distinguish between two different constructions. The first group of Acts uses the verb "charging" in one or the other way. It is based on the consideration that the denial of the immunity will only be triggered when fees are actually charged for a particular purpose. For example, the Pennsylvanian Recreational Use Statute provides that immunity is destroyed:

> "… where the owner of the land charges the person or persons who enter or go on the land for the recreational use thereof, …".[133]

The second kind of statutes, which merely uses the terms "fee" or "charge" and can be found amongst several American state jurisdictions, provides for an exception to the immunity granted under the Recreational Use Act when the permission to enter the premises was granted for a "fee" or "charge".

However, it appears that this is merely a linguistic distinction since most courts seem to have held that this exception is generally only triggered when the fee or charge was paid for the actual entry of the premises, not some corollary service. The pattern of those cases, which have to decide the question whether immunity should be granted by analysing whether a fee has been paid, is always similar. The plaintiff entered the premises without being required to pay for the entry. After having entered the premises for some recreational purpose, the plaintiff rented or purchased equipment or other goods or used services provided by the landowner or an operator.

In **Jones v United States**, the plaintiff entered the premises without paying for it but rented an inner tube from a concessionaire. The court found that the United States would enjoy immunity because the money was paid for the use of the tube, not the park. The judges made the point, that the plaintiff could have brought his/her own tube along while still being able to use the park.

In **Miller v United States, Dep't of the Army**, the plaintiff sought compensation from the Department after sustaining injuries during a bike tour. The plaintiff paid an administrative fee charged by the tour's sponsor and asserted during trial that this would preclude the landowner from immunity as claimed under the relevant Recreational Use Act. The court, however, found that the fee charged by the tour sponsor did not trigger the exception because the landowner provided the property for the recreational use free of charge.[134]

In **Flohr v Pennsylvania Power & Light Co.**, the plaintiffs paid for the right to stay at a campground on the landowner's premises for one night, a fee for the use of this ground.[135] During a fishing excursion, the plaintiff in this case was injured close to the campsite. The court held that under the Pennsylvanian provision, the landowner could claim immunity from liability because the accident happened in an area, which the injured person could have used without paying this charge. The court argued that the

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133 Pennsylvania Statute: 68 P.S § 477-6 (2) (2000); similar Illinois Compiled Statute Annotated: 745 ILCS 65/6 (2001)

134 Miller v United States, Dep't of the Army, 1994 U.S. App. LEXIS 27427 at 7

135 Flohr v Pennsylvania Power & Light Co. 821 F. Supp. 301 at 305 (E. D. Pa. 1993)

injury would also have occurred if the person had only come for the day without having been required to pay any charge.

The ambit of this exception can further be highlighted by reference to jurisprudence in Kentucky. There, the District court found in **Coughlin v TMH** that paid entrance to a commercial cave did exclude the occupier of the property from being able to claim immunity for liability under the according Act.[136] On the other hand, the court of appeal rejected a proposed broad definition of "charge" in **City of Louisville v Silcox**.[137] In this case it was argued that a parking fee for cars at a city park which was used for recreational purposes did not qualify as an admission fee for the right to use the park. Accordingly, the city was held to fall within the protective ambit of the statute.

There are numerous further authorities supporting this contention.[138]

However, it must be noted that there are Acts, which contain the terms "charge" or "fee", however, the courts have still applied a rather broad scheme. In these jurisdictions, any fee charged deprives the landowner nevertheless of the protection as otherwise granted under the Act. In **Plano v City of Renton**, for example, the Court of Appeal of Washington recently denied the City of Renton protection under the Statute. In this case, the use of a pontoon attracted a fee, however only for moorage for more than four hours or overnight.[139] The rest of the time, the use was free as was the use of the remainder of the recreational area. The court concluded that because the Statute provides for protection only if the property is made available

> "…[W]ithout charging a fee of any kind therefore, …"[140]

immunity under the Act would not be available for the city. Holding that the term "fee of any kind" as used in Washington's legislation[141] was unambiguous, the court found that there is no need for interpretation. It further stated that the legislation would only provide immunity from negligence if the landowner does not charge a fee of any kind for use of the property. In turn, the landowner must show that she/he charges no fee for using the land or water area where the injury occurred and she/he will come within the ambit of the provision. The court concluded that its finding accords with the "landowner's purpose test" as applied to determine whether a recreational activity comes within the scope of the Act by considering the landowner's intention for opening the premises.[142]

It must be noted that in the last few years a number of American state jurisdictions established a new type of legislation which does interfere with the provisions concerning the payment of consideration. These Sport Responsibility Statutes became necessary since several legislators did not want to see any broadening of this exception, in particular with respect to commercial operators.[143]

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136 Coughlin v T.M.H. Int'l Attractions, Inc. 895 F. Supp. 159, 161 (W.D. Ky. 1995)

137 City of Louisville v Silcox, 977 S.W.2d 254, 255-57 (Ky. Ct. App. 1998)

138 See eg. for Arkansas: Carlton v Cleburne County 93 F.3d 505 at 510 (8th Cir. 1996); for Florida; Zuk v United States 698 F.Supp. 1577 at 1577 (S.D. Fla. 1988)

139 Plano v City of Renton (2000, Wn) 103 Wn. App. 910; 14 P.3d 871

140 Annotated Revised Code of Washington (ARCW) § 4.24.210 (1)

141 Wash. Rev. Code § 4.24.210

142 "Landowner's purpose test"

143 A detailed analysis of these Acts including a description of the potential interaction with the recreational use statutes would be beyond the scope of this paper. For further references see eg. Centner, T J (2000) at 19 ff

(iii) Other possible Exceptions

There are further exceptions which account for situations typical for a particular state or country. In the US, for example, Hawai'i has an additional exception, the "House Guest" exception. This exception imposes liability for injuries suffered by a house guest while on the owner's premises, even though those injuries were incurred by the house guest while engaged in one or more of the activities listed in the Hawai'ian Recreational Use Statute. This exception is based on two premises. First, it was contemplated that this exception will not deter landowners from opening for the public and second, those injuries would be covered by the homeowner's insurance policy.