
Analysis of Limited Liability Recreation Use Statutes in the Northern Forest States



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Prepared by:

Tommy L. Brown
Human Dimensions Research Unit
Department of Natural Resources



Cornell University
Human Dimensions Research Unit

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ABSTRACT

This publication presents the current limited liability recreation statutes in the Northeastern states and analyzes changes in these statutes over the last 15 years or so. Particular attention is given to the Northern Forest States of New York, Vermont, New Hampshire, and Maine. For these four states, court cases have been reviewed as well as the state statutes. A comparison of the statutes across states, with court cases serving as a background, allows the author to provide an appraisal of the status of the statutes in each of the four states and to offer suggestions for changes that would broaden or solidify the coverage of the statutes in the Northern Forest states. Major changes that have occurred in some states over the last 15 years include (1) broadening coverage of the statutes to include not only recreation activities but also trail construction and maintenance as well as a variety of other scientific, research, educational, and aesthetic uses; and (2) allowing the owner or occupant to receive some compensation and still have limited liability immunity under the statute.

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INTRODUCTION

For many decades sportspersons have depended heavily on private lands for recreation. Because of the variety of habitat on private lands, including cropped land, fallow fields, brush, and woodlots, game has typically been more abundant on private than public lands, and most hunting has occurred on private lands (Decker and Brown 1979). Private land access has also been important historically for fishing, and most states in the Northeast have had programs for several decades in which easements have been purchased from private owners to allow access to rivers, streams, and lakes for fishing.

More recently, access to private lands has become increasingly important in the Northern Forest states (Maine, New Hampshire, Vermont, and New York) for trails for hiking, snowmobiling, cross-country skiing, and use of all-terrain vehicles. For these activities, trails of many miles are often needed, and such trails in most cases can be developed only if parts of them pass through private lands. In other situations, access to private land is needed for portaging canoes and kayaks and for a variety of other types of outdoor recreation. The need for private lands for recreation is important not only to recreationists themselves. The supply of lands available for recreation also has economic importance to local communities; it affects businesses that serve both local residents and tourists who visit areas of the Northern Forests to participate in outdoor activities.

Gaining access to private lands for recreation has been a problem for multiple reasons. Landowners want some control over who uses their property and when it is used. Many owners either have direct experience, or know another owner who has experienced damage to their property from hunters or other recreationists (Siemer and Brown 1993). Beyond these concerns, a major obstacle to gaining access to private lands for recreation has been the liability (both perceived and real) that landowners potentially face for recreationists who are injured on their property. State legislatures have realized that landowners who allow recreationists on their property are providing a public service, and they began in the 1950s and 1960s to pass legislation limiting the liability of landowners who allow recreationists on their property free of charge or other considerations. All states now have such statutes, and the statutes in many states have been amended over the years to cover additional types of recreation and other non-commercial uses.

The objective of this study was to examine the current recreation use statutes of the four Northern Forest States to analyze the extent of their liability coverage, and to suggest additional refinements or amendments that would be useful to provide further protection to landowners. Recreation use conflicts, posting of private lands, and the importance of recreational access to private lands was examined in the Northern Forest states over a decade ago (Brown 1994), but has not been examined comprehensively since then. Several states have amended their statutes in the intervening years.

The focus of this effort is on access to private lands, but because the New York statutes provide some protection for public lands, analysis of that protection is also included in this study. The analysis uses two primary tools:

1. A comparative analysis of coverage in the four Northern Forest States and other northeastern states (whose case law is not analyzed as it is for the Northern Forest states), and

2. An analysis of more recent court cases for the Northern Forest states. The inclusive dates of this analysis vary by states because the dates of modification of each state's recreation use statutes vary. However, relevant court cases for each state were examined at least from 1990 to the present. An analysis of these court cases demonstrates (1) situations in which the statutes were ruled to be in effect and a summary judgment or other action was declared in favor of the defendant landowner; and (2) situations that the courts deemed to be beyond the coverage of the recreational use statutes. It is not clear from these court cases whether subsequent suits were brought and owners were found liable, but these cases help demonstrate the limits to the statutes in each state.

Based on these analyses, suggestions are made for future considerations each state might wish to consider if it wishes to provide additional types of liability protection for landowners and others who have the authority to make decisions about access, or to fill in some of the gaps that courts have ruled that the current statutes do not cover.

This analysis is limited to the state-level recreation use statutes, and to cases that have been decided in state courts. It is likely that the majority of cases are settled out of court. This analysis also does not include cases from federal properties such as national parks and national forests. However, a cursory review of federal district court records between 1990 and 2006 involving Acadia National Park, the Green Mountain National Forest, and the White Mountain National Forest, revealed only two cases involving injury from a recreation activity.

NEW YORK

Statute, Status, and Description

New York became the second state in the nation, after Michigan, and passed its initial limited liability statute under the Conservation Law in 1956, providing basic liability protection to owners who allowed hunting, fishing, trapping, and training of dogs on their property. General Obligations Law (GOL) 9-103 has existed in its basic form since 1963. Additional recreation and other activities have been added, as well as a special section pertaining to farms, in more recent years. GOL 9-103 has not been amended since 1984, although amendments are proposed in the New York Legislature nearly every year.

GENERAL OBLIGATIONS LAW
ARTICLE 9. OBLIGATIONS OF CARE
TITLE 1. CONDITIONS ON REAL PROPERTY

NY CLS Gen Oblig § 9-103 (2006)

§ 9-103. No duty to keep premises safe for certain uses; responsibility for acts of such users

1. Except as provided in subdivision two,

a. an owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hand gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes;

b. an owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

c. an owner, lessee or occupant of a farm, as defined in section six hundred seventy-one of the labor law, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep such farm safe for entry or use by a person who enters or remains in or upon such farm without consent or privilege, or to give warning of any hazardous condition or use of or structure or activity on such farm to persons so entering or remaining. This shall not be interpreted, or construed, as a limit on liability for acts of gross negligence in addition to those other acts referred to in subdivision two of this section.

2. This section does not limit the liability which would otherwise exist

a. for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or

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, or permission to train dogs was granted for a consideration other than that provided for in section 11-0925 of the environmental conservation law; or

c. for injury caused, by acts of persons to whom permission to pursue any of the activities enumerated in this section was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

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

GOL 9-103 lists the specific activities that are covered. The law protects owners and lessees/occupants of premises who do not accept a “consideration” for allowing recreational use,

except that it allows considerations to be given by the state or federal government. A separate section protects owners and lessees of farms from users and does not appear to restrict uses to the above list of activities.

GOL 9-103 indicates that property owners who give permission for their lands to be used does not extend any assurance that the property is safe for such use, and that extending permission does not elevate the user to the status of an invitee. The law holds except for cases of “willful or malicious failure to guard or to warn against a dangerous condition, use, structure, or activity,” and for situations in which a recreationist who was given permission causes injury to a person for whom the owner or lessee owed a duty of care (i.e., a paying customer or other person under the care of the owner, but not another recreationist or person in one of the above categories for which the GOL indicates the owner does not owe a duty of care).

Unlike the statutes of many other states, GOL 9-103 contains no statement indicating the extent of coverage to municipalities, counties, and to the state for lands and waters managed by those entities. As a result, many of the court cases pertaining to GOL 9-103 have involved a public owner. Through these cases, New York courts now have a considerable history of establishing the intent of the initial legislation as applied to public entities and the degree of care public entities owe to recreationists under specific circumstances.

Court-determined Breadth of the Statute

GOL 9-103 has held up well against court challenges for activities specifically covered by the statute. This review will be limited to cases that have been heard after the last amendment to the GOL in 1984.

Status of Owner, Lessee, or Occupant of Property

The presence of the corporate operator of a landfill on the property was sufficient for him to qualify as an “occupant” of the premises and to qualify for immunity under the GOL (*James v Metro N. Commuter R. R.* (1990), 166 AD2d 266).

Whether or not trail construction and maintenance groups qualify as occupants is unclear. In *Bush v. Valley Snow Throwers Inc. of Lewis County*, the Court ruled that Valley Snow Throwers of Lewis County Inc. is a private not-for-profit group that maintained snowmobile trails free of charge to the public. They are clearly authorized to be on the property for the purpose of maintaining the trail, and this authorized presence is sufficient to meet the meaning of “occupant” in the (GOL) statute. Thus, in the case of a snowmobile accident at a point where Valley Snow Throwers had re-routed the trail, Valley Snow Throwers was found to be protected by GOL 9-103 (Supreme Court of New York, *Lewis County* (2004), NY Slip Op 24555; 7 Misc. 3d 285; 790 N.Y.S.2d 350; Appeal upheld (Supreme Court of New York, Appellate Division, Fourth Department 2006; NY Slip Op 2063; 27 A.D.3d 1177; 810 N.Y.S.2d 694; 2006 N.Y. App. Div. Lexis 3319). The same Court ruled that the entity maintaining a designated snowmobile trail on unplowed roads qualified as an occupant (*Blount v. Town of West Turin* (2003), Supreme Court of New York, *Lewis County*; 195 Misc. 2d 892; 759 N.Y.S.2d 851).

However, this was not the ruling in a case where the plaintiff was injured while biking when he fell off a footbridge that he claimed to be in disrepair. While the Court decided in favor of the defendant on the ground that they had not maintained the footbridge, which was on the Bethpage Parkway right-of-way maintained by the State and that the defendant was not specifically responsible for doing so, the Court of Appeals ruled that the Long Island Greenbelt Trail Conference, Inc. (LIGTC) did not qualify as an occupier (*Rosen v. LIGTC, Inc.* (2006), Court of Appeals of New York, 6 N.Y. 3rd 703; 844 N.E.2d 790; 811 N.Y.S.2d 335,). This implies that had an injury occurred in an area where LIGTC had done specific maintenance, they might not have been accorded the protection of GOL 9-103.

Suitability of Land for Activity:

A hunter of woodchucks struck and killed by a bull at a dairy farm was ruled to have gone into the pasture where the bull was located and to have assumed the risks of doing so. The area was deemed suitable for hunting and the owner was deemed to be protected by the GOL (*Olson v Brunner* (1999, 4th Dept) 261 AD2d 922, 689 NYS2d 833, app den 94 NY2d 759, 705 NYS2d 6, 726 NE2d 483).

Portions of a property operated as a landfill were ruled physically conducive to motorbiking so as to satisfy the first element of test for determining suitability of property for application of GOL 9-103 in a personal injury action arising from a motorbiking accident, where the plaintiff provided "abundant evidence" of past recreational use of the landfill for motorbiking (*Albright v Metz* (1996) 88 NY2d 656, 649 NYS2d 359, 672 NE2d 584).

In *Bragg v. Genessee Agricultural Society* (1994, 84 NY2d 544, 620 NYS2d 322), the Court ruled that suitability of the property for an activity should be looked at from viewing the property generally and not one specific portion of the property. Thus, GOL 9-103 was found applicable for property containing an abandoned railway bed suitable for off-road motorcycle operation, even though gravel excavation had left a 10-foot opening in the rail bed.

Application to Suburban and Commercial Areas and Corporations:

GOL 9-103, while initially envisioned to apply to undeveloped lands, is not restricted to wilderness, remote, or undeveloped areas (*Iannotti v. Consolidated Rail Corp.* (1979), 74 NY2d 39, 544 NYS 2d 308, 542 NE2d 621). Commercial properties are not excluded from liability protection, and when properties such as a railroad (in this case) are conducive to public use for several of the listed recreational activities, the Court agreed that use of GOL 9-103 as an inducement for the owner to allow recreational use would further the intent of the statute. The fact that the injured person using his trail bike on the railroad right-of-way was involved in transportation between a shopping area and his home did not eliminate the application of the GOL to the case--the court ruled that the activity was consistent with recreational use as well as transportation.

The statute was ruled to apply to a commercial golf course that neither encouraged nor discouraged, but allowed its property to be used in winter without charge for tobogganing (*Dean*

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

An individual who bought a ski lift ticket to ascend a mountain with the intent of walking down, and who fell and was seriously injured while descending the mountain, was ruled to fall within a normal definition of hiking and the GOL was ruled relevant to the ski resort owner (Cometti v Hunter Mt. Festivals (1997, 3d Dept) 241 AD2d 896, 660 NYS2d 511).

The Faculty-Student Association at SUNY Fredonia was ruled a private corporation and not a municipality, and therefore fell within the immunity of GOL 9-103 in a case in which a sledder was injured on the property. (Heminway v State Univ. of New York (1997, 4th Dept) 244 AD2d 979, 665 NYS2d 493, app den 91 NY2d 809, 670 NYS2d 403, 693 NE2d 750).

The fact that a 15 to 20 acre parcel was in a suburban setting was ruled not to be a controlling factor and the statute was ruled applicable to a case in which a child biker was killed by a falling tree (Hirschler v Anco Builders, Inc. (1987, 4th Dept) 126 App Div 2d 971, 511 NYS2d 746). In another case involving a small lot, the GOL was ruled applicable in Suffolk County, where a child was injured riding a bicycle on a make-shift jumping course on an abandoned 60' X 100' vacant lot (Wiggs v Panzer (1992, 2d Dept) 187 AD2d 504, 589 NYS2d 591).

Erie Boulevard Hydropower, L.P., a hydropower provider, was found to be covered by GOL 9-103 in the case of a kayaking accident on its reservoir, even though a condition of the defendant's operating permit required it to allow boating (Guereschi v. Erie Boulevard Hydropower, L.P. (2005), Supreme Court of New York, Appellate Division, Fourth Department, 19 A.D.3d 1022; 797 N.Y.S.2d 679; 2005 N.Y. App. Div.).

Duty to People Not Asking Permission; "Willful and Malicious" Threshold:

Recreational "wanderers and wonderers" partaking of activities enumerated in GOL 9-103 are owed none of usual safekeeping duties imposed on landowners. However, such people must be clearly participating in one of the listed activities for the statute to apply (Farnham v Kittinger (1994) 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162).

While there is no automatic immunity from landowner liability under GOL9-103 on showing of "willful or malicious" failure to warn, inherent in such exposure to suit is a high-threshold demonstration by the injured party to show willful intent by the landowner, which includes showing of particular, not inferred, malice and willfulness, and not simple negligence (Farnham v Kittinger (1994) 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162).

Similarly, a landowner's conscious disregard and failure to warn of the obvious hazard of a gravel pit on land known to the owner to be used for recreational motorbiking was not sufficient as a matter of law to invoke the "willful and malicious" exception to the landowner's immunity under GOL 9-103, where there was no evidence of malice or willful intent on the owner's part (Bragg v Genesee County Agricultural Society (1994) 84 NY2d 544, 620 NYS2d 322).

In the case of a snowmobile fatality on a trail system on private lands in which a snow grooming association maintained the trail with the permission of the owner, although the groomer changed the location of the trail and failed to post any warning of a trail intersection, the court ruled that this negligence did not rise to the level of willful or malicious, and that the GOL applied to the groomer as an occupant of the property (*Bush v Valley Snow Travelers of Lewis County, Inc.* (2004, Sup.) 790 NYS2d 350).

Application to Posted and Unposted Property:

GOL 9-103 holds regardless of whether the property in question is open or posted with No Trespassing signs (*Bloom v Brady* (1991), 171 AD2d 910, 566 N.Y.S.2d 783; N.Y. App. Div. LEXIS 2618). It also holds even if the owner has previously had trespassers ejected from his property (*Hardy v Gullo* (1986, 2d Dept) 118 App Div 2d 541, 499 NYS2d 159).

Falling Within Definition of Activity Covered by Statute:

Where a bicycle rider tried to take a short-cut across a field near dark and rode into a drainage ditch, the Court ruled that bicycling was a covered activity even if the rider was not engaging in recreation, and that moreover there was no indication of malicious or willful intent on the part of the owner of the drainage ditch (*Seminara v Highland Lake Bible Conference, Inc.* (1985, 3d Dept) 112 App Div 2d 630, 492 NYS2d 146).

In another case involving a listed activity but one not being engaged in for a recreational purpose, the GOL was ruled to cover a situation in which a neighbor adjacent to an abandoned railroad right-of-way had built an ice and snow barrier to slow down ATV traffic. An ATV user was killed and the property owner (*Owasco River Railway Inc.*) was sued. The GOL was deemed to apply even though the ATV user was not riding for recreational purposes. (*Gardner v Owasco River Ry., Inc.* (1988, 3d Dept) 142 App Div 2d 61, 534 NYS2d 819, app den 74 NY2d 606, 544 NYS2d 820, 543 NE2d 85).

Also, in *Cometti v Hunter Mt. Festivals*, referred to above, a person who bought a ski lift ticket to the top of the mountain to facilitate walking down, and who was injured while descending, was ruled to fall within the definition of hiking.

Payments and Considerations:

That GOL 9-103 does not apply when a consideration is paid was ruled to extend to include a sportsman's club in which members pay an initial fee plus a monthly fee for activities that include cutting wood on the property, even though the plaintiff was a guest and not a paying member (*Schoonmaker v Ridge Runners Club 99, Inc.* (1986, 3d Dept) 119 App Div 2d 858, 500 NYS2d 562).

Application to Public Entities:

Understanding the applicability of GOL9-103 to the public sector is important because public entities in New York generally can be sued for acts of negligence. The NY Court of

Claims Act, Section 8, establishes that the State of New York waives its immunity from liability and agrees to have its liability determined in similar manner as for actions taken against individuals and corporations. Also, the General Municipal Law, Article 4, Section 50 e and i, establishes procedures for presenting tort claims against a county, city, town, village, fire district, or school district.

GOL 9-103 has been ruled by the courts to have limited application to public lands. Those that are undeveloped, unimproved, and unsupervised have generally been found to be subject to GOL 9-103. In other situations involving winter activities on lands developed and supervised only for summer activities, GOL 9-103 also has been found to apply.

The role of the landowner in respect to the public's use was ruled to be important in determining whether and when the GOL could be applied to state lands. The statute was deemed to apply to a state park in the case of injury to a cross-country skier because the state did not maintain cross-country trails, provide supervision in winter, or charge an access fee (*Stento v State* (1997, 3d Dept) 245 App Div 2d 771, 665 NYS2d 471, app den (1998) 92 NY2d 802, 677 NYS2d 72, 699 NE2d 432). The GOL was also ruled applicable to an undeveloped state park in the case of a hiker's fall at the park, in that the plaintiffs failed to show why the statute should not apply in that case (*Myers v State* (2004, App Div, 4th Dept) 782 NYS2d 326).

Similar logic was used by the Courts in applying the GOL to the NYS Canal Corp. in the case of an accident involving someone who fell while fishing from a terminal wall. While fishing was allowed, it was not supervised (*McCarthy v New York State Canal Corp.* (1998, 3d Dept) 244 AD2d 57, 675 NYS2d 254, app den 92 NY2d 815, 683 NYS2d 174, 705 NE2d 1215 and app den sub nom *McCarthy v New York State Thruway Auth.*, 92 NY2d 815, 683 NYS2d 174, 705 NE2d 1215).

Similarly, the GOL was ruled applicable to the City of Troy, when a sledder was struck and killed by a snowmobiler on a golf course that was not supervised in winter, and in which the City did not actively encourage winter recreation activities there (*Perrott v City of Troy* (1999, 3d Dept) 261 AD2d 29, 699 NYS2d 783). The GOL was also ruled to be applicable to a bike path used for snowmobiling in winter and owned by the Village of Akron because the Village did not supervise or maintain the trail in winter. *Blair v Newstead Snowseekers, Inc.* (2003, App Div, 4th Dept) 769 NYS2d 807).

In the case of a snowmobiling accident on an unplowed town road designated for snowmobile use and maintained by a private non-profit organization, the Court ruled that the municipality was acting in its proprietary role as a landowner, that the activity was unsupervised, and that the municipality as owner was protected by GOL 9-103, as was the "occupant" authorized to maintain the trail (*Blount v. Town of West Turin* (2003), Supreme Court of New York, Lewis County; 195 Misc. 2d 892; 759 N.Y.S.2d 85).

GOL 9-103 was ruled to insulate a school district from liability when a 5-year-old child was injured on a toboggan during a weekend day (*McGregor v Middletown Sch. Dist. No. 1* (1993, 3d Dept) 190 AD2d 923, 593 NYS2d 609).

In a case where the City of Glens Falls placed a fluorescent chain with streamers across a roadway previously used illegally by snowmobilers, and where a snowmobiler struck the chain and was killed, the court ruled that the GOL was applicable and that plaintiffs failed to demonstrate that any negligence was willful and malicious (*McCleary v. City of Glens Falls* (2006), NY Slip Op 6122—preliminary).

Court-determined Limitations of the Statute

Limitation to Owner, Lessee, or Occupant:

GOL 9-103 did not apply to an electric company that placed a guy-wire along a railroad right-of-way where a motorbike rider was injured because the electric company did not qualify as an owner, lessee, or occupant of the premises (*Adams v Rochester Gas & Elec. Corp.* (1993, 4th Dept) 191 AD2d 960, 594 NYS2d 501).

Also note the inconsistency of Court rulings as to whether trail construction and maintenance groups qualify as occupiers in the earlier discussion on Court-determined breadth of the statute.

Whether Activity Engaged in is Covered by the Statute:

The courts have examined the specified activities covered by the GOL carefully and at times have ruled an individual's activity at the time of an accident to be outside a typical definition of the covered activity, in which case the statute is not applicable. For example, in *Gough v. County of Dutchess* (1996, Misc. 2d 568; 638 N.Y.S.2d 290), a seven-year-old girl was injured after she walked 500 to 600 feet from a store to play on an unused train trestle, from which she fell and was injured. The court ruled that GOL 9-103 covers only the specific activities mentioned, and that this situation did not meet the definition of hiking. Although the defendant was a county government rather than a private landowner, nothing in the case summary suggests that the court held a higher standard of care for the County in this case than for a private owner.

The GOL does not apply to situations in which a defendant is not **engaging in** one of the listed activities. A man fishing on the bank of the Hudson River adjacent to a railroad ran to the track in attempt to rescue his dog and was struck by a train. The Court did not allow the Railroad Company the protection of GOL 9-103 because the fishing was not occurring on the railroad property (*James v. Metro N. Commuter R. R.* (1990), 166AD2d 266). The GOL also does not apply to swimming, which is not a listed activity (*Cramer v Henderson* (1986, 4th Dept) 120 App Div 2d 925, 120 App Div 2d 926, 503 NYS2d 207).

Vehicles are now made that can be used either on-road or off-road. An injury to people in such a vehicle off-road does not automatically invoke the statute—some recreational use or intent must be demonstrated (*Farnham v Kittinger* (1994) 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162). However, if there is a recreational use, the statute holds even for a vehicle such as a Land Rover (*Messinger v Festa* (1986, 2d Dept) 117 App Div 2d 784, 499 NYS2d 111).

Although not material to the summary judgment reached for other reasons, in *Gotz vs. State of New York* (2006 N.Y. Misc.—preliminary), the court ruled that GOL 9-103 would not apply to a spectator at the bottom of a sledding hill at Bear Mountain State Park who was injured when hit by a sled.

Whether Property is Suitable for the Activity:

Courts have ruled that for GOL 9-103 to apply, the property must be suitable to the activity in question. In *Gutchess v Tarolli* ((1999, 4th Dept) 262 AD2d 1008, 691 NYS2d 817), the court ruled that the GOL did not apply to an accident incurred while riding a bicycle across a front lawn because the lawn was not a suitable place for the activity.

Not Applicable to Highly Developed Areas:

Despite the ruled applicability of GOL 9-103 in some developed and commercial areas, the New York Supreme Court ruled in 1986 that the statute was never intended to apply to highly developed areas, and that it did not apply to property owned by the City of New York located in Westchester County, where a motorbike rider on a dirt road struck a cable strung across the roadway (*Russo v New York* (1986, 1st Dept) 116 App Div 2d 240, 500 NYS2d 673).

Willful and Malicious Threshold:

The construction of a 2-wire fence with lightly-colored strands of wire across an area known to be used by recreational vehicles, and the failure to warn recreationists of the fence was judged by a jury to be sufficiently “willful” on the part of the owner that a jury found defendants 65% liable and plaintiffs 35% liable for the occurrence of an accident on defendants' property. (*Hummel v Vicaretti* (1989) 152 AD2d 779).

Limits of Applicability to Public Areas

GOL 9-103 was determined not to apply to an injured biker in a supervised municipal park since the statute was intended to induce private owners to open their property (*Ferres v. New Rochelle* (1986) 68 NY2d 446, 510 NYS2d 57, 502 NE2d 972). Nor did it apply to an injury on a hill in a public (town) park used for sledding (*Sena v Town of Greenfield* (1998) 91 NY2d 611, 673 NYS2d 984, 696 NE2d 996), or on a public golf course open to the public and used for winter recreation activities (*English v City of Albany* (1997, 3d Dept) 235 AD2d 977, 652 NYS2d 873). Nor did it apply to a snow tubing accident at a supervised public park (*Rashford v. City of Utica*, 2005 N.Y Slip-on 8372; 23 A.D. 3d 1000; 803 N.Y.S.2d 453; 2005 N.Y.App. Div.).

It was affirmed that the GOL does not apply to ordinary users of municipal parks (*Bush v Saugerties* (1986, 3d Dept) 114 App Div 2d 176, 498 NYS2d 563). Also, following *Bush*, the Court ruled that GOL liability immunity does not apply to a state boat launch ramp, arguing that previous cases had established that the GOL does not apply to a public park or recreation facility open for public use (*Smith v State* (1986, 3d Dept) 124 App Div 2d 296, 508 NYS2d 277). Nor

did it apply in a county park where a snowmobiler was killed (*Meyer v County of Orange* (1987, 2d Dept) 129 App Div 2d 688, 514 NYS2d 450, app. dismiss'd without op. 70 NY2d 872, 523 NYS2d 497, 518 NE2d 8). Nor did it apply in the case of a boating-related accident at a town park because GOL 9-103 provided no inducement to the town to open to the public what it already considered part of a public park (*Bennett v Town of Brookhaven* (1996, 2d Dept) 233 AD2d 356, 650 NYS2d 752). Nor did it apply in the case of a boating accident on waters whose bottom was owned by a Town because the waterway was ruled to be a navigable water open to the public (*Melby v Duffy* (2003, App Div, 2d Dept) 758 NYS2d 89).

Because the intent of the GOL 9-103 is to apply to “gratuitous owners” who allow their property to be used, according to the Courts, the statute was ruled not to apply when an equestrian was injured by an uprooted tree branch on private property because the Village of Old Westbury had purchased an equestrian easement across the property. Thus, the defendant operator, Northshore Equestrian Center Inc., was ruled to have liability for maintenance of the trail (*Testani v Northshore Equestrian Ctr., Inc.* (1992, Sup) 156 Misc 2d 1031, 595 NYS2d 653).

The New York Supreme Court (second highest court in New York) ruled that while GOL 9-103 has general applicability to state lands, it is less applicable in situations where public access was traditionally provided, and was not applicable on a trail in which an ATV user was killed because this was not an approved use of the trail. In this case, NYSDEC staff stretched a cable that originally was painted orange and had orange streamers attached to it across a trail but the streamers had withered by the time of the accident. The Supreme Court upheld a lower court ruling that the State and the decedent were each 50% responsible, even though the decedent knew ATVs were not permitted on the trail (*Baisley v State of New York* (1990), 163 AD2d 502).

In *Schiff v. State of New York* ((2006), 818 N.Y.2d 597; 2006 N.Y.App. Div.), the courts found that the State should not be shielded from liability to a canoeist who stepped on a sharp underwater object because the State exercised supervision over the site by requiring permits, maintaining the launching site during the canoeing season, and actively encouraging canoeing by building steps and a canoe slide to encourage canoe portaging. Yet the court found that the State should not be expected to conduct a survey of the entire bottom of the area under water.

In the case of a rollerblading accident in an area maintained by the State, the court ruled that while GOL9-103 does not apply to this case because it occurred in an area supervised by a municipality or the State, and probably also because rollerblading is not a covered activity by GOL 9-103, nevertheless the rollerblade participant assumed the risks of the activity, and cracks in the pavement were not of sufficient hazard to find the State liable (*Werbelow v. State* (2005), Court of Claims of New York, N.Y. Slip Op. 50549U, 7 Misc. 3d 1011A; 801 N.Y.S.2d 244, 2005, Uncorrected).

VERMONT

Statute, Status and Description

The Vermont limited liability statute is found in Title 12 (Court Procedure): Chapter 203: (Limitations to Landowner Liability), Sections 5791-5795. It was substantially revised in 1997.

12 V.S.A. § 5791 (2006)

§ 5791. Purpose

The purpose of this chapter is to encourage owners to make their land and water available to the public for no consideration for recreational uses by clearly establishing a rule that an owner shall have no greater duty of care to a person who, without consideration, enters or goes upon the owner's land for a recreational use than the owner would have to a trespasser.

§ 5792. Definitions

As used in this chapter:

(1) *"Consideration" means a price, fee or other charge paid to or received by the owner in return for the permission to enter upon or to travel across the owner's land for recreational use. Consideration shall not include:*

(A) compensation paid to or a tax benefit received by the owner for granting a permanent recreational use easement;

(B) payment or provision for compensation to be paid to the owner for damage caused by recreational use; or

(C) contributions in services or other consideration paid to the owner to offset or insure against damages sustained by an owner from the recreational use or to compensate the owner for damages from recreational use.

(2) (A) *"Land" means:*

(i) open and undeveloped land, including paths and trails;

(ii) water, including springs, streams, rivers, ponds, lakes and other water courses;

(iii) fences; or

(iv) structures and fixtures used to enter or go upon land, including bridges and walkways.

(B) *"Land" does not include:*

(i) areas developed for commercial recreational uses,

(ii) equipment, machinery or personal property, and

(iii) structures and fixtures not described in subdivision (2)(A)(iii) or (iv) of this section.

(3) *"Owner" means a person who owns, leases, licenses or otherwise controls ownership or use of land, and any employee or agent of that person.*

(4) *"Recreational use" means an activity undertaken for recreational, educational or conservation purposes, and includes hunting, fishing, trapping, guiding, camping, biking, in-line*

skating, jogging, skiing, swimming, diving, water sports, rock climbing, hang gliding, caving, boating, hiking, riding an animal or a vehicle, picking wild or cultivated plants, picnicking, gleaning, rock collecting, nature study, outdoor sports, visiting or enjoying archeological, scenic, natural, or scientific sites, or other similar activities. "Recreational use" also means any noncommercial activity undertaken without consideration to create, protect, preserve, rehabilitate or maintain the land for recreational uses.

§ 5793. Liability limited

(a) Land. -- An owner shall not be liable for property damage or personal injury sustained by a person who, without consideration, enters or goes upon the owner's land for a recreational use unless the damage or injury is the result of the willful or wanton misconduct of the owner.

(b) Equipment, fixtures, machinery or personal property.

(1) Unless the damage or injury is the result of the willful or wanton misconduct of the owner, an owner shall not be liable for property damage or personal injury sustained by a person who, without consideration and without actual permission of the owner, enters or goes upon the owner's land for a recreational use and proceeds to enter upon or use:

(A) equipment, machinery or personal property; or

(B) structures or fixtures not described in subdivision 5792(2)(A)(iii) or (iv) of this title.

(2) Permission to enter or go upon an owner's land shall not, by itself, include permission to enter or go upon structures or to go upon or use equipment, fixtures, machinery or personal property.

§ 5794. Landowner protection

(a) The fact that an owner has made land available without consideration for recreational uses shall not be construed to:

(1) limit the property rights of owners;

(2) limit the ability of an owner and a recreational user of the land to enter into agreements for the recreational use of the land to vary or supplement the duties and limitations created in this chapter;

(3) support or create any claim or right of eminent domain, adverse possession or other prescriptive right or easement or any other land use restriction;

(4) alter, modify or supersede the rights and responsibilities under chapters 191, animal control, and 193, domestic pet or wolf-hybrid control, of Title 20; under chapters 29, snowmobiles, and 31, all-terrain vehicles, of Title 23; under chapter 23, bicycle routes, of Title 19; and under chapter 20, Vermont trail system, of Title 10;

(5) extend any assurance that the land is safe for recreational uses or create any duty on an owner to inspect the land to discover dangerous conditions;

(6) relieve a person making recreational use of land from the obligation the person may have in the absence of this chapter to exercise due care for the person's own safety in the recreational use of the land.

(b) Nothing in this chapter shall create any presumption or inference of permission or consent to enter upon an owner's land for any purpose.

(c) For the purposes of protecting landowners who make land available for recreational use to members of the public for no consideration pursuant to this chapter, the presence of one or more of the following on land does not by itself preclude the land from being "open and undeveloped": posting of the land, fences, or agricultural or forestry related structures.

§ 5795. *Exceptions*

This chapter shall not apply to lands owned by a municipality or the state.

Thus, Article 5791 specifies that the purpose of the act is to encourage owners to open their lands and waters for recreational uses to the public by establishing a rule that owners who do so for no consideration have no greater duty of care to recreationists than to a trespasser. Article 5792 defines terms and defines recreational use considerably more broadly than New York's statute, including in addition to outdoor recreation activities and gleaning: picking wild or cultivated plants, nature study, visiting or enjoying archaeological, scenic, natural, or scientific sites, or other similar activities, as well as any noncommercial activities undertaken without consideration to protect, rehabilitate, or improve the land for recreational uses.

Article 5793 (a) exempts landowners of liability for the above situations except for injury resulting from willful or wanton misconduct; and (b) exempts landowners from liability under the same conditions for people who enter the property for recreational purposes and then proceed to use equipment, machinery, personal property, or structures and facilities on the property.

Article 5794 provides some other protections for the owner: that letting people use the land does not restrict the owner's property rights; that it does not extend any assurance that the property is safe; and that it does not lessen users' responsibilities to look out for their own care and safety.

Finally, unlike New York's statute, Article 5795 clearly states that the act does not apply to lands owned by a municipality or the state.

Court-Determined Breadth and Limitations of the Statute

No court cases were found after passage of the revised legislation in 1997 or in the preceding five years that pertained to an adult recreationist on private lands. Whether there has simply been a shortage of cases involving serious injuries, or whether Vermont attorneys are well aware of the statute and it is therefore fulfilling its intent very well would require further research.

Two cases were found with a relationship to landowner liability and children. The first occurred in 1996, in which a child crawled under a barbed wire fence, into a pasture containing a horse, and was kicked and injured by the horse. Plaintiffs claimed the situation posed an attractive nuisance. Both the trial and appeals courts disagreed—the horse had no previous history of aggression, and there was insufficient foreseeability of an accident to justify requiring the owner to child-proof the pasture. The case briefing further explained that the attractive nuisance doctrine (in Vermont) is merely a detailed articulation of ordinary negligence, and that

a trespassing child is not entitled to a heightened standard of care by the possessor of the land (Zukatis by Zukatis v. Perry (1996), No. 94-593, Supreme Court of Vermont, 165 Vt. 298; 682 A.2d 964). Note also that a later case indicates that Vermont has not adopted the doctrine of attractive nuisance (Baisley v. Missisquoi Cemetery Ass'n (1998), No. 96-433, Supreme Court of Vermont, 167 Vt. 473; 708 A.2d 924).

In the second case (Baisley v. Missisquoi Cemetery Ass'n & Robert Young, Sr., (1998), 167 Vt. 473; 708 A.2d 924), three children entered a cemetery and took a ladder out of the cemetery to climb a tree whose branches overhung the cemetery property. A five-year-old child fell out of the tree and was impaled on the spikes of the top of the fence. The trial court had ruled the child a trespasser and had ruled in summary judgment for the defendant Cemetery Association. The Supreme Court ruled that trespass at the time of the accident was a technicality since the tree was not on cemetery property, that the Cemetery Association owed a duty of ordinary care to the defendant, and that a jury could potentially find the Cemetery Association and its caretaker-employee negligent of providing this level of care. Thus, the Court reversed the lower court's order of summary judgment for the defendant.

NEW HAMPSHIRE

Status and Description

The limited liability statutes for New Hampshire are found under the New Hampshire Revised Statutes Annotated (RSA), Title XVIII (Fish and Game), Chapter 212, RSA 212:34 and 215-A:34:

212:34 Duty of Care. *[RSA 212:34 effective until July 1, 2006; see also RSA 212:34 set out below.]*

I. An owner, lessee or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, trapping, camping, horseback riding, water sports, winter sports or OHRVs as defined in RSA 215-A, hiking, sightseeing, or removal of fuelwood, or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph III hereof.

II. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, ride horseback, hike, use OHRVs as defined in RSA 215-A, sightsee upon, or remove fuelwood from, such premises, or use said premises for water sports, or winter sports does not thereby:

(a) Extend any assurance that the premises are safe for such purpose, or

(b) Constitute the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed, or

(c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted except as provided in paragraph III hereof.

III. This section does not limit the liability which otherwise exists:

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

(b) For injury suffered in any case where permission to hunt, fish, trap, camp, ride horseback, hike, use for water sports, winter sports or use of OHRVs as defined in RSA 215-A, sightsee, or remove fuelwood was granted for a consideration other than the consideration, if any, paid to said landowner by the state; or

(c) The injury caused by acts of persons to whom permission to hunt, fish, trap, camp, ride horseback, hike, use for water sports, winter sports or use of OHRVs as defined in RSA 215-A, sightsee, or remove fuelwood was granted, to third persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

IV. Except as provided in paragraph III, a person using the premises as provided in paragraph I or given permission as provided in paragraph II, shall not maintain an action against the owner, occupant, or lessee of the premises for any injury which resulted while on the premises.

215-A:34 Posted Land.

*I. An owner may post all or any portion of his land against use by an OHRV. Such notices may read "SNOW TRAVELING VEHICLES PROHIBITED" or "OHRVs PROHIBITED" or may have in lieu of these words an appropriate sign with the designated symbol of sufficient size to be readable at a distance of 50 feet indicating that use of this land is prohibited for the purpose so specified. Whoever without right enters such land that has been so posted shall be guilty of a violation. Provided, however, that failure of an owner to post his land as provided in this section shall not be construed as granting any license to users of OHRVs to enter said premises, nor shall said failure be construed as implying any **duty of care** to the user of an OHRV by the owner.*

II. It is recognized that OHRV operation may be hazardous. Therefore, each person who drives or rides an OHRV accepts, as a matter of law, the dangers inherent in the sport, and shall not maintain an action against an owner, occupant, or lessee of land for any injuries which result from such inherent risks, dangers, or hazards. The categories of such risks, hazards, or dangers which the OHRV user assumes as a matter of law include, but are not limited to, the following: variations in terrain, trails, paths or roads, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps, and other forms of forest growth or debris, structures on the land, equipment not in use, pole lines, fences, and collisions with other operators or persons.

New Hampshire also has separate trails legislation in RSA 231-A:1ff, and RSA 231-A-8 contains the following clause on liability:

231-A:8 Liability Limited.

I. All trails established under this chapter shall be deemed to constitute land open without charge for recreational or outdoor educational purposes pursuant to RSA 212:34 and RSA 508:14, I, and the liability of owners, lessees or occupants of land affected by a trail, and of the municipality establishing the trail, shall be limited as set forth in those statutes.

*II. The liability of any person performing volunteer management or maintenance activities for or upon any trail established under this chapter, with the prior written approval of the body or organization with supervision over trail management pursuant to **RSA 231-A:7**, shall be limited as set forth in RSA 508:17, and such management shall not be deemed "care of the organization's premises" under RSA 508:17, IV.*

RSA 215-A:1 Definitions.

V. "OHRV" means off highway recreational vehicle.

VI. "Off highway recreational vehicle" means any mechanically propelled vehicle used for pleasure or recreational purposes running on rubber tires, tracks, or cushion of air and dependent on the ground or surface for travel, or other unimproved terrain whether covered by ice or snow or not, where the operator sits in or on the vehicle. All legally registered motorized vehicles when used for off highway recreational purposes shall fall within the meaning of this definition; provided that, when said motor vehicle is being used for transportation purposes only, it shall be deemed that said motor vehicle is not being used for recreational purposes. For purposes of this chapter "off highway recreational vehicle" shall be abbreviated as OHRV. OHRVs shall not include snowmobiles as defined in RSA 215-C.

RSA508:17 provides immunity from civil liability to volunteers of nonprofit organizations or governmental entities if the volunteer organization has a record that the person in question is a volunteer, the volunteer was acting in good faith and within the scope of the official functions and duties of the organization, and the damage or injury was not caused by willful, wanton, or grossly negligent misconduct by the volunteer.

New Hampshire's statutes, which go back to 1961, have been evolving recently—coverage of horseback riding was added to RSA 212:34 in 2003, and Paragraph 4 was added in 2005, effective 2006. Paragraph II of RSA 215-A:34 was added in its current form in 2006. The trails liability portion was added in 1993.

Of particular note is the last section (IV) of New Hampshire's Duty of Care Statute (RSA 212:34), which states that except for situations in section III (willful or malicious failure to guard or warn against; recreation involving a consideration granted to the owner; an injury to someone to whom the owner owed a duty), a person using the property for recreation shall not maintain an action against the owner, occupant, or lessee of the premises for any injury that resulted from being on the premises.

Court-Determined Breadth of the Statute

The limited liability statute was upheld in a 1991 case in which a diver into a lake with a dam hit his head on a rock on the bottom of the lake and sustained a spinal injury. The water level in the lake at that time was above its mean low level. A lower court returned a summary judgment for the defendant property owner, and the Supreme Court, upon appeal, agreed with this ruling, and pointed out that RSA 212:34 clearly stated that the owners had no duty to warn of this water level condition. A technicality in this case which probably had no bearing on the outcome was that the State of New Hampshire apparently owns the bed of the lake, including the rock on which the plaintiff hit his head.

Court-Determined Limitations of the Statute

In a case implying a limitation to the limited liability statutes, involving a business, a mother went to a ski lodge as a volunteer and spectator for an event in which the daughter's ski club paid over \$2,000 to reserve the facility for a meet. The mother, who paid nothing herself to enter the facility, fell into a crevasse and severely injured her knee. A lower court awarded the ski facility a summary judgment on the basis that the plaintiff did not pay any consideration. The appeal court determined that the relevant fact was not whether the defendant paid a consideration, but rather whether or not she was on the property for a purpose related to the owner's business for which the owner customarily charges. Thus, the previous order of summary judgment was reversed and remanded. (*Soraghan v. Mt. Cranmore Ski Resort Inc.*, (2005), 152 N.H. 399; 881 A.2d 693).

In a second case, the Supreme Court of New Hampshire ruled that the statutes apply to opening private property to the general public and not to a private party held on private property (i.e., social guests). Thus, in the case of a two-year-old child who drowned in a pond bordering the owner's property, the Supreme Court reversed and remanded a trial court decision of summary judgment in favor of the defendant. In doing so, the court noted previous cases in which some liability had been found in the case of a developmentally disabled child who drowned in a neighbor's man-made pond and a person who was injured diving into a defendant's back-yard swimming pool. Thus, the Court narrowly interpreted the limited liability statutes to apply only to situations it viewed the state legislature to intend. (*Estate of Jacob Gordon-Coutre v. George Brown* (2005), 152 N.H. 255; 876 A.2d 196). Note that this case contains some history of recreation use statutes nationally and the evolution of case law in New Hampshire.

In a limitation of liability not specific to the above statutes, Baker Brook Lodges and Motel has property on both sides of Route 302. The lodge owners agreed in 1993 to house an Orthodox Jewish group and to allow them to conduct religious services on Saturday morning, knowing that many of the group would need to cross the highway. On that morning, a five-year-old child darted into the roadway and was hit by a car. The Supreme Court overturned a lower court ruling of a summary judgment in favor of the defendant, ruling that a motel or inn has a special relationship with its guests. (*Kellner v. Lowney* 145 N.H. 195; 761 A.2d 421, 2000).

MAINE

Status and Description

The Maine limited liability statute, which dates in its original form from 1961, appears in the Maine Revised Statutes Annotated, Title 14 (Court Procedure-Civil), Part I (General Provisions), Chapter 7 (Defenses Generally), Section 159-A:

14 M.R.S. § 159-A (2005)

*§ 159-A. **Limited liability** for recreational or harvesting activities*

1. DEFINITIONS. As used in this section, unless the context indicates otherwise, the following terms have the following meanings.

A. "Premises" means improved and unimproved lands, private ways, roads, any buildings or structures on those lands and waters standing on, flowing through or adjacent to those lands. "Premises" includes railroad property, railroad rights-of-way and utility corridors to which public access is permitted.

B. "Recreational or harvesting activities" means recreational activities conducted out-of-doors, including, but not limited to, hunting, fishing, trapping, camping, environmental education and research, hiking, recreational caving, sight-seeing, operating snow-traveling and all-terrain vehicles, skiing, hang-gliding, dog sledding, equine activities, boating, sailing, canoeing, rafting, biking, picnicking, swimming or activities involving the harvesting or gathering of forest, field or marine products. It includes entry of, volunteer maintenance and improvement of, use of and passage over premises in order to pursue these activities. "Recreational or harvesting activities" does not include commercial agricultural or timber harvesting.

C. "Occupant" includes, but is not limited to, an individual, corporation, partnership, association or other legal entity that constructs or maintains trails or other improvements for public recreational use.

2. LIMITED DUTY. An owner, lessee, manager, holder of an easement or occupant of premises does not have a duty of care to keep the premises safe for entry or use by others for recreational or harvesting activities or to give warning of any hazardous condition, use, structure or activity on these premises to persons entering for those purposes. This subsection applies regardless of whether the owner, lessee, manager, holder of an easement or occupant has given permission to another to pursue recreational or harvesting activities on the premises.

3. PERMISSIVE USE. An owner, lessee, manager, holder of an easement or occupant who gives permission to another to pursue recreational or harvesting activities on the premises does not thereby:

A. Extend any assurance that the premises are safe for those purposes;

B. Make the person to whom permission is granted an invitee or licensee to whom a duty of care is owed; or

C. Assume responsibility or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

4. LIMITATIONS ON SECTION. This section does not limit the liability that would otherwise exist:

A. For a willful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity;

B. For an injury suffered in any case where permission to pursue any recreational or harvesting activities was granted for a consideration other than the consideration, if any, paid to the following:

1) The landowner or the landowner's agent by the State; or

2) The landowner or the landowner's agent for use of the premise on which the injury was suffered, as long as the premises are not used primarily for commercial recreational purposes and as long as the user has not been granted the exclusive right to make use of the premises for recreational activities; or

C. For an injury caused, by acts of persons to whom permission to pursue any recreational or harvesting activities was granted, to other persons to whom the person granting permission, or the owner, lessee, manager, holder of an easement or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

5. NO DUTY CREATED. Nothing in this section creates a duty of care or ground of liability for injury to a person or property.

6. COSTS AND FEES. The court shall award any direct legal costs, including reasonable attorneys' fees, to an owner, lessee, manager, holder of an easement or occupant who is found not to be liable for injury to a person or property pursuant to this section.

The Maine limited liability statute has been updated since the last review of these statutes in the Northern Forest states—in 2001 and perhaps at other times. The previous statute has been broadened in several ways:

1. The definition of “premises” to which the law is applicable has been broadened to include private ways and roads as well as railroad rights-of-way and utility corridors to which public use is permitted;

2. In the list of recreational or harvesting activities the language (including) “but not limited to” has been added.
3. A definition of occupant has been added that includes a variety of entities that construct and maintain trails for public use.
4. Under “Limited Duty,” a sentence has been inserted specifying that the limited duty applies regardless of whether or not permission has been granted.
5. Under 4. Limitations on Section, Part B-2 allows a payment to the landowner or his agent for recreational use as long as the premises are not used primarily for recreational purposes, and as long as the payment is not for exclusive use of the property. Note that Maine is the only Northern Forest state to have such a clause in its limited liability recreational statute.
6. Under 6, “Costs and fees,” if an owner, etc. is sued and found not liable, court costs, including attorneys’ fees, are awarded to that owner.

Court-Determined Breadth and Limitations of the Law

No recent cases have been decided since the above changes have occurred in Maine’s limited liability statute. As a result, we are forced to look at some previous cases to determine how the statute was previously interpreted.

Discussion in a recent court case decision refers back to *Stanley v. Telcom Maine, Inc.* ((1988), 541 A2d 951, 1988). This case involved an injury to a 14-year-old minor who was tobogganing in a commercial sand pit and was injured when she hit a sand mound. The Supreme Judicial Court of Maine, in upholding a lower court decision of summary judgment for the defendant, noted that the limited liability statute applies (1) to minors, (2) to commercially owned areas, and (3) in attractive nuisance situations if the statute otherwise would apply.

In a 1995 case (*Rogers v. Gardner* (Civil Action Docket No. CV-93-566, 1995), the statute was ruled to apply to a hunting case, even though the hunting was for a nuisance skunk, as opposed to recreational hunting. The fact that the defendant, whose property was adjacent to the plaintiff, who was frequently out of town, and who allowed the defendant access to his house to a freezer, was insufficient for this to be deemed a consideration for hunting.

The statute was also found applicable in an automobile accident on Great Northern lands to a person driving on those lands as part of his outfitting business, even though the plaintiff had paid a \$15 fee to the North Main Woods Association. The Court ruled that even if this fee could be considered a consideration, the plaintiff was not given exclusive access to the property, and the property is not used for commercial recreation purposes. (*Hafford v. Great Northern Nekoosa Corp* 687 A.2d 967, 1996).

In *Landry et al. v. Berube* ((1996), Civil Action Document No. CV-94-355), the court ruled that the limited liability recreation statute as it existed in 1992 did not apply to an invited

guest who broke his leg playing volleyball on a front lawn. The language pertaining to recreation activities covered under the statute has broadened since 1992, but given the intent of the act, which courts give substantial weight to, it is questionable whether the statute would be deemed to apply to this situation today.

Hauling a couch to a camp, at which point a vehicle accident occurred, was ruled to be pursuing the use of the camp for hunting or fishing, and to be within the provisions of the statute (*Robbins v. Great Northern Paper Co.*, (1989), 557 A. 2d 614).

The statute does not apply to public lands because the motivation for the statute was to encourage private owners to open their lands for recreation. (*Noel v. Ogunquit*, 555 A.2d 1054, 1989).

In a case where a minor was injured while using a wood splitter, the limited liability statute was deemed to apply only to premises liability and not to supervisory negligence in the use of dangerous equipment (*Dickinson v. Clark* (2001), ME 49, 767A. 2d 303).

Radley v. Fish ((2004). ME 87; A.2d 1196) involved a bicycle-motorist accident that occurred off the defendant's property (after the bicyclist turned off the property onto a road). It was therefore ruled that the limited liability statute was not applicable.

ADDITIONAL PROTECTION OFFERED BY STATUTES OF OTHER NORTHEAST STATES

A full analysis of the statutes and court cases of other Northeastern states is beyond the scope of this report. However, the statutes for Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, and West Virginia, Virginia were examined. Situations for which the statutes of these states offer additional liability protection for landowners beyond that provided by any of the four Northern Forest States is summarized briefly below.

Massachusetts

1. The Massachusetts statute, Massachusetts Law, Chapter 21, Articles 17C-D, attempts first to cover any loopholes that might exist in applying having permission granted by an owner, lessee, or licensee by applying the statute to anyone with an interest in the land, waters, structures, and equipment who legally gives permission.
2. The purposes of use covered by the statute are very broad (see below).
3. The statute specifically applies without limitation to minors, and
4. The statute allows a voluntary contribution or payment if it is not connected to use of the land.

§ 17C. Limitation of Liability of Landowners Making Land Available to the Public for Recreational Purposes.

(a) Any person having an interest in land including the structures, buildings, and equipment attached to the land, including without limitation, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person.

(b) The liability of any person who imposes a charge or fee for the use of his land by the public for the purposes described in subsection (a) shall not be limited by any provision of this section. The term "person" as used in this section shall be deemed to include the person having an interest in the land, his agent, manager, or licensee and shall include without limitation, any governmental body, agency or instrumentality, nonprofit corporation, trust or association, and any director, officer, trustee, member, employee or agent thereof. A contribution or other voluntary payment not required to be made to use such land shall not be considered a charge or fee within the meaning of this section.

Article 17D additionally covers entry for removal of fuel wood when no charge is made.

Rhode Island

The Rhode Island statutes are found in General Laws of Rhode Island, Title 32, Sections 6-1 through 6-6. Section 6-4 specifically covers lands leased to the state or any subdivision or agency thereof, or land in which any of these entities possesses an easement for recreational purposes.

Connecticut

The Connecticut General Statutes, Sections 52-557f-i, also (like Rhode Island) cover lands leased to the State or a subdivision thereof.

New Jersey

The New Jersey Statutes, Title 13, Sections 13:1B15.134-142, apply not to all owners, but to those who are participating in an agreement with the New Jersey Department of Environmental Protection in its Open Lands Management Act. Owners who enter into an “access covenant” with the State, guaranteeing open access, may receive financial assistance and

in-kind services from the State. Such owners are also offered liability protection similar to that provided by other states.

Pennsylvania

Pennsylvania Statutes, Title 68, Sections 477-1-8 include a broad definition of the recreation activities and enjoying historical, archaeological, scenic, or scientific site. The Recreational Use definition also includes the words “not limited to” and “any of the following or any combination thereof:

§ 477-2. Definitions

(3) "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, water sports, cave exploration and viewing or enjoying historical, archaeological, scenic, or scientific sites.

Maryland

The Maryland Code, Natural Resources Article, Title 5-1104 does not list recreation activities but states that the limited liability applies to those using the property for any recreational or educational purpose or to cut firewood for personal use.

Delaware

The Delaware Statutes (Delaware Code, Title 7:5901-5907) list recreation activities as well as viewing or enjoying historical, archaeological, scenic or scientific sites. However, the statute indicates that the liability is not limited to the listed activities.

West Virginia

The West Virginia statute, West Virginia Code Chapter 19-25-1 to 19-25-5, covers “military training or recreational or wildlife propagation purposes.” It also covers an owner who grants a lease to federal or state government, any agency thereof, or any county, municipality, or agency thereof.

West Virginia has also joined Maine in allowing some financial compensation to the owner. Chapter 19-25-5 allows for the activities covered by the statute a payment to the owner not to exceed \$50 per year per participant.

ANALYSIS AND FUTURE CONSIDERATIONS FOR THE NORTHERN FOREST STATES

The purpose of this study has been to analyze the status of the recreational use statutes in the Northern Forest states and to indicate areas where limited liability might be further extended to owners. Based on the above information, additional considerations are provided for each

state. Each of these considerations has been adopted by at least one other Northeast state. The author takes this position for two reasons (1) the fact that a specific provision has been used in another state contributes to the likelihood that constitutionality will not be a problem if the provision is passed by other states; and (2) incorporating all of the aspects of all 12 Northeastern states would significantly improve the liability protection for any one state.

New York

Activities covered:

The greatest specific weakness in the list of activities covered by GOL 9-103 is that swimming is not included. Also not specifically mentioned is trail construction, improvements, and maintenance. New York could consider following several other states and including all activities engaged in for recreational, educational, and scientific purposes as well as visits to sites of particular historic or cultural interest. A further rationale for broadening the legislation is that there are situations in which a person who intends to, or has just completed an activity of hunting, hiking, etc. is injured on the property. Depending on the specifics of the case, a court may rule that there is not special protection under the statute because the person was not actively participating in the covered activity at the time of the accident.

Status of person covered by statute:

Currently the legislation applies to an owner, lessee, or occupant. The courts have been inconsistent as to whether trail construction and maintenance people qualify as occupants. New York may want to consider a new section or inserted language in GOL 9-103 that specifically covers these groups. Moreover, one could envision situations where an owner has left his property for a period of time and left a friend, neighbor, or relative in charge, and such person has allowed another person to use the property. In the event of an accident, the person giving permission, assuming he was not living on the property temporarily and thus qualifying as an occupant, would not be subject to the protection of GOL 9-103. New York might consider broadening its statute in a similar way as Maine, by including a definition of occupant that includes trail construction and maintenance activities, and also by following Massachusetts and giving protection to anyone with an interest in the land who legally grants permission.

Suitability for the activity:

Court challenges to applicability of GOL 9-103 have not been a problem for the primary audiences for whom the legislation was designed—owners of largely undeveloped lands. However, the courts have used the term “suitability” in two different aspects—in terms of whether the land in question was more highly developed than that for which the statute was designed, and also to the general suitability of the property for the activity in question. Careful examination of the extent to which the property is developed and in a developed area seems quite appropriate. However, it does not seem appropriate that a landowner’s access to the liability protection offered by the statute should be jeopardized because a recreationist chose to use a given property for a covered activity for which it could be successfully argued that the property is inappropriate. To date this has only occurred regarding bicycling in a front yard (*Gutchess v*

Taolli). But it could conceivably happen in other situations (e.g., a motorized recreational vehicle user who attempts to use property that has no trails). Suitability is not expressly written into the GOL, so a clause would need to be added to ensure that the statute would apply in such cases.

Type of Lands to which Statute Applies:

The courts have not been entirely consistent as to the types of land to which GOL 9-103 applies. In *Russo v. City of New York and Consolidated Edison* (1986), the court went back to the original statute passed in 1956, which applied only for hunting, fishing, trapping, and training of dogs, and whose accompanying legislative memorandum stated that the statute was intended to assist in the management and use of wildlife resources of the state. The Court in *Russo v. City of New York and Consolidated Edison* stated that “the legislature never intended the statute to (apply to) premises situated in, through, or around highly developed areas, (but only to) land located in remote, undeveloped areas.” Thus, the court ruled that the statute did not apply to a strip of land ranging from 125 to 250 feet in width that runs the entire length of Westchester County and perhaps beyond (obviously interrupted in places by streets and roads). In a number of other cases, the courts seem to have recognized that as additional activities have been added to the statute in more recent years, the statute should also apply to less remote properties.

Although the statute itself does not refer to remote, undeveloped lands, the language cited above in *Russo* is there for future courts to consider if they wish to make a narrow interpretation based on the historic intent of the statute. Of primary concern is that large portions of New York have become suburbanized or exurbanized to the extent that many holdings suitable for recreation activities, even if they have retained the acreage they had 50 years ago, are no longer in “remote, undeveloped areas.” It is interesting that Section 1c, which pertains to farms, is written as though it pertains to all farms, regardless of location. There seems to be no rational reason for treating farms differently from other undeveloped lands with regard to their location. Thus, future court cases should be watched carefully to determine whether narrow court rulings occur with regard to location of the property; if so, a change in the legislation may be warranted.

Receipt of Consideration by Owner:

As in most other states, owners in New York are not protected under the recreation use statute if they receive any consideration at all directly from the recreationist or other user. It is interesting that the Northern portion of the Northern Forest region has historically had the strongest tradition of open access of undeveloped lands, yet Maine now allows owners to receive a fee when the fee is not for exclusive access or when the primary use of the property is non-commercial. West Virginia also allows the owner to receive up to \$50 per year per recreationist. With the majority of New York lands now posted, New York may wish to consider amending GOL 9-103 to allow some compensation to those who allow others to use their property.

Limits of Applicability to Public Areas:

Because previous New York courts have ruled that the purpose of GOL 9-103 was to provide an incentive for owners to allow public use of their lands gratuitously, the statute has

always had limited applicability to public lands. Public parks and other areas of any size where improvements have been made and where there is some degree of supervision have generally been ruled not to fall within the scope of the statute, while remote areas such as state forests and wildlife areas, or less remote areas such as golf courses that are totally unsupervised in winter, have generally been ruled to fall under the statute. It should be pointed out that in any of the situations discussed in this report, a finding that the limited liability recreation statute is not applicable does not imply liability on the part of a defendant. Rather, there is no special immunity that applies to these cases, and they must be reargued under common law principles.

Vermont

Because of 1997 revisions, Vermont's recreational use statute is considerably broader than New York's, except that the Vermont statute does not apply to public lands. The Vermont statute covers virtually all outdoor activities and also work done on properties without charge for conservation and other purposes. No recent court cases are available that indicate loopholes or other possible exceptions to the statute that should be addressed. Vermont might consider whether it would wish to allow owners to receive a voluntary gift or a small payment and still qualify for protection under its recreation use statute.

Although the statutes in most states were written to apply entirely or primarily to private lands, it is not clear why states and municipalities should have greater liability for open, unimproved lands that they do not supervise. State forests and wildlife management areas are good examples of such lands. Vermont and other states may wish to consider broadening their statutes in this respect. Vermont statute 12 V.S.A. § 5601 holds that the State shall be liable for injuries to persons or property or loss of life caused by negligence of its employees in the same manner and to the same extent as a private person, subject to maximum liability of \$250,000 to one person and aggregate liability of \$500,000 to all persons arising out of a single occurrence.

New Hampshire

The New Hampshire statutes as modified in recent years appear to be serving landowners well. The number of lawsuits has been minimal, probably due to the combination of the tightness of RSA 212:34, including Section IV that prohibits suits against owners for injuries suffered by recreationists except for special circumstances involving a consideration paid to the owner, a willful or malicious failure to guard or warn against a hazardous situation, or an injury to someone to whom the owner owed a duty of care.

Looking to the future, although the list of activities covered by RSA 212:34 is broad, a list of activities will never be all-inclusive. Birdwatching is not listed, for example. Scouting for deer without a weapon may not be considered to be hunting. Thus, New Hampshire may wish to consider abandoning the list of activities and instead covering any activity done for recreational, educational, or scientific purposes.

The New Hampshire statute, like that of most states, holds only when the owner receives no consideration for use of the property. Realizing that many owners feel some responsibility to show prospective recreationists the property and to exercise some supervision over its use, New

Hampshire may wish to consider allowing landowners to be paid either a voluntary contribution or some payment, as has been done in Maine, West Virginia, and Massachusetts.

The New Hampshire statute does not apply to public lands. As indicated above in the considerations for Vermont, it is not clear why states and municipalities should have greater liability for open, unimproved lands that they do not supervise. State forests and wildlife management areas are good examples of such lands. New Hampshire and may wish to consider broadening their statute in this respect. New Hampshire Statutes, Title LV, Chapter 541-B established a five-member Board of Claims to hear and decide claims against the state of \$50,000 or less, and the Superior Court hears claims in excess of \$50,000.

Maine

Maine, from an overall perspective has the most liberal limited liability recreational use statute in the Northeast. The statute does not limit the activities covered to those itemized in a list, and it covers environmental education and research activities. Moreover, the statute allows an unlimited payment to the owner as long as the property is not used primarily for commercial purposes and the payment is not for exclusive use of the property. Additionally, the statute directs the court to award any direct legal costs, including reasonable attorney's fees, to an owner or occupant who is sued but found not liable for an injury suffered in a situation in which this statute applies. Only two cases were found since the statute was modified. One case involved an injury off the property; the second involved an injury not related to activities covered by the statute.

The Maine limited liability statute (14 M.R.S. § 159-A) apparently does not apply to public lands (not written into the legislation but from a court ruling in *Noel v. Ogunquit* (1989)). However, another law provides broad liability immunity to owners of public lands. Statute 14 M.R.S. § 8104-A, Section 2, states that a governmental entity is not liable for any claim which results from the construction, ownership, maintenance or use of unimproved land; historic sites; and land, buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.

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