CITIZENS' GUIDES TO OCEAN AND COASTAL LAW

Protection Against Liability for Landowners Who Allow Public Access

MARINE LAW INSTITUTE

Marine Law Institute
University of Maine School of Law
246 Deering Avenue
Portland, Maine 04102
November, 1990

Many private landowners of coastal land are willing to allow their neighbors or the public to use part of their land for recreational or harvesting activities. However, they sometimes hesitate to give permission because they are concerned they could be sued if somebody is injured on their land. This pamphlet explains the Maine law which greatly limits the liability of private landowners and suggests methods for further reducing any risk.[1]

Statute Limits Liability of Private Landowners Who Permit the Public to Use Their Land for Recreation or Harvesting

State law generally limits the liability (reduces the legal responsibility for injuries) of private landowners[2] who provide recreational and harvester users with access to their land. The law, called "Limited Liability for Recreational or Harvesting Activities,"[3] provides that:

> An owner, lessee or occupant of premises shall owe no 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.[4]

This means that a landowner does not have an affirmative duty of care to protect a person who enters his or her land for recreational or harvesting purposes from injury due to the condition of the premises or any hazardous condition, use, structure, or activity on the premise. The landowner is under

no legal obligation to keep his or her property in a safe condition for the benefit of the public, nor does the landowner have an obligation to warn the public about potential dangers on the property.

The standard is the same — no duty of care — regardless of whether the person enters with or without permission of the owner.[5] This differs from the usual rule, which states that an owner owes a person with permission to enter a place (for example, a person invited into his or her home) the duty to take reasonable steps to protect that visitor from injury.

To What Land Does This Apply?

The "premises" to which this statute applies includes "improved and unimproved lands, private ways, any buildings or structures on those lands and waters standing on, flowing through, or adjacent to those lands."[6] While most recreational or harvesting activities are likely to occur on rural or semi-rural lands, by definition, "improved" lands are included too. The statute applies equally to commercial (e.g., paper company lands, sandpits, etc.) and non-commercial properties.[7]

Despite the inclusion of buildings and structures in the definition of "premises," the statute only applies to injuries which occur in the course of pursuing out-of-doors recreational activities or harvesting activities; it would not apply to the situation where a landowner invites a person into his or her home.

What Is Meant by "Recreational or Harvesting Activities"?

The statute limits the landowner's liability only when a person enters, uses, or passes over the land to pursue "recreational or harvesting activities." By definition in the statute, "recreational activities" means recreational activities **conducted out of doors**, including but not limited to hunting, fishing, trapping, camping, hiking, sight-seeing, operation of snow-traveling and all-terrain vehicles, skiing, hang-gliding, boating, sailing, canoeing, rafting, or swimming. "Harvesting activities," defined in less detail, means activities that involve harvesting (such as clamming or worming for commercial rather than recreational purposes) or gathering forest products.

The specific activities listed are illustrative only; other activities which are not specifically listed, but are similar, are also covered. For example, the U.S. Court of Appeals, in broadly construing covered activities, upheld the District Court's determination that going to a beach in a park to drink a cup of coffee is a recreational activity within the statute.[8]

The statute extends its limited liability protection if people have entered, used, or passed over the premises to pursue those activities. They do not need to actually engage in recreational or harvesting activities on the property as long as their purpose in being on the property is related to the pursuit of those activities. For example, a landowner may allow clammers to pass over property to reach the shore which is adjacent to, but not part of, that property. The owner is entitled to the statute's protection, even though the clam harvesting takes place on adjacent property.

Two Exceptions When a Landowner May Still Be Liable

The statute identifies two situations in which a landowner **may** still be held liable for injuries suffered by a person on his or her land for recreational or harvesting activities.[9]

- if the landowner **willfully or maliciously** fails to guard or warn against a dangerous condition, use, structure or activity; or

- if the landowner **receives compen-**

sation in exchange for granting permission to use the land for recreational or harvesting activities.

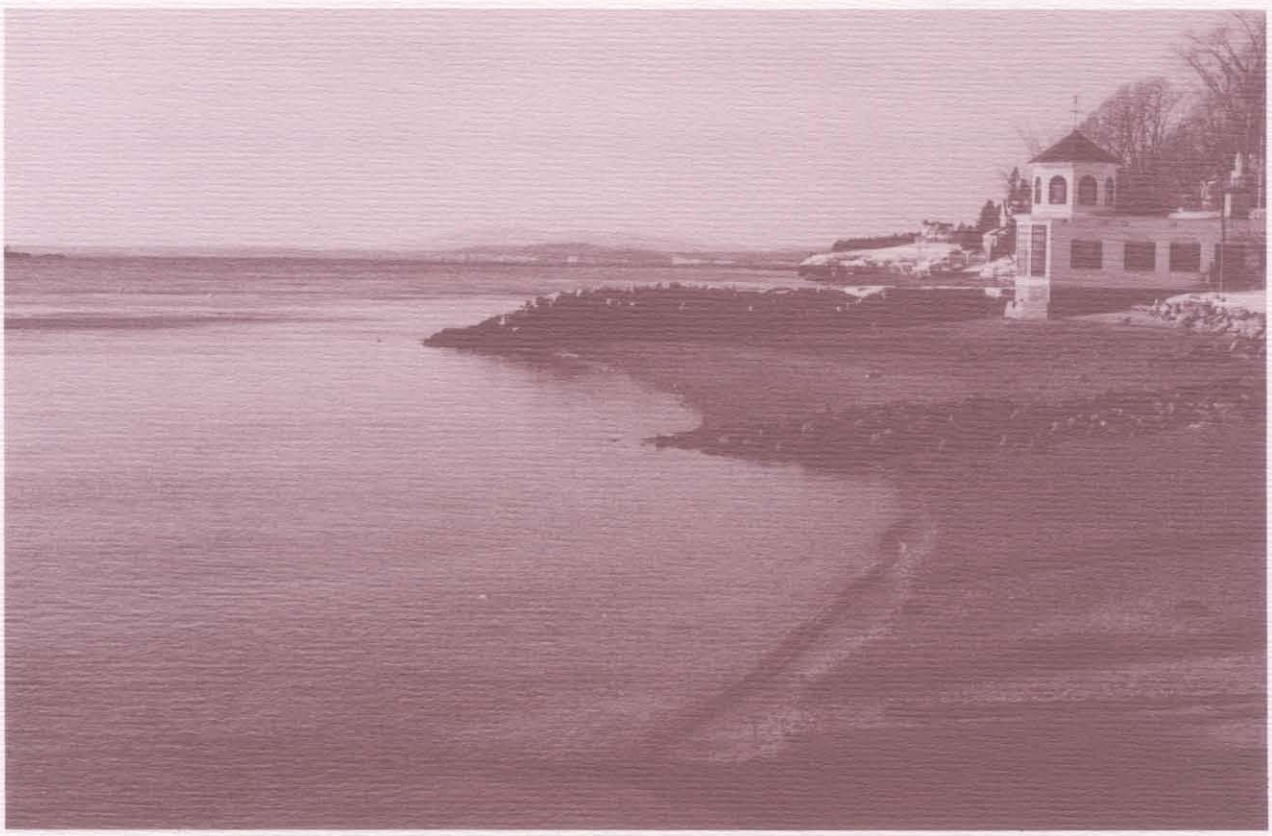
Willful or Malicious Failure to Guard or Warn

The statute is not designed to give the landowner blanket protection for all injuries regardless of the cause. A landowner is relieved of the duty to inspect and maintain the property in a safe condition for the benefit of recreational users. **However, the landowner may still be found liable for injuries that result from the landowner's unreasonable and extreme departure from due care where the risk of injury is apparent.**[10]

It is difficult to define willful or malicious conduct with precision; the courts make the determination on a case-by-case basis. It requires a greater lapse than simple carelessness; the injury must result because the landowner recklessly, callously, or deliberately and consciously disregarded a known condition which presented extreme danger or serious risk to the public.[11] For example, if a landowner intentionally alters a frequently-used bridge so that it will collapse upon use (not just allows it to deteriorate through natural processes), conceals the alterations, and then fails to guard against people using the bridge, the landowner might be liable for resulting injuries. Similarly, if a landowner injures recreational users by shooting a gun in their direction, knowing that they are there, the landowner may be liable.

Receipt of Consideration

Landowners who charge an admission fee (or "consideration") in exchange for allowing others onto their land to pursue recreational or harvesting



activities are similarly not protected by this statute.[12] The statute does **not** provide limited liability to **recreational businesses**.

The courts have applied this exception narrowly. For example, in one case where the plaintiff had paid an entrance fee to watch a "mud run" on one parcel of defendant's land, but then entered a different parcel of defendant's land in pursuit of an unrelated recreational activity and was injured, the court held that the consideration exception did not apply; since plaintiff had not paid to be admitted to the land on which plaintiff was injured, the landowner was protected by this statute.[13]

Similarly, in another case the injured party had paid $95 per year to a paper company to use a leased lot on a pond and was injured while driving on that paper company's road to get to his leased lot. The court held that the defense of limited liability was available despite the annual payment, since the payment of the fee did not entitle the injured party to a greater right than the general public to pursue recreational activities on the lands (other than his lot) where he was injured (i.e., the road). In order to disqualify a landowner from the limited liability defense, the consideration has to be in the nature of an entrance or admission fee which must be paid in order to utilize the overall benefits of the recreational area.[14]

Risks of Suit Slight But Not Entirely Eliminated

As discussed above, the risk of a landowner being held liable for injuries to people pursuing recreational or harvesting activities is very slight. The landowner will not be liable for any injuries sustained by people pursuing recreational or harvesting activities, unless the injured party can show (a) that the landowner willfully or maliciously failed to guard or warn against a dangerous condition, use, structure, or activity, or (b) that the landowner charged a fee for permission to use the premises for recreational or harvesting activities.

Despite the availability of this statutory defense of limited liability, there is still a risk that the landowner will be sued and will be forced to assert this defense in a lawsuit. However, the risk of suit appears to be slight. The Maine courts have restrictively interpreted the exceptions to 14 M.R.S.A. Section 159-A, and they recognize it as an important policy to facilitate public recreational access.

This consistent judicial support should discourage lawsuits. But even if suit is brought, it is likely to be resolved without the expense of going to trial. To date, there are only three Maine Supreme Court cases and one Federal Court of Appeals case construing 14 M.R.S.A. Section 159-A; in all four, the trial courts' grant of summary judgment in favor of the landowner was upheld. (Summary judgment is a decision issued in favor of the moving party, without trial, finding there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law.) There are also a few reported Superior Court cases construing 14 M.R.S.A. Section 159-A; in all except one the court held for the defendant/landowner on a motion for summary judgment, resolving the suit without the necessity of going to trial.[15]

Prevailing Landowner Entitled to Costs and Attorneys Fees

Even if a suit brought by an injured recreational or harvester user has little chance of success, the landowner still faces the prospect of defending against that suit. However, by an amendment, effective July 1, 1986, that burden has been reduced. 14 M.R.S.A. Section 159-A (6) provides that the court shall order the plaintiff to pay the landowner's direct legal costs, including reasonable attorneys' fees, if the landowner is found not to be liable for the plaintiff's injuries. Thus, while the statute cannot guarantee a landowner that an injured party will not bring suit, it does provide a mechanism for substantially reducing the cost of defending against unsuccessful law suits.[16]

Liability Insurance Reduces Risk

It is advisable for all landowners to carry liability insurance. There are two specific benefits to landowners providing public access. First, while it would be unusual for a landowner to be found liable to a recreational or harvester user, in the unusual circumstance that liability is found, the amount of the award could be significant. Liability insurance is one way to guard against this risk, up to the limits of the policy. Second, even if liability is not ultimately found, most policies will obligate the insurance company to pay for the costs of defense against the suit.

Coverage may already be provided under an existing policy, or may be available for a modest premium increase. A landowner should consult with his or her insurance agent and an attorney to evaluate the limits of coverage of any existing homeowner's or similar insurance policy to determine whether additional coverage is advisable.

Remove Known Hazards or Post Warnings

Even though the statute provides that a landowner does not have a **duty** to police his land to keep it safe, a landowner can reduce the likelihood of injury to people (and risk of a resulting lawsuit) by minimizing the chances for people to be injured on his property.

A landowner should inspect his or her property with an eye for "accidents waiting to happen." If there are obvious hazards that can feasibly be removed, it makes sense to do that. If the hazards cannot be removed, posting warning signs nearby should reduce the incidence of injuries. Minimizing the potential for injury will go a long way toward reducing any risk of liability.

For Further Information

For more detailed information about the protection from liability for landowners, including both private and public landowners, see the publication of the Department of Economic and Community Development, Office of Comprehensive Planning, prepared by Marine Law Institute, entitled *Maine Shore Access: Public Access Series: Liability*, 1989, available from DECD, 289-6800.

For examples of shoreway access plans anticipating, at least in part, casements over private lands, see City of Portland, *Portland Waterfront: Public Access Design Guidelines*, 1985 and *Portland Shoreway Access Plan*, 1987; and city of South Portland, *Greenbelt Master Plan*, 1987.

Endnotes

1. Unique factual circumstances will often determine how the principles outlined here apply. Concerned landowners should consult with their own attorney to assess the application of these general principles to their individual circumstances.

2. The term "landowner" is used for conve nience. The following discussion of 14 M.R.S.A. § 159-A applies to owners, lessees (individuals who lease an interest in the premises), and occupants of the premises.

3. 14 Maine Revised Statutes Annotated, § 159-A.

4. 14 M.R.S.A. § 159-A (2).

5. 14 M.R.S.A. § 159-A (3).

6. 14 M.R.S.A. § 159-A (1) (A).

7. *Stanley v. Tilcon Maine, Inc.*, 541 A.2d 951, 953 (Me. 1988).

8. *Schneider v. United States*, 760 F.2d 364, 368 (1st Cir. 1985).

9. The statute also provides that a landowner might be liable for injuries to a person on his or her land at the invitation or request of the landowner if that person is injured by a recreational or harvester user who is on the same land with the permission of the land owner. For example, suppose that the landowner hires Chris to clear brush from a path on her land. The landowner also gives permission to a dirt biker to ride along the same path, without cautioning either Chris or the dirt biker. If Chris is injured by the dirt biker, Chris might be able to prove that the landowner is liable for Chris' injuries. 14 M.R.S.A. § 159-A (4) (C).

10. *See* Prosser, *The Law of Torts*, Sec. 34 at 184-85 (4th ed. 1971), cited in *Bonney v. Canadian National Railway Co.*, 613 F. Supp 887, 1006 (D. Me. 1985), *rev'd* 800 F.2d 274 (1st Cir. 1986).

11. *See, e.g., Bonney, supra* at 1006.

12. But consideration received by a landowner in exchange for leasing land to the State does not disqualify the landowner from protection of the statute.

13. *Spencer v. Condon*, Kennebec Cty. Sup. Ct., No. CV-85-137 (decided August 7, 1986).

14. *Robbins v. Great Northern Paper Co.*, 557 A.2d 614 (Me. 1989).

15. Based on cases reported in Superior Court Digest, 1986 through May 1990. The case in which the defendant's motion for summary judgment was denied subsequently resulted in a jury verdict for the defendant.

16. As with any provision of this nature, there are no absolute guarantees that the landowner's costs will be reimbursed . For instance, the plaintiff may have no resources to pay the award. *See generally* the discussion of liability insurance.

Prepared by the University of Maine School of Law, Marine Law Institute.
Photo Credit: MaJo Keleshian

Produced by the Sea Grant Marine Advisory Program through a grant from the National Oceanic and Atmospheric Administration/Sea Grant College Program NA 89AA-D-SG020.

Additional copies are available from Sea Grant Communications, 30 Coburn Hall, University of Maine, Orono, ME 04469, (207)581-1440 or the University of Maine School of Law, Marine Law Institute, 246 Deering Ave., Portland, ME 04102, (207)780-4474.

University of Maine
University of New Hampshire
Sea Grant College Program