

REAL PROPERTY: Rural Landowners' Liability and Posting of Land

Thomas J. Allen
Dennis K. Smith
Anthony Ferrise

In Cooperation with the
Division of Resource Management
College of Agriculture, Forestry, and Consumer Sciences
and the Agricultural and Forestry Experiment Station
West Virginia University

Updated September 1998 by
David L. Yaussy, Robinson & McElwee, Charleston, West Virginia
Timothy L. Pahl, Extension Specialist, WVU Extension Service, Morgantown, West Virginia

TABLE OF CONTENTS

Purpose	1
Introduction.....	1
Classes of Visitors	1
Duties Toward Children	2
Liability to Recreational Users with Free Access	2
Liability When Users are Charged a Fee	3
Posting of Land.....	3
Streambed Ownership.....	4
The Problem of Lawsuits.....	4
APPENDIX WEST VIRGINIA CODE	5

ACKNOWLEDGMENTS

The following are acknowledged for their review comments in developing the information in this manuscript (1984):

Dick Grist	President, West Virginia Forests, Inc.
Steve Hannah	Executive Secretary, West Virginia Farm Bureau
Anwarul Hoque	Associate Professor, Division of Resource Management, College of Agriculture and Forestry, West Virginia University
Stephen Hunter	Prosecuting Attorney, Pocahontas County, West Virginia
John McCuskey	Attorney at Law, Point Pleasant, West Virginia
R. Michael Shaw	Attorney at Law, Point Pleasant, West Virginia
Roger Sherman	Public Affairs Forester, Westvaco Corporation, West Virginia Woodlands, Rupert, West Virginia
Honorable C. Reeves Taylor	Judge, Twenty-First Circuit, West Virginia
Mary Templeton	Professor, Division of Resource Management, College of Agriculture and Forestry, West Virginia University
Richard Waybright	Executive Secretary, West Virginia Forests, Inc.
Wayne Weber	Assistant Professor, Division of Resource Management, College of Agriculture and Forestry, West Virginia University

PURPOSE

The purpose of this publication is to provide information to rural landowners regarding West Virginia law concerning the liability of landowners to hunters, hikers, children, and other recreational users and to provide landowners with information on posting of land. This is not intended to be a legal guide to landowner liability and posting of land. It is recommended that the reader contact an attorney when dealing with these issues.

INTRODUCTION

Rural landowners are frequently asked to open their land for public recreation, including hunting, fishing, and other activities. Although some landowners do permit public access, many others refuse. Four reasons are commonly cited by landowners for denying public access to private property:

- property damage, such as litter, damaged fences, and injured livestock;
- liability for injuries occurring to persons using the property;
- lack of an economic incentive for opening private property to public use; and
- protectionism, or the attitude that property resources are for the sole benefit of the owner.

The foundations of landowner liability are found in old English law. These laws, inherited from England and later modified by statutes and court decisions, comprise our modern body of landowner liability law.

The term *landowner* is used throughout this publication, although in some cases the same laws may apply to a nonowner, such as a lessee.

CLASSES OF VISITORS

The liability of a landowner to persons injured while visiting his property depends initially on the class or status of the injured visitor. There are three classes or statuses of visitors to property: trespassers, licensees, and invitees. To each of these classes of visitor the landowner owes certain responsibilities to protect the visitor from injury while on the land. These responsibilities are known as the landowner's *duty of care* or *duty toward the visitor*. The extent of the duty owed the visitor depends on his status, with the least duty owed the trespasser and the greatest duty owed the invitee.

A trespasser is a person who enters private land without the owner's permission. The duties owed to a trespasser are minimal; the landowner must refrain from intentionally injuring him or her, but there is ordinarily no obligation to warn a trespasser of dangers on the property. However, if the owner knows or should know 1) that there is a condition on land he owns that could cause serious injury or death to a trespasser, 2) that is not likely to be discovered, and 3) that there are trespassers who constantly intrude in the area of dangerous conditions, reasonable care must be taken to warn the trespasser of the dangerous condition.

The landowner owes the licensee somewhat greater duties. A licensee is a person who enters the land with the permission of the landowner but for his own pleasure or benefit and not for the landowner's. A social guest is a licensee. Again, the landowner must not intentionally injure the licensee and, in addition, the landowner may be required to repair hidden dangers on the property or warn the visitor of these dangers. In general, there is no duty to warn of dangers which are open and obvious to a reasonable person concerned for his own safety.

The final category of visitor, the invitee, is owed the highest duty of care. Invitees are those persons who enter property for the owner's benefit or at his invitation. Shoppers in a store or patrons at a movie theater are invitees. Naturally, invitees, or any other visitor, cannot be intentionally injured by the landowner, and the landowner must use ordinary care to keep the premises in a reasonably safe condition. Any unreasonable danger which is found must be repaired or the visitor warned of its existence. In general, there is no duty to warn of obvious dangers.

If a landowner fails to carry out his responsibilities or duty of care as previously discussed, he is considered negligent under the law. If the landowner's negligence causes the visitor to be injured, the landowner may be liable for the injuries suffered. The landowner should not be liable if he owed the visitor no duty of care, or if he performed his duty and the visitor was injured anyway. For instance, the landowner probably will not be liable if a trespasser is injured while crossing an obviously rotting footbridge, since the only duty owed a trespasser is to refrain from intentionally injuring him and to warn of hidden dangers that could cause serious injury, if trespassers are known to be present. Similarly, if a landowner warns a licensee not to go near his beehives but the visitor does and is injured, the landowner probably will not be liable since he performed his duty to warn. The visitor is at fault.

DUTIES TOWARD CHILDREN

The different duties of care owed to trespassers, licensees, and invitees do not apply as discussed above when the visitor is a child. Instead, there is a higher duty owed to children, regardless of their status as a visitor.

West Virginia has adopted a *dangerous instrumentality* rule for determining the duty owed toward children. If there exists a dangerous instrument or condition, located in an area where children are known to frequent, the owner of the dangerous instrumentality may be liable for injuries it causes to the children. The landowner must be shown to have known, or should have known, that the dangerous condition existed, and also to have known, or should have known, that children frequent the area.

The dangerous instrumentality rule may be applied even if the child is a trespasser, so posting the property or installing warning signs will not serve to reduce liability.

The rule boils down to a question of whether the landowner or person in charge of the dangerous instrument could reasonably foresee that children would be injured. To reduce the chances of liability under the rule, the landowner should first determine if children frequent a particular area of his property. If so, the area should be inspected to determine if any dangerous conditions exist. Examples of dangerous instruments and hazardous conditions may include live electric wires near where children swing or climb, or old farm or mill machinery which are still connected to power sources. It is easy to see how these conditions could prove dangerous to children, given their natural curiosities. After searching and inspecting the property, any dangerous or hazardous instrument or condition found in an area frequented by children should be repaired, replaced, or otherwise rendered safe for visitors.

LIABILITY TO RECREATIONAL USERS WITH FREE ACCESS

In 1965, the West Virginia legislature passed a law which greatly reduced the duty a landowner owes to recreational users who are allowed free access to his property. By reducing the duty owed, the landowner's chances of being liable for injuries which occur to the visitor are similarly reduced. This law was written and passed for the purpose of encouraging landowners to open additional land for recreational use.

West Virginia law (see Appendix) states that the landowner owes no duty of care to keep his property safe for those entering for recreational purposes, nor does he have any duty of care to warn the user of hazardous conditions, so long as he does not charge for the use of the property. The law further provides that the owner who permits free recreational use of his land makes no assurance that the land is safe, nor does he confer upon the user the legal status of an invitee or licensee. In short, the law is intended to reduce the liability of a landowner who permits free recreational use of his land by conferring on the recreational user the status of a trespasser. As discussed earlier, the duties a landowner owes to a trespasser are minimal.

The law states that there are only two situations in which the landowner will be liable for injuries which occur to the recreational user:

- when the landowner deliberately, willfully, or maliciously inflicts injury to persons or property; or
- when the landowner charges the recreational user a fee for the use of the property.

Although West Virginia law does offer some protection against liability to landowners who allow free use of their land, the wise landowner will doubly protect himself by thoroughly inspecting his property to see if any dangerous conditions exist. If dangers or hazards are found, such as open wells, rotten bridges, or concealed barbed wire, they should either be corrected or warning signs posted at their location. The landowner who keeps his property safe will greatly reduce his chances of incurring liability for injuries to visitors.

The West Virginia legislature has designated certain roads and lands for public trails in the state. A landowner who allows the public to use private land for these trails, or who owns land adjoining the trails, owes no duty of care to keep the land safe for entry or use by others for recreational purposes. The landowner is also not required to give any warning to persons using the trail or adjoining land of any dangerous condition or activity on the property, although he must refrain from deliberately injuring anyone. This protection against liability does not apply if there is a charge for entering the trail or adjoining property, or if the landowner derives benefit from commercial activity related to use of the trail.

LIABILITY WHEN USERS ARE CHARGED A FEE

Many landowners allow recreational use of their land but impose some fee on the user. This may be a large fee, sufficient to provide considerable income to the landowner. On the other hand, the fee may be nominal, sufficient only to cover the costs of removing litter or repairing broken fences. In either case, it is considered a fee under the law and the provisions discussed above which protect landowners who allow free access do not apply.

West Virginia law indicates that fees may include certain nonmonetary payments from the recreational user to the landowner. Generally, if the landowner receives some benefit from the visitor's presence, it is presumed that a fee was charged. For example, a farmer who allows free access to his land for hunting and also runs a roadside produce market could be found to be charging the hunter, since the free hunting access can act as an inducement for the hunter to purchase goods from the produce stand. Similarly, if the recreational user helps to clear a road or erect a shelter, a fee may be presumed to exist, since the landowner benefits from the visitor's presence even though money wasn't actually paid for the use of the land.

If the landowner does, in some way, charge the user, the statutory protections discussed above will not apply. Instead, the visitor will be considered an invitee, to whom the landowner owes the greatest duty of inspection, repair, and warning, as previously discussed.

It must be remembered, however, that the landowner is not an insurer of the visitor's safety. Generally, the landowner will be liable for injuries suffered by the recreational user only if he, the landowner, failed to perform the duties required of him by law. He usually will not be liable if a hunter shoots himself or a fisherman trips over a rock.

The landowner who allows recreational users access to his property free of charge will be protected by law against liability for injuries occurring to those users. The landowner who charges will probably be liable if the land is unreasonably dangerous and the landowner fails to warn the user of hidden dangers. Because of so many variables in each case, a landowner considering opening land for recreational use should consult an attorney with the facts of the particular case.

POSTING OF LAND

A landowner who decides to deny all access to his land may indicate this by proper posting.

It is a misdemeanor to trespass onto land that is posted. Posting, by law, consists of maintaining signs along the property boundaries at no more than 500 foot intervals. Signs must be posted at each property corner. Each sign must contain:

the words NO TRESPASSING in letters at least two inches high, and
the name and address of the property owner or lessee.

Several situations occur in which land is considered legally posted even though no NO TRESPASSING signs are displayed. Any piece of property of less than five acres on which a dwelling exists is considered posted under the law. In addition, all fenced property is considered legally posted, as is all cultivated land.

STREAMBED OWNERSHIP

Landowners often know their ownership rights concerning land. Many times, however, landowners are uncertain about their rights regarding a stream or river which flows over their land or forms a property boundary. Can the landowner post the stream against fishing?

Generally, the public may fish on any navigable body of water, although they may not trespass on the land of a private owner in order to gain access to the water. The State owns the bed in any navigable river or stream, and the public may boat, fish, or wade therein, subject, of course, to the State's right to regulate fishing and boating.

It is generally thought, however, that the bed of a non-navigable body of water may be privately owned. In such a case, the owner of each bank owns the streambed to the middle of the stream. If the same person owns both banks, it follows that he owns the entire streambed.

The obvious key to determining whether the public may fish or boat in a given stream or river or, alternatively, whether the landowner can post against fishing or trespassing is whether that body of water is navigable.

The definition of navigable varies from state to state. Some states consider a stream navigable if it is capable of floating a log, even if this is possible only when the stream is swollen from heavy rain or runoff. West Virginia, however, adheres to a narrower definition of navigable.

In West Virginia, a navigable river or stream is one which, in its normal condition, is capable of being used as a highway for commerce; that is, one on which trade or travel is possible. Obviously, the large rivers of the state are navigable, as are some smaller rivers and streams capable of supporting rafting, canoeing, and other recreational boating. Generally, smaller streams should be considered non-navigable and therefore capable of being privately owned. However, the Public Land Corporation, which is vested with title to streambeds in West Virginia, has asserted jurisdiction over all streambeds, even those smaller streams that are not navigable. This potential conflict in ownership has not been resolved.

Man-made lakes are subject to somewhat different rules. Where ownership of the land underlying a man-made lake is clear and distinct, the owner of a portion of the lake bed has the exclusive control and use of the water above the portion of the lake bed which he owns. Further, the owner has a right to exclude others, including other adjoining owners of the lake bed, by erecting a fence or other barrier to prohibit others from utilizing the water which overlies his property.

THE PROBLEM OF LAWSUITS

There are at least three measures that landowners can take to reduce the possibility of lawsuits. First, the landowner should attempt to remove any known hazards which exist on the property or post adequate warning signs nearby. By reducing the number of hazards which could be encountered, the owner reduces the chances of an accident and subsequent law suit. Second, if the landowner chooses to not allow hunting, trapping, or trespassing, the property should be properly posted. Third, the landowner can carry liability insurance. No landowner should assume automatically that he is covered against every liability situation merely because he owns a property insurance policy. Each landowner should consult with his insurance agents and attorney to determine the extent and adequacy of coverage.

**APPENDIX
WEST VIRGINIA CODE
LIMITING LIABILITY OF LANDOWNERS**

19-25-1 Purpose. The purpose of this article is to encourage owners of land to make available to the public land and water areas for military training or recreational or wildlife propagation purposes by limiting their liability for injury to persons entering thereon and for injury to the property of persons entering thereon and limiting their liability to persons who may be injured or otherwise damaged by the acts of omissions of persons entering thereon.

19-25-2 Limiting Duty of Landowner Generally. Subject to the provisions of section four (19-25-4) of this article, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational or wildlife propagation purposes, or to give any warning of a dangerous or hazardous condition, use, structure, or activity on such premises to persons entering for such purposes.

Subject to the provisions of section four of this article, an owner of land who either directly or indirectly invites or permits without charge as that a term is defined in section five (19-25-5) of this article, any person to use such property for recreational or wildlife propagation purposes does not thereby: (a) Extend any assurance that the premises are safe for any purpose; or (b) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

19-25-3 Limiting Duty of Landowner Who Leases Land to State, Counties, Municipalities or Agencies. Unless otherwise agreed in writing, an owner who grants a lease, easement or license of land to the federal government or any agency thereof, for military training or recreational or wildlife propagation purposes owes no duty of care to keep that land safe for entry or use by others or to give warning to persons entering or going upon the land of any dangerous or hazardous conditions, uses, structures or activities thereon. An owner who grants a lease, easement or license of land to the federal government or any agency thereof, or the state or any agency thereof, or any county or municipality or agency thereof, for military training or recreational or wildlife propagation purposes does not by giving a lease, easement or license: (a) Extend any assurance to any person using the land that the premises are safe for any purpose; or (b) confer upon those persons the legal status of an invitee or licensee to whom a duty of care is owed; or (c) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of a person who enters upon the leased land. The provisions of this section apply whether the person entering upon the leased land is an invitee, licensee, trespasser or otherwise.

19-25-4 Application of Article. Nothing herein limits in any way any liability which otherwise exists: (a) for deliberate, willful or malicious infliction of injury to persons or property; or (b) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land other than the amount, if any, paid to the owner of the land by the federal government or any agency thereof, the state or agency thereof, or any county or municipality or agency thereof. Nothing herein creates a duty of care or ground of liability for injury to person or property.

Nothing herein limits in any way the obligation of a person entering upon or using the land of another for recreational or wildlife propagation purposes to exercise due care in his or her use of such land and in his or her activities thereon.

19-25-5 Definitions. Unless the context used clearly requires a different meaning, as used in this article:

- (1) Charge means:
 - (1) For purpose of limiting liability for recreational or wildlife propagation purposes set forth in section two (19-25-2) of this article, the amount of money asked in return for an invitation to enter or go upon the land, including a one-time fee for a particular event, amusement, occurrence, adventure, incident, experience or occasion which may not exceed fifty dollars a year per recreational participant;
 - (2) For purposes of limiting for military training set forth in section six (19-25-6) of this article, the amount of money asked in return for an invitation to enter or go upon the land;
- (2) Land includes, but shall not be limited to, roads, water, watercourses, private ways and buildings, structures and machinery or equipment thereon when attached to the reality;

- (3) Noncommercial recreational activity shall not include any activity for which there is any charge which exceeds fifty dollars per year, per participant;
- (4) Owner includes, but shall not be limited to, tenant, lessee, occupant or person in control of the premises;
- (5) Recreational purposes includes, but shall not be limited to, any one or any combination of the following noncommercial recreational activities: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, motorcycle or all-terrain vehicle riding, bicycling, horseback riding, nature study, water skiing, winter sports and visiting, viewing or enjoying historical, archaeological, scenic or scientific sites or otherwise using land for purposes of the user;
- (6) Wildlife propagation purposes applies to and includes all ponds, sediment control structures, permanent water impoundments or any other similar or like structure created or constructed as a result of or in connection with surface-mining activities, as governed by article three (22-3-1 et seq.), chapter twenty-two of this code, or from the use of surface in the conduct of underground coal mining as governed by said article, and rules promulgated thereunder, which ponds, structures or impoundments are hereafter designated and certified in writing by the director of the division of environmental protection and the owner to be necessary and vital to the growth and propagation of wildlife, animals, birds and fish or other forms of aquatic life, and finds and determines that the premises has the potential of being actually used by the wildlife for those purposes and that the premises are no longer used or necessary for mining reclamation purposes. The certification shall be in form satisfactory to the director and shall provide that the designated ponds, structures or impoundments shall not be removed without the joint consent of the director and the owner; and
- (7) Military training includes, but is not limited to, training, encampments, instruction, overflight by military aircraft, parachute drops of personnel or equipment or other use of land by a member of the army national guard or air national guard, a member of a reserve unit of the armed forces of the United States or a person on active duty in the armed forces of the United States, acting in that capacity.