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OKLAHOMA'S RECREATIONAL LAND USE STATUTE

I. INTRODUCTION

The common-law duty of care owed by a landowner to an entrant on his property is based on the status of the entrant,¹ which in turn is determined by the owner's interest in the entrant's presence.² As a general rule, the landowner owes a duty to trespassers³ and licensees⁴ to refrain from willfully or intentionally injuring them.⁵ To the invitee whose presence benefits the landowner,⁶ however, the landowner owes the higher duty of ordinary care.⁷

A new class of entrant, the recreational user of land, has been added by state legislatures to the common-law categories of trespasser, licensee, and invitee. Recreational use statutes have been enacted in forty-three states,⁸ including Oklahoma.⁹ These statutes limit a land-

1. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 186 (1953).

2. See *Sutherland v. Saint Francis Hosp.*, 595 P.2d 780, 781 (Okla. 1979).

3. A trespasser is one who enters the land of another without a privilege to do so. W. PROSSER, *LAW OF TORTS* § 58, at 357 (4th ed. 1971).

4. A licensee is "one rightfully upon the premises of another for purposes as to which the owner . . . has no beneficial interest." *Foster v. Harding*, 426 P.2d 355, 360 (Okla. 1967); see also W. PROSSER, *supra* note 3, § 60, at 376 (defines licensee). " 'Beneficial' has a business or commercial significance and does not partake of the intangible advantages of social intercourse." *Foster*, 426 P.2d at 360; see also *Simon v. Rizek*, 296 F. Supp. 602, 603 (W.D. Okla. 1969) (social guest was a licensee to whom host owed duty of exercising ordinary care).

5. See, e.g., *Texas O. & E. Ry. v. McCarroll*, 80 Okla. 282, 284-85, 195 P. 139, 141 (1920) (trespassers); *Foster*, 426 P.2d at 360 (licensees). Once a trespasser is discovered, however, the owner must exercise ordinary care to avoid injuring him. *Texas O. & E. Ry.*, 80 Okla. at 285, 195 P. at 141-42. Further, a landowner must warn licensees and discovered trespassers of concealed, dangerous conditions of which the owner has knowledge. W. PROSSER, *supra* note 3, §§ 58, 60, at 357-85.

6. An invitee is a person expressly or impliedly invited on the land for a business purpose; the owner and the invitee have a mutual interest in the invitee's presence. W. PROSSER, *supra* note 3, § 60, at 385. Customers entering business premises are the most common types of invitees. See, e.g., *Reed v. First Nat'l Bank of Wagoner*, 405 P.2d 10 (Okla. 1965); *Hostick v. Hall*, 386 P.2d 758 (Okla. 1963).

7. In Oklahoma the invitor must use ordinary care to maintain his premises in reasonably safe condition. *Wise v. Roger Givens, Inc.*, 618 P.2d 951, 952 (Okla. 1980); *Rogers v. Hennessee*, 602 P.2d 1033, 1034 (Okla. 1979). This duty is applicable only to defects or conditions not readily observable by the invitee. *Sutherland*, 595 P.2d at 783.

8. ALA. CODE §§ 35-15-1 to -5, 35-15-20 to -28 (1975 & Supp. 1983); ARK. STAT. ANN. §§ 50-1101 to -1107 (1971 & Supp. 1983); CAL. CIV. CODE § 846 (West 1982 & Supp. 1983-1984); COLO. REV. STAT. §§ 33-41-101 to -106 (1973 & Supp. 1983); CONN. GEN. STAT. ANN. §§ 52-557f to -557j (West Supp. 1983-1984); DEL. CODE ANN. tit. 7, §§ 5901-5907 (1983); FLA. STAT. ANN.

owner's duty of care to people who enter his land for a recreational purpose, and generally hold him liable only for willful, intentional injury to such entrants.¹⁰ In effect, the entrant assumes responsibility for his own safety in return for access to and use of the land of another.

By enacting recreational use statutes, state legislatures have expressed an intent to encourage private landowners to permit the public to use and enjoy their land by limiting landowners' liability to persons entering the land for recreational purposes.¹¹ This legislative intent is

§ 375.251 (West 1974 & Supp. 1983); GA. CODE ANN. §§ 105-403 to -409 (1968 & Supp. 1982); HAWAII REV. STAT. §§ 520-1 to -8 (1976 & Supp. 1982); IDAHO CODE § 36-1604 (1977 & Supp. 1983); Act of Aug. 2, 1965, §§ 1-7, ILL. ANN. STAT. ch. 70, §§ 31-37 (Smith-Hurd Supp. 1983-1984); IND. CODE ANN. § 14-2-6-3 (Burns 1981 & Supp. 1983); IOWA CODE ANN. § 111C.1-7 (West Supp. 1983-1984); KAN. STAT. ANN. §§ 58-3201 to -3207 (1976); KY. REV. STAT. ANN. § 150.645 (Bobbs-Merrill 1980); LA. REV. STAT. ANN. § 9:2791 (West 1965); ME. REV. STAT. ANN. tit. 14, § 159-A (1980 & Supp. 1983-1984); MD. NAT. RES. CODE ANN. §§ 5-1101 to -1108 (1983); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1981); MICH. COMP. LAWS ANN. § 300.201 (West 1984); MINN. STAT. ANN. §§ 87.01-.03 (West 1977 & Supp. 1983); MISS. CODE ANN. § 89-2-1 to -7 (Supp. 1983); MONT. CODE ANN. §§ 70-16-301 to -302 (1983); NEB. REV. STAT. §§ 37-1001 to -1008 (1978); NEV. REV. STAT. § 41.510 (1981); N.H. REV. STAT. ANN. § 212.34 (1978 & Supp. 1983); N.J. STAT. ANN. §§ 2A:42A-2 to -5 (West Supp. 1983-1984); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1978 & Supp. 1982-1983); N.D. CENT. CODE §§ 53-08-01 to -06 (1982); OHIO REV. CODE ANN. §§ 1533.18-.181 (Baldwin 1980); OR. REV. STAT. §§ 105.655-.680 (1979-1980); 68 PA. CONS. STAT. ANN. §§ 477-1 to -8 (Purdon Supp. 1983-1984); S.C. CODE ANN. §§ 27-3-10 to -70 (Law. Co-op. 1976 & Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-9-5 (1979); TENN. CODE ANN. §§ 11-10-101 to -104 (1980 & Supp. 1983) (liability of owner of land leased to state), §§ 70-7-101 to -104 (1980 & Supp. 1983) (liability of landowner to persons using land); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969 & Supp. 1982-1983); VT. STAT. ANN. tit. 10, § 5212 (1973); VA. CODE § 29-130.2 (1979 & Supp. 1983); WASH. REV. CODE ANN. §§ 4.24.200-.210 (Supp. 1983-1984); W. VA. CODE §§ 19-25-1 to -6 (1984); WIS. STAT. ANN. §§ 29.68 (West 1973 & Supp. 1983-1984); WYO. STAT. §§ 34-19-101 to -106 (1977).

North Carolina and Utah have repealed their recreational use statutes. *See* N.C. GEN. STAT. §§ 113-120.5-.7 (1979) (repealed 1980); UTAH CODE ANN. §§ 23-1-13 to -14 (1965) (repealed 1971).

9. OKLA. STAT. tit. 76, §§ 10-15 (1981).

10. *See infra* notes 117-34 and accompanying text. For discussions of recreational use statutes see Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1 (1977-1978); Knowles, *Landowners' Liability Toward Recreational Users: A Critical Comment*, 18 IDAHO L. REV. 59 (1982); Comment, *Tort Liability and Recreational Use of Land*, 28 BUFFALO L. REV. 767 (1979); Comment, *Landowner Liability Under the Wyoming Recreational Use Statute*, 15 LAND & WATER L. REV. 649 (1980); Note, *The Minnesota Recreational Use Statute: A Preliminary Analysis*, 3 WM. MITCHELL L. REV. 117 (1977).

11. The Alabama statute expresses the legislative purpose in a policy statement:

It is hereby declared that there is a need for outdoor recreational areas in this state which are open for public use and enjoyment; that the use and maintenance of these areas will provide beauty and openness for the benefit of the public and also assist in preserving the health, safety, and welfare of the population; that *it is in the public interest to encourage owners of land to make such areas available to the public for non-commercial recreational purposes by limiting such owners' liability towards persons entering thereon for such purposes*; that such limitation on liability would encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public, thereby reducing state expenditures needed to provide such areas.

ALA. CODE § 35-15-20 (Supp. 1982) (emphasis added); *see also* ARK. STAT. ANN. § 50-1101

based on a desire to reduce the number of landowners who bar access by the public to their land for fear of incurring tort liability if entrants are injured on their land.¹² In addition, the opening of private land for public recreation reduces the expenditures state governments otherwise would have to make to provide such areas.¹³

Although the Oklahoma recreational use statute was enacted almost two decades ago,¹⁴ it has yet to be judicially construed. Cases involving similar legislation in other states provide a basis for predicting the problems of interpreting the Oklahoma act and the results that will be achieved thereunder. This Comment analyzes the provisions of Oklahoma's recreational use statute in light of the problems of application that have arisen under other states' statutes. In addition, it suggests the need for a partial revision of the Oklahoma statute in order to avoid interpretational problems and to better effectuate the policy that led to the statute's enactment.

II. ANALYSIS AND INTERPRETATION OF OKLAHOMA'S STATUTE

A. *Structure of the Act*

The Oklahoma statute limits the liability of a landowner who allows other persons to use his land for recreational purposes.¹⁵ An "owner" may be "the possessor of a fee interest, a tenant, a lessee, . . . [or anyone] in control of the premises."¹⁶ The statute thus draws within the ambit of its protection all persons with any degree of control

(1971); COLO. REV. STAT. § 33-41-101 (1973); DEL. CODE ANN. tit. 7, § 5901 (1983); FLA. STAT. ANN. § 375.251 (West 1974); GA. CODE ANN. § 105-403 (Supp. 1983); HAWAII REV. STAT. § 520-1 (1976); IDAHO CODE § 36-1604 (1977); Act of Aug. 2, 1965, § 1, ILL. ANN. STAT. ch. 70, § 31 (Smith-Hurd Supp. 1983-1984); IOWA CODE ANN. § 111C.1 (West Supp. 1983-1984); KAN. STAT. ANN. § 58-3201 (1976); MD. NAT. RES. CODE ANN. § 5-1102(a) (1983); MINN. STAT. ANN. § 87.01 (West 1977); MISS. CODE ANN. § 89-2-1 (Supp. 1983); NEB. REV. STAT. § 37-1001 (1978); OR. REV. STAT. § 105.660 (1979-1980); 68 PA. CONS. STAT. ANN. § 477-1 (Purdon Supp. 1983-1984); S.C. CODE ANN. § 27-3-10 (Law. Co-op. 1976); WASH. REV. CODE ANN. § 4.24.200 (Supp. 1983-1984); W. VA. CODE § 19-25-1 (1984).

12. *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 731, 136 Cal. Rptr. 224, 228 (1977).

13. ALA. CODE § 35-15-20 (Supp. 1982).

14. Act of June 30, 1965, ch. 384, 1965 Okla. Sess. Laws 669.

15. OKLA. STAT. tit. 76, § 10(c) (1981) ("recreational purpose" includes, *inter alia*, "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites"). Cf. *Odor v. Chase Manhattan Bank*, 138 N.J. Super. 464, 351 A.2d 389 (Super. Ct. App. Div. 1976) (person coming to another's aid not recreational entrant); *Villanova v. American Fed'n of Musicians*, 123 N.J. Super. 57, 301 A.2d 467 (1973) (musician preparing to give outdoor concert held not recreational user).

16. OKLA. STAT. tit. 76, § 10(b) (1981).

over real property sufficient to allow the recreational use of that property by others.¹⁷ Although most recreational use statutes limit the application of immunity to owners who permit members of the public to use their land,¹⁸ the Oklahoma statute applies to any owner of land "who either directly or indirectly invites or permits" the recreational use of his land.¹⁹ Thus, the Oklahoma landowner may receive statutory immunity regardless of whether he specifically intended to invite or permit entry onto his land.

The Oklahoma statute applies only to recreational activities on land used primarily for farming or ranching.²⁰ In this respect, the Oklahoma statute is much narrower in scope than the statutes of most other states,²¹ which apply to any "premises,"²² "land,"²³ or "real prop-

17. Cf. COLO. REV. STAT. § 33-41-102(3) (Supp. 1983) ("owner" includes . . . any person having a right to grant permission to use the land"); *Smith v. Scrap Disposal Corp.*, 96 Cal. App. 3d 525, 529, 158 Cal. Rptr. 134, 137 (1979) (recreational use statute applies when owner has a right to bar entry).

Michigan courts have found that the holder of an easement is an owner of property within the meaning of the Michigan statute. See, e.g., *Crawford v. Consumers Power Co.*, 108 Mich. App. 232, 236, 310 N.W. 2d 343, 345 (1981); *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, —, 228 N.W.2d, 786, 790 (1975), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975). In California and Washington, however, courts have focused on right to possession as a key factor in the issue of ownership. See, e.g., *Power v. Union Pac. R.R.*, 655 F.2d 1380, 1387 (9th Cir. 1981) (999-year lease found to give a lessee of railroad right of way the requisite possession and control to qualify as an owner under the California statute); *Darr v. Lone Star Indus.*, 94 Cal. App. 3d 895, 900-01, 157 Cal. Rptr. 90, 93 (1979) (California statute does not apply to holders of easements since an easement is a nonpossessory interest rather than an estate in land); *O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 911, 159 Cal. Rptr. 125, 129-30 (1979) (immunity of the statute extends only to those who have a possessory interest, not to persons such as licensees with nonpossessory rights only). The California statute was subsequently amended to include "any estate or any other interest in real property whether possessory or nonpossessory." CAL. CIV. CODE § 846 (West 1982).

18. See, e.g., ALA. CODE § 35-15-2 (1975) (applies to landowner who "gives permission" for recreational use).

19. OKLA. STAT. tit. 76, § 12 (1981). For a discussion of possible interpretations of this language, see *infra* notes 87-100 and accompanying text.

20. OKLA. STAT. tit. 76, § 12 (1981). "Land" also includes "roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to realty which is used primarily for farming or ranching activities." *Id.* § 10(a).

21. The only other state that expressly limits the application of the act to farm land is South Dakota. See S.D. CODIFIED LAWS ANN. § 20-9-5 (1979) ("rural real estate used exclusively for agricultural purposes").

A few states limit the type of land to which the statute applies in similar ways. See COLO. REV. STAT. § 33-41-101 (1973) (land with rural areas); Act of Aug. 2, 1965, § 2(a), ILL. ANN. STAT. ch. 70, § 32(a) (Smith-Hurd Supp. 1983-1984) (land outside city limits); IOWA CODE ANN. § 111C.2(1) (West Supp. 1983-1984) (includes "abandoned or inactive surface mines, caves, and land used for agricultural purposes"); OHIO REV. CODE ANN. § 1533.18(A) (Baldwin 1980) (includes privately-owned land and state-owned land leased to private owner); OR. REV. STAT. § 105.655 (1979-1980) (agricultural land, range land, forest land and lands adjacent to the ocean); VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973) (land includes unposted land, more than 500 feet from residential or commercial buildings outside city limits).

22. See IND. CODE ANN. § 14-2-6-3 (Burns Supp. 1983); KY. REV. STAT. ANN. § 150.645

erty.”²⁴ Judicial construction of such broad terms, however, has limited the applicability of some statutes to recreational activities on rural lands.²⁵

The Oklahoma recreational use statute limits the owner's duty to recreational users in several ways. An owner of farm or ranch land who permits entry for recreational purposes owes no duty to others to keep the premises safe or warn of dangerous conditions.²⁶ Further, by inviting or permitting recreational use, the owner does not extend any assurance that the premises are safe, confer upon the entrant the legal status of invitee or licensee, or incur liability for injury to persons or property caused by the user.²⁷

Two exceptions limit this general grant of immunity. The landowner remains liable for willful or malicious failure to guard or warn of a dangerous condition on the land.²⁸ This duty is analogous to the minimal standard of care a landowner owed to trespassers at common law.²⁹ In addition, the immunity of the statute does not apply when the owner charges for admission to his land.³⁰ This exception preserves the common-law duty of the landowner when he has an economic interest in the presence of another.³¹

(Bobbs-Merrill 1980); LA. REV. STAT. ANN. § 9.2791 (West 1965); ME. REV. STAT. ANN. tit. 14, § 159-A(1)(A) (1980); NEV. REV. STAT. § 41.510(1) (1981); N.H. REV. STAT. ANN. § 212:34(I) (Supp. 1983); N.J. STAT. ANN. § 2A:42A-3(a) (West Supp. 1983-1984); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (McKinney Supp. 1983-1984); TENN. CODE ANN. § 70-7-102(1) (1983).

23. See ARK. STAT. ANN. § 50-1103 (1971); CONN. GEN. STAT. ANN. § 52-557g(a) (West Supp. 1983); DEL. CODE ANN. tit. 7, § 5903 (1983); FLA. STAT. ANN. § 375.251(1) (West 1974); GA. CODE ANN. § 105-405 (Supp. 1982); HAWAII REV. STAT. § 520-3 (1976); IDAHO CODE § 36-1604(d) (Supp. 1983); KAN. STAT. ANN. § 58-3203 (1983); MD. NAT. RES. CODE ANN. § 5-1103 (1983); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1981); MICH. COMP. LAWS ANN. § 300.201 (West 1984); MINN. STAT. ANN. § 87.022 (West Supp. 1984); MISS. CODE ANN. § 89-2-1 (Supp. 1983); NEB. REV. STAT. § 37-1003 (1978); N.D. CENT. CODE § 53-08-03 (1982); OR. REV. STAT. § 105-655 (1981); 68 PA. CONS. STAT. ANN. § 477-3 (Purdon Supp. 1983-1984); S.C. CODE ANN. § 27-3-30 (Law. Co-op. 1976); W. VA. CODE § 19-25-2 (1984); WYO. STAT. § 34-19-101 (1977).

24. CAL. CIV. CODE § 846 (West 1982); MONT. CODE ANN. § 70-16-302 (1983); TEX. REV. CIV. STAT. ANN. art. 1b(1) (Vernon 1969); VA. CODE § 29-130.2 (Supp. 1983).

25. See, e.g., *Harrison v. Middlesex Water Co.*, 80 N.J. 391, —, 403 A.2d 910, 914 (1979) (recreational use statute reference to “premises” inapplicable to owners of land in residential or populated neighborhoods). *But see Syrowik v. City of Detroit*, 119 Mich. App. 343, —, 326 N.W.2d 507, 509 (1982) (Michigan statute referring to “land” applied to city playground).

26. OKLA. STAT. tit. 76, § 11 (1981).

27. *Id.* § 12.

28. *Id.* § 14(a).

29. See *supra* note 5 and accompanying text.

30. OKLA. STAT. tit. 76, § 14(b) (1981).

31. See *supra* note 7 and accompanying text.

B. *Potential Issues of Interpretation*

A key to whether Oklahoma courts will interpret the state recreational use statute broadly or narrowly may lie in whether the statute is considered a change in the common law or a codification thereof. Some courts have found their states' laws to be in derogation of common law and public policy, and thus construe them strictly. For instance, in *Boileau v. DeCecco*,³² a New Jersey court noted that the "trend in public policy has been to expand the areas of tort liability and to eliminate islands of immunity,"³³ and refused to interpret the New Jersey statute³⁴ as protecting the owner of a private swimming pool in the city.³⁵ Other courts have taken a different view of the effect of recreational use statutes, holding that they codify the common law at the time of their enactment and should be liberally interpreted.³⁶

The different approaches may be explained, in part, by the wording of the statutes involved. The earlier acts, such as the one enacted in Wisconsin, state that permission to enter land for a recreational purpose does not "constitute the person to whom permission is granted an

32. 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973), *aff'd mem.*, 64 N.J. 503, 317 A.2d 716 (1974), *aff'd*, 323 A.2d 449 (1974).

33. *Id.* at —, 310 A.2d at 499.

34. N.J. STAT. ANN. §§ 2A:42A-2 to :42A-5 (West Supp. 1983-1984).

35. 125 N.J. Super. at —, 310 A.2d at 500; *see also* *Harrison v. Middlesex Water Co.*, 80 N.J. 391, —, 403 A.2d 910, 914 (1979) (recreational use statute must be narrowly construed because "immunity from liability for the negligent infliction of injury upon others is not favored in the law," and will not cover residential land or rescue activity); *Krevics v. Ayars*, 141 N.J. Super. 511, —, 358 A.2d 844, 846-47 (Salem County Ct. Law Div. 1976) (recreational use statute which is in derogation of common law and therefore to be strictly construed does not exempt owner who stretched a cable across roadway from liability for injuries suffered by motorcyclist); *Kucher v. County of Pierce*, 24 Wash. App. 281, —, 600 P.2d 683, 686 (1979) (statute in derogation of common law must be strictly construed and will not cover wooded park in city); *Copeland v. Larson*, 46 Wis. 2d 377, —, 174 N.W.2d 745, 749 (1970) (recreational use statute changes duty toward licensees and therefore is in derogation of common law; "valuable consideration" exclusion will be broadly interpreted to include indirect economic benefit to owner).

36. *See* *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, —, 228 N.W.2d 786, 790 (1975) (statute restates common law duty of landowners and should be liberally construed; therefore, owner of utility easement is an owner within the statute), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975); *Rock v. Concrete Materials, Inc.*, 46 A.D.2d 300, —, 362 N.Y.S.2d 258, 260-61 (1974) (recreational use statute codifies common law and owner's construction of gate across roadway does not constitute willful and wanton behavior), *appeal dismissed*, 36 N.Y.2d —, 329 N.E.2d 672, 368 N.Y.S.2d 841 (1975); *Wight v. New York*, 93 Misc. 2d 560, —, 403 N.Y.S.2d 450, 452 (Ct. Cl. 1978) (standard of care of a landowner is "nothing more than a statutory restatement of the common law duty of care owed to a licensee" and owner is not liable for injury suffered by a snowmobiler who hit a concrete dock while snowmobiling on a frozen lake). *But see* *Cutway v. New York*, 89 A.D.2d 406, —, 456 N.Y.S.2d 539, 541 (N.Y. App. Div. 1982) (although recreational use statute codifies common law and is to be liberally construed, it does not relieve liability of owner who placed a steel cable across a roadway used by motor vehicles).

invitee to whom a duty of care is owed."³⁷ Other states such as Oklahoma provide that permission to enter does not confer upon the entrant the legal status of invitee or licensee.³⁸ The addition of the reference to licensees effects a dramatic change in the common-law duty of a landowner. Under the traditional common-law rule, a landowner is liable to licensees only for willful or wanton injury.³⁹ That standard is ameliorated, however, by specific exceptions that reflect a steadily increasing concern for human safety.⁴⁰ For example, a landowner who conducts dangerous activities on his land must use reasonable care to protect licensees.⁴¹ If he is aware of dangerous conditions that would not be obvious to an entrant, the landowner has a duty to warn or to take measures to guard against injury.⁴² In addition, the landowner may be liable if he alters conditions in a way that creates a trap in a place where licensees are likely to be.⁴³ A statute that denies an entrant the status of licensee withholds the protection carved out by these exceptions to the common-law rule.⁴⁴

Moreover, the statutes which codified common-law duties preserved those duties as they existed at the time the statutes were enacted, and since that time the common law has changed. In *Rowland v. Christian*,⁴⁵ the California Supreme Court abandoned the status-based approach to premises liability and declared that a landowner owes the same duty of care, based on foreseeability of injury, to all who enter his property.⁴⁶ Since *Rowland* a minority of states have adopted the foreseeability standard for premises liability.⁴⁷ In short, the common law

37. WIS. STAT. ANN. § 29.68(2) (West Supp. 1983-1984).

38. OKLA. STAT. tit. 76, § 12(b) (1981) (emphasis added).

39. W. PROSSER, *supra* note 3, § 60, at 379.

40. *Id.*

41. *Id.*

42. *Id.* at 380.

43. *Id.* at 382.

44. This is particularly true in light of the strict interpretation that many courts have given the usual exception for willful and malicious behavior. See *infra* notes 126-31 and accompanying text.

45. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (en banc).

46. *Id.* at —, 443 P.2d at 568, 70 Cal. Rptr. at 104.

47. See *Webb v. City & Borough of Sitka*, 561 P.2d 731 (Alaska 1977); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Pickard v. City & Cty. of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Cates v. Beauregard Elec. Coop.* 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); *Quellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Barker v. Parnossa, Inc.* 39 N.Y.2d 926, 386 N.Y.S.2d 576, 352 N.E.2d 880 (1976); *Mariorenzi v. Joseph Di Ponte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975). For a collection of cases adopting the *Rowland* standard, see Annot., 22 A.L.R. 4th 294 (1983).

has evolved, but the recreational use statutes retain the traditional common-law classifications and their underlying assumptions.

The view taken by a court on whether the recreational use statute changes or codifies the common law, however, does not always explain the result in a particular case. For instance, a New Jersey plaintiff injured when the motorbike he was riding came in contact with a cable that had been stretched across a roadway on privately owned land was allowed recovery against the landowner under a strict construction of the state's recreational use statute.⁴⁸ On almost identical facts, a Wisconsin plaintiff was denied a remedy⁴⁹ despite the similar wording of the Wisconsin statute⁵⁰ and the apparent construction of the act as being in derogation of the common law.⁵¹

1. To What Land Does the Statute Apply?

Perhaps the most important question to be answered in analyzing the recreational use statute is what kinds of land the statute affects. The Oklahoma statute applies only to cases involving "land which is used primarily for farming or ranching activities."⁵² This phrase is not defined in the statute, and may pose a difficult interpretational problem for the courts.⁵³

Another issue raised by the language of the Oklahoma statute is whether it applies to activities on public as well as private land.⁵⁴ A few states address this issue specifically.⁵⁵ Many statutes also have pol-

48. *Krevics v. Ayars*, 141 N.J. Super. 511, —, 358 A.2d 844, 846-47 (Salem County Ct. Law Div. 1976) (noting that "since the act is in derogation of common law it must be strictly construed," court found that the act was not intended to eliminate but to expand the concept that foreseeability is the basis of landowner liability for injuries occurring on his land).

49. *Wirth v. Ehly*, 93 Wis. 2d 433, —, 287 N.W.2d 140, 143 (1980). Although the accident in *Wirth* took place in a public park, rather than on private land as in *Krevics*, this distinction was not cited in the court's reasoning.

50. Compare WIS. STAT. ANN. § 29.68(2) (West Supp. 1983-1984) (permission to enter does not constitute the entrant an invitee) with N.J. STAT. ANN. § 2A:42A-3(b)(2) (West Supp. 1983-1984) (same).

51. See *LePoidevin ex rel. Dye v. Wilson*, 111 Wis. 2d 116, —, 330 N.W.2d 555, 562 (1983) (post-*Wirth* decision giving Wisconsin's recreational use statute a narrow construction).

52. OKLA. STAT. tit. 76, § 10(a) (1981); see also *id.* §§ 11, 12.

53. OKLA. STAT. tit. 50, § 1.1(A)(1) (1981) defines "agricultural activities" as, *inter alia*, "the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, grain, mint, hay, and dairy products" for purposes of the law of nuisance. Cf. *Tijerina v. Cornelius Christian Church*, 273 Or. 58, —, 539 P.2d 634, 637 (1975) (noting vagueness of statutory reference to agricultural land, OR. REV. STAT. § 105.655 (1979-1980), court held statute applied only to "landholdings which . . . have recreational value but [are not] susceptible to adequate policing or correction of dangerous conditions").

54. Cf. OKLA. STAT. tit. 76, § 13 (1981) (applies to private land leased to state).

55. See ALA. CODE § 35-15-21(1) (Supp. 1983) (owner includes "[a]ny public or private or-

icy statements that express a legislative intent to encourage landowners to open private land to public use.⁵⁶ In light of this policy, it seems that recreational use statutes should not apply to government-owned lands which are already open to the public for recreational purposes. Despite the logic of this position, many courts have held that recreational use statutes apply to public as well as private land. Applicable state recreational use statutes often control the liability of the United States in suits⁵⁷ brought under the Federal Tort Claims Act.⁵⁸ For example, the Ninth Circuit Court of Appeals in *Jones v. United States*⁵⁹ held that the Washington statute⁶⁰ applied to national park land, and dismissed a claim against the federal government for injuries the plaintiff sustained while snowsliding in Olympic National Park.⁶¹ The plaintiff argued that the United States should be denied immunity in light of the legislative purpose to encourage landowners to allow public access to their land.⁶² The court disagreed, noting that federal regulations permit the closing of parks and therefore do not oblige the national parks to remain open.⁶³

There is one exception to the otherwise uniform treatment of suits under the Federal Tort Claims Act. The Illinois legislature has created a statutory scheme that embodies the plaintiff's rationale in *Jones*. Those who hold their property out to the public as a recreational facil-

ganization [including] any federal, State or local political subdivision"); COLO. REV. STAT. § 33-41-102(3) (Supp. 1983) (owner includes "any public entity"); HAWAII REV. STAT. § 520-2(2) (1976) (excludes land owned by the government); IDAHO CODE § 36-1604(b)(1) (Supp. 1983) (applies to private or public land); IOWA CODE ANN. § 111C.2(2) (West Supp. 1983-1984) (excludes land owned by the state, its political subdivisions, or any public body); MINN. STAT. ANN. § 87.021 (West Supp. 1983) (applies to private land only); OHIO REV. CODE ANN. § 1533.18(A) (Baldwin 1980) (applies to private land and public land leased to private owners); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1983-1984) (applies to any public or private landowner); WIS. STAT. ANN. § 29.68(5)(b) (West Supp. 1983-1984) (includes private and public owners).

56. See statutes cited *supra* note 11.

57. See, e.g., *Donaldson v. United States*, 653 F.2d 414, 416 (9th Cir. 1981); *Simpson v. United States*, 652 F.2d 831, 832 (9th Cir. 1981); *Otteson v. United States*, 622 F.2d 516, 517 (10th Cir. 1980); *Phillips v. United States*, 590 F.2d 297, 298 (9th Cir. 1979); *Gard v. United States*, 594 F.2d 1230, 1232 (9th Cir. 1979), *cert. denied*, 444 U.S. 866 (1979); *Mandel v. United States*, 545 F. Supp. 907, 908 (W. D. Ark. 1982); *Fisher v. United States*, 534 F. Supp. 514, 515 (D. Mont. 1982); *Hahn v. United States*, 493 F. Supp. 57, 59 (M.D. Pa. 1980), *aff'd*, 639 F.2d 773 (1980); *Blair v. United States*, 433 F. Supp. 217, 218 (D. Nev. 1977); *Hamilton v. United States*, 371 F. Supp. 230, 231 (E.D. Va. 1974).

58. 28 U.S.C. §§ 2671-2680 (1982).

59. 693 F.2d 1299 (9th Cir. 1982).

60. WASH. REV. CODE ANN. §§ 4.24.200-.210 (Supp. 1983-1984).

61. 693 F.2d at 1302.

62. *Id.*

63. *Id.*

ity are subject to the state's Recreational Area Licensing Act.⁶⁴ In *Miller v. United States*,⁶⁵ this act was held to render the Illinois recreational use statute applicable only to those who permit land to be used recreationally on a casual basis.⁶⁶ The federal government was held to a standard of reasonable care under the Licensing Act and the plaintiff was allowed to recover for injuries sustained in a diving accident in a national wildlife refuge.⁶⁷

Although most state courts have applied recreational use statutes in suits arising out of injury on state land,⁶⁸ there is some authority to the contrary. For instance, in *Nelsen v. City of Gridley*,⁶⁹ a California court reasoned that it would make little sense to apply the immunity to public entities since the legislation was designed to increase access to private land.⁷⁰ In addition, the state's tort claims act requires public entities to exercise reasonable care to prevent injury resulting from dangerous conditions on their property.⁷¹ For these reasons, the court held that the California recreational use statute did not apply to governmental entities.⁷²

Until recently the question of whether the recreational use statute would apply to public land in Oklahoma was moot because of the doctrine of sovereign immunity.⁷³ In *Vanderpool v. State*,⁷⁴ however, the

64. Recreational Area Licensing Act, ILL. ANN. STAT. ch. 111½, §§ 761-792 (Smith-Hurd 1977 & Supp. 1983-1984).

65. 442 F. Supp. 555 (N.D. Ill. 1976).

66. *Id.* at 561.

67. *Id.*

68. See, e.g., *Syrowik v. City of Detroit*, 119 Mich. App. 343, 326 N.W.2d 507 (1982); *Diodata v. Camden Cty. Park Comm'n*, 162 N.J. Super. 275, 392 A.2d 665 (1978); *Rochette v. Town of Newburgh*, 88 A.D.2d 614, 449 N.Y.S.2d 1013 (1982); *Cutway v. State*, 89 A.D.2d 406, 456 N.Y.S.2d 539 (1982); *Wight v. State*, 93 Misc. 2d 560, 403 N.Y.S.2d 450 (1978); *McCord v. Ohio Div. of Parks & Recreation*, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978); *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 597 P.2d 1362 (1979) (en banc); *Quesenberry v. Milwaukee Cty.*, 106 Wis. 2d 685, 317 N.W.2d 468 (1982).

69. 113 Cal. App. 3d 87, 169 Cal. Rptr. 757 (1981).

70. *Id.* at 91, 169 Cal. Rptr. at 759.

71. CAL. GOV'T CODE §§ 810-996.6 (West 1982).

72. 113 Cal. App. 3d at —, 169 Cal. Rptr. at 759; see also *Cords v. Ehly*, 62 Wis. 2d 31, 214 N.W.2d 432 (1974); *Goodson v. City of Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973) (holding the Wisconsin recreational use statute inapplicable to state and municipal parks respectively); Note, *supra* note 10, at 137 (endorsing holdings of Wisconsin state courts). Cf. *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, —, 597 P.2d 1362, 1367 (1979) (Dolliver, J., dissenting) (distinguishing between "passively allowing" public use and "actively operating" a recreational park as a "primary" and "exclusive" use of the land, arguing that public park land should not be encompassed by recreational use statute despite its applicability to "[a]ny public or private landowners," WASH. REV. CODE ANN. § 4.24.210 (Supp. 1983-1984)).

73. The Political Subdivision Tort Claims Act of 1978, OKLA. STAT. tit. 51, §§ 151-170 (1981), imposed tort liability only on municipalities, school districts, counties, and public trusts. *Id.* §§ 152(6), 153.

Oklahoma Supreme Court abrogated tort immunity for state and local governmental entities.⁷⁵ The state legislature, in response to the *Vanderpool* decision, has proposed the Oklahoma Tort Claims Act⁷⁶ which, if enacted, will generally waive the state's immunity from suit for its torts and those of its employees.⁷⁷ While the Act would greatly expand governmental tort liability, it provides that with the removal of immunity the state will be "subject to liability . . . where the state, if a private person or entity, would be liable . . . under the laws of this state."⁷⁸ Under this provision, it is arguable that the state is also entitled to the same degree of immunity afforded by the Oklahoma recreational use statute to private landowners.⁷⁹ The fact that other states' courts have frequently extended landowners' immunity to public entities⁸⁰ bolsters this contention.

It seems unlikely, however, that the recreational use statute would be applied to public land in Oklahoma. Inasmuch as it denies licensee or invitee status to recreational entrants,⁸¹ the statute may be strictly construed as one in derogation of common law.⁸² In addition, the provisions of the Political Subdivisions Tort Claims Act and the proposed Oklahoma Tort Claims Act which specifically exempt the state from liability for claims arising from "[n]atural conditions of unimproved property"⁸³ may be construed as imposing liability for all other types of claims arising on government property.

2. Invitation or Permission to Enter

Issues of entrant status are not entirely eliminated by the Oklahoma recreational use statute, despite its language indicating that landowners have no duty to warn or to keep the premises safe for all "persons" entering for recreational purposes.⁸⁴ A landowner who "directly or indirectly invites or permits . . . any person" to enter for a recreational purpose will not be held thereby to assure the entrant of

74. 672 P.2d 1153 (Okla. 1983).

75. *Id.* at 1156-57.

76. S. 469, 39th Leg., 2d Sess. §§ 1-19 (1984). If enacted, the Act will be codified at OKLA. STAT. tit. 76, §§ 101-118. *Id.*

77. *Id.* § 4.

78. *Id.*

79. See cases cited *supra* note 57.

80. See *supra* notes 57-68 and accompanying text.

81. OKLA. STAT. tit. 76, § 12(b) (1981).

82. See *supra* notes 32-35, 37-44 and accompanying text.

83. See OKLA. STAT. tit. 51, § 155(10) (1981); S. 469, 39th Leg., 2d Sess. § 9(22) (1984).

84. OKLA. STAT. tit. 76, § 11 (1981).

the land's safety, confer on him the status of invitee or licensee, or assume responsibility for the entrant's acts or omissions.⁸⁵ For purposes of determining the act's applicability, then, it may be necessary to inquire whether direct or indirect permission or invitation was given the entrant.

Courts which have considered the question have held that this description includes regular entrants whose presence is known by the landowner. For example, motorcyclists or snowmobilers who are known to use the owner's land are generally held to have permission to enter, regardless of whether the landowner permitted or merely tolerated their entry.⁸⁶ Although a landowner's social guests may be viewed as "directly invited," it is not clear whether they are included in the class of persons protected by Oklahoma's recreational use statute.

Several states' recreational use statutes specifically except invited guests.⁸⁷ Construing the California statute's exclusion of "persons who are expressly invited rather than merely permitted to come upon the premises by the landowner,"⁸⁸ the court in *Phillips v. United States*⁸⁹ held that the promotional literature published by the United States Forest Service was not an "express invitation" to the plaintiff to use a national forest.⁹⁰

Even under statutes containing language similar to that of the Oklahoma statute, the weight of authority suggests that social guests are not considered statutory recreational users. In *Herring v. Hauck*,⁹¹ the court held that in order to claim the limited liability of the Georgia statute⁹² an owner "must permit the free use of his . . . land by the public generally" rather than by specific individuals.⁹³ In *LePoidevin*

85. *Id.* § 12.

86. *See, e.g.*, *Thone v. Nicholson*, 84 Mich. App. 538, 269 N.W.2d 665 (1978) (motorcyclists); *Rock v. Concrete Materials, Inc.*, 46 A.D.2d 300, 362 N.Y.S.2d 258 (1974) (snowmobilers), *appeal dismissed*, 36 N.W.2d 772, 369 N.E.2d 672, 368 N.Y.S.2d 841 (1975); *Wight v. State*, 93 Misc. 2d 560, 403 N.Y.S.2d 450 (1978) (snowmobilers); *Wirth v. Ehly*, 93 Wis. 2d 433, 287 N.W.2d 140 (1980) (motorcyclists).

87. *See, e.g.*, CAL. CIV. CODE § 846 (West 1982) (liability to those expressly invited to enter is not limited); HAWAII REV. STAT. § 520-5(3) (1976) (liability to house guests is not limited); IND. CODE ANN. § 14-2-6-3 (Burns 1981) (liability to invited guests is not limited).

88. CAL. CIV. CODE § 846 (West 1982).

89. 590 F.2d 297 (9th Cir. 1979) (*per curiam*).

90. *Id.* at 300. The court reserved the question of whether promotional literature, if mailed to and read by the entrant, could constitute an express invitation. *Id.* at 299; *see also Simpson v. United States*, 652 F.2d 831, 834 (9th Cir. 1981) (court acknowledged that sign inviting public to enter national forest, plus provision of public facilities, could constitute express invitation).

91. 118 Ga. App. 623, 165 S.E.2d 198 (1968).

92. GA. CODE ANN. § 105-406 (1968) ("directly or indirectly invites or permits").

93. 118 Ga. App. at —, 165 S.W.2d at 199.

ex rel. Dye v. Wilson,⁹⁴ the Wisconsin Supreme Court held that landowners remained liable to their social guests, basing its reasoning on the premise that the immunity granted by the recreational use statute⁹⁵ should be narrowly circumscribed as in derogation of common law.⁹⁶ The court also emphasized the distinction between allowing public access and inviting friends onto one's land.⁹⁷

Strong policy reasons favor this exclusion of social guests from the purview of the statute. The trend in premises liability in general is to accord social guests the higher standard of care based on foreseeability of injury traditionally accorded business invitees.⁹⁸ Furthermore, as the court in *LePoidevin* noted, "Granting the protection . . . to a landowner who invites a friend of the family to the summer cottage . . . does not foster the purpose of [the act] to encourage landowners to make land . . . available to the *public* for recreational use."⁹⁹

3. What Is a 'Charge' for the Recreational Use of Land?

All forty-four recreational use statutes provide that if the entrant confers some economic benefit on the landowner for the use of his land, the owner's liability is not limited by the statute.¹⁰⁰ For example, the Oklahoma statute states, "Nothing in this act limits in any way any

94. 111 Wis. 2d 116, 330 N.W.2d 555 (1983).

95. WIS. STAT. ANN. § 29.68(2)(c) (West Supp. 1983-1984) (no immunity when landowner has given a person to whom he owes a duty to keep premises safe or to warn of danger permission to enter).

96. 111 Wis. 2d at —, 330 N.W.2d at 563.

97. *Id.* at —, 330 N.W.2d at 563.

98. See *supra* notes 6-7 and accompanying text.

99. *LePoidevin*, 111 Wis. 2d at —, 330 N.W.2d at 563 (emphasis added); see also Note, *supra* note 10, at 148-49.

The rationale behind the recreational use statute is that the acceptance of the lower standard of care by the entrant is the *quid pro quo* for a new right of entry. The statute thus attempts to open land to persons to whom it otherwise would be unavailable, *i.e.*, the general public. The typical guest, however, already enjoys the use of the land for recreational purposes. Considerations of liability are unlikely to motivate the landowner's consent to entry.

Id.

100. Twenty-two states deny coverage to a landowner who "charges" for entry. See ARK. STAT. ANN. § 50-1106(b) (1971); COLO. REV. STAT. § 33-41-104(b) (1973); CONN. GEN. STAT. ANN. § 52-557h(2) (West Supp. 1983); DEL. CODE ANN. tit. 7, § 5906(2) (1984); GA. CODE ANN. § 105-408(b) (1968); HAWAII REV. STAT. § 520-5(2) (1976); Act of Aug. 2, 1965, § 6(b), ILL. ANN. STAT. ch. 70, § 36(b) (Smith-Hurd Supp. 1983-1984); IOWA CODE ANN. § 111C.6(2) (West Supp. 1983-1984); KAN. STAT. ANN. § 58-3206(b) (1976); MD. NAT. RES. CODE ANN. § 5-1106 (1983); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1981); MINN. STAT. ANN. § 87.025(b) (West 1977); MISS. CODE ANN. § 89-2-7 (Supp. 1983); NEB. REV. STAT. § 37-1005 (1978); N.D. CENT. CODE § 53-08-05(2) (1982); OKLA. STAT. tit. 76, § 14(b) (1981); OR. REV. STAT. § 105.675 (1979-1980); 68 PA. CONS. STAT. ANN. § 477-6(2) (Purdon Supp. 1983-1984); S.C. CODE ANN. § 27-3-60(b) (Law. Co-op. 1976); TEX. REV. CIV. STAT. ANN. art. 1b(4)(2) (Vernon 1969); WASH. REV. CODE ANN.

liability which otherwise exists . . . where the owner of land charges the persons or persons who enter or go on the land for the recreational use thereof"¹⁰¹ The act defines "charge" as "the admission price or fee asked in return for invitation or permission to enter . . . the land."¹⁰² The reason for the exclusion is apparent: landowners who charge for entry do not further the purpose of the act, which is to encourage free public enjoyment of land in exchange for tort immunity.

Some courts have given a very narrow reading to this type of exception. In *Diodato v. Camden County Park Commission*,¹⁰³ the court held that the County Park Commission was entitled to immunity from liability to the plaintiff who had been injured in a county park after having paid a fee for his use of a baseball field in the park.¹⁰⁴ The court noted that the fee was imposed only for the use of the field. Since the plaintiff was injured in a part of the park that was open without charge to the public,¹⁰⁵ the statutory exception for "any case where permission to engage in sport . . . activity on the premises was granted for a consideration"¹⁰⁶ was held inapplicable.¹⁰⁷

Other courts have interpreted the exception broadly to allow

§ 4.24.210 (Supp. 1983-1984) ("charging a fee"); W. VA. CODE § 19-25-4(b) (1984); WYO. STAT. § 34-19-105(a)(ii) (1977).

Fifteen states deny coverage if "consideration" is given in return for permission to enter. *See* CAL. CIV. CODE § 846 (West 1982); IND. CODE ANN. § 14-2-6-3 (Burns 1981) ("monetary consideration"); KY. REV. STAT. ANN. § 150-645 (Bobbs-Merrill 1980); ME. REV. STAT. ANN. tit. 14, § 159-A(4)(B) (1980); MICH. COMP. LAWS ANN. § 300.201 (West 1984) ("valuable consideration"); MONT. CODE ANN. § 70-16-302 (1983) ("valuable consideration") NEV. REV. STAT. § 41.510(3)(b) (1981); N.H. REV. STAT. ANN. § 212:34 (III)(b) (1977); N.J. STAT. ANN. § 2A:42A-4(b) (West Supp. 1983-1984); N.Y. GEN. OBLIG. LAW § 9-103(2)(b) (McKinney 1978); OHIO REV. CODE ANN. § 1533.18(B) (Baldwin 1982) ("fee or consideration"); S.D. CODIFIED LAWS ANN. § 20-9-5 (1979) ("valuable consideration"); TENN. CODE ANN. § 70-7-104(2) (1983); VA. CODE § 29-130.2(d) (Supp. 1983); WIS. STAT. ANN. § 29.68(3)(b) (West Supp. 1983-1984) ("valuable consideration").

The remaining states have similar exclusions. *See* ALA. CODE § 35-15-3 (1975) (no immunity where permission is granted for commercial enterprise for profit); FLA. STAT. ANN. § 375.251(2)(a)(3)(b) (West 1974) (no immunity if charge is made or any commercial activity is conducted on the land); IDAHO CODE § 36-1604(f)(3) (Supp. 1983) (no immunity for owner who permits entry for compensation); LA. REV. STAT. ANN. § 9:2791(B) (West 1965) (no immunity if premises used principally for commercial, recreational enterprise for profit); VT. STAT. ANN. tit. 10, § 5212(b) (1973) (statute applies only if permission to enter is gratuitous).

101. OKLA. STAT. tit. 76, § 14(b) (1981).

102. *Id.* § 10(d).

103. 162 N.J. Super. 275, 392 A.2d 665 (1978).

104. *Id.* at —, 392 A.2d at 669-70.

105. *Id.*

106. N.J. STAT. ANN. § 2A:42A-4(b) (West Supp. 1983-1984).

107. 162 N.J. Super. at —, 392 A.2d at 669-70; *see also* Stone Mt. Mem'l Ass'n v. Herrington, 225 Ga. 746, —, 171 S.E.2d 521, 523 (1969) (parking fee for automobiles entering park was not related to admission and recreational use statute applied).

plaintiffs to recover. In *Copeland v. Larson*,¹⁰⁸ the plaintiff was injured when he dived off a pier at a small lake. The pier and other facilities such as a general store, restaurant, boat launch, and lodge were owned by the defendants. Although the plaintiff had paid no fee for admission to the area or for the use of the pier, he had patronized the defendant's store on previous visits and had intended to buy food and cigarettes the day he was injured.¹⁰⁹ The court held that the "valuable consideration" exception to the Wisconsin recreational use statute¹¹⁰ should apply when the recreational user's presence is of potential economic benefit to the landowner, or when some mutuality of interest between landowner and user exists.¹¹¹ Under this test, the plaintiff's intended purchases at the defendants' store were deemed an economic benefit to the landowner, who was thus denied the protection of the recreational use statute.¹¹²

In *Ducey v. United States*¹¹³ the Ninth Circuit Court of Appeals cited the *Copeland* decision with approval and gave several policy reasons for a broad interpretation of the consideration exception. A landowner who benefits economically from public use of his land is motivated by profit potential rather than tort immunity, is in a position to "post warnings, supervise activities, and otherwise seek to prevent injuries," and is able to spread the cost of injury through liability insurance.¹¹⁴

The approach of the Wisconsin Supreme Court and Ninth Circuit is preferable. It is contrary to the legislative purpose of a recreational use statute to extend immunity to owners who derive economic benefit

108. 46 Wis. 2d 337, 174 N.W.2d 745 (1970).

109. *Id.* at —, 174 N.W.2d at 747.

110. WIS. STAT. ANN. § 29.68(3)(b) (West Supp. 1983-1984).

111. 46 Wis. 2d at —, 174 N.W.2d at 750.

112. *Id.* at —, 174 N.W.2d at 751; *see also* *Ducey v. United States*, 713 F.2d 504, 510 (1983) ("consideration" exception in NEV. REV. STAT. § 41.510(3) (1981) is to be construed more broadly than those statutes using language such as "fee" or "charge"); *Kesner v. Trenton*, 216 S.E.2d 880, 886 (W. Va. 1975) (immunity denied to owners of a marina who allowed the public to swim at a free beach because of anticipated revenue from the swimmers). *But see* *Hamilton v. United States*, 371 F. Supp. 230, 234 (E.D. Va. 1974) (federal taxes did not constitute consideration within the meaning of the recreational use statute); *Epps v. Chattahoochee Brick Co.*, 140 Ga. App. 426, —, 231 S.E.2d 443, 444 (1976) (public relations value of allowing free swimming was not consideration to operator of a fishing lake); *Bourn v. Herring*, 225 Ga. 67, —, 166 S.E.2d 89, 92 (1969) (good will to dairy from free use of grounds for picnicking was not a "charge" for the use of the land), *aff'g in part, rev'g in part* *Herring v. R.L. Mathis Certified Dairy Co.*, 118 Ga. App. 132, 162 S.E.2d 863 (1968), *appeal dismissed*, 400 U.S. 922 (1970).

113. 713 F.2d 504 (1983), *aff'g in part, rev'g in part* *Ducey v. United States*, 523 F.2d 225 (1981).

114. *Id.* at 511.

from public use of their land—even if they do not charge for admission per se. The incentive that the legislation was designed to provide is displaced by the economic incentive of the commercial activity, and as the court in *Ducey* noted, one way to avoid extending the statute to situations it was not intended to cover is to give as broad a reading as possible to the exceptions therein.¹¹⁵

A better solution is to amend the statute to define “charge” as including “indirect economic benefit” as well as fees for entry. A recent amendment of the Alabama recreational use statute is instructive. The statute does not apply to land upon which “any commercial recreational enterprise is conducted.”¹¹⁶ This language may be too narrow in scope, as it would still grant tort immunity to landowners who operate commercial ventures on their property which are not of a recreational nature and who derive economic benefits from the patronage of entrants who are given access to the land for recreational purposes. Thus, a statute that denies immunity where the commercial activity and recreational use are related would better serve the purpose of the legislation.

4. Willful or Malicious Failure to Guard or Warn

Most recreational use statutes do not provide immunity for a landowner’s grossly negligent or deliberately injurious conduct. The Oklahoma statute excludes “willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity” from the protection of the act.¹¹⁷ Twenty-two other statutes contain the same exclusion,¹¹⁸ and most of the others have similar provisions.¹¹⁹ The

115. *Id.* at 510.

116. ALA. CODE §§ 35-15-26 (Supp. 1983).

117. OKLA. STAT. tit. 76, § 14(a) (1981).

118. See CAL. CIV. CODE § 846 (West 1982); CONN. GEN. STAT. ANN. § 52-557h(1) (West Supp. 1983); DEL. CODE ANN. tit. 7, § 5906(1) (1984); GA. CODE ANN. § 105-408(a) (Supp. 1982); HAWAII REV. STAT. § 520-5(1) (1976) (slightly dissimilar); Act of Aug. 2, 1965, § 6(a), ILL. ANN. STAT. ch. 70, § 36(a) (Smith-Hurd Supp. 1983-1984); IOWA CODE ANN. § 111C.6(1) (West Supp. 1983-1984); KAN. STAT. ANN. § 58-3206(a) (1983); KY. REV. STAT. ANN. § 150.645 (Bobbs-Merrill 1980) (“willful and malicious”); ME. REV. STAT. ANN. tit. 14, § 159-A(4)(A) (1980); MD. NAT. RES. CODE ANN. § 5-1106 (1983); NEB. REV. STAT. § 37-1005(1) (1978); NEV. REV. STAT. § 41.510(3)(a) (1981); N.H. REV. STAT. ANN. § 212.34 III(a) (Supp. 1983); N.J. STAT. ANN. § 2A:42A-4(a) (West Supp. 1983-1984); N.Y. GEN. OBLIG. LAW § 9-103(2)(a) (McKinney Supp. 1983-1984); N.D. CENT. CODE § 53-08-05(1) (1982); 68 PA. CONS. STAT. ANN. § 477-6(1) (Purdon Supp. 1983-1984); TENN. CODE ANN. §§ 11-10-103(1) (Supp. 1983) (“dangerous or hazardous”), 70-7-104(1) (1983); VA. CODE § 29-130.2(d) (Supp. 1983); W. VA. CODE § 19-25-4 (1984) (“dangerous or hazardous”); WIS. STAT. ANN. § 29.68(3) (West Supp. 1983-1984).

119. See ALA. CODE § 35-15-24(a) (Supp. 1982) (quoted *infra* note 134); ARK. STAT. ANN. § 50-1106(a) (Supp. 1983) (“malicious, but not mere negligent, failure to guard or warn against an

term "willful or malicious" behavior, however, is even more ambiguous than "charge for entry," and has been more difficult for the courts to define.

In *Miller v. United States*,¹²⁰ an Illinois federal district court awarded damages to the plaintiff for injuries sustained on federal park land.¹²¹ The decision, in part, was based on the court's interpretation of the exception for "willful or malicious" conduct in the Illinois recreational use statute.¹²² According to the court, a landowner's failure to warn of a dangerous condition is "willful and malicious" when he could have discovered the dangerous condition by reasonable care.¹²³ The *Miller* standard in essence reimposes the landowner's common-law duty to warn,¹²⁴ despite the existence of the recreational use statute.

Interpreting similar language, however, an Arkansas federal court reached a different conclusion. In *Mandel v. United States*,¹²⁵ the court held that the statutory exception for "willful or malicious failure to guard or warn"¹²⁶ applied in cases involving "actual or deliberate intention to harm or conduct which, if not intentional, shows an utter disregard for the safety of others."¹²⁷ Declining to impose the higher

ultra-hazardous condition, structure, personal property, use or activity actually known to . . . be dangerous"); COLO. REV. STAT. § 33-41-104(a) (1973) ("willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm"); FLA. STAT. ANN. § 375.251(4) (West 1974) ("deliberate, willful or malicious injury to persons or property"); IND. CODE ANN. § 14-2-6-3 (Burns Supp. 1983) ("malicious or illegal acts"); LA. REV. STAT. ANN. § 9:2791(B) (West 1965) ("deliberate and willful or malicious injury to persons or property"); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1981) ("willful, wanton or reckless conduct"); MICH. COMP. LAWS ANN. § 300.201 (West 1984) ("gross negligence or willful and wanton misconduct"); MINN. STAT. ANN. § 87.025(a) (West 1983) ("conduct which . . . entitles a trespasser to maintain an action"); MISS. CODE ANN. § 89-2-5 (Supp. 1983) ("deliberate, willful or malicious injury"); MONT. CODE ANN. § 70-16-302 (1983) ("willful or wanton misconduct"); OR. REV. STAT. § 105.655 (1981) ("reckless failure to guard"); S.C. CODE ANN. § 27-3-60(a) (Law. Cop. 1976) ("grossly negligent, willful, or malicious failure to guard or warn"); S.D. CODIFIED LAWS ANN. § 20-9-5 (1979) ("gross negligence or willful and wanton misconduct"); TEX. REV. CIV. STAT. ANN. art. 1b(2) (Vernon 1969) ("willful or malicious injury to persons or property"); VT. STAT. ANN. tit. 10, § 5212(b) (1973) ("no greater duty except as to acts of active negligence than is owed a trespasser"); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1983-1984) ("injuries . . . by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted").

Only two recreational use statutes contain no such exception. See IDAHO CODE § 35-1604 (Supp. 1983); OHIO REV. CODE ANN. § 1533.18-.181 (Baldwin 1980).

120. 442 F. Supp. 555, 557 (N.D. Ill. 1976), *aff'd*, 597 F.2d 614 (1979).

121. *Id.* at 556.

122. Act of Aug. 2, 1965, § 6(a), ILL. ANN. STAT. ch. 70, § 36(a) (Smith-Hurd Supp. 1983-1984).

123. 442 F. Supp. at 561.

124. See *supra* note 5 and accompanying text.

125. 545 F. Supp. 907 (W.D. Ark. 1982).

126. ARK. STAT. ANN. § 50-1106(a) (1971).

127. 545 F. Supp. at 911.

standard of care set out in *Miller*,¹²⁸ the court held that in order to recover the plaintiff must show that the landowner engaged in conduct which would naturally or probably result in injury, that he knew or reasonably should have known that his conduct would result in injury, and that he continued his course of conduct in reckless disregard of the consequences.¹²⁹ Other courts interpreting the "willful and wanton misconduct" exception have also required either intent to cause harm,¹³⁰ or indifference to the harmful results of one's conduct.¹³¹

A test which strikes an equitable balance between landowner and recreational entrant was expressed in *McGruder v. Georgia Power Company*.¹³² Under the *McGruder* test, a finding of willful failure to guard or warn would require proof that the owner had actual knowledge that his property was being used by recreational entrants, that a latent condition involving an unreasonable risk of death or serious bodily harm existed, and that the owner chose not to guard or warn.¹³³ This standard is more stringent than the *Miller* test in that it excludes constructive knowledge or a duty to inspect, but less harsh than the tests that require actual design or intent to injure.¹³⁴

128. *Id.*

129. *Id.* at 913. An amendment of the Arkansas recreational use statute in 1983 reinforces this court's interpretation of the exception. ARK. STAT. ANN. § 50-1106(a) (Supp. 1983) (immunity does not include "malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use or activity actually known to such owner to be dangerous").

130. *See, e.g.*, *Rushing v. State*, 381 So. 2d 1250, 1252 (La. Ct. App. 1980) (willful and wanton conduct is "purposeful and knowing conduct from which one can conclude that the owners of the premises had a conscious design to injure").

131. *See, e.g.*, *Ducey v. United States*, 523 F. Supp. 225, 230 (D. Nev. 1981) ("though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury"), *aff'd in part, rev'd in part on other grounds*, 713 F.2d 504 (1983); *Johnson v. Stryker Corp.*, 70 Ill. App. 3d 717, —, 388 N.E.2d 932, 935 (1979) (court expressly rejects the *Miller* standard); *Burnett v. City of Adrian*, 414 Mich. 448, —, 326 N.W.2d 810, 812 (1982) (to qualify as willful and wanton the conduct complained of must show "an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does").

132. 126 Ga. App. 562, —, 191 S.E.2d 305, 306, *rev'd on other grounds*, 194 S.E.2d 440 (1972).

133. *Id.* at —, 191 S.E.2d at 307.

134. The *McGruder* test has since been codified in Alabama. *See* ALA. CODE § 35-15-24 (Supp. 1983). The revised section reads:

Nothing in this article limits in any way legal liability which otherwise might exist when such owner has actual knowledge:

- (1) That the outdoor recreational land is being used for non-commercial recreational purposes;
- (2) That a condition, use, structure, or activity exists which involves an unreasonable risk of death or serious bodily harm;
- (3) That the condition, use, structure, or activity is not apparent to the person or persons using the outdoor recreational land; and

5. Effect on Attractive Nuisance Doctrine

At common law a special exception to the general duty of a landowner toward trespassers was formulated to increase the standard of care owed to trespassing children.¹³⁵ This exception, called the attractive nuisance doctrine, recognized both the vulnerability of children to injury and the interest of society in the protection of their safety and welfare.¹³⁶ The increase in a landowner's duty was premised on his superior ability to appreciate the risk of injury inherent in conditions or structures on his land and to anticipate that children might be drawn or "attracted" to them out of curiosity and a lack of caution.¹³⁷ The Restatement of Torts later discarded the theory of attraction, instead basing liability on the foreseeability of injury to trespassing children when a dangerous condition was known to exist.¹³⁸ In states which have enacted recreational use statutes, however, the doctrine may no longer be dispositive of issues of owner liability when children are injured by what would have been termed an attractive nuisance at common law.¹³⁹

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- (4) That having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.

135. W. PROSSER, *supra* note 3, § 59, at 364-66.

136. *Id.*

137. The term "attractive nuisance" originated in an early case stating the doctrine. *Keffe v. Milwaukee & St. P. R.R.*, 21 Minn. 207 (1875).

In Oklahoma a landowner is subject to liability under the attractive nuisance doctrine if the instrumentality or condition causing injury is "a sufficient allurements as likely to attract children upon the premises, and . . . fraught with such danger to young children as reasonably to require that precautions be taken to prevent children from coming in conflict therewith." *J.C. Penney Co. v. Clark*, 366 P.2d 637, 639 (Okla. 1961); *see also Shell Petroleum Co. v. Beers*, 185 Okla. 331, —, 91 P.2d 777, 780 (1939) (attractive nuisance modifies landowner's duty to trespassers); *Lone Star Gas Co. v. Parsons*, 159 Okla. 52, —, 14 P.2d 369, 372 (1932) (doctrine is an exception to rule denying protection to trespassers).

138. A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

- (a) the place where the condition exists is one upon which the possessor knows . . . that children are likely to trespass, and
- (b) the condition is one of which the possessor knows . . . will involve an unreasonable risk of death or serious bodily harm . . . and
- (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
- (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
- (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339 (1965).

139. Some believed that recreational use statutes would have little effect on the attractive nuisance doctrine because the chance of child trespassers being injured on artificial conditions on rural land is slight. *See Note, supra* note 10, at 162. However, many of the reported cases constru-

A few states explicitly except the attractive nuisance doctrine from the scope of their recreational use statutes.¹⁴⁰ Other statutes implicitly render the attractive nuisance doctrine inapplicable by defining the recreational entrant as "any individual, regardless of age, maturity, or experience."¹⁴¹ Under the remaining statutes, such as Oklahoma's, in which the age of the entrant is not mentioned,¹⁴² it is up to the courts to decide whether the recreational use statute overrides the attractive nuisance doctrine when injured children are plaintiffs.

In *O'Connell v. Forest Hill Field Club*,¹⁴³ the court considered the impact of New Jersey's recreational use statute on the common-law doctrine of attractive nuisance. Noting that the policy underlying the doctrine is an accommodation of landowners' rights and society's interest in the safety of the young, the court held there was nothing in the recreational use statute itself or the legislative history that indicated that it was meant to apply to an infant trespasser.¹⁴⁴ An opposite view

ing these statutes have involved minor plaintiffs. *See, e.g.*, *Jones v. United States*, 693 F.2d 1299, 1300 (9th Cir. 1982) (fourteen-year-old injured while snow sliding in national park); *Smith v. Crown-Zellerbach, Inc.*, 638 F.2d 883, 884 (5th Cir. 1981) (ten-year-old injured on hot ashes and chemical debris); *Fisher v. United States*, 534 F. Supp. 514, 515 (D. Mont. 1982) (child on school field trip killed when she fell on a snowplow blade); *Blair v. United States*, 433 F. Supp. 217, 218 (D. Nev. 1977) (eleven-year-old drowned in a pool constructed by private persons on land under management of Bureau of Land Management); *Magerowski v. Standard Oil Co.*, 274 F. Supp. 246, 246 (W.D. Mich. 1967) (nine-year-old drowned when he fell off defendant's dock); *Paige v. North Oaks Partners*, 134 Cal. App. 3d 860, —, 184 Cal. Rptr. 867, 868 (1982) (ten-year-old injured when he fell into an open trench on construction site); *Epps v. Chattahoochee Brick Co.*, 140 Ga. App. 426, —, 231 S.E.2d 443, 444 (1976) (six-year-old drowned in an artificial lake near apartment complex); *Heider v. Michigan Sugar Co.*, 375 Mich. 490, —, 134 N.W.2d 637, 639 (1965) (two brothers, aged twelve and eight, drowned in a pond); *Tallaksen v. Ross*, 167 N.J. Super. 1, —, 400 A.2d 485, 485 (1979) (infant child injured while ice skating on a frozen swamp); *Rochette v. Town of Newburgh*, 88 A.D.2d 614, —, 449 N.Y.S.2d 1013, 1014 (1982) (eleven-year-old injured when ice sailboats collided on lake adjacent to defendant's property); *McCord v. Ohio Div. of Parks & Recreation*, 54 Ohio St. 2d 72, —, 375 N.E.2d 50, 51 (1978) (nine-year-old drowned in state park); *Wiegand ex rel. Wiegand v. Mars Nat'l Bank*, — Pa. Super. —, —, 454 A.2d 99, 100 (1982) (sixteen-year-old injured on vacant lot); *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, —, 588 P.2d 1351, 1353 (1979) (en banc) (two brothers, aged six and eight, drowned in a pond on city-owned land); *LePoidevin ex rel. Dye v. Wilson*, 111 Wis. 2d 116, —, 330 N.W.2d 555, 557 (1983) (sixteen-year-old injured when she dived into shallow water from a pier owned by defendant).

140. *See* COLO. REV. STAT. § 33-41-104(c) (1973); IND. CODE ANN. § 14-2-6-3 (Burns Supp. 1983); IOWA CODE ANN. § 111C.7(3) (West Supp. 1983-1984); S.D. CODIFIED LAWS ANN. § 20-9-5 (1979); TEX. REV. CIV. STAT. ANN. art. 1b(3) (Vernon 1969); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1983-1984).

141. ALA. CODE § 35-15-21(4) (Supp. 1983); Act of Aug. 2, 1965, § 2(e), ILL. ANN. STAT. ch. 70, § 32(e) (Smith-Hurd Supp. 1983-1984); S.C. CODE ANN. § 27-3-20(e) (Law. Co-op. 1976) ("individuals regardless of age").

142. *See* OKLA. STAT. tit. 76, § 12 (1981) (applies to "any person" invited or permitted to use the land for recreational purposes).

143. 199 N.J. Super. 317, 291 A.2d 386 (Super. Ct. Law Div. 1972).

144. *Id.* at —, 291 A.2d at 388; *see also* *Smith v. Crown Zellerbach, Inc.*, 638 F.2d 883, 885

has been taken in Michigan, where the recreational use statute has been construed as a codification of common law.¹⁴⁵ There the courts have been liberal in applying the statute, even when the injured plaintiffs have been children.¹⁴⁶

The uneven application of recreational use statutes to minor plaintiffs has been noted.¹⁴⁷ It has been suggested that the age of the plaintiff be considered as a factor in determining whether the landowner has been guilty of willful and wanton misconduct and is thus outside the scope of statutory immunity.¹⁴⁸ It seems preferable, however, to deal specifically with minors in the statute itself. The legislation is clearly intended to apply to adults: it creates a new class of entrant distinct from trespasser, licensee, or invitee. The recreational entrant is defined by his intent to enter for a recreational purpose, and a fundamental requisite of the new status is the entrant's willingness to accept responsibility for injury in exchange for right of entry. Trespassing children, however, are already a discrete class, given special treatment in accord with their special status. As one court noted, their activities usually are recreational¹⁴⁹ and they are not capable of forming the intent to trade tort immunity for access to land. An explicit exclusion of the attractive nuisance doctrine in the recreational use statute would preserve the higher standard of care traditionally accorded trespassing children.

III. PROPOSAL FOR REVISION OF THE OKLAHOMA STATUTE

As the previous section indicates, the language of Oklahoma's recreational use statute creates several areas of uncertainty of application. Revision of the statute might avert some of the problems of interpreta-

(5th Cir. 1981) (no intent by the Louisiana legislature to remove liability under the attractive nuisance doctrine when it passed the recreational use statute); *Paige v. North Oaks Partners*, 134 Cal. App. 3d 860, —, 184 Cal. Rptr. 867, 869 (1982) (the California statute does not exclude applicability of attractive nuisance); *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, —, 588 P.2d 1351, 1356 (1979) (en banc) (Washington statute expressly disclaims intent to alter attractive nuisance doctrine).

145. See *supra* note 36 and accompanying text.

146. See, e.g., *Heider v. Michigan Sugar Co.*, 375 Mich. 490, —, 134 N.W.2d 637, 639 (1965) (en banc) (recreational use statute barred minor plaintiff's claim), *cert. dismissed*, 385 U.S. 362 (1966); see also *Magro v. City of Vineland*, 148 N.J. Super. 34, —, 371 A.2d 815, 818 (Super. Ct. App. Div. 1977) (court found no evidence of legislative intent to exclude infant plaintiffs from the scope of the statute). Cf. *Wirth v. Ehly*, 93 Wis. 2d 433, —, 287 N.W.2d 140, 147 (1980) (court refused to apply attractive nuisance doctrine because injured child was not trespassing in public park).

147. See, e.g., Comment, *Tort Liability and Recreational Use of Land*, 28 BUFFALO L. REV. 767, 785-88 (1979).

148. *Id.* at 788.

149. *Paige v. North Oaks Partners*, 134 Cal. App. 3d 860, —, 184 Cal. Rptr. 867, 869 (1982).

tion that have plagued courts in other states. In addition, the Oklahoma legislature should consider extending the protection of the act in a way which more clearly promulgates the policy upon which it is based.

A. *Unimproved Land*

Not only does Oklahoma's limitation of "land" to that used primarily for farming or ranching¹⁵⁰ pose a difficult question of the statute's scope,¹⁵¹ this narrow definition of land may restrain the applicability of the legislation to the point of denying its usefulness.¹⁵² The fact that the statute has never been applied in a reported case evidences its limited effect. In order to better implement the purpose of recreational land use legislation, which is the encouragement of public use of private land for recreational purposes,¹⁵³ Oklahoma should follow the lead of other states which have broadened the class of lands encompassed by their recreational use statutes.¹⁵⁴

This is not to suggest that the Oklahoma act should be made applicable to all types of land.¹⁵⁵ The purpose of the act is not advanced by extending its coverage to developed, residential, or urban areas. Instead, the statute should be drafted to include all unimproved land.¹⁵⁶ Such a provision is in keeping with both the policy and the logic underlying recreational use statutes. It would include land which, though not

150. OKLA. STAT. tit. 76, § 10(a) (1981).

151. See *supra* notes 52-53 and accompanying text.

152. See *Diodato v. Camden Cty. Park Comm'n*, 162 N.J. Super. 275, —, 392 A.2d 665, 670 (1978) (New Jersey statute should be given the broadest interpretation to include all lands susceptible to use for the recreational activities enumerated therein).

153. See *supra* notes 11-13 and accompanying text.

154. See N.J. STAT. ANN. § 2A:42A-3(a) (West Supp. 1983-1984) ("premises") (amending N.J. STAT. ANN. § 2A:42A-1 (1962) ("agricultural lands or woodlands")); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1983-1984) ("lands whether rural or urban") (amending WASH. REV. CODE ANN. § 4.24.210 (1976) ("agricultural or forest lands")).

155. See *Harrison v. Middlesex Water Co.*, 80 N.J. 391, —, 403 A.2d 910, 913 (1979) ("The use of the word 'premises' . . . creates some unsureness of the statute's intended scope The statutory ambiguity has been witnessed by the struggles of lower courts to fashion a sensible and consistent approach in applying the Act").

156. Although no recreational use statute restricts the scope of applicability to unimproved land, several courts have interpreted the statutes as applying only to unimproved or undeveloped land. See, e.g., *Thone v. Nicholson*, 84 Mich. App. 538, —, 269 N.W.2d 665, 668 (Ct. App. 1978) (vast areas of vacant but private lands); *Diodato v. Camden Cty. Park Comm'n*, 162 N.J. Super. 275, —, 392 A.2d 665, 670 (Super. Ct. Law Div. 1978) (non-residential, rural, or semi-rural unimproved lands); *Michalovic v. Genessee-Monroe Racing Ass'n*, 79 A.D.2d 82, —, 436 N.Y.S.2d 468, 470 (1981) (property of a relatively undeveloped nature); *Quesenberry v. Milwaukee Cty.*, 106 Wis. 2d 685, —, 317 N.W.2d 468, 472 (1982) (land in its natural undeveloped state as contrasted to the more structured, landscaped and improved land).

used for farming or ranching, would be ideally suited to public recreational use. The activities listed in most recreational use statutes are of a type usually pursued on large, unimproved tracts of land.¹⁵⁷ Further, the lack of improvements warns entrants that no precautions for safety have been taken, and, as a consequence, they are on notice that they are responsible for their own well being.

The term "unimproved" should be carefully defined to avoid interpretational problems and to further the statutory purpose. Exclusion of all land which has been altered by the landowner would unnecessarily restrict the scope of immunity.¹⁵⁸ An improvement should instead be defined as an addition that has a recreational use or purpose, erected by the landowner for use by the public. This definition would cover owner-placed additions such as picnic facilities,¹⁵⁹ swimming pools,¹⁶⁰ golf courses,¹⁶¹ and race tracks,¹⁶² all of which indicate to the entrant that the area is a recreational facility for which some responsibility has been taken to insure safety to those who enter. The definition should not cover "improvements" such as an impromptu football field,¹⁶³ snowmobile trail,¹⁶⁴ or motorcycle trail¹⁶⁵ carved out by users of the land. It would also exclude improvements that may have a recreational use but were placed by the owner for his own use such as fishing docks,¹⁶⁶ sheds,¹⁶⁷ or boat ramps,¹⁶⁸ or additions such as a cornfield,

157. See *supra* note 15.

158. See Comment, *Tort Liability and Recreational Use of Land*, 28 BUFFALO L. REV. 767, 791 (1979) (to deny immunity whenever an owner improves his land is "an overly harsh and restrictive approach to recreational tort immunity").

159. See, e.g., *Van Gordon v. Portland Gen. Elec. Co.*, 294 Or. 761, —, 662 P.2d 714, 715 (1983).

160. See, e.g., *Erickson v. Century Management Co.*, 154 Ga. App. 508, —, 268 S.E.2d 779, 779 (1980).

161. See, e.g., *Quesenberry*, 106 Wis. 2d at —, 317 N.W.2d at 468; *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, —, 291 A.2d 386, 387 (Super. Ct. Law Div. 1972).

162. See, e.g., *Michalovic*, 79 A.D.2d at —, 436 N.Y.S.2d at 470.

163. See, e.g., *Wiegand ex rel. Wiegand v. Mars Nat'l Bank*, — Pa. Super. —, —, 454 A.2d 99, 100 (1982).

164. See, e.g., *LaCarte v. New York Explosives Corp.*, 72 A.D.2d 873, —, 421 N.Y.S.2d 949, 950 (1979); *Wight v. New York*, 93 Misc. 2d 560, —, 403 N.Y.S.2d 450, 450-51 (1978).

165. See, e.g., *Parish v. Lloyd*, 82 Cal. App. 3d 785, —, 147 Cal. Rptr. 431, 431 (1978); *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, —, 136 Cal. Rptr. 224, 225-26 (1977); *Reuter v. Kocan*, 113 Ill. App. 3d 903, —, 446 N.E.2d 882, 883-84 (1983); *Thone v. Nicholson*, 84 Mich. App. 538, —, 269 N.W.2d 665, 667 (1978).

166. See, e.g., *Magerowski v. Standard Oil Co.*, 274 F. Supp. 246, 246 (W.D. Mich. 1967).

167. See, e.g., *Curtiss v. County of Chemung*, 78 A.D.2d 908, —, 433 N.Y.S.2d 514, 514-15 (1980).

168. See, e.g., *Sea Fresh Frozen Prods. v. Abdin*, 411 So. 2d 218 (Fla. 1982), *rev'g* *Abdin v. Fischer*, 374 So. 2d 1379 (Fla. 1979).

stock pond, or barn that make no implicit statement to the public that the land is safe for recreational use.

B. *Failure to Warn of a Known Dangerous Latent Condition*

To protect recreational users from unnecessary risk of injury, the Oklahoma statute should also be amended to preserve the landowner's common law duty to warn of known dangerous conditions.¹⁶⁹ An owner who knows of a dangerous condition on his property which is not observable by an entrant should be held responsible for posting a warning before permitting others to enter for recreation. Otherwise, the condition acquires the nature of a trap, for which landowners have been held liable under even the most minimal standard of care.¹⁷⁰ If this duty seems burdensome to the owner, he has the option of not permitting entry.

IV. CONCLUSION

Recreational use legislation serves the dual purpose of making private land available to the public and protecting the owner who permits public use of his land. Such legislation, however, is an exception to the general movement of the common law toward holding landowners responsible for the safety of people who come on their land. Inasmuch as the recreational use statute holds owner responsibility in abatement, it should be precisely drafted to fit the purpose for which it was enacted.

This Comment is offered in hope that it will alert practitioners to the existence of the Oklahoma recreational use statute. In addition, it is hoped that the legislature will note that revisions need to be made in order to increase the usefulness of the statute and to avoid some of the problems of interpretation that have arisen in other states.

Zoe A. Bullen

169. See ALA. CODE § 35-15-24(a) (Supp. 1982); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1983-1984); *McGruder v. Georgia Power Co.*, 126 Ga. App. 562, —, 191 S.E.2d 305, 307, *rev'd on other grounds*, 229 Ga. 811, 194 S.E.2d 440 (1972).

170. See *supra* note 5 and accompanying text.