

## Law Update

# Minimizing Liability for Public Access on Private Lands

by Bill Silberstein and Ellis Rosenzweig

If a land trust wishes to open its lands for recreational use, one concern is liability for injury to those using the land. The degree of liability that a land trust takes on for allowing public access to its lands depends on a number of factors, including state law on recreational use, common law, the land trust's insurance and how well the organization has managed risks. [See box below.]

### Common Law Liability

Under the traditional legal standards of common law, a landowner's liability varies according to who is on the property:

- A **licensee** is a person permitted to enter or remain on private land by the landowner's consent, but only for the visitor's benefit. In this case, the landowner is responsible for warning of known dangers, gross negligence and willful and wanton misconduct. [See box, page 25 for an explanation of these terms.]
- An **invitee** is a person who is invited to enter or remain on private land for a purpose directly or indirectly related to the owner's benefit. A visitor who pays a fee to use private land would

be an invitee. (Before introducing a fee to visitors on its lands, land trusts should look into the liability implications.) The highest duty of care is owed to invitees. A landowner is responsible for safety from known conditions as well as those conditions that, by an exercise of reasonable care, would have been discovered. The landowner is also responsible for negligence, gross negligence, and willful and wanton misconduct.

- A **trespasser** is a person who comes onto land without the landowner's consent. The landowner has little responsibility to adult trespassers.

Landowners generally owe children the highest duty of care, even if they are trespassing. Landowners should particularly guard against "attractive nuisances"—an inherently dangerous condition from which visitors, especially children, have not been adequately protected. Attractive nuisances are usually artificial conditions on the land, but they can also be natural conditions like a pond, lake or river. Warning signs and fences for dangerous features can significantly reduce liability risks.

The liability of an attractive nuisance varies with state law, and, in the event of a court case, by a jury's interpretation of what constitutes an attractive nuisance and what a landowner has done to mitigate the risks. Courts have ruled open mine shafts, gravel pits and quarries to be attractive nuisances.

### Recreational Use Statutes (RUS)

To encourage landowners to make land available for recreation, 47 states have adopted legislation limiting landowners' liability. These laws are generally referred to as recreational use statutes (RUSs), and they provide landowners more protection than under common law. For example, Colorado's RUS [Colo. Rev. Stat. § 33-41-103] states, "an owner of land who either directly or indirectly invites or permits, without charge, any person to use such property for recreational purposes does not thereby... incur liability for any injury to persons or property or for the death of any person caused by an act or omission of such person."

A typical RUS protects the landowner from general liability for visitors' injuries

## Risk Management—Your First Defense Against Liability

The first defense against potential liability problems is to anticipate risks and eliminate or reduce them, a process known as risk management. Risk management starts when a land trust considers purchasing or accepting a donation of land or a conservation easement, or taking on land management or other responsibilities. For example, a land trust must consider whether a property poses an unreasonable danger due to buildings or other structures in poor repair, or unsafe features such as cliffs or washed-out trails. If the risks outweigh the benefits of protecting the property, or correcting the problems is too expensive, the land trust may have to decide not to accept, acquire or manage the parcel.

Once you hold land, you will need to inspect your properties regularly for all types of potential safety hazards, such as trails in need of maintenance, unsafe buildings, dangerous swimming areas, etc. Remedy such hazards if it is possible and consistent with your management plan. Otherwise, post clear warnings.

—excerpted from *Starting a Land Trust*, published by LTA [Also see *The Standards and Practices Guidebook*, 6-45, for steps of risk management.]

if the property is allowed to be used by others for recreational purposes and no fee is charged. A landowner is still liable for gross negligence, willful and wanton conduct and failure to warn of known dangers.

It is important to note, however, that state laws vary drastically. Ask an attorney about the RUSs:

- Does the statute cover both rural and urban areas?
- Does it cover injuries only on land or does it include water, roads and buildings?
- Is the landowner liable for injuries where the government holds a conservation easement?
- Does the attractive nuisance doctrine override the statute in regard to children?
- What is the definition of recreational purposes? Is the definition limited to specific activities or is it broad and all encompassing?
- Does the RUS only protect against a specific percentage or dollar amount of liability?

[See The Standards and Practices Guidebook, [Section 6-40](#).]

### Liability for Conservation Easement Holders

The extent to which those holding a conservation easement on land open to public access are liable for personal injury is uncertain. Legal scholarship and court rulings on the matter are extremely limited. What is available relates to other easements, not conservation easements.


The question of whether an easement holder is liable as a landowner is determined by how much the easement holder exercises "control and possession" of the land. The Pennsylvania Superior Court in *Leichter v. Eastern Realty Co.*, 516 A2d. 1247, held that liability of a corporate holder of an easement for use of a parking lot depended on whether the holder had exercised its rights to build and use the parking lot. If so, then it was liable for visitors on the lot.

It is reasonable to assume that a conservation easement holder would be afforded similar protections to that of a landowner under a state's RUS. Conversely, it seems as if the amount of liability placed on a land trust, as an easement holder, is proportional to the amount of control it exercises over properties as a result of its easements. If the easement requires public access for recreation, then the easement holder may be liable for visitors who use the land under that provision. And the more the easement holder controls management issues related to public access, the greater its liability.

### Insurance

While RUSs help reduce liability related to public access, they have not eliminated liability. Land trusts that own land or conservation easements should own commercial general liability (CGL) insurance to protect against liabilities for personal injury, property damage and deaths on these properties. CGL policies provide broad coverage for indemnification and usually require an insurance carrier to defend any lawsuit seeking damages.

Land trusts should follow a few simple steps to ensure that they are safe from liability for injuries suffered on their lands:

- Consult an attorney in your area to determine the scope of the state recreational use statute and how it protects your land trust.
- Practice risk management by inspecting land before opening it to public use, and take steps to lessen dangerous features.
- Purchase general liability insurance.
- Consider carefully before charging access fees as this will almost always increase your liability. 

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The following legal terms relate to a landowner's liability. In the event of a liability lawsuit, a jury or judge would decide whether a term applies to a specific situation.

- **Reasonable care** is the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under like circumstances. (Land trusts, for example, would likely be compared with other land trusts or organizations that manage publicly accessible properties.)

- **A known danger** relates to knowledge of a certain dangerous condition on the land. An example would be if the landowner knew of a dilapidated bridge, or particularly slippery area on a trail that might warrant a railing.

- **Negligence** means the failure to exercise the standard of care that a reasonably prudent person would exercise in a similar situation. An example would be if the owner of land open to the public dug up a road for repairs and left the construction site unmarked or non-barricaded.

- **Gross negligence** is a conscious voluntary act, or intentional failure to act, which is likely to result in grave injury and in reckless disregard of a legal duty with consequences to another person. An example of this might be if a property owner failed to remedy a situation that had already caused death or injury, or where one had knowledge that the situation would likely cause death or injury.

- **Willful and wanton conduct** is usually grouped with gross negligence. A good example of such conduct would be setting up a spring gun, or a bear trap hidden from view in order to deter trespassers.

- **Highest duty of care** requires exercising a highest degree of care, as compared with the practice of very careful, skillful and diligent persons engaged in the same business. For example, land trusts would be measured against how other land trusts manage their preserves in similar situations. The amount of preventative attention demanded in a certain situation must be in proportion to the apparent risk. As the danger becomes greater, the landowner is required to exercise caution commensurate with it.