Landowner Liability - Dinnie Sloman

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Introduction

Do you have any of the following hazards on your property: holes, ledges, stone walls, wire fences, old sheds or fallen trees? If you own rural property, chances are that you not only have the ones just listed, but quite a few more. Do you hire workers to fix your home or to harvest timber? What happens if they are hurt, or they hurt someone else? The possibility that a danger will injure someone and that they will sue petrifies many landowners. In these days of law suits and exorbitant jury awards, no one wants to be liable for injuring another.

Often, landowners "post" their land to keep people out, hoping to limit their liability exposure. Unfortunately, landowners still have a limited duty to protect trespassers, so posting does not give absolute peace of mind. In addition, by posting a landowner may anger local residents, and, therefore, may lose a valuable property protection tool: the happy, helpful eyes of friendly neighbors. Posting has its place and clearly marked boundaries with ownership information are essential for preventing and prosecuting timber theft, but that is a different issue.

New Yorkers can protect themselves in other ways. Statutory guidelines, user agreements and insurance all play a role. This article will introduce you to the concepts.

Recreational Activities

In New York, a statutory law (General Obligation Law 9-103) protects landowners from liability for injuries to recreational users of their property. This statute probably gives relief not only to the outright owners of property but also to tenants occupying the property. It lists a number of covered recreational activities: hunting, fishing, organized gleaning, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes and training of dogs. The protection arises regardless of whether the landowner posts the property. While posting is essential to winning a trespass case, it does not affect liability under the statute. Likewise, the statutory protection arises regardless of whether the recreational user has permission to be on the property. Thus, under most circumstances, the

landowner has no duty to recreational users to keep the premises safe or to warn of a dangerous condition, use, structure or activity (a "trap").

Two situations deprive the landowner of the statute's coverage: (1) the landowner willfully or maliciously fails to guard or warn of a trap, or (2) the landowner requires compensation for the recreational use of their property. *Willful and malicious* refers to an intentional act of an unreasonable character performed in disregard of a known or obvious risk so great as to make it highly probable that harm will result. For example, the court considered a wire gate that was not visible from a distance adequate for a snowmobile to stop to be a willful failure to warn and ordered the landowner to pay. A trap does not include natural features or man-made structures plainly visible and reasonably avoidable.

Compensation includes the obvious, like fees, but it also may include the delivery of a portion of gathered items. For instance, compensation probably results if permission to cut firewood requires that a cord of wood be left for the property owner. Rent from hunting leases probably constitutes compensation, but no New York case has arisen where a hunting lessee successfully sued a property owner. At least one case has found that the statute did not cover a recreational club that charged an initiation fee and membership dues. In addition, the statute does not cover accidents occurring on portions of the property not suitable for recreation, such as gravel pits, even though most of the property is suitable.

Non-Recreational Activities

Thus, the statute does not cover non-recreational uses (uses not on the list), willful or malicious "traps" and compensated uses. Some examples of instances where the statute does not apply include swimming, timber harvests, mining, property improvement and charging for hunting, fishing or camping rights.

When the statute does not apply, case law determines landowner liability. In New York, the famous case of *Basso v. Miller* set the standard. It states that the duty of care owed by a landowner depends on the foreseeability of the risk of injury. Several factors contribute to foreseeability: who owns the land, the injured person's age, whether the injured person paid for using the property, the location of the property in relation to populated areas and what measures the defendant would have to take to find and prevent the trap. Applying these factors, landowners owe the highest duty to children paying to use urban property where the landowner could have taken easy, inexpensive measures to shield a known danger. On the other hand, landowners owe the least duty to unknown, adult trespassers on remote rural property where the landowner could not easily know of or protect against the danger. Courts, therefore,

determine duty of care on a sliding scale depending on the factual circumstances surrounding a particular danger.

Protection

To limit exposure, a landowner should determine who uses their property (even trespassers) and how they use it. Inspect the property to find traps and to determine whether you can take reasonable steps to protect against known dangers. If the statute does not cover a use, then you should take active steps to limit liability exposure.

First, landowners should purchase adequate liability insurance for their circumstances. Insurance to cover liability should be specifically written to cover all the activities you anticipate to occur on your property. Careful review of your homeowner's policy is required. Do not assume that a general policy covers your needs. Short term policies often are available for one-time activities. Sometimes the user, or worker, has their own liability insurance. Always request a certificate from them showing the policy limits and the expiration date.

Second, for all persons you hire to work on your property, make sure they are covered by worker's compensation insurance. Ultimately, the employer must purchase worker's compensation insurance. This requirement raises the thorny question of whether a worker is an employee or an independent contractor. Your lawyer can help make that determination. A good strategy is: (1) request a certificate from the worker showing that they already have worker's compensation insurance coverage (different from a liability insurance certificate), (2) if they do not have it, talk to your lawyer or insurance agent about the nature of the work and your legal duty, and (3) if necessary, purchase a short-term policy to cover the worker while he or she is on your property. By the way, lump sum sales of timber relieve landowners from worker's compensation liability requirements: the logger is working for himself, not the landowner.

Third, if you permit persons to use your property, have them sign a simple, written agreement describing the permitted use and the liability arrangement. Clearly stating the liability arrangement may reduce the probability of recovery and, therefore, the likelihood of a lawsuit. The agreement should include the following: acknowledgment that the user accepts the property in its current as-is condition; an obligation of the user to make an inspection; that owner makes no warranty or representation as to condition of property; indemnification for liability or damages if the owner suffers from the actions of the user, whether or not the use is permitted under the terms of the agreement; that the owner is not liable to persons entering upon the property in response to an accident of the user or their guests; and that the user agrees to get his or her own insurance.

Finally, if you charge for the use of your property, try to get the user to agree that the payment is only to offset expenses, not to compensate for use, and that the value of the use greatly exceeds the amount of the payment. While no cases have reviewed such a procedure, it could possibly help in the event of an accident. Do not, however, use this procedure as a substitute for adequate liability insurance.

Conclusion

Controlling your liability exposure is better than assuming that you do not have any. By learning of the potential risks and preparing for them, landowners can gain legitimate peace of mind. Act before an accident happens. Otherwise, the accident may control you.

Of course, seek professional legal advice if you have any questions concerning your particular situation.