

FARM LAW

Virginia Young Lawyers Section Virginia Bar Association

By George Barlow III

With the advent of the 1989-90 hunting act many Virginia farmers and other landowners will be asked for permission to hunt on their property. How many farmers and landowners in the situation have asked themselves, or their lawyers what would be the effect of a hunting accident or some other mishap?

Fortunately, Virginia has a "recreational use" statute (Virginia Code S29.105) which protects landowners and other occupiers of land who permit other persons onto their property to engage in certain recreational activities.

This statute limits the duty of care on the part of the landowner to warn a recreational user of dangers on the property or to eliminate dangerous conditions on the property. The statute also limits a landowner's liability for damages to a recreational user who is injured on the property.

Before the passage of the original recreational use statute by the Virginia General Assembly in 1962, it was very difficult for a landowner to predict with any certainty whatsoever the appropriate duty of care he owed to a person using his property for recreational purposes.

In order to determine the appropriate duty of care owed by the landowner to a person coming onto his land, it was necessary to place that person in one of three categories: trespasser, licensee or invitee.

A trespasser is, of course, one who makes an unauthorized entry onto the lands of another. The landowner owes the trespasser only the slightest duty of care to warn the trespasser of, or protect the trespasser from hazardous conditions on the property, and must not intentionally or willfully injure the trespasser.

A licensee is a person, such as a social guest, who has the permission or consent of the landowner to come onto his land. The landowner owes the licensee a slightly greater duty of care and may not intentionally or willfully injure the licensee. In addition, the landowner owes him the active duty of protection from any dangers known to the landowner or dangers that the landowner should have known about if he had used reasonable care.

An invitee on the premises is a person, such as a customer in a retail store, who comes on to the property out of a common interest or mutual advantage to both the invitee and the landowner. The landowner owes the invitee a higher duty of care to keep the premises reasonably safe for the visit and to use ordinary care to protect the invitee from injury by other persons or conditions on the property.

The owner should warn the invitee of any unsafe condition known to the landowner, unless the condition is so open and obvious that the invitee should recognize it himself.

If the distinctions between the trespassers, licensees, and invitees seem artificial and unclear to you, then you are not alone in your observations.

By enacting the recreational use statute, the state legislature encourages farmers and other landowners to permit recreational uses of their property by limiting the liability of a landowner for injuries to hunter, fishermen and other users of private property.

The recreational use statute simply states: "A landowner shall have not duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, point-to-point racing, bicycle riding or collecting, gathering, cutting or removing firewood or for any other recreational use."

Neither is the landowner required to give any warning of hazardous conditions on the property or hazardous uses of, structures on, or activities on the property. In giving permission to come onto the property for recreational purposes, the

farmer or other landowner does not impliedly or expressly represent that the premises are safe for a recreational activity.

The law specifically says that granting permission to use the property for recreational purposes does not make the person coming onto the property an invitee thus avoiding the high standard of care owed to invitees. The landowner further assumes no responsibility for and incurs no liability for, any intentional or negligent act by the person coming onto the property or any other person.

Although this statute gives landowners great protection from liability for injuries to people using their property, liability of a landowner is not limited if an injury occurs because of the landowner's gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

If a landowner actually knows of a condition on his property that will probably result in injury to the recreational user if the user is not warned, or other precautions are taken, then the landowner is well advised to avoid the harm or injury by giving the warning or repairing the hazardous condition. There is no duty to warn of conditions that are obvious to the recreational user exercising reasonable care.

In most instances, a cliff would be considered an open and obvious hazard, with no attendant duty to warn of its presence. There is, however, a duty to warn of conditions that will likely cause injury to a recreational user, but are at the same time not open and obvious. Frankly, it is difficult to think of examples of this type of condition that might be encountered by a recreational user.

The recreational use statute does not limit the liability of a landowner if that landowner receives a fee for giving the recreational user permission to enter onto his land and engage in one of the listed recreational activities. This is where the standard of care owed to an invitee comes back into play. Because the landowner receives some gain for giving permission to come onto the property, he must take more affirmative steps to protect the user from harm.

If, however, a landowner leases property to the Commonwealth of Virginia or the use of his land by the public for recreational purposes, the Commonwealth will be considered the "landowner" and the actual landowner will be immune from liability arising out of the recreational use.

If the actual landowner is sued by an injured recreational user, the Commonwealth agrees to provide all necessary legal assistance and the costs of that assistance for the landowner defending the suit.

Unfortunately, there are almost no cases in Virginia explaining the application of the recreational use law. In the one case that talks about this law at any length, the court stated that "...under Virginia law, the landowner, ...owned no duty of care to keep the land or premises safe for entry or use by others for sightseeing, nor under the law of the State of Virginia was the landowner required to give any warning of hazardous conditions or structures on, or activities on such land or premises to any person entering the land." (Hamilton v. United States, 371 F.Supp.230 (E.D. Va. 1974)). This case was decided under an old version of the recreational use law, which protected landowners from injuries to hunters, fishermen and sightseers. The law has since been expanded to cover a great variety of recreational uses.

Virginia's recreational use statute provides comprehensive protection to farmers and other owners of real property who give permission to other people to come onto their property for various recreational purposes, including hunting, fishing and cutting firewood.

This statute gets rid of the trespasser-licensee-invitee distinction unless of course the recreational user is charged a fee for the use of the property. The landowner has no duty to warn or guard against dangers on the property unless he knows of some hidden danger that is very likely to cause injury.

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For more information about legal concerns contact the Virginia Lawyer Referral Service at 1-800-552-7977.

Additional References:

Virginia Code

<https://law.lis.virginia.gov/vacode/title29.1/chapter5/section29.1-509/>

The Virginia Horse Council

<https://www.virginiahorsecouncil.org/virginia-regulations-pertaining-to-the-horse-industry/>