

Recreational access and owner liability - Tommy L. Brown

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Introduction

With the rising interest of the general public in year-round recreation activities, landowners increasingly face questions such as these:

- What are my rights, and how do I exercise them to control recreational use of my property?
- What is the extent of my liability to recreationists, and how can I protect myself against liability suits?
- What does posting do, how does it affect liability, and how do I post my land?

Answers to these questions often are not simple. However, by understanding the laws relating to trespass and liability and the safeguards you can take to lessen your liability, you, the landowner, can make more informed decisions. This publication is intended to help you better understand your rights, responsibilities, and alternatives related to the recreational use of your property. In conjunction with the information contained in this publication, we recommend that you consult with your attorney about legal questions, and with your insurance agent about insurance related to recreational uses of private property.

Property Rights of Landowners and Recreationists

New York laws provide a framework in which landowners have the means to control recreational use of their property. Landowners, by their actions, can allow blanket permission for anyone to use their property; they can exclude all recreational use; or they can decide whether to allow recreationists on a case-by-case basis.

Two sections of New York law, Penal Law 140.00-140.10 and Environmental Conservation Law (ECL) 11-2111-2117, define the rights of landowners versus recreationists or others who might enter or use private property. Penal Law 140.10 states (in part):

A person is guilty of criminal trespass in the third degree when he knowingly *enters or remains unlawfully* in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Note that in Penal Law 140.00, which defines the terms used above, the term "enter or remain unlawfully" is explained as follows:

A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner.

ECL 11-2113 makes it illegal for persons to trespass on private lands that are properly posted under ECL 11-2111. ECL 11-2115 makes it illegal if hunters, trappers, or anglers do not leave private lands, whether posted or not, immediately upon the request of the landowner. Finally, ECL 11-2117 makes it illegal for hunters, trappers, or anglers to kill or injure dogs or livestock (including poultry), or to damage gates, fences, vehicles, farm equipment, or buildings on private lands.

Violations of any of the above laws for which you wish to press charges should be reported to the proper law enforcement authorities. If the violation involves hunting, fishing, trapping, or disturbing wildlife, it may be reported to an environmental conservation officer or to your local sheriff. Environmental conservation officers are not required to enforce trespass laws that do not involve fish and wildlife activities. Other forms of trespass should be reported to your local sheriff.

Controlling Recreational Use of Your Property

Studies show that relatively few of New York's landowners wish to totally reserve their properties for their own use. Most landowners are willing to let some recreationists use their property. However, most landowners want some measure of control over who uses their property and when it is used. Below are some access policy options for landowners to consider.

Leaving your property unposted. If you are one of the majority of landowners who are willing to let others use your property for recreation, and if you are seldom inconvenienced by others who use your property, consider leaving it unposted. By doing so, you may be providing a welcome service to neighbors and others who do not have sufficient property of their own for recreation. You would still have considerable control over recreational use of your property; for according to New York law, any person must leave your property upon request, even if it is not posted. Also, the results of previous court cases indicate that your recreational liability is no greater on unposted than on posted property.

A possible disadvantage to not posting your land is that although the State strongly encourages all recreationists using private lands to first request permission, this is not a legal requirement on open (unfenced), nonposted rural lands. Often property boundaries of rural lands are not apparent to recreationists. In addition, not all recreationists take the time to request permission. Thus, at any given time, recreationists may be using your property without your knowledge. If this poses a frequent problem, you may wish to consider posting your property.

Posting with By Permission Only signs. For landowners who are generally sympathetic to recreationists, but who wish to control the number of recreationists on their property at any given time, signs indicating such messages as "Hunting by Permission Only", or "Permission May Be Granted: See Landowner" may be an attractive option. Unfortunately, these signs are not readily for sale in the usual retail outlets. However, hunting and fishing clubs in some areas of New York are making such signs and erecting them for cooperative landowners who permit their use. Also, the State Fish and Wildlife Management Board sponsors an "Ask" program in which these signs are made available to landowners. Your regional Department of Environmental Conservation Office, local hunting and fishing club, or Cooperative Extension Office may have information on the availability of these signs.

Other alternatives to posting. If a limited number of recreationists whom you can identify are causing you problems, there are several steps to consider in addition to posting. First, you may approach these recreationists and try to work out a solution. Second, a local hunting and fishing club or snowmobile club may be willing to help you reach and inform the recreationists who are causing problems. Third, if you wish, you may ask these recreationists to leave; and by law, they must. Finally, if you can identify those who are causing you problems, New York's Environmental Conservation Law states that you can serve a written notice to these individuals, which will have the effect of posting the property against their presence. The written notice should provide a description of the property and the activities (any or all) for which these individuals are not welcome. The law does not specify how the notice is to be delivered; but for proof of delivery, consider sending it by certified mail.

This type of limited exclusion takes action against offending individuals without penalizing responsible recreationists.

If your rural lands are entirely fenced, you may be able to prosecute the trespassers under Penal Law 140 without actually posting your lands. However, when prosecuting under this law, the burden of proof is on the landowner to show that the fence was designed to exclude intruders. A well-maintained, tall fence topped with barbed wire is likely to be adequate proof of intent. However, a lower stock fence probably would not qualify.

Posting your property. Posting your property has the effect of making it illegal for anyone (if "No Trespassing" or simply "Posted" is indicated) or any specific type of recreationist (e.g., hunter or angler, if so indicated by the signs posted) to enter your property without your permission. The primary advantage of posting is that it provides the legal means to bring charges against recreationists and others found on your property without your permission, and it therefore discourages recreationists from using your property without permission. Posting is the proper procedure for landowners who do not want their property used by others. However, landowners who simply want to regulate use of their property should consider other options as well as that of posting, because Posted signs often carry the implication that no recreationists are welcome. Again, available legal evidence suggests that posting your property does not lessen your liability for an accident that occurs on the property (see the next section for further information).

For your property to be legally posted, signs must meet the following criteria:

1. They must be at least 11 inches square.
2. They must be posted no more than 40 rods (660 feet) apart, along the boundaries of the area where posting is desired.
3. At least one sign must be posted along *each* border and at *each* corner of the plot.
4. Posting notices must include the name and address of the person posting.
5. Illegal or torn-down notices must be replaced annually in March, July, August, or September.

Recreational Liability When No Fee Is Charged

Liability is a concern that all landowners face in arriving at a policy about recreational use of their property by others. What if a hunter, hiker, or another recreationist is injured on your property? Are you liable?

The New York State Legislature was among the first in the nation to realize how much people depend upon the use of private property for outdoor recreation. To encourage landowners to keep their lands open to recreationists, legislation was passed in 1956 that limited the liability of landowners who allowed hunting, fishing, trapping, and training of dogs on their property when no fee is charged and the landowner receives no other consideration from the recreationist. In the succeeding years, numerous other recreation activities have been added to this list in General Obligations Law (GOL) 9-103: canoeing, hiking, horseback riding, bicycle riding, motorized vehicle operation for recreational purposes, snowmobile operation, cross-country skiing, tobogganing, sledding, hang gliding, speleological activities, boating, and the cutting or gathering of wood for noncommercial purposes.

GOL 9-103 does not totally exclude the liability of landowners toward recreationists. Assuming no fee is charged, the statute states that the landowner owes no duty to keep the premises safe for entry or use by recreationists pursuing the listed activities, or to give warning of any hazardous condition, use of property, structure, or activity on the property to persons entering for recreation. It also states that farm owners or lessees have no duty to keep their farms safe for use by recreationists or to give warning of hazardous conditions or uses of the property. However, landowners are not protected if they intentionally harm a recreationist, or if they "willfully" or "maliciously" fail to guard against, or warn recreationists of, a danger on the property.

In general, New York courts are supposed to decide liability cases on the basis of foreseeability as well as the amount of duty the owner has to a particular type of visitor. Landowners who have obviously hazardous situations on their property may be found liable for injuries to anyone, including trespassers. Thus, if you have such a hazard, you should try to eliminate it. Open wells and old buildings in danger of falling in are examples of these hazards. For a recreation activity listed under GOL 9-103 for which you the landowner receive no consideration from the recreationist, GOL 9-103, if it applies to your situation, has the effect of removing all of your liability except that associated with gross negligence (e.g., having a hazard on your property such as an open well or unsafe building; not warning recreationists of such a hazard, given that you had the opportunity to do so).

When might GOL 9-103 be found not applicable? First, if the landowner receives any fee or other consideration from the recreationist. Second, if the activity is not listed above, GOL 9-103 may not apply. Courts have not been entirely consistent in this regard. Note that swimming is not a listed activity. Also, GOL 9-103 may not apply to lands that are not privately owned, rural, and undeveloped. Some courts have ruled that the statute is also applicable to public lands such as state forests or wildlife management areas that are not supervised or patrolled. Larger tracks of undeveloped private land in urban or suburban settings suitable for recreation may be found to qualify under the statute, but it is clear that back yards and paved areas do not qualify.

We are only able to track recreational liability suits that are decided in the courts. On rare occasions, a suit is decided in a manner that appears to be contrary to decisions reached in similar previous cases. Usually, however, the outcomes of similar suits are consistent and provide good indicators of how courts would rule in future suits. Below, we use the results of these cases to provide an informed opinion on some of the most frequently asked questions involving recreational liability on private lands when no fee is charged. This is intended to help landowners and recreationists be better informed, but is not intended as a substitute for legal advice that can best be provided by your attorney about your specific situation.

Question: Can I be sued for natural situations or hazards, such as if a hunter trips over a rock or falls down a steep slope and is injured?

Opinion: Anyone can be sued, but to be successfully sued if GOL 9-103 applies, the recreationist must prove that you:

1. knew of a dangerous condition on your property,
2. realized the possibility of the recreationist encountering it, and
3. willfully or maliciously failed to eliminate or reduce the hazard or to warn the recreationist of it; and
4. he or she must show proof of actual loss or damage. Generally, previous courts have ruled that landowners have no duty to warn about naturally occurring, readily observable natural situations such as lakes, streams, or steep slopes.

Question: Suppose there is a hazard on my property, such as an abandoned well or a fallen-in barn, that a recreationist might encounter. How can I protect myself against someone getting hurt and suing me?

Opinion:

1. Do all you can to eliminate the hazard. Have the well filled in or the building torn down.
2. If you can't eliminate the hazard, enclose it by a high, sturdy fence. If a trail leads to the hazard, reroute the trail or put up a barricade to prevent recreationists from continuing toward the hazard. Be careful that the barricade or fence is obvious and does not itself constitute a hazard. Do not use a single wire or cable that a snowmobiler or other recreation vehicle user may not notice and run into. Post frequent warning signs around the hazard, stating that it is a dangerous area and for all to keep out. Note that even these steps may not be sufficient in every situation. Consult your attorney for further advice on your specific situation.
3. Make sure you have adequate liability insurance.

Question: I can't warn all recreationists because some don't ask permission. Can I lessen my liability by posting my land?

Opinion: Generally, no. Posting your land gives you the ability to prosecute a trespasser, but courts make little if any distinction between trespassers and those who have permission to use the property when it comes to liability. Every landowner is responsible for keeping his or her property safe from *foreseeable* dangers involving others.

Question: Suppose several hunters were hunting on my property, and one accidentally shot another. Could the landowner be found liable?

Opinion: General Obligations Law 9-103 states that by allowing hunting, the landowner does not assume responsibility for or incur liability for any injury to persons or property caused by those to whom permission is granted. The injured hunter might be able to successfully sue only by showing convincingly that you, the landowner, realized that there were so many hunters on your property that this accident was foreseeable, and that you deliberately failed to warn of the hazard. To protect yourself against this possibility, limit the number and general location of hunters on your property at a given time to a level that you feel is safe, and warn hunters of the presence of other hunters on your property.

Question: Some hunting and snowmobile club members claim that they or their clubs have their own insurance, in case someone gets hurt. Will this relieve the landowner of liability?

Opinion: No, although the policy may provide coverage if the landowner is a named insured on the policy. The basic responsibility of the landowner to keep his or her property free of foreseeable danger cannot be purchased by or assigned to someone else. Even if clubs have insurance that can be applied in case of an injury to a recreationist, this is no substitute for primary liability insurance that every landowner should have.

Question: If an accident occurs in which I am found liable, won't my liability insurance rates skyrocket?

Opinion: Generally, no. Unlike automobile insurance, most companies figure general liability insurance rates only on an aggregate basis. Thus, your rate should not increase appreciably as a result of a suit successfully brought against you. Check with your insurance company to be sure.

Liability to Recreationists Who Pay a Fee

In contrast to recreationists who are not charged, the landowner has a stronger duty to protect those who pay the landowner a fee for recreation. Receipt of a fee of any amount, a gift, or work on your property, such as mending fences, could remove a landowner from the special protection of GOL 9-103. When GOL 9-103 is not in effect, landowner liability extends to all known dangers and those that would be discovered with reasonable care.

Court cases on this topic are rare; but to illustrate the difference in liability when a fee is charged, a farmer who charges people to cross his or her lands to fish could be held liable for the hypothetical problems below:

- Damage caused by farming activities not carried out "with reasonable care." *Example: A hunter is cut by flying debris caused by a farmer who is chopping brush nearby.*
- Injuries caused to recreationists by employees. *Example: The farmer's helper tosses a rock out of the way and thereby injures a passing angler.*
- Damage to one patron caused by another. *Example: Excessive brush on an access path causes one angler to slip and hook another, injuring an eye.*
- Damage caused by known hazards not identified to patrons. *Example: An angler slips and breaks her ankle on a treacherous path she wasn't warned about.*
- Damage caused by hazards that could have been discovered by routine inspection. *Example: An angler falls through some weak boards covering an old well that the farmer could have easily replaced.*

Landowners providing recreation for a fee can minimize possible problems by erecting signs to identify hazards, fencing off hazards, posting open hours, and giving patrons a written statement of known hazards and rules and regulations. Insisting that proper safety equipment is used and supervising the area may not lessen your liability, but it will lessen the likelihood of an accident occurring.

Liability Insurance

As long as the landowner makes no charge to the recreationist, suits resulting from harm suffered by a recreationist, in which the landowner is found to be negligent, will be covered by nearly any standard homeowners or farmowners insurance policy. However, two points should be carefully checked—amount of coverage and parcels covered.

Amount of coverage. The standard homeowners policy in New York contains a limit of \$25,000 per occurrence for liability coverage and \$1,000 for premises medical payments. This amount is insufficient to cover many types of serious accidents. Liability coverage can be upgraded to \$50,000, 100,000, \$300,000, or \$500,000; medical payments can be increased to \$2,000, \$5,000, or \$10,000. The cost of increased coverage on homeowners' policies varies from company to company, but the annual additional premium for increasing your coverage to the next increment listed above is very inexpensive for both liability and medical coverage. While liability insurance protects the policyholder for a claim of negligence, premises medical payments coverage protects the policyholder for any injury that a third party

might sustain on the premises, regardless of whether a negligent act or condition occurred. Because these costs are modest, we recommend that rural landowners strongly consider carrying the maximum limits allowed on their homeowner's policy.

Additional liability protection may be afforded under an "umbrella liability policy." Such a policy provides an additional limit of insurance in \$1,000,000 increments. If one already has at least \$300,000 in liability coverage, an insurance carrier will provide an "umbrella policy" for an annual premium of approximately \$150 per million for personal liability exposure, and \$250 per million if there is commercial or agricultural exposure. *Check the extent of your liability insurance and make sure you have enough.*

Be sure to notify your insurance agent of any change in the use of your land that is unusual or involves commercial activities. Failure to do so could result in the denial of a liability claim due to situations or activities not covered in your present policy. Most new uses that you might make of your land can be insured by having your insurance agent append an endorsement to your current policy.

Parcels covered. If your farm or other rural property was all purchased at the same time, your homeowners or farmowners policy will almost certainly cover the entire property. However, if you have more recently purchased an adjacent parcel or some other rural parcel, there is a chance that you did not have it added to your policy. *Double check your policy to see that you have liability insurance on all of your property.*

Riparian Rights and Recreation

The beds of Lakes Ontario and Erie, some other large lakes in New York, and major rivers (the Hudson and the Mohawk) are publicly owned. Thus, recreationists have the right to use these waters. However, they do not have the right to cross private lands to reach these waters without obtaining permission from the riparian landowner. In addition, private ownership along these major waterways typically runs to the mean low water mark; and as a result, recreationists have no right, except in an emergency, to land on the shore where ownership is private.

For most smaller lakes and for some lakes as large as Hemlock of the Finger Lakes, the beds are privately owned. Previously, recreationists could legally boat or canoe these small lakes if there was a public access point or if the recreationist was the guest of a riparian owner. Recreationists could legally boat or canoe rivers and streams with privately owned bottoms only if they had been declared to be navigable. This right of transport did not extend to the right to fish or to swim except in cases where public access points had been purchased by state or local governments. In nonnavigable

streams with no public access points, riparian landowners had the exclusive rights of such activities as fishing, swimming, and boating.

Note that a river or stream does not have to be navigable to commercial transport, and does not have to be navigable throughout the year for the state legislature to declare it navigable. The legislature may consider whether such a river or stream is being used by pleasure boaters, and whether public access points exist in determining whether or not it should be declared navigable.

The question of whether small rivers and streams not previously declared to be navigable should be open to public recreational use is currently in flux. A state Supreme Court judge recently ruled that Adirondack rivers capable of floating a canoe or other recreational boat are open to the public and cannot be closed by private clubs or timber companies who own the riparian land and the bottom. This decision is currently under appeal.

Unlike the case on inland waterways, ownership along the tidal waters of Long Island, unless previously sold by the state to private landowners, is public between mean high water and mean low water marks. Although the public may not illegally cross private lands to reach this foreshore, courts have ruled that the public has the right of recreational use of this area below the mean high water mark.

Traditionally, the extent of your rights as a riparian landowner depended upon the extent of your property ownership up to and into the bed of the lake or stream. For current and more specific information on your rights versus those of recreationists, check your deed and consult with your attorney.

Sources for Additional Information

For individual questions of liability and land ownership, contact:

- your attorney,
- your insurance agent.

For specific requirements of the New York State Environmental Conservation Law posting regulations, contact:

- your local Environmental Conservation Officer (in phone book),
- the nearest Regional Office of the New York State Department of Environmental Conservation.

For information on permanent public fishing or hunting areas, contact:

- the nearest Regional Office of DEC.

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