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GOOD SPORTS AND BAD LANDS: THE APPLICATION OF WASHINGTON'S RECREATIONAL USE STATUTE LIMITING LANDOWNER LIABILITY

John C. Barrett*

I. INTRODUCTION

The principles governing the liability of landowners and land occupiers¹ to entrants for injuries caused by natural or artificial conditions on the land have long been the subject of judicial and academic criticism. Because liability traditionally has been determined according to the entrant's classification,² rather than on the basis of foreseeability of the injury, the rules seem arbitrary, confusing, and contrary to the policy of protecting the public safety.³

The classic formulation of liability is rooted in the common law credendum that a man's home is his castle, wherein he should be free from the duty to exercise reasonable care toward others. A landowner owes trespassers and licensees the duty merely to refrain from wilfully or wantonly injuring them;⁴ such entrants are thus required to bear the risk of injury. Only invitees may hold the landowner to the higher standard of reasonable or ordinary care.⁵

In recent years there has been increasing resistance to the neat but often harsh results of this doctrine. In a number of jurisdictions the

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1. Unless indicated otherwise in the text, the terms "landowner" and "land occupier" are used synonymously to denote one who is in immediate possession or control of premises. For a discussion of liability principles as they affect owners when distinguished from tenants, see Comment, *Liability of Landlord and Tenant to Persons Injured on the Premises*, 39 WASH. L. REV. 345 (1964).

2. W. PROSSER, LAW OF TORTS § 58 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1 (1956).

3. See generally Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633 (1959); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954).

4. W. PROSSER, *supra* note 2, §§ 58, 60. See, e.g., *Steele v. Thorne*, 72 Wn. 2d 714, 718, 435 P.2d 544, 546 (1967) (social guest as licensee), overruled by *Memel v. Reimer*, 85 Wn. 2d 685, 691, 538 P.2d 517, 520 (1975).

5. RESTATEMENT (SECOND) OF TORTS §§ 341A, 343 (1965). See also Morton

courts have expanded the responsibilities of landowners⁶ by developing the "public invitee"⁷ classification and by requiring higher standards of care when the trespasser is a child⁸ or when a dangerous activity is carried out on the premises.⁹ At the same time, however, there has been a trend in state legislatures to diminish landowners' duties where public recreational interests are at stake. Forty-one states, including Washington, have adopted laws which limit the liability of landowners whose lands are used for recreational activities such as hunting, sight-seeing, and water sports.¹⁰ Most of these laws have their genesis in a model act promulgated in 1965 by the Council of State

v. Lee, 75 Wn. 2d 393, 400 & n.2, 450 P.2d 957, 961-62 & n.2 (1969); *Buttnick v. J. & M., Inc.*, 186 Wash. 658, 661, 59 P.2d 750, 752 (1936).

6. For example, some courts have abolished the distinction between invitees and licensees. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (abolishing the distinction in maritime law); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Marioenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975).

7. *See* text accompanying notes 33-36 *infra*. The public invitee test is adopted by the RESTATEMENT (SECOND) OF TORTS § 332(2) (1965): "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." The public invitee test supplements the narrower business visitor test in § 332(3): "A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."

8. *E.g., Mathis v. Swanson*, 68 Wn. 2d 424, 413 P.2d 662 (1966).

9. *E.g., Potts v. Amis*, 62 Wn. 2d 777, 384 P.2d 825 (1963).

10. ALA. CODE tit. 47, §§ 281-285 (Cum. Supp. 1973); ARK. STAT. ANN. §§ 50-1101 to 1107 (1971); CAL. CIV. CODE § 846 (West Supp. 1977); CONN. GEN. STAT. ANN. §§ 52-557g to 557j (West Supp. 1976); DEL. CODE tit. 7, §§ 5901-5907 (1974); FLA. STAT. ANN. § 375.251 (West 1974 & Supp. 1976); GA. CODE ANN. §§ 105-403 to 409 (1968); HAW. REV. STAT. §§ 520-1 to 8 (Supp. 1975); IDAHO CODE § 36-1604 (1977); ILL. ANN. STAT. ch. 70, §§ 31-37 (Smith-Hurd Supp. 1976); IND. CODE ANN. § 14-2-6-3 (Burns 1973); IOWA CODE ANN. §§ 111C.1-7 (West Supp. 1977); KAN. STAT. ANN. §§ 58-3201 to 3207 (1976); KY. REV. STAT. ANN. § 150.645 (Baldwin 1976); LA. REV. STAT. ANN. § 9:2795 (West Supp. 1977); ME. REV. STAT. tit. 12, §§ 3001-3005 (1974); MD. NAT. RES. CODE ANN. §§ 5-1101 to 1108 (1974); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973); MICH. STAT. ANN. § 13.1485 (Cum. Supp. 1977); MINN. STAT. ANN. §§ 87.01-.03 (West 1977); MONT. REV. CODES ANN. §§ 67-808 to 809 (1970); NEB. REV. STAT. §§ 37-1001 to 1008 (1974); NEV. REV. STAT. § 41.510 (1975); N.H. REV. STAT. ANN. § 212:34 (Supp. 1975); N.J. STAT. ANN. §§ 2A:42A-1 to 5 (West Supp. 1977); N.M. STAT. ANN. § 53-4-5.1 (Supp. 1975); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney Supp. 1976); N.C. GEN. STAT. §§ 113-120.5 to .7 (1975); N.D. CENT. CODE §§ 53-08-01 to 06 (1974); OHIO REV. CODE ANN. §§ 1533.18-.181 (Page 1964 & Supp. 1977); OKLA. STAT. ANN. tit. 76, §§ 10-15 (West 1976); OR. REV. STAT. §§ 105.655-.680 (1975); PA. STAT. ANN. tit. 68, §§ 477-1 to 7 (Purdon Supp. 1977); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977); TENN. CODE ANN. §§ 11-1301 to 1303 (1973), §§ 51-801 to 805 (1977); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969); VT. STAT. ANN. tit. 10, § 5212 (1973); VA. CODE § 8-654.2 (Supp. 1976); WASH. REV. CODE §§ 4.24.200-.210 (1976); WIS. STAT. ANN. § 29.68 (West 1973 & Supp. 1977); WYO. STAT. §§

Governments.¹¹ Because of this statutory development, it has become important to analyze the effect of recreational use statutes on the right of recovery of sportsmen, vacationers, and the numerous other recreational users who risk injury while on the lands of another.

II. THE GENERAL IMPACT OF RECREATIONAL USE LEGISLATION ON THE COMMON LAW

Under the common law, neither the specific intent of one entering another's property¹² nor the general character or use of the property¹³ is decisive in determining the occupier's duty of care. The common law does not require separate examination of the duty of care owed to recreational users because recovery depends instead on categorizing the individual user into the traditional classes of invitee, licensee, and trespasser.¹⁴ Recreational use legislation changes much of this, making the intent of the land user¹⁵ and the character of the subject property¹⁶ central to the determination of the owner's duty of care.

The purpose of this change is to limit the liability of private landowners, thereby encouraging them to make their property available for public recreation.¹⁷ There is little doubt that overpopulation and increased leisure time have added to the pressures on publicly owned

34-389.1-.6 (Cum. Supp. 1975). Utah's statute, 1965 Utah Laws, ch. 115, §§ 1, 2, formerly codified at UTAH CODE ANN. §§ 23-1-13 to 14 (Supp. 1967), was repealed in 1971.

11. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, Vol. XXIV, 150-52 (1965) [hereinafter cited as MODEL ACT].

12. For example, store owners may owe the same duty of care to an entrant accompanying a friend, *Briggs v. John Yeon Co.*, 168 Or. 239, 122 P.2d 444 (1942), or retrieving a coat, *Sulhoff v. Everett*, 235 Iowa 396, 16 N.W.2d 737 (1944) as they owe to a bona fide customer.

13. Under the common law, a religious organization that uses its church only for ethereal pursuits may be liable to an injured entrant as readily as a corporation engaged in the more earthly scramble for profits. Compare *Sullivan v. First Presbyterian Church, Waterloo*, 260 Iowa 1373, 152 N.W.2d 628 (1967) with *Blancher v. Bank of Cal.*, 47 Wn. 2d 1, 286 P.2d 92 (1955).

14. See, e.g., *Rovegno v. San Jose Knights of Columbus Hall Ass'n.*, 108 Cal. App. 591, 291 P. 848 (1930) (invitee); *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912) (licensee); *Meyer v. General Elec. Co.*, 46 Wn. 2d 251, 280 P.2d 257 (1955) (trespasser).

15. See text accompanying notes 125-36 *infra*.

16. See text accompanying notes 137-52 *infra*.

17. Section 1 of the model act provides: "The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." MODEL ACT, *supra* note 11, at 150.

recreation areas in the past two decades. National and state parks are crowded,¹⁸ wilderness areas are fast succumbing to suburbia's bulldozers,¹⁹ and the playthings of our mechanized society are invading the remaining open spaces with bewildering speed.²⁰ Despite a resurgent interest in adding new lands to the national parks system, current forecasts predict little improvement in recreational opportunities absent the contribution of private landowners.²¹ Thus, there is an objective basis for the aim of recreational use acts: to promote increased public access to private lands by reducing the liability of landowners and occupiers. The degree to which owners and occupiers in fact open their lands will depend largely on how effectively this legislation relieves them of their common law duty of care.

A. Landowner Immunities From Liability

Under the model act, landowners²² are protected in two ways from liability for injuries suffered by entrants. First, when a landowner directly or indirectly invites another to use his property for a recreational purpose, the entrant does not thereby become a licensee or invitee.²³ Second, the act expressly states that landowners owe "no duty

18. COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 325-28 (1972). According to recent tabulations 827.1 million annual visits were made to national and state parks in 1970 compared with 174.9 million in 1950. COUNCIL ON ENVIRONMENTAL QUALITY, FIFTH ANNUAL REPORT 359 (1974).

19. COUNCIL ON ENVIRONMENTAL QUALITY, FIFTH ANNUAL REPORT 3-26 (1974).

20. It is estimated that over 5 million all-terrain vehicles are now in operation in the United States. Snowmobile ownership alone reportedly increased from near zero in 1959 to over 2 million by 1973. *Id.* 207.

21. See BUREAU OF OUTDOOR RECREATION, U.S. DEP'T. OF THE INTERIOR, OUTDOOR RECREATION—A LEGACY FOR AMERICA 57-58, 81-85 (1973); U.S. DEP'T. OF THE INTERIOR, CONSERVATION YEARBOOK: THE POPULATION CHALLENGE 39-51 (1975).

22. The model recreational use act was drafted to cover only privately owned lands, but several state statutes now include lands occupied by governmental entities as well, thereby creating a limited form of sovereign immunity. For example, Washington's act applies to "public or private landowners." WASH. REV. CODE § 4.24.210 (1976). See note 58 *infra*. See also DEL. CODE tit. 7, § 5905 (1974); GA. CODE ANN. § 105-407 (1968); KY. REV. STAT. ANN. § 150.645 (Baldwin 1976); OR. REV. STAT. § 105.670 (1975); TENN. CODE ANN. §§ 11-1301 to 1303 (1973). In the absence of any express legislative provision covering publicly owned lands, however, the courts have refused to extend the immunity beyond private landowners. *Anderson v. Brown Bros.*, 65 Mich. App. 409, 237 N.W.2d 528 (1975); *Goodson v. City of Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973).

23. The model act provides:

Except as specifically recognized by or provided in Section 6 of this act, 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:

(a) Extend any assurance that the premises are safe for any purpose.

of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition.”²⁴ Because it affects both licensees and invitees, this portion of the legislation has been construed by courts in several jurisdictions to be in derogation of the common law.²⁵

Traditionally, express or implied permission to enter another’s property conferred upon the entrant, at a minimum, the status of licensee.²⁶ Under the *Restatement (Second) of Torts*, a landowner or occupier owes such licensees at least a limited duty of care.²⁷ He must refrain from intentional misconduct²⁸ and carry on his activities with due regard for the licensee’s presence.²⁹ Similarly, the common law requires the landowner to disclose any known hazards on the land involving an unreasonable risk of harm if the licensee would have no reason to know of the condition or appreciate its dangers.³⁰

In jurisdictions which follow the *Restatement (Second)*, an invitation to enter, extended in such a way as to suggest that the premises are safe, confers upon entrants the even higher status of invitee.³¹ Traditionally, only those whose presence was of potential economic benefit to the owner acquired this status.³² However, the courts have increasingly embraced the “public invitee” standard adopted by the *Restatement (Second)*. Under this standard, students on a field trip

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

MODEL ACT, *supra* note 11, § 4 at 151.

24. *Id.* § 3 at 151.

25. *E.g.*, *Garfield v. United States*, 297 F. Supp. 891, 895 (W.D. Wis. 1969). *O’Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 291 A.2d 386 (1972); *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970). *Contra*, *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786 (1975), *rev’d on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975).

26. *See, e.g.*, *Recreation Centre Corp. v. Zimmerman*, 172 Md. 309, 312, 191 A. 233, 234 (1937) (gratuitous spectator at sporting event); *Lindelov v. Peter Kiewit Sons’*, 174 Neb. 1, 115 N.W.2d 776 (1962) (employees engaging in frolic in their off-hours); *Murdock v. Petersen*, 74 Nev. 363, 332 P.2d 649 (1958) (good samaritan); *Rogers v. Cato Oil & Grease Co.*, 396 P.2d 1000 (Okla. 1964) (fireman); *Cordula v. Dietrich*, 9 Wis. 2d 211, 101 N.W.2d 126 (1960) (social guest).

27. RESTATEMENT (SECOND) OF TORTS §§ 333–339 (1965).

28. *Cf. id.* § 333, Comment d.

29. *Id.* § 341.

30. *Id.* § 342. *Cf. Robles v. Severyn*, 19 Ariz. App. 61, 504 P.2d 1284 (1973) (no warning required because danger was obvious).

31. RESTATEMENT (SECOND) OF TORTS § 332(2) (1965).

32. *See, e.g.*, *Dotson v. Haddock*, 46 Wn. 2d 52, 278 P.2d 338 (1955).

through a factory,³³ people attending church meetings,³⁴ and users of free playground facilities³⁵ may be protected. For such entrants, the land occupier may be liable not only for failure to guard against known hazards but also for failure to take reasonable steps to discover and remedy others.³⁶ Whether an owner will be held liable for his failure to discover and correct dangers depends on the surrounding circumstances—in other words, whether the nature of the hazard and the ease of its discovery are such that he should have foreseen the danger of injury and sought to prevent it.³⁷

The model recreational use act drastically alters these principles. Under the act, except when there is consideration,³⁸ owners may remain silent and allow even known hazards to persist without incurring liability for resultant injuries to recreational users, regardless of the users' classification at common law.³⁹ Thus, the act works a fundamental change in the law by shifting the burden of liability for injuries from the land occupier, who may be in a position to prevent accidents, to the entrant, who may be entirely powerless to avoid them. The underlying premise of this legislation is that the public benefit of encouraging free use of the land outweighs the increased cost of injuries to hapless sportsmen. As a result, one inevitable effect of such legislation is to reduce the pressure on landowners to repair their property or to warn others about existing hazards.⁴⁰

B. *Residual Landowner Duties*

At common law, persons such as business visitors⁴¹ are deemed invitees because they share a mutuality of economic interest with the

33. *Gilliland v. Bondurant*, 51 S.W.2d 559 (Mo. App. 1932), *aff'd*, 332 Mo. 881, 59 S.W.2d 679 (1933).

34. *See, e.g., Sullivan v. First Presbyterian Church, Waterloo*, 260 Iowa 173, 152 N.W.2d 628 (1967).

35. *Millum v. Lehigh & Wilkes-Barre Coal Co.*, 225 Pa. 214, 73 A. 1106 (1909).

36. *Ward v. Thompson*, 57 Wn. 2d 655, 660, 359 P.2d 143, 145 (1961).

37. *See, e.g., Morton v. Lee*, 75 Wn. 2d 393, 450 P.2d 957 (1969); *Brant v. Market Basket Stores, Inc.*, 72 Wn. 2d 446, 433 P.2d 863 (1967); *Dickinson v. Tesia*, 2 Wn. App. 262, 467 P.2d 356 (1970). *See also James, supra* note 3, at 621-23.

38. *See* note 43 *infra*.

39. *See* text accompanying note 24 *supra*.

40. *See* text accompanying notes 170-71 *infra*.

41. Actual and prospective patrons of business establishments provide perhaps the most common examples. *See generally James, supra* note 3, at 612-16. The business visitor standard apparently was first embraced by the Washington court in

owner and, therefore, are owed the duty of affirmative protection against known or discoverable hazards.⁴² The model act maintains this common law principle “where the owner of land charges the person or persons who enter.”⁴³ However, the act’s provision may be somewhat narrower than the contemporary business visitor standard. For example, under the *Restatement (Second)*, payment of a monetary admission is only one type of consideration necessary to qualify one as an invitee.⁴⁴ The model act, on the other hand, appears to deny invitee status to recreational users unless they have been charged a fee for the use of the land.⁴⁵

The act also fails to limit liability when the entrant is injured by a “wilful or malicious” act of the owner.⁴⁶ There may be considerable debate over the meaning of the words “wilful or malicious.”⁴⁷ Indeed, a number of states following the lead of the model act have substituted a variety of other phrases aimed at the same basic kind of conduct—for example: “deliberate, wilful, or malicious,”⁴⁸ “malicious or illegal,”⁴⁹ “wilful, wanton, or reckless,”⁵⁰ “gross negligence or wilful

Gasch v. Rounds, 93 Wash. 317, 160 P. 962 (1916) (implied invitation may be based on business purpose). See also notes 69–87 and accompanying text *infra*.

42. See, e.g., Morton v. Lee, 75 Wn. 2d 393, 450 P.2d 957 (1969); Hemmen v. Clark’s Restaurant Enterprises, 72 Wn. 2d 690, 434 P.2d 729 (1967); Presnell v. Safeway Stores, Inc., 60 Wn. 2d 671, 374 P.2d 939 (1962).

43. Section 6 of the model act provides:

Nothing in this act limits in any way any liability which otherwise exists:

(a) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

MODEL ACT, *supra* note 11, at 151.

44. RESTATEMENT (SECOND) OF TORTS § 332(3), Comment f (1965).

45. See, e.g., Bourn v. Herring, 225 Ga. 67, 166 S.E.2d 89 (1969). See also FLA. STAT. ANN. § 375.251(3)(b) (West 1974) (liability limitation not applicable where any commercial activity conducted on any part of land). *But see* Copeland v. Larson, 46 Wis. 2d 337, 174 N.W.2d 745 (1970) (broad interpretation to valuable consideration).

46. See note 43 *supra*.

47. In individual jurisdictions much may turn on the precise wording used. See, e.g., Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 WIS. L. REV. 705, 711–12 (observing the dilemma posed when Wisconsin abolished the concept of “gross negligence”).

48. FLA. STAT. ANN. § 375.251(4) (West 1974); LA. REV. STAT. ANN. § 9:2795B (West Supp. 1977).

49. IND. CODE ANN. § 14–2–6–3 (Burns 1973).

50. MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973).

and wanton misconduct,"⁵¹ and "reckless failure to guard or warn."⁵² Whatever the variation, all of the statutes appear to be attempting to restate the basic common law obligation of an occupier regarding trespassers—to "refrain from more grievous types of wrong."⁵³

It is less clear what impact recreational use legislation will have on the attractive nuisance doctrine, which imposes on occupiers a greater duty of care toward child trespassers who are enticed onto the land by the presence of a dangerous object.⁵⁴ The model act and the majority of state statutes are silent on this matter. When there is no reliable extrinsic evidence that the legislature intended to abolish the doctrine,⁵⁵ the issue may well turn on the traditional rule of statutory construction that an act in derogation of the common law should be narrowly construed.⁵⁶ Application of this rule would retain the attractive nuisance doctrine in jurisdictions where it already exists, but would preclude its development elsewhere.⁵⁷

51. MICH. STAT. ANN. § 13.1485 (Cum. Supp. 1977).

52. OR. REV. STAT. § 105.675 (1975).

53. James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144, 146 (1953).

54. W. PROSSER, *supra* note 2, § 59 at 364-65.

55. If the doctrine were abolished, infant trespassers would bear the risk of their injuries in common with the general population of recreational users. A compelling basis exists for concluding that Oregon has purposefully abolished the attractive nuisance doctrine, at least when the child is engaged in a recreational activity. Although Oregon's recreational statute is silent on the subject of the attractive nuisance doctrine, OR. REV. STAT. §§ 105.655-.680 (1975), it replaced an earlier version that had expressly retained the doctrine. 1963 Or. Laws ch. 524, §§ 1-2 (repealed 1971) (formerly codified at OR. REV. STAT. § 30.790). Furthermore, during legislative committee deliberations one state supreme court justice testified that he would interpret the bill that later passed as abolishing the doctrine. See Remarks of Justice Denecke before the Oregon House Subcomm. on Natural Resources, 56th Legis. Assembly, May 19, 1971, Tape No. 11, side 2 (on file at Oregon State Archives, Salem, Ore.).

56. Compare *Boileau v. DeCecco*, 126 N.J. Super. 263, 310 A.2d 497 (1973) (act is in derogation of common law, recovery allowed) with *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W.2d 637 (1965) (act restates common law, recovery denied). See generally 3 STATUTES AND STATUTORY CONSTRUCTION §§ 61.01-.06 (C.D. Sands ed. 1974).

57. In Washington, the recreational use act should have no effect on the attractive nuisance doctrine because of the second proviso in WASH. REV. CODE § 4.24.210. See note 58 *infra*. However, it is not presently clear that land occupiers can be held liable to trespassing children for injuries caused by natural conditions on the land, as distinguished from those created by an "artificial" activity. For example, in *McDermott v. Kaczmarck*, 2 Wn. App. 643, 469 P.2d 191 (1970), the court of appeals stressed the fact that the premises did "not differ in any significant way from countless natural formations." *Id.* at 653, 469 P.2d at 197. See also *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950); *Meyer v. General Electric Co.*, 46 Wn. 2d 251, 253, 280 P.2d 257, 258 (1955). In Oregon, a divided supreme court recently reaffirmed its reliance on just such a distinction between natural and artificial conditions under the attractive nuisance doctrine, taking some

III. LIABILITY LIMITATIONS AND RESIDUAL DUTIES UNDER THE WASHINGTON STATUTE

Although the basic thrust of the Washington statute is identical to the model act, the language of the residual duty clause of R.C.W. § 4.24.210 is unique. It preserves owner liability in only three situations: when the entrant is charged a “fee of any kind,” when he is injured by an intentional act, and when he sustains injuries “by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.”⁵⁸

A. Fee of Any Kind

In common with versions of recreational use legislation in other states,⁵⁹ the Washington act plainly prohibits application of the public invitee standard to recreational entrants. Indeed, some observers have concluded—without discernible authority—that it was the Washington court’s decision to embrace this standard in *McKinnon v. Washington Federal Savings and Loan Association*⁶⁰ that provided the

comfort in the process from the legislative policy it perceived in the newly enacted state recreational use statute. *Loney v. McPhillips*, 268 Or. 378, 385–86, 521 P.2d 340, 343–44, (1974).

58. WASH. REV. CODE § 4.24.210 (1976). The complete text of the recreational use act reads:

4.24.200

The purpose of RCW 4.24.200 and 4.24.210 is to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

4.24.210

Any public or private landowners or others in lawful possession and control of agricultural or forest lands or water areas or channels and rural lands adjacent to such areas or channels who allow members of the public to use them for the purposes of outdoor recreation, which term includes hunting, fishing, camping, picnicking, swimming, hiking, pleasure driving, the pleasure driving of all-terrain vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users: *Provided*, That nothing in this section shall prevent the liability of such a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted: *Provided further*, That nothing in RCW 4.24.200 and 4.24.210 limits or expands in any way the doctrine of attractive nuisance.

59. *See, e.g., Rock v. Concrete Materials, Inc.*, 46 App. Div. 2d 300, 362 N.Y.S.2d 258 (1974) (purpose of New York statute is to prevent liberal extension of liability for injuries to sportsmen).

60. 68 Wn. 2d 644, 650–51, 414 P.2d 773, 777 (1966) (girl scout leader injured while attending scout meeting held to be public invitee).

major impetus for the statute's enactment.⁶¹ However, when the act is applied to a gratuitous entry, even an express invitation coupled with preparation of the land for recreational purposes will not make such entrants invitees.

The Washington law has been applied to date in only one reported opinion, *Bilbao v. Pacific Power & Light Co.*⁶² In that case, the plaintiff tripped over a cable located near the shore of Lake Merwin while picnicking with her family. The jury was instructed on both the common law invitee standard and the recreational use statute. On appeal, the plaintiff apparently stipulated that R.C.W. § 4.24.210 applied. Based on this stipulation, the Oregon Supreme Court reversed the plaintiff's verdict, holding that the trial court erred in giving the common law invitee instruction because it "imposed a higher duty upon the defendant than the duty imposed by the Washington statute."⁶³

Because of the plaintiff's apparent stipulation, *Bilbao* cannot be read as barring a court from giving the jury alternative instructions when there is an issue of fact as to whether an entrant is an invitee or a recreational user. The *Bilbao* court, however, did state in dictum that once the recreational use statute has been found to apply, a plaintiff cannot rely on a common law theory of public or express invitation. Thus, recreational use laws confer almost complete immunity upon owners for negligence in circumstances in which a public invitation would have been found under the standard of the *Restatement (Second)*,⁶⁴ as, for example, when the landowner provides tourist facilities including a free scenic lookout,⁶⁵ or allows entrants to install and maintain recreational equipment for many years,⁶⁶ or provides transportation for entrants onto his property and to their chosen place of sport.⁶⁷

R.C.W. § 4.24.210 also narrows the usual scope of the business

61. See Note, *Land Occupier Liability in Washington*, 43 WASH. L. REV. 867, 875 n.59 (1968); Brief for Appellant at 15, *Bilbao v. Pacific Power & Light Co.*, 257 Or. 360, 479 P.2d 226 (1971). This seems unlikely, however, inasmuch as the statute as enacted covers neither the kind of premises nor the type of activity at issue in *McKinnon*.

62. 257 Or. 360, 479 P.2d 226 (1971).

63. *Id.* at 365, 479 P.2d at 228.

64. See note 7 *supra*.

65. *Hamilton v. United States*, 371 F. Supp. 230 (E.D. Va. 1974).

66. *Taylor v. Mathews*, 40 Mich. App. 74, 198 N.W.2d 843 (1972).

67. *State ex rel. Tucker v. District Court*, 155 Mont. 202, 468 P.2d 773 (1970).

visitor class of invitee.⁶⁸ Prior to the passage of the act, entrants were found to be business visitors merely upon a showing of mutuality of interest. In *Kalinowski v. Y.W.C.A.*,⁶⁹ for example, a volunteer dance chaperone was held to be an invitee because the land occupier "benefited by the [chaperone's] services."⁷⁰ An even more tenuous business connection was presented in *Heckman v. Sisters of Charity*.⁷¹ In that case the Washington Supreme Court held that a guest at a graduation ceremony was a business visitor, on the theory that the ceremony served a business purpose of the defendant nursing academy as part of its effort "to always have available a sufficient number of intelligent young women of high character, who are well-trained and competent nurses."⁷² As strained as this reasoning seems, the Washington court in a later case explained the result as an implicit recognition that the land occupier derived "at least potential benefit, of a material or pecuniary nature"⁷³ from the guest's presence.

Not all state recreational use statutes disregard this kind of potential benefit. Indeed, almost half have departed from the model act and speak principally in terms of consideration passing from an entrant to an owner.⁷⁴ Those states adopting such language construe owner benefit broadly as roughly parallel in scope to that of the business visitor

68. See note 7 *supra*.

69. 17 Wn. 2d 380, 135 P.2d 852 (1943).

70. *Id.* at 390, 135 P.2d at 858.

71. 5 Wn. 2d 699, 106 P.2d 593 (1940).

72. *Id.* at 705, 106 P.2d at 595.

73. *Dotson v. Haddock*, 46 Wn. 2d 52, 56, 278 P.2d 338, 341 (1955).

74. See, e.g., *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970)

(Wisconsin statute construed to deny immunity to grocery store owner who received valuable consideration from potential customers swimming off his dock). Almost half of the existing state recreational use statutes express the exception in terms of giving consideration. E.g., CAL. CIV. CODE § 846 (West Supp. 1977); IND. CODE ANN. § 14-2-6-3 (Burns 1973) (monetary consideration); KY. REV. STAT. ANN. § 150.645 (Baldwin 1976); ME. REV. STAT. tit. 12, § 3004 (1974); MICH. STAT. ANN. § 13.1485 (Cum. Supp. 1977). A number of other statutes refer somewhat more narrowly to a charge. E.g., ARK. STAT. ANN. § 50-1106(b) (1971); DEL. CODE tit. 7, § 5906(b) (1974); GA. CODE ANN. § 105-408(b) (1968); IDAHO CODE § 36-1604 (1977) ("charge" and "for compensation").

Minnesota's former statute was unique in establishing a land classification known as a free recreational area which in part was defined as "any privately owned area of land or water which the owner . . . has made subject to any recreational use or uses by the public without compensation." 1961 Minn. Laws ch. 638, § 2 (amended 1971) (current version at MINN. STAT. ANN. § 87.021 (West 1977)). Alabama expresses an exception to the immunity grant where "permission . . . was granted for commercial enterprise for profit." ALA. CODE tit. 47, § 283 (Cum. Supp. 1973). One state makes no express exception at all. OHIO REV. CODE ANN. § 1533.181(2) (Page 1964).

class under the common law.⁷⁵ The reference in R.C.W. § 4.24.210 to a "fee of any kind" arguably excludes non-monetary forms of consideration, such as advertising⁷⁶ and other incidental benefits.⁷⁷ Indeed, under the recreational use act, even one who accompanies a paying guest may be denied invitee status unless it can be inferred that the fee was charged for both entrants.⁷⁸

On the other hand, R.C.W. § 4.24.210 should not be construed as narrowly as the Georgia court interpreted its statute in *Stone Mountain Memorial Association v. Herrington*.⁷⁹ In that case, a two dollar fee was assessed on all automobiles entering a public park, entitling the occupants to "park and drive about the park premises."⁸⁰ The Georgia Supreme Court held that the fee "was in no way related to the admission of persons to the park," because the fee was the same regardless of the number of passengers in a car, making it "purely a parking or driving permit."⁸¹ Thus, *all* the occupants of the car were denied recovery under the statute.

Many parks simply assess entrance charges per automobile as a convenient method of collection.⁸² Revenues generated by such charges are just as available for park upkeep and warning signs as revenues provided by an individual admission fee. Furthermore, the result in *Stone Mountain* seems particularly harsh because in many recreational areas the only realistic means of access is by automobile.⁸³ By confusing the method of collecting entrance fees with whether

75. Compare *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969) (advertising benefit not a charge) with *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970) (possibility of future sales is sufficient "consideration").

76. E.g., *Barrett v. Faltico*, 117 F. Supp. 95, 99 (E.D. Wash. 1953).

77. In *Hamilton v. United States*, 371 F. Supp. 230, 234 (E.D. Va. 1974), the entrant to a federally owned scenic area unsuccessfully claimed business visitor status based on her payment of federal taxes which in part maintain the area.

78. See *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974) in which a federal district court, applying the Wyoming recreational use statute, WYO. STAT. § 34-389.5 (Cum. Supp. 1975), held that a teenage passenger in his family's car could not recover for injuries sustained in Yellowstone Park because park regulations allowed free admission for persons under sixteen.

79. 225 Ga. 746, 171 S.E.2d 521 (1969).

80. 171 S.E.2d at 523.

81. *Id.*

82. See, e.g., 36 C.F.R. § 6.3 (1976) (federal fee schedule for certain parks and related areas).

83. Apparently, auto traffic is so frequent at Yellowstone Park, for example, that in one summary of tort claims filed against the government over a two-year period, auto accidents constituted the largest category of allowed claims, both in terms of the number of cases and the damages paid. 2 LAND AND WATER L. REV. 447, 461 (1967).

there was, in fact, a fee charged, the Georgia court extended the scope of land occupier immunity beyond its intended limits.

Under the Washington statute, similar results are unlikely. Any kind of fee paid for entry to a recreational area should qualify the paying visitor for invitee status regardless of the amount or manner in which it is collected. Furthermore, if it is reasonable to construe the fee as also covering others who accompany the visitor,⁸⁴ they should be considered invitees as well.⁸⁵

There is, however, a question whether the recreational use statute should be applied to an occasional free user when most users actually pay for admission. In *Barrett v. Faltico*,⁸⁶ a case arising before the Washington statute was enacted, a federal district court applied traditional common law rules to hold that a racetrack spectator who sneaked in without paying admission was not an invitee or licensee to whom a duty of care was owed, even though the landowner plainly had prepared his grounds to receive the public. The denial of recovery in this case indicates that one who enters by stealth is no different from an undiscovered trespasser and should not be allowed to rely on the owner's duty of care toward others for his own protection.⁸⁷ This policy is far less compelling, however, when the landowner voluntarily grants a special fee waiver. Barring recovery in this situation serves neither the purpose of the recreational use statute in opening additional lands to public recreation nor the public policy against trespassers. When the general practice is to charge admission, occasional voluntary fee waivers will not change either the behavior of the landowner or the expectations of entrants. Yet, under a literal application of R.C.W. § 4.24.210, the occasional entrant whose fee is waived bears the risk of injuries arising from the owner's negligence.

84. The well known "Golden Eagle Passport" into the national park system provides perhaps the best example. This annual admission permit entitles the holder "and any person accompanying him" in a private automobile to enter national parks and recreation areas. 16 U.S.C. § 4601-6a(a) (1970) (Supp. V 1975). The revenues generated by the annual pass are deposited to the Land and Water Conservation Fund. They are then used for "any authorized outdoor recreation function of the agency by which the fees were collected." *Id.* § 4601-6a(f).

85. This result is consistent with the purpose of the model legislation, which is to avoid the inequity of landowners being liable to recreationalists "from whom the accommodating owner receives no compensation or other favor in return." MODEL ACT, *supra* note 11, at 150 (commentary).

86. 117 F. Supp. 95 (E.D. Wash. 1953).

87. See generally James *supra* note 53.

B. *Intentional Injuries*

The Washington recreational use statute retains landowner and occupier liability for intentional injuries to recreational entrants.⁸⁸ It has long been the rule in Washington that a landowner or occupier must refrain from wilful or wanton misconduct toward any entrant.⁸⁹ Wilfulness generally is defined as premeditated or maliciously inspired harm,⁹⁰ and is plainly comprehended by the intentional injuries clause. Although there are no Washington cases in which entrants have recovered from land occupiers for wilfully-inflicted injury,⁹¹ other jurisdictions have allowed recovery in situations where, for example, the landowner sets a spring gun to maim suspected thieves⁹² or assaults unwanted trespassers.⁹³

In contrast, wanton behavior has had a checkered career in the courts. It has been said to be in the same class as wilfulness, yet it also has been characterized as involving less culpability than wilful misconduct.⁹⁴ Wanton behavior has been held to be an act, or failure to act, creating a high probability of harm to which the actor is consciously indifferent.⁹⁵ Thus, the issue in interpreting the recreational use statute is whether the phrase "intentional injuries" requires that there exist subjective intent to harm, akin to maliciousness, or merely a subjective intent to do the act itself which falls short of malice.

There is little extrinsic evidence to indicate how the courts will decide this issue. The Washington Supreme Court, however, construed the word "intentional" in the former guest passenger statute⁹⁶ to include both wilful and wanton behavior.⁹⁷ The legislature has since amended R.C.W. § 4.24.210 without modifying this language in the

88. WASH. REV. CODE § 4.24.210 (1976), reproduced in note 58 *supra*.

89. *Gasch v. Rounds*, 93 Wash. 317, 160 P. 962 (1916); *West v. Shaw*, 61 Wash. 227, 112 P. 243 (1910).

90. *Adkisson v. Seattle*, 42 Wn. 2d 676, 258 P.2d 461 (1953).

91. See Note, *supra* note 61, at 869.

92. *E.g.*, *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

93. *E.g.*, *James v. Hayes*, 63 Kan. 133, 65 P. 241 (1901).

94. Compare *Crowley v. Barto*, 59 Wn. 2d 280, 286, 367 P.2d 828 (1962) (Mallery, J. dissenting) with *Adkisson v. Seattle*, 42 Wn. 2d 676, 684, 258 P.2d 461, 466 (1953) in which the court states: "There is a distinction between 'wilful' and 'wanton' misconduct, although the two words are used interchangeably by many text writers and courts."

95. *Greetan v. Solomon*, 47 Wn. 2d 354, 287 P.2d 721 (1955); *McNamara v. Hall*, 38 Wn. 2d 864, 233 P.2d 852 (1951).

96. 1961 Wash. Laws ch. 12, § 46.08.080 (repealed 1974), formerly codified at WASH. REV. CODE § 46.08.080.

97. *Sorensen v. Estate of McDonald*, 78 Wn. 2d 103, 470 P.2d 206 (1970).

residual duty clause.⁹⁸ To this modest evidence of implicit legislative approval may be added the fact that a broad reading of “intentional injuries” would be consistent with prior Washington law regarding common law duties to trespassers,⁹⁹ and with other state statutes based on the model act.¹⁰⁰ Moreover, such a broad interpretation is permissible because there probably is a greater danger to public safety from occupier indifference to the welfare of others than from outright malevolence. Except in bizarre cases like those involving hidden spring guns, entrants are more likely to have forewarning against a manifestly hostile owner than an indifferent one, and therefore are better situated to take appropriate precautions for their own safety—such as not using the premises at all.

Even under a broad interpretation of this residual duty, however, decisions under recreational legislation in other states indicate that an intentional misconduct standard demands only a minimal duty of care. For example, courts have denied recovery when the occupier did not replace destroyed warning signs when he knew that people habitually placed themselves in the zone of danger created by his activities;¹⁰¹ when the occupier did post warning signs, but in a different place from where he knew children liked to play;¹⁰² and when no warning signs were posted at all by an occupier who continued to carry on a dangerous activity nearby.¹⁰³ On the other hand, in *Estate of Thomas v. Consumers Power Co.*,¹⁰⁴ the Michigan Supreme Court reversed a summary judgment for a defendant who allegedly had constructed a utility pole and unmarked guy wires which exposed entrants

98. 1972 Wash. Laws, 1st Ex. Sess. ch. 153, § 17.

99. *Winter v. Mackner*, 68 Wn. 2d 943, 416 P.2d 453 (1963).

100. See, e.g., *Lovell v. Chesapeake & Ohio R.R. Co.*, 457 F.2d 1009 (6th Cir. 1972) (Michigan law); *Herring v. Hauck*, 118 Ga. App. 623, 165 S.E.2d 198 (1968); *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 291 A.2d 386 (1972). Some courts have been careful to emphasize that entrants within the statute's scope technically are not to be classified as trespassers, although under the current state of these states' common law, the duty owed is identical. See, e.g., *State ex rel. Tucker v. District Court*, 155 Mont. 202, 468 P.2d 773 (1970). See also N.M. STAT. ANN. § 53-4-5.1(A)(4) (Supp. 1976) (expressly making recreational entrants equivalent to trespassers).

101. *Odar v. Chase Manhattan Bank*, 138 N.J. Super. 464, 351 A.2d 389 (1976); cf. *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W.2d 637 (1965) (occupier's general knowledge that trespassers would set animal traps at a pond did not justify finding wantonness).

102. *McGruder v. Georgia Power Co.*, 126 Ga. App. 562, 191 S.E.2d 305 (1972), *rev'd sub nom. Georgia Power Co. v. McGruder*, 229 Ga. 811, 194 S.E.2d 440 (1972).

103. *Washington v. Trend Mills, Inc.*, 121 Ga. App. 659, 175 S.E.2d 111 (1970) (element of knowledge relied on to some extent by court).

104. 394 Mich. 459, 231 N.W.2d 653 (1975).

to a new hazard undiscoverable under the circumstances. The court held that the complaint made out a case for gross negligence under the statute.

C. *Known Dangerous Artificial Latent Conditions*

Until recently, Washington was among a minority of states which imposed no greater duty of care toward licensees than was owed to trespassers. Landowners were required merely to refrain from wilful or wanton misconduct.¹⁰⁵ In recent years, the Washington Supreme Court has created a number of exceptions to this otherwise minimal obligation. In *Potts v. Amis*,¹⁰⁶ the court held that owners were liable for injuries caused by their own negligent activities on the land, as distinguished from negligently maintained land conditions. In *Ward v. Thompson*,¹⁰⁷ the court suggested that landowners also might be liable to licensees for injuries caused by a "dangerous instrumentality" on the land, even if it was in plain view and, in fact, seen by the injured person.

The third residual duty clause of the Washington recreational use statute maintains landowner liability "for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted."¹⁰⁸ This clause does more than attempt to codify the common law obligations to licensees,¹⁰⁹ notwithstanding the fact that the language closely parallels the holding in *Miniken v. Carr*.¹¹⁰ In that case, a visitor to an attorney's office was injured on her way to a restroom when she opened an

105. *Steele v. Thorne*, 72 Wn. 2d 714, 435 P.2d 544 (1967).

106. 62 Wn. 2d 777, 384 P.2d 825 (1963) (liability upheld for injuries to social guest struck by a golf club).

107. 57 Wn. 2d 655, 359 P.2d 143 (1961) (scaffold at building site).

108. WASH. REV. CODE § 4.24.210 (1976).

109. This language of the residual duty clause includes language from neither the *Potts* nor the *Ward* cases. The principle in *Potts* was not incorporated because that case distinguishes an "activity" from a passive "condition" on the land. The alternative holding of *Ward* is similarly excluded by the reference in the statute to "latent" conditions.

Furthermore, after enactment of the recreational use act, the Washington Supreme Court modified the common law duties owed to licensees in important respects. See *Memel v. Reimer*, 85 Wn. 2d 685, 689, 538 P.2d 517, 519 (1975) (imposing "a duty to exercise reasonable care where there is a known dangerous condition on the property and the occupier can reasonably anticipate that his licensee will not discover or realize the risks"). See also RESTATEMENT (SECOND) OF TORTS § 342 (1965).

110. 71 Wn. 2d 325, 428 P.2d 716 (1967).

unmarked door and fell down a stairway. The Washington Supreme Court held that she could recover even if she was only a licensee. Liability was based on the land occupier's duty to warn the plaintiff about "concealed, dangerous conditions of which the occupier has knowledge, and of which the licensee does not know."¹¹¹ Although this is similar to the residual duty created by the act, the danger in *Miniken* arose only because the condition itself was not readily visible. Conditions which are readily visible, but whose dangers may not be obvious, present a different problem and may explain the statute's curious reference to "artificial" conditions.

Artificial conditions, as opposed to natural conditions, have been used at times as a predicate for application of the attractive nuisance doctrine¹¹² and at other times in connection with landlord duties to tenants for injuries occurring in areas where the landlord retains control.¹¹³ The identification of conditions as artificial or natural may be simple at times.¹¹⁴ However, as one Washington decision has pointed out, certain man-made structures such as reservoirs and ponds are identical to their natural counterparts and create no greater level of risk.¹¹⁵ It is not rational, therefore, to apply the statute literally and shield occupiers from liability when the danger is created by a natural pond, but to strip away that protection when a similar pond is created by a man-made dam, sustained by natural rainfall.¹¹⁶

Although there is little extrinsic evidence of legislative intent regarding this portion of the act,¹¹⁷ it is preferable to construe the resi-

111. *Id.* at 328, 428 P.2d at 718.

112. In theory, one required element for application of the doctrine is that the alluring condition be such that its dangers could not be appreciated by a child. *See Mathis v. Swanson*, 68 Wn. 2d 424, 413 P.2d 662 (1966). However, the courts embrace the assumption that hazardous conditions which occur in nature always should be appreciated, even by a child barely out of infancy. *See, e.g., Meyer v. General Electric Co.*, 46 Wn. 2d 251, 280 P.2d 257 (1955). This premise has been persuasively disputed by Prosser, among others. *See, e.g., W. PROSSER, supra* note 2, § 59, at 366-69.

113. *Cf. Bennett v. McGoldrick-Sanderson Co.*, 15 Wn. 2d 130, 129 P.2d 795 (1942) (snow on sidewalks); *Oerter v. Ziegler*, 59 Wash. 421, 109 P. 1058 (1910) (ice on steps).

114. *E.g., McDermott v. Kaczmarek*, 2 Wn. App. 643, 469 P.2d 191 (1970) (rocky cliff); *Miniken v. Carr*, 71 Wn. 2d 325, 428 P.2d 716 (1967) (doorway).

115. *Meyer v. General Electric Co.*, 46 Wn. 2d 251, 280 P.2d 257 (1955).

116. Of course, where the recreational use act does not apply, an entrant classified as a licensee is protected against certain conditions regardless of any artificial or natural distinction. RESTATEMENT (SECOND) OF TORTS § 342, Comment e (1965).

117. At a hearing on the bill, concern was expressed that allowing motorcycling in recreational areas enhances the risk of forest fires caused by such vehicles. One purpose of the legislation was to relieve owners of liability in such cases. Telephone

dual duties of landowners as being narrow in scope, rather than adhere blindly to theoretical differences between natural and artificial conditions. For example, forest fires may have artificial as well as natural origins; yet landowners are not necessarily in a better position to prevent injuries to entrants when the fires are caused by man rather than by natural agencies. A reasonable interpretation is that the statute was designed to follow the results of Washington cases involving latent hazards by relieving landowners of the burden of repairing dangerous conditions or warning entrants about hazardous features of the property when that burden would be disproportionately heavy.¹¹⁸

So analyzed, an owner's liability under R.C.W. § 4.24.210 need not depend on whether the hazard is natural or artificial. When the hazard is of mixed origin, liability should depend on balancing the severity of the burden of either repairing the dangerous condition or warning entrants of the hazard against the probability that an entrant would notice and appreciate the danger. The greater the burden in proportion to the risk presented, the more such a hazard is likely to be classified as a natural condition, for which no liability attaches. Thus, a known dangerous artificial latent condition, for which liability would arise, is one which could have been repaired or warned against

interview with Victor Moon, Washington Legislative Research Council (Sept. 23, 1976).

118. *E.g.*, *Garner v. Pacific Coast Coal Co.*, 3 Wn. 2d 143, 100 P.2d 32 (1940) is an example of the Washington Supreme Court's approach. In that case two girls were travelling a well beaten path across the defendant's property from a nearby creek. The land had a natural appearance, but, as the defendant knew, immediately beneath the topsoil were incendiary remains of a man-made coal slag which had been created many years earlier. The girls were burned when the topsoil gave way and they fell several feet into a bed of hot cinders. The court denied recovery, even though it found that the defendant knew of the inflammable nature of the undersoil and of the public's frequent use of the path. The court reasoned that because there was no specific knowledge of the precise underground location within the slag where coals might be burning or of the presence of these two particular girls, the defendant was not liable for failure to warn. More compelling, however, may have been the fact that the danger of spontaneous combustion from smoldering coals was one which the court believed could take place up to 50 years after formation of a coal slag. Furthermore, the land in question was an undeveloped tract of several thousand acres; even the slag itself was more than two acres in size. To require repairs or even warning signs over such an area for so many years would have involved a considerable burden.

119. In many circumstances the costs will not always be easily susceptible to monetary calculation. The expense of adequate warning signs or repairs to the property may not be excessive, but the extent of the loss to the occupier and the general public in recreational, scenic, utilitarian or aesthetic value as a result of such warnings or repairs could be considerable. *Cf. Smith v. United States*, 383 F. Supp.

at a cost¹¹⁹ less burdensome than the risk created by failure to repair or warn.¹²⁰

It is apparent that the residual duty to warn entrants about latent artificial conditions will require a case-by-case resolution of each factual circumstance. Moreover, Washington's developing case law regarding a landowner's common law duty to licensees is inapplicable, because whether or not a condition is artificial is immaterial to a determination of landowner liability to licensees under the *Restatement (Second)*.¹²¹ It also may be immaterial that conspicuous warnings were posted, because in some instances the duty to a licensee may require elimination of the hazard rather than merely alerting a licensee to the danger.¹²² The *Restatement (Second)* rule governing landowners' duties to licensees was expressly adopted by the Washington Supreme Court.¹²³ This rule imposes a greater duty of care on landowners than does the residual duty clause of the Washington recreational use statute. In sum, the legislature has created an entirely new classification of recreational entrant who enjoys less protection than a licensee under either former Washington law or the newly adopted *Restatement (Second)* standard.

IV. LIMITS ON THE APPLICABILITY OF THE RECREATIONAL USE STATUTE

Although under the Washington statute land occupiers are not relieved of *all* duties toward recreational entrants, the scope of these duties is clearly limited. When no admission charge has been paid, an entrant will be required to prove that the owner either acted intention-

1076, 1080 (D. Wyo. 1974) (recreational value of Yellowstone Park would be diminished by posting or repairing all hazards). As Prosser stated in the context of child trespassers, "[t]he utility to the possessor of maintaining the condition must be slight as compared with the risk to children involved." W. PROSSER, *supra* note 2, § 59, at 375.

120. Such a test, of course, requires the party with the burden of proof to introduce relevant evidence on this question. *See, e.g.*, *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975). In that case the plaintiff proved that the defendant knew of a dangerous condition brought about by heavy use of the property, and therefore the Oregon Supreme Court refused to find that the defendant land occupier was immune under that state's recreational use law.

121. RESTATEMENT (SECOND) OF TORTS § 342, Comment e (1965).

122. *Id.*, Comment k (posting a warning sign is not enough when the licensee is "blind, illiterate, or a foreigner, or a child too young to be able to read").

123. *Memel v. Reimer*, 85 Wn. 2d 685, 538 P.2d 517 (1975).

ally or had prior knowledge of a dangerous condition which could have been warned against at reasonable expense. As the cases from other states suggest, both of these elements are difficult to prove.¹²⁴ For this reason, injured litigants may attempt to shift to a strategically more favorable battlefield—challenging the application of the recreational use statute itself. Under the Washington act, such an attack requires detailed evidence of the entrant's purpose and the character of the subject property.

A. *Recreational Purposes*

Unlike some state statutes which limit applicability of recreational use legislation to certain specific activities, the Washington act applies broadly to all outdoor recreation.¹²⁵ Many specific kinds of sporting activities are mentioned in the act;¹²⁶ the list is not exclusive but merely illustrative. Thus, even if an entrant is injured while engaged in an outdoor sport not expressly mentioned in the statute, a court may conclude that recovery is barred because his sport is similar to those described. For example, one court has held that both snowmobiling and diving are within a statute governing "fishing, hunting, trapping, camping, hiking, sightseeing, or other similar outdoor recreational use."¹²⁷ These activities are similar because they are widely recognized as sports, involve some degree of physical exertion, and usually require open spaces. However, in instances when the activities of the entrant do not meet one or more of these criteria, courts have held that the recreational use acts do not apply. In *Villanova v. Amer-*

124. Each basis for liability requires, to a different degree, evidence of the defendant's state of mind. In most cases such a matter can be proved only circumstantially. Yet cases decided under recreational use legislation indicate reluctance on the part of courts to infer wantonness or foreknowledge from circumstantial evidence. See, e.g., *Garfield v. United States*, 297 F. Supp. 891 (W.D. Wis. 1969) (action by non-paying guest dismissed although she was expressly invited onto military reservation and firing range where unexploded shell was present); *Odor v. Chase Manhattan Bank*, 138 N.J. Super. 464, 351 A.2d 389 (1976) (defendant warned by health officials and police not to allow unsupervised recreational use of property).

125. WASH. REV. CODE § 4.24.210 (1976), cited in note 58 *supra*.

126. Washington's statute is among the most detailed in terms of describing individual sports. See, e.g., OHIO REV. CODE ANN. § 1533.18 (Page Supp. 1977) (no duty owed "to a recreational user"); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969) (limited to "hunting, fishing and/or camping").

127. Michigan Court of Appeals citing MICH. STAT. ANN. § 13.1485 (Cum. Supp. 1977) in *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786, 791 (1975) *rev'd on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975) (snowmobiling) and *Taylor v. Mathews*, 40 Mich. App. 74, 198 N.W.2d 843, 844 (1972) (diving).

ican Federation of Musicians, Local 16,¹²⁸ the plaintiff was a member of a band involved in a free outdoor park concert. The defendant, in urging its immunity under the recreational use act, relied on statutory and dictionary definitions of recreation as “forms of play, amusement, diversion or relaxation.”¹²⁹ Rejecting the defendant’s interpretation as unnecessarily broad, a New Jersey appellate court employed the rule of *ejusdem generis* to conclude that recreational uses covered by the statute generally are characterized by “physical” activities “typically requiring the outdoors.”¹³⁰

With respect to R.C.W. § 4.24.210, all the individual recreational activities listed characteristically occur outdoors. Moreover, from the express use of the phrase “outdoor recreation,” it can be inferred that the act applies specifically to injuries which occur in large, open spaces. It seems unlikely that the statute would cover such mishaps as a fall on a walkway while entering a dance¹³¹ or injuries suffered while playing or watching an indoor sport.¹³² The legislature might have chosen to protect landowners in such cases but, unlike some other states,¹³³ it did not.

How physical the outdoor activity must be before it comes within the scope of the statute is another matter. Among the recreational activities listed in Washington’s act are “nature study,” and “viewing or enjoying historical, archaeological, scenic, or scientific sites.”¹³⁴ Arguably, even walking across the ground is included. Thus, a gratuitous entrant who did little more than lie in the grass and attempt to walk to his car would be covered by the statute.¹³⁵

128. 123 N.J. Super. 57, 301 A.2d 469 (1973), *cert. denied*, 63 N.J. 504, 308 A.2d 669 (1973).

129. 301 A.2d at 468.

130. *Id.* at 468–69.

131. See *McKinnon v. Washington Fed. Sav. & Loan Ass’n*, 68 Wn. 2d 644, 414 P.2d 773 (1966).

132. Even a sport normally played outside, such as golf, will not qualify under the Washington statute when moved inside. There are no reported cases in which a recreational use act defense was raised against a claim for injuries occurring indoors. But in most cases the expectation of safety by a social guest indoors is likely to be greater, thus justifying the legislative distinctions made in the act. Compare *Wood v. Postelthwaite*, 6 Wn. App. 885, 496 P.2d 988, *aff’d*, 82 Wn. 2d 387, 510 P.2d 1109 (1972) (plaintiff injured on golf course denied recovery) with *Potts v. Amis*, 62 Wn. 2d 777, 384 P.2d 825 (1963) (plaintiff injured by golf club at private home allowed recovery). Interestingly, Hawaii’s recreational use statute adds a unique residual duty of care toward all “house guests.” HAW. REV. STAT. § 520–5(3) (Supp. 1975).

133. See, e.g., ALA. CODE tit. 47, § 281 (Cum. Supp. 1973) (immunity extends to all premises).

134. WASH. REV. CODE § 4.24.210 (1976).

135. *Dickinson v. Tesia*, 2 Wn. App. 262, 467 P.2d 356 (1970).

When an entrant's activity changes character after he enters the land, the applicability of the statute may be debatable. For example, a business visitor may remain to enjoy nearby recreational facilities or a recreational entrant may interrupt his sport for other activities. If injuries occur after the initial purpose in coming on the land has changed, has the landowner's duty of care changed as well? Under some state recreational statutes, if an entrant's initial purpose was recreational, he remains subject to the statute even though he later abandons his recreational activity.¹³⁶ However, in the reverse situation, when an entrant initially enjoys a higher duty of care, he should lose this protection once his purpose becomes recreational. The statute's policy of encouraging free recreational use of lands is equally served whether recreation was the entrant's initial purpose or an after-thought.

B. Land Classification

R.C.W. § 4.24.210 is among a minority of recreational use statutes containing express language limiting their geographical reach.¹³⁷ However, the Washington act poses a difficult problem of statutory construction because the words limiting its coverage—"agricultural or forest lands or water areas or channels and rural land adjacent to such areas or channels"¹³⁸—are not defined in the act. Use of dictionary definitions is not likely to resolve the problem. As one court recently noted in response to the argument that Webster's Dictionary defines agricultural lands as ground suitable for growing crops: "The fact that the land could be farmed does not distinguish it from most of the land in [the state]."¹³⁹ Similarly, other courts have held backyards¹⁴⁰ and vacant lots¹⁴¹ to be beyond the scope of recreational use statutes, even though they meet the literal dictionary meaning.

In Oregon, where an extensive legislative history is available, the state supreme court has concluded that the land classifications were to encompass only "landholdings which tended to have recreational

136. *Lovell v. Chesapeake & Ohio R.R. Co.*, 457 F.2d 1009 (6th Cir. 1972).

137. *See, e.g.*, IOWA CODE ANN. § 111C.2(1) (West Supp. 1977); OR. REV. STAT. § 105.655(2) (1975); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977).

138. WASH. REV. CODE § 4.24.210 (1976), reproduced in note 58 *supra*.

139. *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634, 637 (1975).

140. *Herring v. Hauck*, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

141. *Shepard v. Wilson*, 123 Ga. App. 74, 179 S.E.2d 550 (1970).

value but [which were not] susceptible to adequate policing or correction of dangerous conditions.”¹⁴² Whether a given acreage falls within this standard thus turns on an analysis of the landowner’s ability to maintain safe conditions or post suitable warnings on the property. Cases under recreational use statutes in a number of other jurisdictions suggest three possible factors in this analysis.

First, the amount of land owned by the defendant is important in determining whether the maintenance of safe conditions or adequate warning signs is practical. Fairgrounds,¹⁴³ a lakeside resort,¹⁴⁴ a military reservation,¹⁴⁵ and a twenty-seven-acre pond¹⁴⁶ have all been found within the intended scope of state recreational use statutes. In contrast, an abandoned barge,¹⁴⁷ a residential swimming pool,¹⁴⁸ and a three-acre ball field¹⁴⁹ have been held to be beyond the reach of such statutes.

Second, the arrangement of the land and its improvements may be significant. As one court has observed, “a company could own a large tract of land whereon extensive stretches would be almost totally unoccupied while other sections, for example where there were buildings, would be subjected to relatively regular scrutiny.”¹⁵⁰ It would be consistent with the general purposes of recreational use legislation to relieve the land occupier of liability as to injuries occurring on the uninspected portions of the property, but to hold him responsible for those occurring in areas frequently policed.

Third, some cases indicate that the relative proximity of the land to a population center is a factor to be considered. Only one state statute expressly covers land located beyond the boundaries of a town or village,¹⁵¹ but courts have indicated that it is difficult to justify the inclusion of suburban property and residential areas even under more gen-

142. *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634, 637 (1975).

143. *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786 (1975), *rev'd on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975).

144. *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969).

145. *Garfield v. United States*, 297 F. Supp. 891 (W.D. Wis. 1969).

146. *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W.2d 637 (1965).

147. *Scheck v. Houdaille Constr. Materials, Inc.*, 121 N.J. Super. 335, 297 A.2d 17 (1972).

148. *Boileau v. DeCecco*, 125 N.J. Super. 263, 310 A.2d 497 (1973).

149. *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975).

150. *Scheck v. Houdaille Constr. Materials, Inc.*, 121 N.J. Super. 335, 297 A.2d 17, 21 (1972).

151. ILL. ANN. STAT. ch. 70, § 32(a) (Smith-Hurd Supp. 1976).

eral recreational use legislation, without demonstrable evidence that the legislature intended to revise the entire area of landowner liability law.¹⁵²

In Washington, the Canal Commission Act of 1965,¹⁵³ the Shoreline Management Act of 1971,¹⁵⁴ and recently enacted current use assessment provisions¹⁵⁵ may be helpful in bringing greater specificity to the land classifications of R.C.W. § 4.24.210. Each of these acts expressly recites that one underlying legislative purpose is to enhance public recreational opportunities.¹⁵⁶ Moreover, each uses language similar to the recreational act's classifications.

1. *Agricultural lands*

Under the real property assessment legislation, "agricultural lands" generally are defined to include: (a) parcels of land twenty acres or more in size which are "devoted primarily to the production of livestock or agricultural commodities" for commercial purposes; (b) parcels of five to twenty acres which have earned at least \$100 gross income per acre in three of the last five years; and (c) parcels of less than five acres "devoted primarily to agricultural uses" which have earned at least \$1,000 gross income annually in three of the last five years.¹⁵⁷ Landowners must apply to county authorities for the appropriate classification; in ruling on the application, the county is expressly authorized to consider, *inter alia*, whether the current land use enhances "recreation opportunities."¹⁵⁸ After three years of actual farm use, a parcel may qualify as agricultural land for tax purposes. If, in the intervening three years, an injury occurs to an entrant, the land occupier should not be foreclosed from showing his potential eli-

152. *Shephard v. Wilson*, 123 Ga. App. 74, 179 S.E.2d 550 (1970); *Boileau v. DeCecco*, 125 N.J. Super. 263, 310 A.2d 497, 500 (1973).

153. WASH. REV. CODE §§ 91.12.010-.060 (1976).

154. *Id.* §§ 90.58.010-.930.

155. Property Taxes—Open Space, Farm, and Timber Lands—Current Use Assessment Act of 1973, WASH. REV. CODE §§ 84.34.010-.160 (1976).

156. *Id.* § 84.34.010 ("to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens"); Shoreline Management Act of 1971, WASH. REV. CODE § 90.58.020 (1976) (listed sixth on a priority list of shoreline preferred uses—"Increase recreational opportunities for the public in the shoreline"); Canal Commission Act of 1965, WASH. REV. CODE § 91.12.010 (1976) ("to aid commerce and navigation, including the development of recreational facilities related thereto").

157. WASH. REV. CODE § 84.34.020(2) (1976).

158. *Id.* § 84.34.037.

gibility for agricultural land classification, because the administrative procedure clearly comprehends retrospective classification. On the other hand, it should be fatal to any immunity defense that a classification was sought and denied by a county assessment authority either before or after an injury.

2. *Forest lands*

Forest lands are defined for tax purposes as parcels of at least twenty acres that are “primarily devoted to and used for growing and harvesting timber.”¹⁵⁹ However, because the legislature has equated “forest land” with “timberland,”¹⁶⁰ a separate provision of the Washington tax statute, defining timberland as “five or more acres which is devoted primarily to the growth and harvest of forest crops,”¹⁶¹ arguably reduces the minimum required size to five acres.

3. *Water areas and channels*

The only express use of the term “water areas” in the Washington code is in the Shoreline Management Act, which defines shorelines to include “all of the water areas of the state . . . and their associated wetlands” except (a) certain delineated shorelines of statewide significance, (b) shorelines upstream from the point where “the mean annual flow is twenty cubic feet per second or less,” and (c) shorelines and wetlands on lakes less than twenty acres in size.¹⁶² The Shoreline Management Act thus defines certain important types of recreational areas chiefly by excluding other types.

No statutory definition of “channels” exists in Washington. However, the Canal Commission Act of 1965 defines canal as “any waterway for navigation created by construction of . . . channels by excavation in dry ground, in streams, rivers or in tidal waters.”¹⁶³ As in the case of water areas and agricultural and forest lands, one express legislative purpose of this act is to promote the development of recreational facilities.¹⁶⁴

159. Timber and Forest Lands Valuation Act of 1971, WASH. REV. CODE § 84.33.100(1) (1976).

160. *Id.*

161. Property Taxes—Open Spaces, Farm, and Timber Lands—Current Use Assessment Act of 1973, WASH. REV. CODE § 84.34.020(3) (1976).

162. WASH. REV. CODE § 90.58.030(2)(d) (1976).

163. *Id.* § 91.12.060.

164. *Id.* § 91.12.010.

4. *Adjacent rural lands*

The last category of lands in R.C.W. § 4.24.210—"rural lands adjacent to such areas or channels"—may be plagued by definitional problems because of its vagueness.¹⁶⁵ In unrelated contexts, however, the Washington Supreme Court has approved similar wording as reasonably susceptible to a definite and nondiscriminatory meaning.¹⁶⁶ A precise reference to adjacent lands is included in the wetlands provision of the Shoreline Management Act. In that act, a perimeter of "two hundred feet in all directions"¹⁶⁷ from the high water mark of a shoreline is included in the lands regulated. Such a definition would lend certainty to the "adjacent" language of the recreational use act, and at the same time would comport with the legislature's view of recreationally significant lands.

Although there is no explicit legislative directive that these land classifications in other code chapters be used to interpret the terms in the recreational use act, this seems the proper approach. All of these enactments share a common legislative interest in promoting public recreational opportunities, and they are complementary in the sense that they seek through economic manipulations to protect certain favored privately-held lands. Furthermore, when these various chapters are construed *in pari materia*, another purpose of recreational use legislation is served: landowners will know with greater certainty the extent of their responsibility toward gratuitous entrants.¹⁶⁸ Ideally, the more certain landowners are of their liabilities and immunities, the more they will open their lands to the public.

V. CONCLUSION

It is doubtful whether the Washington recreational use act has had any effect on land occupier behavior. Landowner decisions to allow public access do not always turn on economics; interests of privacy¹⁶⁹

165. The United States Supreme Court commented that the term "adjacent" "must be read in the context of its use and the land to which it applies." *United States v. St. Anthony R.R.*, 192 U.S. 524, 530 (1904). See also *Stone v. United States*, 64 F. 667, 673-74 (9th Cir. 1894), *aff'd*, 167 U.S. 178 (1897).

166. *McMillan & Sons v. Sims*, 132 Wash. 265, 231 P. 943 (1925); *State v. Van Vlack*, 101 Wash. 503, 172 P. 563 (1918); *Barker v. State Fish Comm'n.* 88 Wash. 73, 152 P. 537 (1915).

167. WASH. REV. CODE § 90.58.030(2)(f) (1976).

168. See MODEL ACT, *supra* note 11, at 150 (commentary).

169. See, e.g., 3 ENV'T L. 74, 75-76 (1973) (discussing deprecations to property by snowmobilers).

or concern over moral if not legal responsibility for injuries to entrants can be important factors also. Moreover, the economic incentives themselves may not be great, even though in theory immunity from liability eventually should result in lower insurance premiums. Decreased insurance costs may be masked by general inflationary cost increases, by the lag time involved in rate change approval by regulatory agencies, and by the fact that insurance policies often cover a number of other risks unrelated to recreational use. Given these masking phenomena, the economic incentives of recreational use legislation seem marginal at best. For self-insurers such as industrial forest owners, the impact may be more immediate; however, empirical data is not yet available on personal injury settlements, jury awards, and lower land maintenance costs.

Furthermore, it is not evident that reduced cost exposure has appreciably influenced any occupier's decision to open lands to public use. In the past, some landowners have threatened to close their property to public use altogether if landowner immunity was not conferred by the legislature;¹⁷⁰ it is tempting to discount such threats as saber-rattling attendant to spirited lobbying. On the other hand, it is clear that some large commercial concerns such as forest products corporations have believed it to be in their own self interest to invite public recreational use. Furthermore, while enhanced corporate image may partially account for such practices, some industrial landholders have long been required by law to make a certain amount of land available to public use irrespective of any state immunity law.¹⁷¹

There is also a distinct possibility that recreational use acts change only the degree to which landowners police their property for the

170. *See, e.g.*, Testimony of B. Sam Taylor, of Boise-Cascade Corp., before the Oregon Senate Committee on State and Federal Affairs, 56th Legislative Sess. (March 1, 1971) (transcript on file at Oregon State Archives, Salem, Ore.).

171. For example, utilities subject to the licensing authority of the Federal Power Commission (FPC) are required to attach what is known as Exhibit R to their applications for operating licenses and permits. 18 C.F.R. § 4.41 (1976). This exhibit describes the utility's proposed plan for full development of the recreational potential of the utility's property. The FPC then commonly conditions the license on a requirement that the utility: "allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purposes." Wisconsin Michigan Power Company, Project No. 2431, 38 F.P.C. 199, 208 at Article 19 (1967). Every other year thereafter, the licensee is required to submit appropriate supplements to the Exhibit R materials. 18 C.F.R. § 8.11(b) (1976).

safety of others. Although the commentary to the model act glosses over this feature, recreational use legislation undeniably reduces any economic incentive to repair or post warnings on one's land. Thus, a farmer who in past years may have posted warnings at a pond has no economic reason to maintain signs after enactment of the recreational use act. The hazards of a swimming hole are obvious to all, but unless the pond is an artificial latent condition or the landowner has acted intentionally, he will escape liability. The more widely known the statutory immunity becomes, the greater its disincentive effects may be, and R.C.W. § 4.24.210 could lead to gradual deterioration of suitable and safe recreational areas.

In terms of public policy, therefore, recreational use legislation has yet to prove its wisdom. In one sense, perhaps, it achieves a laudable departure from the rigidities of common law landowner and occupier liability rules by distributing responsibility according to public policies that transcend largely discredited feudal notions of land ownership. In a more immediate sense, however, R.C.W. § 4.24.210 merely adds another entrant category—the recreational user—to the jerry-built common law classification scheme. Furthermore, the Washington act is clearly opposed to the modern trend of holding landowners to a higher standard of care in the interests of public safety. Under this act, the social and economic costs of injuries fall squarely on those who usually are least able to bear the burden.

For these reasons, courts should be careful not to extend the act beyond its limited scope. In particular, the mere existence of the act should not be viewed as a justification for abandoning the line of recent judicial decisions which have edged closer to imposing a general obligation of reasonable care on all landowners. At best, R.C.W. § 4.24.210 is an act of limited scope addressed to the special problem of shrinking recreational space. Accordingly, the legislative policies which it reflects have no bearing on the *general* field of occupier liability, notwithstanding recent suggestions to the contrary.¹⁷²

Insofar as the Washington act regulates liability in one discrete portion of the law of occupier liability, it may be appropriate for the legislature to reexamine the statute in light of the growing number of cases decided under recreational use statutes in Washington and elsewhere. In some states, there are grounds for doubting that lawmakers were

172. See *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 236 N.W.2d 1, 13-16 (1975).

advised accurately about the prevailing common law rules and the impact of recreational use immunity.¹⁷³ Combined with the meager explanation of the model act provided by its sponsors in 1965, the absence of a meaningful judicial record until very recently warrants a reassessment of the immunities granted in R.C.W. § 4.24.210. If the act demonstrably fails to further the public interest in opening private lands for recreational use and at the same time denies recovery to people who would otherwise be protected, then the statutory immunity should be abandoned.¹⁷⁴

173. As one illustration, it is appalling to observe that during legislative deliberations in Oregon on the bill, the chief draftsman and proponent explained that a licensee is "a person who is there with the permission of the landowner and is paying the landowner some money so that there is a benefit to the landowner." Minutes of the House Subcomm. on Natural Resources, 56th Oregon Legislative Sess. (April 26, 1971) at 3 (remarks of W. Armstrong). An "invitee" was described as "a person who the landowner for some reason or other actually has invited." *Id.*

Another example of possible legislative misdirection is suggested by the recent repeal of Utah's recreational use law. A somewhat abbreviated version of the model act was passed in Utah in 1965. 1965 Utah Laws, ch. 115, §§ 1, 2. By chance, it was codified in general provisions relating to fish and game management. UTAH CODE ANN. §§ 23-1-13 to 14 (Supp. 1967). When Utah's Wildlife Resources Code was enacted in a reform of fish and game administration laws, the recreational use statute codified only in the pocket part was repealed, possibly by mistake. See 1971 Utah Laws, ch. 46, § 137.

174. One of the western states' largest industrial forest owners, in response to an inquiry from the author, has reported:

Specifically, you have asked if the Boise Cascade Corporation has added new lands to those available for public recreation and whether our tort claims settlement pattern has been materially improved. The answer to both questions is 'no.' We have the same amount of land available as in the past. We have not considered closing any lands. We have had no tort claims in the past five years. In summary, we see value in the Act in the event of some future claims, but we cannot currently demonstrate that it has had any direct impact on our operations. Letter from Richard Rohrbach, Boise Cascade Corporation Director of State Affairs (December 6, 1976) on file at *Washington Law Review*.