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LANDOWNER LIABILITY UNDER THE WYOMING RECREATIONAL USE STATUTE

If one were to ask any first year law student to describe the historical nature of the liability of owners and occupiers of land for injuries to persons entering thereon, and to discuss trends in that area of the law, it's likely that he would outline the three common law classifications of trespasser, licensee, and invitee, with corresponding duties of care, and exceptions.[1] He would add, no doubt, that the trend in a minority of jurisdictions is to abolish these classifications entirely and substitute a uniform standard of reasonable care under the circumstances,[2] or to at least abolish the distinction between licensees and invitees and to require ordinary care as to both.[3] A Wyoming student would probably tell you that the Wyoming courts have not followed these trends, so that one still needs to concern himself with these three classifications.

That answer would be at least three-fourths right—but there is apparently another category which lawyers representing plaintiffs and landowners in Wyoming and elsewhere may need to be concerned with, legislatively created in a majority of states. The legislation creates what will be called, for lack of a better term, a recreational user, and in certain cases lowers the standard of care to which a landowner is held. The statute in Wyoming has lain dormant since 1965, except for a single case. This comment will discuss possible ramifications of this legislation, and examine judicial responses attempting to harmonize and limit a new classification superimposed on the common law in opposition to a trend in the courts to expand the landowner's liability for foreseeable harms. The statute should be of interest to those whose lands are open to

1. PROSSER, TORTS 357-415 (4th Ed. 1971); DOOLEY, 1 MODERN TORT LAW 375-379 (1977).
2. *See* Annot., 32 A.L.R.3d 508 (1970), collecting early cases, including Rowlands v. Christian, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968), the first case to do so. For a more recent collection of cases, see Note, *Premises Liability—New York Joins Minority of States Abolishing Trespasser, Licensee, Invitee Distinctions,* 45 FORDHAM L. REV. 682 (1976).
3. *See* Note, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care Under The Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194 (1979).

the use of hunters, skiers, hikers, and other lovers of the outdoors, but may nonetheless be of little practical significance, as will be seen.

I. THE RECREATIONAL USE ACT

The Wyoming legislation is to be found at Sections 34-19-101 through 106. A discussion of the Act's history, purpose, and structure is in order.

A. History and Purpose

There appear to be forty-two jurisdictions which have adopted what will be called Recreational Use Acts.[4] They vary somewhat, but seem to trace their origins to a Wisconsin statute enacted in 1963.[5] The Wisconsin statute came about because of the problems experienced by foresters with destruction of trees by deer. To solve this problem, they invited hunters to hunt on their lands, but feared liability for negligent maintenance of narrow logging roads and other facilities. For this reason, the foresters were able to persuade the Wisconsin Legislature to pass a recreational use act to limit their potential liability.[6]

The reason currently given for adoption of these statutes elsewhere is a legislative desire to encourage landowners to open their lands to the public for recreational use by limiting their civil liability for doing so.[7] This policy was the motive force behind a Model Act developed by the Committee of State Officials on Suggested State Legislation of the Council of State Governments.[8] This Model Act was

4. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1, 2 fn. 10 (1977) lists forty-one, while Judge Renfrew in Gard v. United States, 420 F. Supp. 300, 302 (N.D.Cal. 1976) refers to forty-three. Barrett's list does not include the Colorado statute, COLO. REV. STAT. § 33-41-101 *et. seq.* (1973). Judge Renfrew may have counted UTAH CODE ANN. § 23-1-13 *et. seq.* (1967 Supp.), repealed in 1971.
5. WIS. STAT. ANN. § 29.68 (1973).
6. Goodson v. City of Racine, 61 Wis.2d 554, 213 N.W.2d 16, 19 (1973) and Note, *Liability of Landowners to Persons Entering for Recreational Purposes*, 1964 WIS. L. REV. 705, 709 (1964).
7. *See, e.g.*, English v. Marin Municipal Water District, 66 Cal. App.3d 725, 136 Cal. Rptr. 224, 228 (1977), Barrett, *supra* note 4, at 4.
8. COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, XXIV SUGGESTED STATE LEGISLATION 150-152 (1975). The policy preamble states:
> Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The

adopted verbatim by the Wyoming Legislature in 1965,[9] except that the first section of the Act, stating its purpose, was not enacted.[10] The inference would be, then, that the Wyoming Legislature adopted the Act for the reasons the Model Act was promulgated.

Statutes of this kind[11] have been held constitutional against equal protection challenges as rationally related to the valid state purpose of opening private lands for use by the public.[12] The attacks have relied on cases striking down automobile guest statutes limiting liability to passengers to cases of gross negligence. The courts have found a closer relationship between the recreational use statutes and their classifications than those of guest statutes.[13]

B. Structure of the Act

The Wyoming Recreational Use Act limits the duty of an owner[14] to persons using his land[15] for recreational

> acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreation resources available . . . in those instances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.

9. 1965 WYO. SESS. LAWS Ch. 9.
10. Section One of the Model Act reads, "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." SUGGESTED STATE LEGISLATION, *supra*, at 150. Some states have enacted the statement of purposes; *e.g.*, ILL. ANN. STAT. Ch. 70, § 31 (1979 Supp.). Others have deleted this section as Wyoming did; *e.g.*, LA. REV. STAT. ANN. § 9:2795 (1979 Supp.).
11. Including those not based on the Model Act.
12. Parish v. Lloyd, 82 Cal. App.3d 785, 147 Cal. Rptr. 431, 432 (1978) and Lostritto v. Southern Pac. Transp. Co., 73 Cal. App.3d 737, 140 Cal. Rptr. 905, 910-911 (1977), upholding CAL. CIV. CODE § 846 (West Supp. 1979); and Estate of Thomas v. Consumers Power Co., 58 Mich. App. 486, 228 N.W.2d 786, 792 (1975), upholding MICH. COMP. LAWS ANN. § 300.201 (Supp. 1979).
13. *See, e.g.*, Parish v. Lloyd, *supra* note 12, at 432, distinguishing Brown v. Merlo, 8 Cal.3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), which had found the California automobile guest statute violative of the state and federal equal protection clauses, on the ground that the classification created by the guest statute did not serve its ostensible purpose. *Cf.* Nehring v. Russell, 582 P.2d 67, 77-80 (Wyo. 1978), holding the Wyoming guest statute violative of WYO. CONST. art. 1, § 34, requiring laws to be of uniform operation.
14. As defined in WYO. STAT. § 34-19-101(a)(ii) (1977), "the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises."
15. Defined by WYO. STAT. § 34-19-101(a)(i) (1977) to be "land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."

purposes[16] in two ways. First, the statute directs that except as otherwise provided in the Act, the owner owes no duty of care to keep the premises safe or to warn of a dangerous condition, use, structure or activity on his premises to persons using the land for recreational purposes.[17] Secondly, an owner who directly or indirectly invites a person to use his property for recreational purposes doesn't extend any assurance of safety, confer legal status as a licensee or invitee, or assume responsibility for any injury to users caused by other recreational users.[18] The Act thus places invitees, licensees, and trespassers on the same footing if they are recreational users, and eliminates the need for an inquiry into the owner's consent or lack of it.[19]

The Act excepts two classes of cases from its operation, even when the use is recreational.[20] The Act does not limit liability for a willful or malicious failure to guard against a dangerous condition, structure, or activity,[21] nor does it limit the liability of an owner who charges[22] for the recreational use of his land, excluding from this exception lease fees paid by the state.[23]

The Act creates no duty of care, nor does it relieve the user of land for recreational purposes of any duty to use due care.[24] The Act applies to an owner of land leased to the state, unless otherwise provided in writing.[25]

The effect of the Act, in summary, is to relieve an owner of land of any duty of care to persons using it for

16. WYO. STAT. § 34-19-101(a)(iii) (1977) defined as including, but not limited to "any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites."
17. WYO. STAT. § 34-19-102 (1977).
18. WYO. STAT. § 34-19-103 (1977).
19. Barrett, *Good Sports and Bad Lands*, *supra* note 4, at 3.
20. WYO. STAT. § 34-19-105 (1977).
21. WYO. STAT. § 34-19-105(a)(i) (1977). Such a limitation would no doubt have been implied as a matter of public policy.
22. Defined by WYO. STAT. § 34-19-101(a)(iv) (1977) as "the admission price or fee asked in return for invitation or permission to enter or go upon the land."
23. WYO. STAT. § 34-19-105(a)(ii) (1977).
24. WYO. STAT. § 34-19-106 (1977).
25. WYO. STAT. § 34-19-104 (1977).

recreational purposes, unless he charges for use of the land, or his acts are willful or malicious.

II. WYOMING LAW OF OWNERS AND OCCUPIERS[26] PRIOR TO ENACTMENT

Before attempting to assess the impact, if any, of the Wyoming Recreational Use Act on the landowner's duty of care in Wyoming, it is necessary to first determine what that duty was. The courts of Wyoming, like those of most states,[27] have historically drawn on the three common law categories of trespasser, licensee, and invitee to determine duties owed by a landowner to persons on his land.[28] Recent cases show little inclination to depart from that analysis,[29] unless the recent case striking down the Wyoming automobile guest statutes could be taken as a precursor of an intent to abolish the distinction between licensees and invitees by analogy.[30]

The first problem in applying the categories is, of course, to decide whether a particular plaintiff is a trespasser, licensee, or invitee. The term "trespasser" does not appear to be expressly defined in the Wyoming cases, but there can be little doubt that the term is used as it commonly is to indicate "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."[31] A licensee, although not clearly defined in Wyoming law, appears be defined, also as he commonly is, to be one who "is privileged to enter or remain on land only by the possessor's consent."[32]

One might expect a great deal of litigation over the existence or absence of consent in a given case and whether,

26. The term "owner" or "landowner" will be used indiscriminately to refer to owners and occupiers, except as otherwise indicated.
27. PROSSER, *supra* note 1, at 351, DOOLEY, *supra* note 1, at 375-377.
28. Loney v. Laramie Auto Co., 36 Wyo. 339, 255 P. 350 (1927), and Maher v. City of Casper, 67 Wyo. 268, 219 P.2d 125, 128-129 (1950).
29. Bluejacket v. Carney, 550 P.2d 494 (Wyo. 1976), and Sinclair Refining Company v. Redding, 439 P.2d 20 (Wyo. 1968), for example, rely on these categories without discussion of possible change.
30. Nehring v. Russell, *supra* note 13.
31. RESTATEMENT (SECOND) OF TORTS § 329 (1965). To the same effect, see PROSSER, *supra* note 1, at 357, DOOLEY, *supra* note 1, at 379.
32. RESTATEMENT (SECOND) OF TORTS § 330 (1965), PROSSER, *supra* note 1, at 376, DOOLEY, *supra* note 1, at 381.

therefore, a given plaintiff is a trespasser or a licensee. This has not been the case, however, because the duty as to both is nearly identical. In *Maher v. City of Casper*, the Wyoming Supreme Court (per Justice Blume) held that the only duty owed to a trespasser or a licensee is to refrain from wantonly injuring him.[33] The sole difference, as to a licensee, appears to be that an owner has a duty to warn as to dangers in the nature of a trap.[34]

The important distinction is that between an invitee and a licensee. The proper definition of an invitee is a question which has divided the courts. The first and minority group holds that a potential economic benefit to the plaintiff is the test of invitee status.[35] The second and majority test is whether the owner has opened his property to the public, and if so whether he's represented that the premises are safe to his visitors.[36] Wyoming, in name at least, utilized the economic benefit test in *Sinclair Refining Company v. Redding*.[37] However, the court clearly stretched the test beyond any real requirement of a possible economic benefit, for it held that the plaintiff, who was injured while using service station restroom facilities without a purchase of gasoline, might perhaps purchase fuel on the return trip.[38] It thus seems that any potential benefit would suffice to constitute a person an invitee, to whom the owner will owe a duty to use reasonable care.[39]

The plaintiff's chief obstacle in Wyoming, then, has been to prove himself an invitee, or alternatively to show that he was wantonly injured by the defendant.[40]

33. *Supra* note 28, at 129. The language referred to speaks of municipal corporations, but the cases discussed do not rely on that distinction.

34. Loney v. Laramie Auto Co., *supra* note 28, at 351.

35. PROSSER, *supra* note 1, at 386, and RESTATEMENT (FIRST) OF TORTS §§ 332, 343 (1934). *See* Rickey v. Kemper, 392 S.W.2d 266, 268 (Mo. 1963) for an example.

36. PROSSER, *supra* note 1, at 388, DOOLEY, *supra* note 1, at 384.

37. 439 P.2d 20, 23 (Wyo. 1968).

38. *Id.* The court held that these facts raised a jury question, not that the plaintiff was an invitee as a matter of law.

39. Loney v. Laramie Auto Co., *supra* note 28, at 351.

40. The Wyoming cases do not appear to distinguish between a duty of a care as to conditions and that as to activities carried on upon the land, as some courts do, as to licensees. PROSSER, *supra* note 1, at 379.

III. EFFECT OF THE RECREATIONAL USE ACT

A. Interpretation

To date, only one case has been reported under the Wyoming Recreational Use Act, and that in the federal district court for Wyoming.[41] As a result, the possible effects of the Act are speculative. However, there are a substantial number of cases in other states with similar or identical statutes which should offer some guidance.

The first problem that courts have encountered is the conceptual one of deciding what effect the Acts were intended to have on the common law. If in derogation of the common law, then the Acts must be strictly construed.[42] If the Acts merely codify or restate prior law, then they may be read more liberally.[43] In Alabama, this decision was made by the legislature by proclaiming an intent to clarify the common law in the Act.[44] Some courts have reached the same conclusion without the benefit of legislative guidance, holding that the statutes were intended merely to preserve the common law against more liberal approaches.[45] Others have reached the opposite conclusion, finding the statutes to alter the common law.[46]

41. Smith v. United States, 383 F. Supp. 1076 (D.Wyo. 1974). The plaintiff was injured in a fall into an unmarked hot pool in Yellowstone Park. The application of the Recreational Use Act is interesting for reasons discussed *infra*, and resulted in judgment for the defendant. In Smith v. United States, 546 F.2d 872 (10th Cir. 1976), the court of appeals upheld the verdict on the basis of contributory negligence. The case predated the effective date of the Wyoming Comparative Negligence Act, WYO. STAT. § 1-1-109 (1977).
42. SUTHERLAND, 3 STATUTORY CONSTRUCTION 41 (4th Ed. 1974).
43. Estate of Thomas v. Consumers Power Co., *supra* note 12, at 789. "[T]his statute does not change the common-law duty of owners and occupiers of property owed to those who come upon such property as mere licensees, as were the plaintiffs in this case. The Act is merely a codification of tort principles which are universally recognized at common law." The Michigan Act, MICH. COMP. LAWS ANN. § 300.201 (Supp. 1979) is not based on the Model Act.
44. 1965 Ala. Acts, Act No. 463, § 3. *See* Wright v. Alabama Power Co., 355 So.2d 322, 323 (Ala. 1978).
45. Estate of Thomas v. Consumers Power Co., *supra* note 12, at 789, and Rock v. Concrete Materials, Inc., 46 A.D.2d 300, 362 N.Y.S.2d 258, 260 (1974), *app. dism.* 36 N.Y.2d 772, 368 N.Y.S.2d 841, 329 N.E.2d 672 (1975). The New York statute does not adopt the format of the Model Act, but is quite similar. N.Y. GEN. OBLIG. LAW § 9-103 (McKinney Supp. 1979).
46. Boileau v. DeCecco, 125 N.J. Super. 263, 310 A.2d 497, 500 (1973), and Goodson v. City of Racine, *supra* note 6, at 18.

The resolution of this question will necessarily turn on the state of the common law in the jurisdiction in question, and the precise language of the applicable statute. As seen above, *Maher v. City of Casper*[47] indicates that the only duty owed to a trespasser or licensee is to avoid wantonly injuring him. To the extent that the Recreational Use Act applies to persons who were classified as trespassers or licensees under common law,[48] the statute's clause reserving situations involving willful or malicious acts[49] from its operation seems to preserve the common law.[50]

The significant change is in the invitee classification. In *Sinclair Refining Company v. Redding*,[51] the court extended invitee status in a situation involving a very attenuated possibility of economic benefit. However, the Recreational Use Act, limiting liability to willful or malicious harms, applies to any person using the land for a recreational purpose unless the owner charges for admission.[52] The definition of charge in the statute is an "admission price or fee asked in return for invitation or permission to go upon the land."[53] To the extent one who would otherwise be an invitee is a recreational user under the Act, he is only exempt from its limitations if he has paid a charge. For example, suppose that a developer of mountain real estate made available a campground in the hope of attracting potential buyers and exposing them to his property. Under *Sinclair Refining*, the campers would probably be invitees. However, if the developer didn't charge a camping fee, the Act would apply, redefining the developer's liability to that for willful or malicious acts.

47. *Supra* note 28.
48. WYO. STAT. §§ 34-19-102 and 34-19-103 (1977).
49. WYO. STAT. § 34-19-105 (1977).
50. There appears to be no Wyoming case defining the term wanton. Generally, however, willful, wanton, and reckless conduct seem to be defined to require a knowledge of danger to others and at least an indifference to that danger. *See, e.g.*, Byers v. Hesston Appliance, Inc., 212 Kan. 125, 509 P.2d 1151, 1154 (1973); Storckman v. Keller, 143 Ind. App. 43, 237 N.E.2d 602, 603 (1968). The problem of how the term "willful" is defined bears on this issue, and is more fully discussed below.
51. *Supra* note 29.
52. WYO. STAT. § 34-19-105 (1977).
53. WYO. STAT. § 34-19-101(a)(iv) (1977), *supra* note 22.

If this is true, then the statute alters prior law as to invitees, and modifies the common law. The significance of this would be in the judicial approach to application of the statute in doubtful cases, as will be seen below.

B. Lands Under the Act

By its terms, the Wyoming statute applies to "lands, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."[54] The statute contains no express limitation as to realty, wherever located, and could conceivably apply anywhere that a use constituting a recreational purpose under the Act could be carried on. Courts in other jurisdictions, however, have been unwilling to apply the Recreational Use Acts to limit liability on the kinds of lands not within purposes contemplated by the legislature in passing the Acts. For example, in *Shepard v. Wilson*,[55] a Georgia Court of Appeals refused to apply the Georgia Act (identical to that of Wyoming) to a case in which a child was burned by hot coals left on a vacant lot owned by the defendant, located in an urban area. The court held that "to say that the statute would apply to a vacant lot in a residential area under the facts of this case would extend its coverage far beyond its intended purpose."[56]

The New Jersey courts have also refused to apply that state's act to residential areas. In *Boileau v. De Cecco*,[57] the court construed an amendment of the applicable statute[58] from "agricultural lands" to "premises" narrowly so as not to "enlarge the protected class of homeowners to suburbia."[59] The court relied on the strict reading to be given a statute in derogation of common law.[60] An earlier case relied on in *Boileau* had held that the statute merely

54. WYO. STAT. § 34-19-101(a)(i) (1977), *supra* note 15.
55. 123 Ga. App. 74, 179 S.E.2d 550 (1970), construing GA. CODE ANN. §§ 105-403 to 406 (1968 Rev.).
56. *Id.*, at 551.
57. *Supra* note 46. It should be noted that the New Jersey courts have been quite vigorous in limiting the scope of that state's Recreational Use Act.
58. N.J. STAT. ANN. §§ 2A-42A-2 through 4 (West Supp. 1979).
59. Boileau v. Shepard, *supra* note 46, at 500.
60. *Id.*

stated a rule of reasonableness as to landowners' liability, in seeming conflict.[61] Later New Jersey cases have applied a test relying on the nature of the property and its use, as opposed to mere location.[62]

Another basis for refusing to apply a recreational use statute is a limitation on access. For example, in *Herring v. Hauck*, a Georgia case, the court held the Act inapplicable to a private swimming pool because the pool was not open to the public, but merely to specific individuals.[63] The same reasoning has led to exemption from the New Jersey Act in that state.[64]

Other limitations may be found in express statutory limitations[65] not enacted in Wyoming, or in implied exceptions. In *Miller v. United States*,[66] a federal district court held that persons or agencies subject to the Illinois Recreational Area Licensing Act[67] were not entitled to the protection of the Illinois Recreational Use Act.[68] The suit was against the United States, which the court found would be subject to the former Act if a private individual, and concluded that the two statutes created a scheme whereby a facility must fall under one or the other.[69]

A related question is whether Recreational Use Acts apply to lands owned by federal, state, and local governments. Section 34-19-104 of the Wyoming Statutes causes it to apply to lands leased to the state, but makes no specific reference to lands owned in fee by the state or local governments. This does not present a problem in suits against the United States, since the Federal Tort Claims

61. Scheck v. Houdaille Construction Materials, Inc., 121 N.J. Super. 335, 297 A.2d 17, 21 (1972).
62. Harrison v. Middlesex Water Co., 158 N.J. Super. 368, 386 A.2d 405, 412 (1978). "[T]he key factors must be the activity and the kind of property and use to which it is put."
63. 118 Ga. App. 623, 165 S.E.2d 198, 199 (1968).
64. Harrison v. Middlesex Water Co., *supra* note 62, at 411.
65. *E.g.*, WASH. REV. CODE ANN. § 4.24.210 (Supp. 1978).
66. 442 F. Supp. 555 (N.D.Ill. 1976).
67. ILL. ANN. STAT. Ch. 111½, §§ 761 to 785 (Smith-Hurd 1977).
68. ILL. ANN. STAT. Ch. 70, §§ 31 to 37 (Smith-Hurd Supp. 1979).
69. Miller v. United States, *supra* note 66, at 561.

Act specifically applies when a private individual would be liable.[70]

One court has refused to find local government lands subject to a Recreational Use Act when the Act was passed before sovereign immunity was abrogated. In *Anderson v. Brown Brothers, Inc.*,[71] the defendant was a lessee from a city, excavating gravel from an area adjacent to a city park. The plaintiff was injured when he dove off a diving board into the shallow water of the quarry. The court held that the statute was not intended to apply to land used for governmental functions, as a common law tort immunity existed at that time, and that the legislature couldn't have intended a double exemption. The statute therefore did not apply to the municipality or its lessee.[72]

The same reasoning could be applied in Wyoming because of the status of tort immunity of the state and municipalities at the time the Recreational Use Act was passed in 1965. Municipal immunity was abrogated in *Oroz v. Board of County Commissioners*,[73] decided in 1978. The Wyoming Governmental Claims Act passed in response to that decision in 1979 specifically reserves all common law defenses to suits in tort, but does not speak to the issue of a prior statutory defense.[74] The Act does subject governmental entities to liabilities for negligent operation or maintenance of buildings, recreation areas, or parks.[75]

Another judicial method of limiting these statutes is to restrict them to their purpose—to encourage private landowners to open their lands for recreational use. In *Goodson v. City of Racine*,[76] the Wisconsin court found the

70. 28 U.S.C. § 2674 (1976), Miller v. United States, *supra* note 66, at 561.
71. 65 Mich. App. 409, 237 N.W.2d 528 (1975).
72. *Id.*, at 531-532.
73. Oroz v. Board of County Commissioners of Carbon County, 575 P.2d 1155 (Wyo. 1978). *See also Note*, 14 LAND & WATER L. REV. 271 (1979).
74. WYO. STAT. § 1-39-102 (1977).
75. WYO. STAT. § 1-39-106 (1977). For a more complete treatment of the Governmental Claims Act, *see* Comment, *Wyoming's Governmental Claims Act—A Statutory Analysis*, 15 LAND & WATER L. REV. 619 (1980).
76. *Supra* note 6, at 19. The Wisconsin act applies to "premises," defined as "lands, private ways, and any buildings, structures or improvements thereon." WIS. STAT. ANN. § 29.68 (West 1973).

statute inapplicable to publicly owned lands for that reason. Other states, however, have held their respective statutes applicable to state and municipal lands expressly or implicity.[77]

C. Entrants to Whom the Act Applies.

The test for determining whether the Wyoming Recreational Use Act applies, in addition to the problems discussed above, is whether the use or intended use falls within the definition of recreational purpose, which is as follows:

> "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic or scientific sites.[78]

It is obvious that the Act could reach any type of outdoor activity, and this has been held to be the limitation on the scope of the Act by one court. In *Villanova v. Amercian Federation of Musicians*,[79] a New Jersey appellate court refused to apply the New Jersey Act to a musician injured in a county park while preparing to give a free concert. The court relied on the principle of *ejusdem generis* to the statute, and found its scope limited to physical activities requiring the outdoors, wholly excluding spectator sports.[80]

A problem which has troubled the courts is the application of the doctrine of attractive nuisance to uses covered by the statute.[81] Some statutes expressly reserve the operation of that doctrine from the statute.[82] Courts applying statutes without such limitations, like that of Wyoming, have reached inconsistent results. Some hold simply that

77. *See, e.g.*, Diodato v. Camden County Park Commission, 162 N.J. Super. 275, 392 A.2d 665 (1978), and Trimblett v. State, 156 N.J. Super. 291, 383 A.2d 1146 (1977). In Trimblett, the court relied on a reservation of private remedies to the state in its Tort Claims Act.
78. WYO. STAT. § 34-19-101(a)(iii) (1977), *supra* note 16.
79. 123 N.J. Super. 57, 301 A.2d 467 (1973).
80. *Id.* at 469.
81. DOOLEY, *supra* note 1, at 259.
82. *See, e.g.*, S. D. COMPILED LAWS ANN. § 20-9-5 (1979).

since there is no specific exception from the Act, it must have been intended to apply to children.[83] The New Jersey courts have reversed this reasoning, holding that since such a statute is in derogation of common law, it must be strictly construed not to apply to children without expressly so providing.[84] These issues may be moot in Wyoming, where the doctrine of attractive nuisance has not been accepted or rejected.[85]

An alternative method for avoiding the Act in the case of children is to hold that since the intent of the child in entering the land is crucial to determining if the entry was for a recreational purpose, it is a jury question of fact as to whether the child was old enough to and had formed the requisite intent.[86]

Still another problem with entrants has been the situation of rescuers. In *Odar v. Chase Manhattan Bank*, a New Jersey court held that a rescuer who had entered the land of the defendant to rescue his daughter after she fell through the ice was within the Act, and that no liability could arise to a foreseeable rescuer unless the defendant was responsible for willfully causing the original accident.[87] This creates an awkward policy situation. It seems fair and desirable that a user of private land must take his chances thereon. It does not seem so fair or desirable that a rescuer should be faced with risks when he attempts to render aid, at least if he is not associated with a recreational user in any way.

D. Conditions to Which the Act Applies

The Wyoming Recreational Use Act literally applies to "a dangerous condition, use, structure, or activity."[88]

83. Heider v. Michigan Sugar Company, 375 Mich. App. 490, 134 N.W.2d 637, 643 (1965), followed in Magerowski v. Standard Oil Company, 274 F. Supp. 246, 247 (W.D.Mich. 1967). The same rule was applied in Blair v. United States, 433 F. Supp. 217 (D.Nev. 1977).
84. Scheck v. Houdaille Construction Co., *supra* note 60, at 22, and O'Connel v. Forest Hill Field Club, 119 N.J. Super. 317, 291 A.2d 386, 389 (1972).
85. Maher v. City of Casper, *supra* note 28.
86. Scheck v. Houdaille Construction Co., *supra* note 61, at 20.
87. Odar v. Chase Manhattan Bank, 138 N.J. Super. 464, 351 A.2d 389, 392 (1976).
88. WYO. STAT. § 34-19-102 (1977).

On its face, the Act does not distinguish between artificial and natural conditions, and some courts have not made such a distinction.[89] However, the New Jersey courts, despite the absence of any specific statutory language which would support such a distinction,[90] have found the New Jersey Act not to apply to artificial conditions. In *Diodato v. Camden County Park Commissioners*,[91] the plaintiff dove into a river from the banks of land owned by the defendant city and struck a submerged barrel, breaking his neck. The court held that the Act did not apply because the barrel had no connection with the premises or the activity, and because all prior New Jersey cases under the Act had dealt with natural hazards.[92]

Such a construction seems clearly inconsistent with the purposes of the Recreational Use Acts, especially since the barrel was undoubtedly placed in the river by users of the riverside park, or carried there by the current. So interpreted, the Act would only exempt the landowner from liability for natural conditions, and would thus create little incentive to open lands to public use, especially when the landowner is making a concurrent use of the property.

IV. THE RESERVATIONS

As noted above, the Wyoming Recreational Use Act reserves two classes of persons from its operation; those who are willfully or maliciously injured, and those who pay a charge for use of the land.[93] These will be considered in order.

A. Willful or Malicious Acts.

The Act itself contains no definition of the terms willful or malicious. "Malicious" has, however, been defined in the

89. *See, e.g.*, Gard v. United States, *supra* note 4, applying the statute to an abandoned mine tunnel.
90. N. J. STAT. ANN. § 2A-42A-3 (West Supp. 1979), "an owner . . . of premises, whether or not posted . . . owes no duty to keep the premises safe for entry or use by others for sport and recreational activities, or to give warning of any hazardous condition of the land."
91. *Supra* note 77.
92. *Id.*, at 671.
93. WYO. STAT. § 34-19-105 (1977).

criminal case law to refer to the intentional doing of a wrongful act, or a deliberate intent to injure.[94] If the definitions from these cases apply, a plaintiff subject to the Act would bear the heavy burden of proving that the defendant intended to harm him, which would rarely be the case.

The term "willful" is a greater problem, although there is a definition of that term in a case under the automobile guest statute:[95]

> Willful misconduct is the intentional doing of something which should not be done, or intentional failure to do something which should be done, in the operation of the automobile, under circumstances tending to disclose the operator's knowledge, express or implied, that an injury to the guest will be the probable result of such conduct. It differs from negligence, even gross negligence, although it may include gross negligence, and involves a distinct positive element as distinguished from the merely negative element of negligence or carelessness. It is willfully designed to accomplish a specific result, and is not aimless of purpose or regardless of result.

It is obvious that the operation of an automobile is a very different endeavor than allowing recreational users on one's land, for it is an active enterprise where the driver will be exposing himself to the same risks as his passenger. It is helpful, therefore, to look at the definitions applied in cases decided under Recreational Use Acts.

Those cases do not reveal a uniform application. One case[96] has relied on the Second Restatement of Torts definition of reckless disregard of safety,[97] which does not seem

94. Elliot v. State, 47 Wyo. 36, 30 P.2d 791, 793 (1934), State v. Johnson, 7 Wyo. 512, 54 P. 502, 503 (1898). *See also*, Nunez v. State, 383 P.2d 726, 729 (Wyo. 1963), defining malicious homicide in the same way.

95. Mitchell v. Walters, 55 Wyo. 317, 100 P.2d 102, 107 (1940), quoting BLASHFIELD, 4 CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2322 (1927).

96. Estate of Thomas v. Consumers Power Co., *supra* note 12, at 794. On appeal, the Michigan Supreme Court overruled the appellate court's decision that there was no jury question of gross negligence, a ground of liability under the Michigan statute, unlike that of Wyoming. Estate of Thomas v. Consumers Power Co., 394 Mich. 459, 231 N.W.2d 653, 654 (1975).

97. RESTATEMENT (SECOND) OF TORTS, § 500 (1965).
> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which

to require an actual knowledge of dangerous conditions nor any particular intent to injure beyond awareness of facts which would lead a reasonable man to recognize a risk greater than negligence, or should lead him to recognize such a risk. Two other courts have diluted the standard still farther, with a New Jersey county court holding that the statute in that state creates a simple standard of foreseeability, and an Illinois federal district court holding that the standard imposes a duty to use care to discover and alleviate the danger.[98]

On the other extreme, a California federal district court applying Nevada law defined willful so as to require a design, purpose, and intent to do wrong and inflict the injury[99]—which seems to fit the Wyoming meaning of "malicious." Somewhere between the extremes is that of a Georgia court of appeals, which requires:[100]

> Actual knowledge of the owner that its property is being used for recreational purposes; that a condition exists involving an unreasonable risk of death or serious bodily harm; that the condition is not apparent to those using the property, and that having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.

It seems that the definition adopted in Nevada law could not apply in Wyoming, because it would render the term "malicious" in the statute superfluous. On the other hand, mere foreseeability, really just a test of proximate

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it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

98. Krevics v. Ayars, 141 N.J. Super. 511, 358 A.2d 844, 847 (1976), and Miller v. United States, *supra* note 65, at 561-562.

99. Gard v. United States, *supra* note 4.

100. McGruder v. Georgia Power Company, 126 Ga. App. 562, 191 S.E.2d 305, 307 (1972). On appeal, the Georgia Supreme Court found the Act not to apply because the land was posted against trespassers. Georgia Power Company v. McGruder, 229 Ga. 211, 194 S.E.2d 440, 441 (1972). The Court ignored GA. CODE ANN. § 105-405 (1968 Rev.), which is identical to WYO. STAT. § 34-19-102 (1977). That section abrogates the landowner's duty to any recreational user, regardless of consent. The decision would appear to be incorrect, at least on that ground.

cause, is clearly too low a standard to be consistent with the Act's purpose. The Restatement definition would impose a duty of inspection on the landowner, which is also inconsistent with the purpose of encouraging the owner to open up his lands, as would the ordinary negligence standard applied by the Illinois district court. The Wyoming guest statute case contains elements of knowledge of an unreasonable risk, and a disregard of that risk. The Georgia definition most closely approximates that standard, for no intent to injure is required, but the owner must know of the condition, risk, and recreational use. However, the rule approximates the common law duty of the landowner to licensees not to create a trap for them,[101] so may be a slightly higher standard of care than the legislature intended. The rule should probably be limited to artificial conditions because natural dangers are more likely to be known by recreational users, and are probably more expensive to guard against.

For the defendant, the major concern is whether a summary judgment may be granted in his favor.[102] Cases which have been held to raise a jury question of willfulness include the stretching of a cable across a motorcycle path,[103] and failure to warn of fluctuations in water levels near a dock.[104] The first situation, where the cable blended in with the surrounding area, would seem to fit any definition of willfulness except that of Nevada.[105] The second dilutes the willfulness standard to one of ordinary negligence, in resistance to a clear statutory mandate.

The Wyoming legal situation most analogous to the Recreational Use Act, in terms of classifying fault, is the now unconstitutional guest statute. The statute barred recovery for injuries except those caused by "gross negligence or wlllful and wanton misconduct of the owner or

101. Loney v. Laramie Auto Co., *supra* note 28.
102. *See Annot.*, 50 A.L.R.2d 1309 (1956), collecting cases in which summary judgments have been held proper or improper under reduced standards of care.
103. Krevics v. Ayars, *supra* note 98.
104. Miller v. United States, *supra* note 66.
105. Gard v. United States, *supra* note 4.

operator."[106] Most of the cases dealt with gross negligence, but the notable fact is that the court did eventually dilute the standard by ruling that a series of acts of ordinary negligence could constitute gross negligence.[107] This probably indicates a judicial uncomfortableness with a rigid statutory standard in cases where the application would achieve a harsh result. Such an attitude could affect the application of the Recreational Use Act.

A related problem is whether the contributory negligence of the plaintiff would be a defense to liability for acts found to be willful or malicious. The general tort rule is that contributory negligence is no defense to willful, wanton, or reckless misconduct,[108] although there is no Wyoming case on this point. The courts of other states, applying Recreational Use Acts, have so held.[109] This can lead to anomolous results, as *Miller v. United States*[110] illustrates. In that case the court really applied a standard of reasonable care in defining willful conduct—in short, an ordinary negligence test. It then concluded that as to this "willful" act or omission in failing to warn of fluctuations in water depth in a river, contributory negligence was no defense. The Act, in short, backfired. In their attempts to restrict the operation of the statute courts may find willful conduct too readily, and yet deny the landowner defenses he would have at common law even if the plaintiff were an invitee.[111]

B. Charges Under the Recreational Use Act.

Section 34-19-105 of the Wyoming Statutes exempts recreational users who are charged for entering the land for the recreational use thereof. One's first reaction would be to assume that a fee paid at the gate of an area to be

106. WYO. STAT. § 31-5-1116 (1977); *supra* notes 13 and 95.
107. Krahn v. Lameres, 483 P.2d 522, 525 (Wyo. 1971).
108. PROSSER, *supra* note 1, at 426, DOOLEY, *supra* note 1, at 100.
109. Lostritto v. Southern Pacific Transp. Co., *supra* note 12, at 909, and Miller v. United States, *supra* note 66, at 562.
110. Miller v. U.S., *id.*
111. Dudley v. Montgomery Ward, 64 Wyo. 357, 192 P.2d 617, 622 (1948): "It must not be lost sight of that under the law the invitee who accepts an invitation owes a reciprocal duty to the invitor while on the invitor's premises to exercise ordinary care to avoid injuring himself."

used for a defined recreational purpose would remove the case from the Act.[112] Courts have limited the definition of charge, however.

In *Smith v. United States*,[113] a visitor to Yellowstone National Park ventured too near a thermal pool, fell through the crust, and was severely burned. The National Park Service had not posted the area because it wished to keep it undeveloped. The plaintiff was fourteen years old and travelling with his parents, who paid the usual entry fee to get into the park. Under a regulation then in force,[114] however, persons under sixteen years of age could not be charged a fee for entry, and therefore the statutory exemption did not apply, the court held, so that the plaintiff was subject to the Act.

A similar result was reached in *Stone Mountain Memorial Association v. Herrington*.[115] In that case, the plaintiffs paid a fee at the entrance of the Stone Mountain Memorial, where plaintiff was later injured in a fall. The Georgia court held that the statutory exception[116] (identical to that of Wyoming) did not apply, for the fee was solely a parking permit, not an admission charge.[117]

Still another example, although perhaps a more reasonable one, is *Diodato v. Camden County Park Commission*,[118] discussed above. There the plaintiff was part of a group which had rented a baseball field from the county, but was injured diving into a nearby river. The court held that the exception in the New Jersey statute did not apply, since the

112. In McClure v. Sutter, 63 Ill. App.3d 378, 20 Ill. Dec. 308, 379 N.E.2d 1376 (1978), the court (without discussion) did not apply the Illinois Act to a situation in which a camping fee was paid by the plaintiff's parents, prior to his drowning in a private lake. Cases in other jurisdictions, discussed below, might dictate a different result, on the theory that the fee was not for the use of the lake, and that the Act should therefore apply.
113. Smith v. United States, *supra* note 41, at 1080.
114. The regulation is not cited by the court, and does not appear in Title 36 of the Code of Federal Regulations for the appropriate period.
115. 225 Ga. 746, 171 S.E.2d 521 (1969).
116. GA. CODE ANN. § 105-408 (1969).
117. Stone Mountain Memorial Association v. Herrington, *supra* note 115, at 522-523.
118. *Supra* note 77.

fee was for the use of the baseball field, and no charge was made for the rest of the park.[119]

The *Diodato* decision is defensible because the park was open to the public without charge, and only the use of the ball field required payment. *Smith* and *Stone Mountain* are not so defensible. The fact that a fee is charged on a vehicular basis can create two difficulties. First, since the plaintiff's father in *Smith* paid a fee, the case implies that only the owner or operator of the automobile is exempted from the Act by virtue of payment. Second, because fees are collected on a vehicular basis, it can quite reasonably be argued that the permit issued therefore is solely for vehicular use.[120] Since touring a national park falls into the definition of recreational use under Section 34-19-101(a)(iii) ("viewing . . . scenic . . . sites"), such an interpretation, based on *Smith* or *Stone Mountain*, would exempt the government from all but willful or malicious acts.

Such a result seems clearly incorrect, in view of the statute's purpose of encouraging private landowners to open their property to the public. National, state, municipal and private parks or facilities where fees are charged will be unlikely to close if held to the common law standards applied prior to the Act. The definition of a charge under the statute should reach a situation in which the landowner derives an economic benefit and impliedly extends an assurance that his lands are safe for visitors.

V. CONCLUSIONS

It is obvious from the cases cited that the Recreational Use Acts have introduced a great deal of confusion into the law. The traditional rules applying to owners and occupiers were an accommodation of conflicting rights evolved over time.[121] The decision to abrogate these common law classifications was likewise based upon considerations in an evolv-

119. *Id.* at 669-670.
120. Barrett, *Good Sports and Bad Lands*, *supra* note 4, at 12-13, *see* 36 C.F.R. § 6.1 *et. seq.* (1979).
121. DOOLEY, *supra* note 1, at 375-377.

ing society.[122] The Recreational Use Acts impose an unfamiliar category of entrants on this structure and the courts have been forced to struggle with them without adequate guidance.

In Wyoming, it is questionable whether the Act has been or will be of any great effect. The absence of cases appealed to the Wyoming Supreme Court is an indication of the lack of need for such a statute. The vast quantities of public lands within the state perhaps indicate a lesser need for private lands to be opened to the public,[123] unlike eastern states having identical legislation. Moreover, the common law limitation on liability to trespassers and licensees to wanton misconduct, coupled with the economic benefit test, has probably served to create a reduced risk to landowners. Finally, one commentator suggests that property owners do not really close their lands to the public out of a fear of civil liability as much as through a desire for privacy, and that the real effect of the Acts is to reduce the incentive to landowners who do open their lands to maintain them.[124]

If the legislature does feel that a Recreational Use Act would be desirable, the present Act could be modified to serve its purpose. First, the scope of the Act should be more clearly defined, as to the lands to which it should be applied. There is probably no policy reason to apply it to abandoned buildings in an urban area (if any area in Wyoming can be called urban), since these areas would

122. Rowlands v. Christian, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561, 564 (1968).

> a departure from this fundamental principle [duty of reasonable care] involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the communnity of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Id.* at 564.

123. The federally owned lands in the state of Wyoming comprise an area greater than that of the entire state of Pennsylvania. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE CONGRESS 22 (1970). These lands total 30,059,522 acres, or 48.2 percent of Wyoming's land area. *Id.*, Appendix F.

124. Barrett, *Good Sports and Bad Lands*, *supra* note 4, at 26-27.

most likely only constitute a potential trap for children. The statute could be limited in application to city parks open to the public, rural areas, lands bordering public lands, riverbanks and private lakes, for example. The Washington state statute is an example of this sort of limitation.[125] Second, the terminology used should tie into the common law scheme, to eliminate confusion. Third, the term "willful" should be more clearly defined, at least as well as it can be, to offer the courts some guidance. Fourth, the definition of a "charge" should be expanded to apply to any situation where the payment of a fee as a practical matter grants access to recreational facilities, even if ancillary to another use, such as the renting of a campsite near a private lake or other hazard. The definition should extend to a situation in which an implied assurance of safety is given, or where potential economic benefit to the owner justifies holding him to an ordinary negligence standard of care. This could be done most broadly by limiting the statute to common law licensees or trespassers.

In summary, the Recreational Use Act is a piece of legislation which is unlikely to have any significant impact on any user of land except one that may confer economic benefit on the owner. It probably adds little to landowner protection, and is a great potential source of confusion for the Wyoming courts. For these reasons, retention of the Act in its present form should be reconsidered carefully, especially in view of its genesis in land problems of the East and Midwest which are not presented in Wyoming.

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125. WASH. REV. CODE ANN. § 4.24.210 (Supp. 1978).