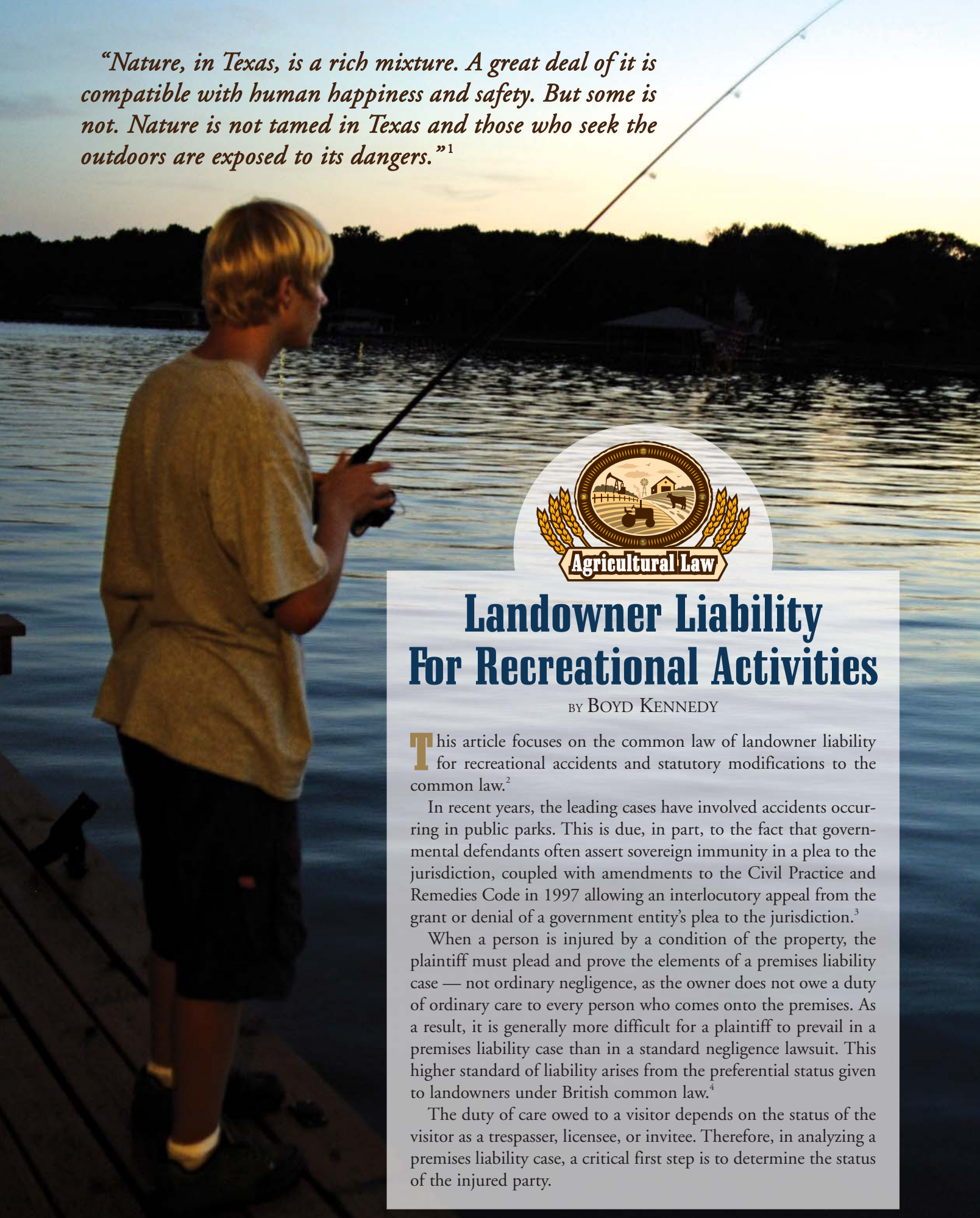
"Nature, in Texas, is a rich mixture. A great deal of it is compatible with human happiness and safety. But some is not. Nature is not tamed in Texas and those who seek the outdoors are exposed to its dangers."[1]



Agricultural Law

Landowner Liability For Recreational Activities

BY BOYD KENNEDY

This article focuses on the common law of landowner liability for recreational accidents and statutory modifications to the common law.[2]

In recent years, the leading cases have involved accidents occurring in public parks. This is due, in part, to the fact that governmental defendants often assert sovereign immunity in a plea to the jurisdiction, coupled with amendments to the Civil Practice and Remedies Code in 1997 allowing an interlocutory appeal from the grant or denial of a government entity's plea to the jurisdiction.[3]

When a person is injured by a condition of the property, the plaintiff must plead and prove the elements of a premises liability case — not ordinary negligence, as the owner does not owe a duty of ordinary care to every person who comes onto the premises. As a result, it is generally more difficult for a plaintiff to prevail in a premises liability case than in a standard negligence lawsuit. This higher standard of liability arises from the preferential status given to landowners under British common law.[4]

The duty of care owed to a visitor depends on the status of the visitor as a trespasser, licensee, or invitee. Therefore, in analyzing a premises liability case, a critical first step is to determine the status of the injured party.

Classification of Visitors

Trespasser

A trespasser is a person who goes onto property with no right, authority, invitation, or permission. A landowner owes a trespasser only the duty to refrain from injuring the trespasser through willful or wanton acts, or gross negligence. This is sometimes characterized as a duty not to set a trap.[5]

Licensee

A licensee goes onto land of another for his own convenience or benefit or the benefit of a third party. A landowner has a duty to avoid injuring a licensee through gross negligence or through willful or wanton acts. There is no duty to inspect the premises, but if the landowner becomes aware of a dangerous condition, he must warn of the hazard or make the area reasonably safe. There is no duty to warn or make safe hidden hazards or conditions that the licensee is already aware of.[6] A "dangerous condition" presents an unreasonable risk of harm to the licensee and is not something the licensee should have anticipated under the circumstances. For example, ground that becomes soft and muddy after a rain is not a condition involving unreasonable risk of harm and is something a visitor would be aware of or anticipate.[7]

Invitee

An invitee enters onto land with the owner's knowledge and for their mutual benefit. If the owner knows or should know of a dangerous condition, he must take reasonable steps to reduce or eliminate the danger to the invitee. This is sometimes characterized as a duty to inspect and warn or make safe.

The Recreational Use Statute

Under the common law, a person who visits for recreational purposes with consent of the owner would be classified as a licensee or invitee, meaning the owner has a duty to warn or make safe dangerous conditions, and in the case of invitees, a duty to inspect for the presence of dangerous conditions.

The recreational use statute (Chapter 75, Civil Practice and Remedies Code) raises the burden of proof for recreational users by requiring proof of gross negligence, willful or wanton acts, malicious intent, or bad faith on the part of the owner. In *State v. Shumake*, 199 S.W.3d at 290, 291, Texas Supreme Court Justice Scott Brister, dissenting, wrote, "The people of Texas face a choice with respect to wild lands: We can leave them like they are and trust visitors to use reasonable caution, or we can flatten them and fill them with signs for the safety of those few who might not. The recreational use statute favors the former."[8]

The statute distinguishes between agricultural land and nonagricultural land in the provisions relating to liability insurance, the duty of care owed to social guests, and the attractive nuisance doctrine. Agricultural land is land that is suitable for forestry, timber production, ranching, or farming, including floriculture, viticulture, or horticulture.[9] Note that this definition does not require that agriculture take place on the land, as long as the land is *suitable for* agricultural use.

What is "recreation?"

Chapter 75 lists numerous activities that are deemed "recreation," including hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving (including off-road vehicles), nature study, bird-watching, cave exploration, waterskiing, bicycling, disc golf, dog walking, radio-controlled flying, and "any other activity associated with enjoying nature or the outdoors."[10] Additionally, soccer,[11] diving,[12] and playing on playground equipment[13] have been held to be recreation within the meaning of the statute.

The use of challenge courses and indoor fitness equipment has been held *not* to be recreation,[14] and one court of appeals has expressed doubt as to whether drag racing is recreation within the meaning of the statute.[15]

Beneficiaries of Chapter 75

Chapter 75 applies to four categories of landowners:

1. State, county, and local government agencies;
2. Landowners who do not charge for entry to the premises (including a landowner who has dedicated a public easement for recreational purposes[16]);

3. Landowners whose total charges collected in the previous calendar year for all recreational use of the entire premises are not more than 20 times the total amount of *ad valorem* taxes imposed on the premises for the previous calendar year; and
4. Owners of agricultural land who have liability insurance coverage of at least $1 million per occurrence of death or injury for an act or omission by the owner, lessee, or occupant relating to the premises.

Limitation on Monetary Damages for Agricultural Land

Chapter 75 caps the liability of owners of agricultural land that obtain at least $1 million liability insurance for an act or omission relating to the premises that results in damages to a person on the premises.[17] This portion of Chapter 75 is not a model of clarity, but seems to be intended to provide a potential source of funds for an injured plaintiff, while at the same time limiting the owner's liability to the cost of the insurance policy. Chapter 75 places no cap on damages for uninsured landowners or owners of non-agricultural land.

Social Guests

Should a landowner get the benefit of Chapter 75 when an invited social guest is injured? In one case, a friend of the owner was injured when she fell out of a tree. The court of appeals reasoned that applying the Chapter 75 limitation of liability would not further the purpose of the statute, which is to increase the public's opportunities for outdoor recreation. Thus, the invited guest had the status of licensee or invitee.[18] In the case of *Lipton v. Wilhite*,[19] the court reached the same conclusion when an invited guest injured himself by diving into shallow water.

In 1997, the Texas Legislature reacted by adding Section 75.003(h) to provide that Chapter 75 applies when a non-paying social guest is injured by recreational activity on agricultural land. *Lipton* involved a weekend house on the shores of Lake Livingston — a setting that would not typically qualify as "agricultural land," despite the broad definition used in the statute. Therefore, *Lipton* is probably still good law to the extent it holds that social guests on non-agricultural land are licensees or invitees.

The Recreation Fee/*Ad Valorem* Tax Calculation

Chapter 75 applies when the recreational fees collected in the previous year do not exceed 20 times the amount of *ad valorem* taxes imposed for the previous year. When comparing the recreational fees received to the amount of *ad valorem* tax paid, which fees and which part(s) of the premises should be included in the calculation? These were the issues presented when a swimmer was injured by an allegedly defective diving board at an outdoor pool owned and operated by a private university.

The university collected fees for use of the pool, for a lifetime fitness program, and for challenge courses. The lifetime fitness program allowed participants to use the university's gym, locker rooms, weightlifting equipment, and aerobic equipment. The court of appeals ruled that those activities do not fit within Chapter 75's definition of "recreation." The court also held that although the challenge courses had recreational components, "the scope of the program exceeds the scope of mere recreation and, therefore, is not contemplated by the recreational use statute."[20] Therefore, the fees collected for the fitness program and challenge courses were not counted as recreational fees.

The court also held that for the purpose of calculating the *ad valorem* taxes imposed, the owner's entire premises should be included, not just the part used for recreation. Because the *ad valorem* taxes imposed on the campus exceeded the recreation fees collected, the university owed to the injured diver the same standard of care owed to a trespasser.

The Gross Negligence Standard

The text of Chapter 75 does not impose on a landowner the duty to warn visitors or protect them from dangerous conditions. In fact, the statute provides that a landowner does not owe a duty of care to recreational visitors.[21] Nevertheless, a landowner who fails to warn or make safe hidden dangers may be guilty of gross negligence. In the case of *State v. Shumake*,[22] a young girl tubing the river in a state park was swept into a submerged culvert and drowned. The landowner was aware that other people had nearly drowned at the same spot. The plaintiffs alleged that because the danger was hidden to the public and known to the landowner, the owner was grossly negligent in not warning them or eliminating the danger.

The court determined that by failing to define "gross negligence" in the recreational use statute, the Legislature incorporated the traditional, commonly accepted meaning of the term: An act or omission involving subjective awareness of an extreme risk of serious injury or death, indicating conscious indifference to the rights, safety, or welfare of others. The court held that failure to warn of a hidden, dangerous artificial condition can constitute gross negligence when the landowner is aware of both the presence of visitors and the hidden danger. Therefore, it was proper for the trial court to deny the state's plea to the jurisdiction.[23]

Naturally Occurring Hazards

Does a landowner have a duty to warn or guard visitors against natural dangers? Can failure to warn or protect a visitor from natural hazards constitute gross negligence?

A state park visitor who was struck by a falling tree limb alleged that tree branches constituted a hidden defect, and the owner's failure to inspect and trim the campground trees or warn visitors of their dangers was gross negligence. The Texas Supreme Court evaluated the steps the park staff had taken to detect and remove rotten tree limbs, and held that as a matter of law, the plaintiff had not established gross negligence.[24] Does the Court's failure to dispose of the case on a "no duty" theory imply that there can be a duty to warn visitors of naturally occurring hazards?

The Supreme Court addressed this issue squarely in the 2009 case of *City of Waco v. Kirwan*.[25] The city had constructed

a low wall obstructing access to a cliff in a city park and posted signs reading "For your safety do not go beyond wall." A college student proceeded past the wall and past the signs and was sitting on the edge of the cliff when the ground gave way beneath him and he fell to his death.

The court held that under the recreational use statute a landowner does not generally owe a duty to visitors to protect or warn against the dangers of natural conditions on the land. In this case, because the dangers of the cliff were open and obvious, the city had no duty to warn or protect park visitors against them or otherwise refrain from gross negligence with respect to the cliff.[26]

However, the court expressly left open the possibility that a landowner may have some duty of care when the landowner knows of a hidden and dangerous natural condition in an area frequented by recreational users, the landowner is aware of deaths or injuries related to that condition, and the danger is something a reasonable recreational user would not expect to encounter on the property. This is very similar to the standard announced by the court in *Shumake* for manmade hazards.

It remains to be seen just what facts would justify a departure from the general rule. Likewise, which conditions are transformed from natural to artificial due to a landowner's modifications remains an open question. The court also issued a reminder that a duty may be imposed on a landowner who has undertaken affirmative acts to make a natural hazard safe, and negligently carried out that undertaking.[27]

Wild Animal Attacks

The holding in *Kirwan* is consistent with earlier decisions involving wild animal attacks. Native wild animals are treated as a condition of the land itself. The presence of wild animals is an open and obvious danger that was not created by the landowner, and the possibility of encountering hazardous wild animals is a matter of common knowledge. Furthermore, the landowner does not own or control wild animals.[28] For these reasons, a landowner "may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake."[29]

When wasps attacked an 11-year-old boy while he was climbing a billboard, summary judgment for the person who had built and maintained the billboard was proper because the defendant owed no duty to the boy to inspect for wasps, remove the nest, or post a warning.[30] In a subsequent case, fire ants attacked a man working under his trailer at a South Texas RV park, stinging him more than 1,000 times. He died three months later. It was held that fire ants are indigenous wild animals, and the owners of the park had no duty to warn or guard against them.[31] Applying Texas law, a federal district court held that a landowner had no duty to warn the plaintiff of the dangers of being bitten by a tick and contracting Lyme disease.[32]

Kirwan voiced support for this general rule by asking rhetorically whether a landowner "must post warnings throughout Big Bend Ranch State Park concerning the dangers of rattlesnakes and mountain lions?"[33] The courts have left open the possibility of exceptions to the general rule if the landowner has reduced the wild animal to possession, "harbors" the animal, or has contractually assumed a duty to warn of the dangers.

Attractive Nuisance

The attractive nuisance doctrine is intended to protect children who are too immature to appreciate the dangers presented by manmade objects or conditions. A place or object may be an attractive nuisance to a preschooler, but not to a teenager, due to the different levels of maturity.[34] The attractive nuisance doctrine does not apply to naturally occurring hazards, such as rivers and trees. An object need not be attractive or a nuisance in the usual sense of the words to qualify as an attractive nuisance. When an attractive nuisance exists, the landowner must take reasonable steps to locate dangerous artificial conditions and eliminate the danger or otherwise protect children.

In order to establish liability under the attractive nuisance doctrine, a four-part test must be met:

1. The child, because of age, cannot realize or appreciate the dangerous condition;
2. The landowner knew or should have known that children frequented the area;[35]
3. The landowner knew or should have known that the dangerous condition presented an unreasonable risk of death or serious injury to children; and
4. The benefit to the landowner from the dangerous condition was slight, compared to the probability of injury to children.[36]

Chapter 75 eliminates the doctrine of attractive nuisance as to trespassers on agricultural land that are over the age of 16.[37] Practically speaking, this clause has little effect, as it is unlikely that a plaintiff would persuade a court to apply the doctrine to a person over 16 years old, unless the person was mentally younger than their years. The attractive nuisance doctrine is still in effect as to all other child trespassers.

Sufficiency of Warning Signs

When signs are posted warning of dangerous conditions, the appellate courts are reluctant to allow a premises liability case to proceed on the basis of allegedly insufficient signs.

In two separate incidents, fishermen climbed over or through a fence and drowned in the turbulent waters of a discharge canal near an electric plant. The fishermen were trespassers, so the issue in the ensuing wrongful death lawsuits was whether the landowner was guilty of gross negligence. Besides fences and "no trespassing" signs, the landowner had also posted signs proclaiming "Danger, Keep Out, Deep Water-Strong Current, 'Stay Away!' For Your Own Safety." In both cases, the courts of appeals held that posting the signs demonstrated a conscious concern for the safety of trespassers, which defeated claims of gross negligence.[38]

The survivors of a boater who drowned in a bayou near a saltwater barrier alleged that the structure was known to the defendant to be a dangerous condition, and the warning signs were inadequate. The court declined the invitation to evaluate the sufficiency of the warning sign(s). "To hold otherwise would basically place courts (and juries) in the position of deciding whether the governmental agency made the right decision as to *how* to warn of the danger or whether some other method (*e.g.*, a larger sign, different color, different words) would have been more appropriate … . "[39]

A barrier and a warning sign generally will be sufficient to defeat a claim of gross negligence with respect to a dangerous natural condition as well.[40]

Statutory Limitations for Horse-Related Activities

The Legislature has encouraged horseback riding and related activities by enacting legislation that limits the liability of those who sponsor or participate in rodeos, rides, and shows. The statute shields "any person" from liability for damage, injury, or death arising from the inherent risks of equine activity, which are described in the statute.[41] There are exceptions for willful or wanton acts, such as providing faulty equipment, or failing to make a reasonable and prudent effort to determine the rider's skill level.[42]

Thus, when a trail rider's saddle slipped and caused him to fall, it was improper to grant summary judgment for the riding company when there were fact issues as to whether the leader of the ride properly saddled the horse, sufficiently monitored the trail riders, and was qualified to lead the ride.[43]

An animal's unpredictable reaction to other animals is one of the inherent risks of equine activity.[44] Therefore, the landowner was not liable when a horse, reacting to fire ant bites, caused a rider to fall and injure herself.[45] The danger of striking a tree limb while riding a galloping horse is another one of the inherent risks of equine activity, for which the proprietor of a riding facility is immune from liability.[46]

The statute also requires "equine professionals" and livestock show sponsors to post a warning notice and include a warning in contracts, the language of which is specified by the statute.[47]

Conclusion

The common law of Texas limits the liability of owners, lessees, and occupants of land for recreational mishaps. In order to promote outdoor recreation, the Legislature has further limited this liability for a host of activities. An owner, occupant, or lessee who permits or tolerates public recreation should structure the operation so as to take advantage of the statutes that limit liability. Those steps, along with an effective release of liability, should serve to insulate the owner from liability for most recreational accidents.

Notes

1. *Nicholson v. Smith*, 986 S.W.2d 54 at 62 (Tex. App. — San Antonio 1999).
2. The term "owner" or "landowner," as used in this article, also includes lessees and occupants of land.
3. *Civ. Prac. & Rem. Code Sec. 51.014 (a)(8).*
4. Michael Shaunessy, *Sovereign Immunity and the Extent of the Waiver of Immunity Created by the Texas Tort Claims Act*, 53 Baylor L.R. 87 at 109 (Winter 2001).
5. Use of a device that creates a substantial risk of death or serious bodily injury to the trespasser, such as a spring gun, can lead to criminal liability as well. See Penal Code Sec. 9.44.
6. *Lower Neches Valley Authority v. Murphy*, 536 S.W.2d 561 (Tex. 1976). (Diver aware of dangerous shallow spots concealed by muddy water.)
7. *Brownsville Navigation District v. Izaguirre*, 829 S.W.2d 159 (Tex. 1992).
8. *State v. Shumake*, 199 S.W. 3d 279 at 290, 291 (Tex. 2006) (Brister, J., dissenting).
9. *Civ. Prac. & Rem. Code Sec. 75.001 (1).*
10. *Civ. Prac. & Rem. Code Sec. 75.001 (3).*
11. *Garcia v. City of Richardson*, 2002 WL 1752219 (Tex. App. — Dallas 2002, rev. den., not designated for publication).
12. *Howard v. East Texas Baptist University*, 122 S.W.3d 407 (Tex. App. — Texarkana 2003).
13. *City of Bellmead v. Torres*, 89 S.W.3d 611 (Tex. 2002); *Kopplin v. City of Garland*, 869 S.W.2d 433 (Tex. App. — Dallas 1993, writ den.); *Flye v. City of Waco*, 50 S.W.3d 645 (Tex. App. — Waco 2001).
14. *Howard v. East Texas Baptist University*, 122 S.W.3d 407 (Tex. App. — Texarkana 2003).
15. *Farmer Ins. Exchange v. Neal*, 120 S.W.3d 493 (Tex. App. — Texarkana 2003).
16. *Stephen F. Austin State University v. Flynn*, 228 S.W.3d 653 (Tex. 2007).
17. *Civ. Prac. & Rem. Code Sec. 75.004.*
18. *McMillian v. Parker*, 910 S.W.2d 616 (Tex. App. — Austin 1995, writ den.).
19. *Lipton v. Wilhite*, 902 S.W.2d 598 (Tex. App. — Houston 1st 1995, writ den.). The *Lipton* opinion also contains a review of the legislative history of Chapter 75.
20. *Howard v. East Texas Baptist University*, 122 S.W.3d at 410, fn 2.
21. *Civ. Prac. & Rem. Code Sec. 75.002.*
22. *State v. Shumake*, above.
23. *State v. Shumake*, above. See also *City of Houston v. Cavazos*, 811 S.W.2d 231 (Tex. App. — Houston 14th 1991 writ dism'd.). (Gross negligence not to warn public of hidden drop off at concrete slab in popular fishing spot.)
24. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217 (Tex. 2004).
25. 298 S.W.3d 618 (Tex. 2009).
26. It has also been held that the City of Galveston has no duty to warn swimmers of the danger of drowning in the ocean. *Gray v. City of Galveston*, 2003 WL 22908145 (Tex. App. — Houston 14th, 2003, not designated for publication).
27. *Wilson v. Tex. Parks & Wildlife Dept.*, 8 S.W.3d 634 (Tex. 1999). (Department installed flood warning sirens, which failed to alert the decedents of a flood.)
28. *Parks and Wildlife Code Sec. 1.011 (a).*
29. *State v. Shumake*, 199 S.W.3d at 288.
30. *Gowen v. Willenborg*, 366 S.W.2d 695 (Tex. Civ. App. — Houston [1st], 1963, writ ref'd n.r.e.).
31. *Nicholson v. Smith*, 986 S.W.2d 54 (Tex. App. — San Antonio 1999).
32. *Riley v. Champion Int'l Corp.*, 973 F. Supp. 634 (US D.C., E.D. Texas 1997).
33. *City of Waco v. Kirwan*, 298 S.W.3d at 625 and 626.
34. Compare *Banker v. McLaughlin*, 208 S.W.2d 843 (Tex. 1948) to *Massie v. Copeland*, 233 S.W.2d 449 (Tex. 1950) (flooded sand pits).
35. Compare *Burk Royalty Co. v. Pace*, 620 S.W.2d 882 (Tex. Civ. App. — Tyler 1981) to *Vista Petroleum Co. v. Workman*, 598 S.W.2d 721 (Tex. Civ. App. — Eastland 1980) (oilfield pumping units).
36. *Texas Utilities Electric Co. v. Timmons*, 947 S.W.2d 191 (Tex. 1997).
37. *Civ. Prac. & Rem. Code Sec. 75.003 (b).*
38. *Smither v. Texas Utilities Elec.*, 824 S.W.2d 693 (Tex. App. — El Paso 1992, writ dism'd.); *Baldwin v. Texas Utilities Elec. Co.*, 819 S.W.2d 264 (Tex. App. — Eastland 1991, writ den.).
39. *Guadalupe-Blanco River Authority v. Pitonyak*, 84 S.W.3d 326 at 344 (Tex. App. — Corpus Christi 2002).
40. *City of Waco v. Kirwan*, 298 S.W.3d at 628.
41. *Civ. Prac. & Rem. Code Sec. 87.003.*
42. *Civ. Prac. & Rem. Code Sec. 87.004.*
43. *Steeg v. Baskin Family Camps, Inc.*, 124 S.W.3d 633 (Tex. App. — Austin 2003, rev. dism'd).
44. *Civ. Prac. & Rem. Code Sec. 87.003 (2).*
45. *Gamble v. Peyton*, 182 S.W.3d 1 (Tex. App. — Beaumont 2005).
46. *Little v. Needham*, 236 S.W.3d 328 (Tex. App. — Houston 1st 2007).
47. *Civ. Prac. & Rem. Code Sec. 87.005.*

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