

ARTICLES

Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities

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I. Introduction

Landowners and businesses providing sport and recreational activities to members of the public have a concern about the safety of individuals engaged in the activities and the liability of providers for injuries.¹ Historic common law “status” rules² for invitees³ and licensees⁴ generally meant persons providing recreational activities could incur liability for failing to warn of a dangerous condition.⁵ Distinctions between licensees

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1. Product safety data of the U.S. Consumer Product Safety Commission provides estimates of injuries for many major recreational activities. NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM, U.S. CONSUMER PRODUCT SAFETY COMMISSION, ALL PRODUCTS—CY 1997 [hereinafter INJURY SURVEILLANCE SYSTEM]. For snow skiing and snowboarding, it is estimated that there were 84,190 and 37,638 injuries, respectively, in 1997. *Id.*, Product Codes 3283, 5031. For horseback riding, there may have been 58,709 injuries, and for roller skating 54,609 injuries. *Id.*, Product Codes 1239, 3216.

2. The duty owner to an entrant of another’s property is determined by the entrant’s status, be it trespasser, licensee or invitee. *See, e.g., Morin v. Bell Court Condominium Assn.*, 612 A.2d 1197, 1199 (Conn. 1998) (citations omitted). A North Carolina court enunciated the following basis for such distinction:

The obligation owed to a licensee is higher than that owed to a trespasser because the possessor may be required to look out for licensees before their presence is discovered. By the same token, the obligation owed to an invitee is higher than that owed to a licensee because of the express or implied invitation for the invitee to enter the premises.

Newton v. New Hanover Co. Bd. of Educ., 467 S.E.2d 58, 63 (N.C. 1996).

3. A person who enters premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself is an invitee. Invitees are owed a duty by a possessor of land whereby the premises must be inspected and maintained in a reasonably safe condition. *See, e.g., Morin v. Bell Court Condominium Assn.*, 612 A.2d 1197, 1199 (Conn. 1998) (citations omitted). Landowners are liable for injuries “sustained by an invitee which are caused by dangerous conditions known, or which should have been known, by the property owner but which are unknown and not to be anticipated by the invitee.” *Newton v. New Hanover Co. Bd. of Educ.*, 467 S.E.2d 58, 63 (N.C. 1996).

4. The duty of care owed licensees was generally less than owed invitees but more than owed trespassers. *See, e.g., Morin v. Bell Court Condominium Assn.*, 612 A.2d 1197, 1199 (Conn. 1998) (citations omitted). Persons who enter premises as social guests or for the benefit of the landowners are licensees. Landowners must warn licensees of risks of harm or dangerous conditions of which the host has knowledge and the guest is unaware. *See, e.g., Salaman v. City of Waterbury*, 246 Conn. 298, 305 (1998); *Arvantis v. Hios*, 705 A.2d 355, 357-58 (N.J. App. Div. 1998).

5. For licensees, there may be an obligation to warn of known dangers that would not be obvious to the licensee. *See generally, W. PAGE KEETON ET AL., PROSSER AND KEETON, ON THE LAW OF TORTS* § 60 (5th ed. 1984).

and invitees were abolished by statute in England⁶ and in some American states by case law.⁷ Rather than looking at status, these states employ a basic test of reasonableness,⁸ persons are owed reasonable care under the circumstances.⁹

In spite of the presence or absence of distinctions regarding invitees and licensees, all states have adopted recreational use statutes limiting the duties owed by landowners who allow others to engage in recreational activities without a fee.¹⁰ More recently, equine liability,¹¹ pick-your-own,¹² and sport responsibility statutes¹³ disclose additional categories of immunity provisions that limit tort liability. The proliferation of these statutes, together with amendments to Good Samaritan and gleaning statutes, disclose a plethora of multifaceted legislative strategies to provide immunity from tort liability to qualifying individuals.

While immunity from a tort was originally a creation of the judiciary, legislative provisions currently offer a larger and more significant basis for excusing a person from tort liability.¹⁴ Legislative immunity provisions have been enacted for defined classes of

6. Occupiers' Liability Act (1957), 5 & 6 Eliz. 2, ch. 31 (Eng.). It is argued that this fact may not be significant to American law because negligence cases in England are tried without a jury as opposed to jury trials in most cases in the United States. *Jones v. Hansen*, 867 P.2d 303, 313 (Kan. 1994) (McFarland, J. dissenting).

7. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968); *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 311-12 (Colo. 1971); *Pickard v. City & County of Honolulu*, 452 P.2d 445, 446 (Haw. 1968); *Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Mounsey v. Ellard*, 297 N.E.2d 43, 51-52 (Mass. 1973); *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996); *Ouelette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976); *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1115 (N.J. 1993); *Basso v. Miller*, 352 N.E.2d 868, 871 (N.Y. 1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 135 (R.I. 1975); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993).

Some of these states include trespassers who are governed by a test of reasonableness. E.g., *Ouelette v. Blanchard*, 364 A.2d 631, 633-34 (N.H. 1976). See also Vitauts M. Gulbis, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294-314 (1983) (giving a general overview of status rules); Michael Sears, Comment, *Abrogation of the Traditional Common Law of Premises*, 44 KAN. L. REV. 175 (1995) (discussing the retraction of state status rules for tort actions); *Carrie Restieri-Heslin*, Note, *Torts*, 24 SETON HALL L. REV. 2227 (1994) (discussing New Jersey's adoption of a single duty of reasonable care to protect against foreseeable harms for premises liability).

8. See, e.g., *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 133 (R.I. 1975) (retaining the ability to look at evidence of the statute but status itself will not be determinative of the degree of care owed by the owner).

9. See, e.g., *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976) (finding that foreseeability shall be a measure of liability under a single standard of reasonable care under the circumstances).

10. See Appendix 1: State Recreational Use Statutes; see also W.L. Church, *Private Lands and Public Recreation*, 1991 WIS. L. REV. 491 (1991) (describing the justifications for recreational use statutes); John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?*, 24 IND. L. REV. 1587 (1991) (describing the recreational use statutes); Martha L. Noble, *Recreational Access to Agricultural Land: Insurance Issues*, 24 IND. L. REV. 1615 (1991) (discussing insurance issues with respect to recreational uses of land).

11. See Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157 (1994) (describing equine liability statutes); Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997 (1995) (classifying the state equine liability statutes); Terence J. Centner, *Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors*, 50 ARK. L. REV. 637 (1998) (describing the grant of immunity in relation to equine accidents).

12. See Terence J. Centner, *The New "Pick-Your-Own" Statutes: Delineating Limited Immunity from Tort Liability*, 30 U. MICH. J.L. REF. 743 (1997) (contrasting state immunity provisions).

13. See Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming's Recreational Safety Act—An Update*, 33 LAND & WATER L. REV. 249 (1998) (analyzing a recreational safety statute that is written as a sport responsibility statute).

14. See Frank L. Maraist and Thomas C. Galligan, Jr., *The Employer's Tort Immunity: A Case in Post-Modern Immunity*, 57 LA. L. REV. 467, 467-68 (1997) (noting that the judiciary provided and then took away immunity, leading legislatures to provide immunity to narrowly defined classes of persons).

persons, such as operators and providers of horseback activities,¹⁵ skiing,¹⁶ and roller-skating.¹⁷ Moreover, under some of the legislative immunity provisions, an actor is immune from liability for negligent acts while remaining liable for more egregious conduct.¹⁸ An immunity statute may offer immunity for gross negligence while retaining liability for willful failure to guard or warn against a dangerous condition.¹⁹

This article examines four categories of immunity provisions that have been introduced to lessen the liability of persons who assist others, provide services to others, or allow others to come onto their property for recreational and other activities. To evaluate immunity dispensation, Section II reviews Good Samaritan and gleaning statutes to discern immunity prerequisites. Section III investigates the four categories of statutory provisions enacted for providers of various activities: (1) recreational use statutes, (2) equine liability statutes, (3) pick-your-own statutes, and (4) sport responsibility statutes.

With this foundation, Section IV identifies five policy issues presented by the different immunity provisions for recreational accidents. The first issue is whether some liability statutes provide excessive protection by shielding some defendants against gross negligence.²⁰ The historic Good Samaritan protection was simply for negligence; Good Samaritans retained common law and statutory duties, including liability for gross negligence.²¹ Why have legislative bodies enacted statutes that sanction gross negligence?

Second, the analysis of the immunity provisions shows explicit provisions to allow commercial businesses to qualify for immunity in equine liability and sport responsibility statutes²² while contrasting provisions in recreational use statutes disqualify provid-

15. See Appendix 2: State Equine Liability Statutes.

16. See Appendix 4: State Sport Responsibility Statutes for Skiing.

17. See Appendix 5: State Sport Responsibility Statutes for Sports other than Skiing.

18. For example, a California immunity statute provides immunity for negligence while retaining liability for gross negligence:

No cause of action shall arise against the owner, tenant, or lessee of land or premises for injuries to any person who has been expressly invited on that land or premises to glean agricultural or farm products for charitable purposes, unless that person's injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. The immunity provided by this section does not apply if the owner, tenant, or lessee received any consideration for permitting the gleaning activity.

CAL. CIV. CODE § 846.2 (West Supp. 1998).

19. For example, the Connecticut recreational use statute provides that an owner of recreational land available to the public owes no duty of care if qualifying conditions are met, but provides an exception whereby the owner remains liable "[f]or wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. . . ." CONN. GEN. STAT. ANN. §§ 52-557g, -557h (West 1991).

20. For example, a Wisconsin statute may grant ski patrol members immunity for gross negligence: (2) Except as provided in sub. (3), a ski patrol member is immune from civil liability for his or her acts or omissions while he or she is acting in his or her capacity as a ski patrol member, including the rendering of emergency care. (3) The immunity under this section does not apply if the act or omission of the ski patrol member involves reckless, wanton or intentional misconduct.

WIS. STAT. ANN. § 895.482(2—3) (West Supp. 1997).

21. For example, a Virginia Good Samaritan statute shows only negligence being excused:

Any licensed physician serving without compensation as the operational medical director for a licensed emergency medical services agency in this Commonwealth shall not be liable for any civil damages for any act or omission resulting from the rendering of emergency medical services in good faith by the personnel of such licensed agency unless such act or omission was the result of such physician's gross negligence or willful misconduct.

VA. CODE ANN. § 8.01-225 (Michie Supp. 1998).

22. These immunity provisions were specifically written for business enterprises attempting to make profits by providing a sport or recreational activity.

ers from immunity if they are compensated.²³ Selected exceptions in recreational use statutes disclose ideas for retaining the general prohibition against compensation but allowing remuneration in five specific situations. Amending recreational use statutes to allow compensation in exceptional situations might be helpful in encouraging providers to make available additional properties for recreational activities.

Next, a proposal to extract safety measures as a condition to a legislative grant of immunity from damages is identified for the equine liability statutes.²⁴ Legislatures might want to be more creative in championing safety when they enact immunity legislation. Fourth, the topic of how the new sport responsibility statutes curb litigation is addressed. Legislative responses that allow issues to be decided as a matter of law rather than a question for the trier of fact may help diminish litigation expenditures.²⁵

Finally, the profusion of different legislative responses calls for the coordination and possible consolidation of immunity provisions. Rather than adopting statutes for given interest groups or industries, legislatures may be better advised to revisit established legislation concerning assignments of risks and revise provisions that are outdated or incongruous with more recent statutes. Alternatively, a concise sport responsibility statute,²⁶ as adopted in Wyoming,²⁷ may delineate a way to reduce the number of statutes to simplify liability rules for risky recreational activities.

II. Historic Dispensation from Tort Liability

A. Good Samaritan Statutes

Commencing with the California Legislature in 1959,²⁸ legislative bodies have encouraged good activities and afforded immunity to persons who assist others in need by limiting tort liability through a variety of Good Samaritan statutes.²⁹ Good Samaritan statutes provide that qualifying persons are not liable for damages if they met a requisite duty of care and other conditions.³⁰ Therefore, a person seeking to avoid liability due to a Good Samaritan statute must raise the statute as an affirmative defense and proceed to prove qualification.³¹ The defense of a Good Samaritan statute requires a defendant to

23. These statutes follow the Good Samaritan precedent and preclude persons who are compensated for providing recreational activities from qualifying for the statutory immunity. *See infra* notes 123-24 and accompanying text.

24. *E.g.*, the equine liability statutes might incorporate encouragement for wearing safety helmets. *See infra* notes 341-46 and accompanying text.

25. *See* Hansen-Stamp, *supra* note 13, at 277 (discussing the Wyoming sports responsibility statute).

26. A concise statute omits the delineation of duties and the scope of inherent risks. *See* Cathy Hansen and Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act*, 28 LAND & WATER L. REV. 149, 168-73 (1993) (discussing the Wyoming ski statute that declined to define duties or delineate specific inherent risks).

27. WYO. STAT. §§ 1-1-121 to -123 (Michie 1997).

28. 1959 Cal. Stat. ch. 1507 (currently codified, as amended, at CAL. BUS. & PROF. CODE § 2395 (West 1990)); *see also* 2 STEPHEN E. PEGALIS, J.D. & HARVEY F. WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE §§ 6.13 to .15 (1981).

29. *See* Danny R. Veilleux, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 294 (4th ed. 1989); ALVIN LEE BLOCK & CHARLES BOND, MEDICAL MALPRACTICE: HANDLING INTERNAL MEDICINE CASES § 47.14 (1992); WILLIAM N. HARSHA, MEDICAL MALPRACTICE: HANDLING ORTHOPEDIC CASES § 8.06 (1990). *See, e.g.*, the Georgia Good Samaritan statute, which provides: "[a]ny person . . . who in good faith renders emergency care . . . shall not be liable for any civil damages. . . ." Ga. Code Ann. § 51-1-29 (1982).

30. *See infra* notes 36-48 (describing the Good Samaritan paradigm).

31. *See, e.g.*, *Hernandez v. Lukefahr*, 879 S.W.2d 137, 142 (Tex. Ct. App. 1994) (finding that the defendant established qualification under the Good Samaritan statute).

present evidence that establishes the essential qualifications and conditions of the statutory affirmative defense.³²

Every state legislature has enacted one or more of these provisions to encourage charitable or philanthropic activities.³³ Most Good Samaritan statutes provide immunity against negligence actions so that qualifying persons who commit an act or omission causing an injury while performing a good deed are excused from liability for damages.³⁴ While the original basis of Good Samaritan statutes involved encouraging physicians in rendering medical assistance, the expansion of the Good Samaritan paradigm has provided partial immunity for a wide range of classes and activities.³⁵

Although Good Samaritan statutes vary significantly, five major elements have been identified as forming the Good Samaritan paradigm.³⁶ First, the paradigm establishes a protected class.³⁷ As noted, this class has been expanded by state legislatures.³⁸ Second, a zone of protection is prescribed by the paradigm: historically, an emergency situation

32. See, e.g., *id.* (placing burden on the defendant to establish affirmative defense); *Willard v. Mayor & Aldermen of Vicksburg*, 571 So.2d 972, 975 (Miss. 1990) (finding questions regarding timeliness of action and reasonableness of care that presented issues to preclude summary judgment despite defendant's qualification as a member of the protected class under a Good Samaritan statute).

33. See PEGALIS & WACHSMAN, *supra* note 28, at § 6.13 (deciding that immunity is valued by emergency medical service systems); FRANK B. MAPEL, III & CHARLES J. WEIGEL, II, *Good Samaritan Laws—Who Needs Them?: The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. LAW REV. 327, 354 (1981) (concluding that Good Samaritan statutes do not alter a person's decision on whether to render aid to someone in need); MITCHELL MCINNES, *Good Samaritan Statutes: A Summary and Analysis*, 26 BRIT. COL. L. REV. 239, 240 (1992) (analyzing Canadian Good Samaritan statutes); see also ERIC A. BRANDT, Student, *Good Samaritan Laws—The Legal Placebo: A Current Analysis*, 17 AKRON LAW REV. 303, 332 (1983) (arguing that Good Samaritan legislation was a response to an imagined rather than real problem).

34. This may not be true. For example, a Mississippi court found that a Good Samaritan statute imposed reasonableness as a standard of care, the same standard as existed under common law. *Willard v. Mayor & Aldermen of Vicksburg*, 571 So.2d 972, 975 (Miss. 1990) (finding that a strict reading of the statute disclosed a standard of care of reasonableness).

35. See, e.g., CAL. BUS. & PROF. CODE § 2398 (West 1990) (granting immunity to licensees providing emergency medical assistance to participants of athletic events); GA. CODE ANN. § 26-2-374 (1982) (persons assisting a human who is choking); GA. CODE ANN. § 31-11-8 (1996) (licensees providing ambulance service); GA. CODE ANN. § 46-5-131 (1992) (participants in 911 emergency service); GA. CODE ANN. § 51-1-29.2 (Supp. 1998) (persons providing services in conjunction with catastrophic acts of nature); GA. CODE ANN. § 51-1-30.1 (Supp. 1998) (drivers of fire apparatus); GA. CODE ANN. § 51-1-30.3 (Supp. 1998) (persons donating services to schools); GA. CODE ANN. § 51-1-30.2 (Supp. 1998) (drug abuse instructors); GA. CODE ANN. § 51-11-8 (Supp. 1998) (employees of compressed gas dealers assisting a law enforcement agency); GA. CODE ANN. § 52-7-14 (Supp. 1998) (operators of vessels rendering assistance to persons affected by a casualty); 225 ILL. COMP. STAT. ANN. 60/31 (West 1998) (persons providing services at free medical clinics); 745 ILL. COMP. STAT. ANN. 20/1 (West 1993) (law enforcement officers); IND. CODE ANN. § 15-5-1.1-31 (Michie 1993) (veterinarians); LA. REV. STAT. ANN. § 9:2799 (West Supp. 1998) (donees of food); MASS. GEN. LAWS ANN. ch. 231, § 85I (West 1985) (ski patrol members); N.Y. GEN. MUN. LAW § 205-b (McKinney Supp. 1998) (volunteer firefighters); OHIO REV. CODE ANN. § 2305.232 (Banks-Baldwin Supp. 1997) (persons assisting in clean-up of hazardous materials); OHIO REV. CODE ANN. § 2305.233 (Banks-Baldwin 1994) (assistance under reciprocal fire protection agreements); OHIO REV. CODE ANN. § 4765.49 (Banks-Baldwin Supp. 1998) (emergency medical personnel and agencies); OHIO REV. CODE ANN. § 4765.49(C) (Banks-Baldwin Supp. 1998) (supervised students enrolled in medical services training programs); OHIO REV. CODE ANN. § 4765.49(E) (Banks-Baldwin Supp. 1998) (dispatchers or communicators of requests for emergency medical services); WIS. STAT. ANN. § 146.37 (West 1997) (persons on oversight health care committees).

36. Mapel & Weigel, *supra* note 33, at 327 (analyzing Good Samaritan statutes with respect to the five elements).

37. This was initially physicians. The statutorily defined class may not include persons who already have a duty to aid others in peril. See, e.g., *Sims v. General Tel. & Electronics*, 815 P.2d 151, 158 (Nev. 1991) (finding that an employee's existing duty to rescue a fellow employee meant that his rescue efforts were not covered by the Good Samaritan law).

38. See *supra* note 35 (listing statutes with different protected classes).

or the site of an accident.³⁹ The third requirement of the Good Samaritan paradigm demands a gratuitous act.⁴⁰ Traditionally, an actor who collected a fee did not qualify for the statutory immunity.⁴¹ Next, good faith is required under the paradigm, either as a subjective state of the Samaritan's mind or an objective limitation on a Samaritan's qualification.⁴²

A standard of conduct that cannot be exceeded to qualify for the immunity of a Good Samaritan statute constitutes the fifth element of the paradigm.⁴³ Good Samaritan statutes provide that persons who are negligent in engaging in acts may qualify for immunity⁴⁴ and also may establish a duty of care.⁴⁵ Thereby, Good Samaritans may remain liable for injuries arising from gross negligence and the wanton disregard of the safety of another.⁴⁶ Immunity has been granted for injuries arising from gross conduct in a few Samaritan statutes,⁴⁷ but is rarely available for the willful and wanton disregard for the safety of another.⁴⁸

Because of the vagaries of political processes in fifty different states, many Good Samaritan statutes fail to prescribe one or more of the enumerated elements. Therefore, the Good Samaritan paradigm may not constitute an accurate description of a specific statute.⁴⁹ However, generalizations about the paradigm assist in describing other legisla-

39. See, e.g., *Clayton v. Kelly*, 183 Ga. App. 45 (Ga. Ct. App. 1987) (finding that questions were presented whether a defendant was acting pursuant to a duty or in a voluntary fashion that would qualify him for immunity under a Good Samaritan statute); *Jackson v. Mercy Health Center*, 864 P.2d 839, 845 (Okla. 1993) (finding that an emergency regarding the visiting husband of a patient was within the zone of protection of a Good Samaritan statute); *Buck v. Greyhound Lines, Inc.*, 783 P.2d 437, 440 (Nev. 1989) (finding no emergency so that a Good Samaritan statute did not apply).

Some Good Samaritan statutes extend immunity to persons who were not involved in an emergency or accident. See, e.g., N.Y. GEN. MUN. LAW § 205-b (McKinney Supp. 1998) (providing immunity for members of volunteer fire companies without reference to an emergency); VA. CODE ANN. § 54.1-3811 (Michie 1998) (providing immunity for veterinary professionals who render health care services to animals in good faith without charge or compensation).

40. Many Good Samaritan statutes still preclude the collection of a fee or a charge for the service. See, e.g., 745 ILL. COMP. STAT. ANN. 20/1 (West 1993) (providing immunity for law enforcement officers and firemen only if there was no fee).

41. This may be changing for some licensed medical personnel. See, e.g., *Tatum v. Gigliotti*, 583 A.2d 1062, 1064-65 (Md. 1991) (finding that the applicable Good Samaritan statute allowed a salaried emergency medical technician to qualify for the statutory immunity).

42. Robert A. Mason, Comment, *Good Samaritan Laws—Legal Disarray: An Update*, 38 MERCER L. REV. 1439, 1448 (1987) (noting interpretations in Georgia of the good faith requirement of Good Samaritan statutes).

43. This generally involves some type of aggravated misconduct. See *Mapel & Weigel, supra* note 33, at 342.

44. This is generally achieved by granting immunity unless the person engaged in an act or omission constituting gross negligence, recklessness, or willful misconduct. See, e.g., CAL. BUS. & PROF. CODE § 2395.5(a) (West 1990) (providing that licensees on an on-call basis to a hospital emergency room do not qualify for immunity for acts or omissions constituting gross negligence, recklessness, or willful misconduct).

45. See Nicole Rosenkrantz, Note, *The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for Their Negligence*, 37 B.C. L. REV. 1061, 1061 (1996) (discussing the Good Samaritan doctrine and its duty of care upon an individual or organization).

46. See, e.g., CAL. BUS. & PROF. CODE § 2398 (West 1990) (providing that persons providing voluntary medical assistance under some circumstances are liable for gross negligence).

47. See, e.g., 745 ILL. COMP. STAT. ANN. 20/1 (West 1993) (providing that law enforcement officers and firemen who engage in willful or wanton misconduct do not qualify for the immunity of the Good Samaritan statute).

48. At least 14 statutes may provide immunity for aggravated misconduct. *Mapel & Weigel, supra* note 33, at 342. However, a good faith requirement incorporated in all of these statutes suggests that a person engaging in willful or wanton misconduct would not qualify for immunity under these statutes.

49. See, e.g., *Tatum v. Gigliotti*, 583 A.2d 1062, 1064 (Md. 1991) (noting that the argument that the interpretation of other states' Good Samaritan statutes did not apply to the statute under consideration due to a distinguishing provision).

tive strategies that are being adopted to provide limited immunity in qualified situations. The veterinary Good Samaritan statutes are analyzed to further highlight the Good Samaritan paradigm and to demonstrate how state legislative bodies have taken different approaches in granting a common class of professionals dispensation from liability.

B. Veterinary Good Samaritan Statutes

At least eighteen states have adopted veterinary Good Samaritan statutes in which veterinarians treating animals are the protected class.⁵⁰ A few states also offer the statutory immunity to registered veterinary technicians⁵¹ or others assisting veterinarians.⁵² These veterinary statutes follow the Good Samaritan model and excuse qualifying persons from liability.⁵³ Veterinarians generally are required to be treating an animal in an emergency before the statute's provisions apply.⁵⁴ The veterinary Good Samaritan statutes delineate various qualifications for an emergency, such as care at the scene of an accident or emergency,⁵⁵ care adjacent to public highways,⁵⁶ emergency treatment to sick and injured animals,⁵⁷ or a combination of these qualifications.⁵⁸

While the veterinary Good Samaritan statutes may be modeled after Good Samaritan statutes, many of them do not adhere to the latter three elements of the historic paradigm. An examination of the third element of the Good Samaritan prototype reveals that eight of the veterinary statutes follow the requirement that there be no fee,⁵⁹ while ten do not specify this element.⁶⁰ With respect to the requirement of good faith, only eleven of

50. ALA. CODE § 34-29-90 (1997); ALASKA STAT. § 09.65.097 (Michie 1996); CAL. BUS. & PROF. CODE § 4826.1 (West 1990); COLO. REV. STAT. ANN. § 12-64-118 (West 1996) (repealed effective July 1, 2001); FLA. STAT. ANN. Ch. 768.13(3) (Harrison Supp. 1997); 225 ILL. COMP. STAT. ANN. 115/18 (West 1998); IND. CODE ANN. § 15-5-1.1-31 (Michie 1993); KAN. STAT. ANN. § 47-841 (1993); LA. REV. STAT. ANN. § 37:1731(c) (West Supp. 1998); MD. CODE ANN., AGRIC. § 2-314 (1999), CTS. & JUD. PROC. § 5-614 (Supp. 1997); MASS. GEN. LAWS ANN. ch. 112, § 58A (West 1996); MINN. STAT. ANN. § 346.37, subd. 2 (West 1990 & Supp. 1998); N.J. STAT. ANN. § 45:16-9.11 (West 1995); OKLA. STAT. ANN. tit. 59, § 698.17 (West 1989); 42 PA. CONS. STAT. ANN. § 8331.1 (West 1998); R.I. GEN. LAWS § 4-15-15 (1998); TEX. REV. CIV. STAT. ANN. tit. 132, art. 8891 (West Supp. 1998); VA. CODE ANN. § 54.1-3811 (Michie 1998).

51. See, e.g., MO. ANN. STAT. § 340.328 (West Supp. 1998) (covering duly registered veterinary technicians).

52. See, e.g., ALASKA STAT. § 09.65.097(a) (Michie 1996) (including persons working under the direct supervision of a licensed veterinarian); FLA. STAT. ANN. 768.13(3) (Harrison Supp. 1997) (providing dispensation for any person rendering emergency care or treatment of an injured animal).

53. For example, the Kansas statute shows the Good Samaritan paradigm being followed:

Any licensed . . . veterinarian . . . who in good faith as a volunteer and without fee renders emergency care or treatment to an animal shall not be liable in a suit for damages as a result of such veterinarian's acts or omissions which may occur during such emergency care or treatment, nor shall such veterinarian be liable to any animal hospital for such hospital's expense if under such emergency conditions such veterinarian orders an animal hospitalized or causes admission to such hospital.

KAN. STAT. ANN. § 47-841(a) (1993).

54. *Contra* VA. CODE ANN. § 54.1-3811 (Michie 1998) (stating no emergency required).

55. See, e.g., N.J. STAT. ANN. § 45:16-9.11 (West 1995) (requiring treatment "at or from the scene of an accident or emergency situation").

56. See, e.g., FLA. STAT. ANN. Ch. 768.13(3) (Harrison Supp. 1997) (limiting the exception to emergency care or treatment "at the scene of an emergency or adjacent to a roadway").

57. See, e.g., 225 ILL. COMP. STAT. ANN. 115/18 (West 1998) (limiting the statutory disposition to emergency treatment).

58. See, e.g., MO. ANN. STAT. § 340.328 (West Supp. 1998) (providing that the treatment must be "to a sick or injured animal at the scene of an accident or emergency").

59. ALA. CODE § 34-29-90 (1997); COLO. REV. STAT. ANN. § 12-64-118 (West 1996) (repeal effective July 1, 2001); FLA. STAT. ANN. Ch. 768.13(3) (Harrison Supp. 1997); KAN. STAT. ANN. § 47-841 (1993); LA. REV. STAT. ANN. § 37:1731(c) (West Supp. 1998); MD. CODE ANN., AGRIC. § 2-314 (1999); MASS. GEN. LAWS ANN. ch. 112, § 58A (West 1996); VA. CODE ANN. § 54.1-3811 (Michie 1998).

60. ALASKA STAT. § 09.65.097 (Michie 1996); CAL. BUS. & PROF. CODE § 4826.1 (West 1990); 225 ILL. COMP. STAT. ANN. 115/18 (West 1998); IND. CODE ANN. § 15-5-1.1-31 (Michie 1993); MINN. STAT. ANN. §

the statutes prescribe good faith as a requirement for qualification.⁶¹ Although it is unclear whether a particular statutory Good Samaritan provision entails a subjective state of mind or an objective limitation on the immunity,⁶² a negligent veterinarian who acts in good faith probably would qualify for the statutory immunity.⁶³ On the other hand, if a veterinarian engages in gross negligence, it is more likely that this veterinarian fails to meet the statutory good faith requirement under a subjective standard.⁶⁴

The statutory standard of conduct that cannot be exceeded for a veterinarian to qualify for immunity varies in the veterinary Good Samaritan statutes. Eight statutes specify that the statutory immunity is not available whenever the veterinarian's conduct is grossly negligent.⁶⁵ This suggests that a veterinarian is not liable for ordinary negligence, but can be liable for gross negligence.⁶⁶ The provisions of two states seem to grant greater protection for veterinarians.⁶⁷ Colorado provides that the "immunity does not apply in the event of wanton or reckless disregard of the rights of the owner of [the] animal."⁶⁸ This suggests that gross negligence by a veterinarian is sanctioned in that state. Rhode Island provides that the veterinarian is not liable,⁶⁹ raising the possibility that in Rhode Island an injured plaintiff suffering from a veterinarian's willful disregard of safety in medical treatment of an animal may not lead to liability for damages.

Thus, the eighteen veterinary Good Samaritan statutes show significant variations in the qualification of professionals for immunity and the standard of conduct protected by the immunity of the statutes. While the Good Samaritan paradigm may be insightful, it does not accurately describe many Good Samaritan statutes.

C. Gleaning Statutes

The charitable act of allowing needy individuals to collect leftover products, called gleaning, has been offered as a situation where the Good Samaritan paradigm applies.⁷⁰

346.37 (West Supp. 1998); N.J. REV. STAT. § 45:16-9.11 (West 1995); OKLA. STAT. ANN. tit. 59, § 698.17 (West 1989); 42 PA. CONS. STAT. ANN. § 8331.1 (West 1998); R.I. GEN. LAWS § 4-15-15 (1987); TEX. REV. CIV. STAT. ANN. art. 8891 (West Supp. 1998).

61. ALA. CODE § 34-29-90 (1991); COLO. REV. STAT. ANN. § 12-64-118 (West 1996); (repeal effective July 1, 2001); FLA. STAT. ANN. § 768.13 (Harrison Supp. 1997); KAN. STAT. ANN. § 47-841 (1993); LA. REV. STAT. ANN. § 37:1731(c) (West Supp. 1998); MASS. GEN. LAWS ANN. ch. 112, § 58A (West 1996); N.J. REV. STAT. § 45:16-9.11 (West 1995); OKLA. STAT. ANN. tit. 59, § 698.17 (West 1989); 42 PA. CONS. STAT. ANN. § 8331.1 (West Supp. 1998); VA. CODE ANN. § 54.1-3811 (Michie 1998). In addition, Minnesota requires humane assistance, which may be a comparable requirement. MINN. STAT. ANN. § 346.37, (West Supp. 1998).

62. *Contra* 42 PA. CONS. STAT. ANN. § 8331.1(6) (West Supp. 1998) (prescribing the good faith requirement as referring to "the immediacy of the situation.").

63. *But cf.* FLA. STAT. ANN. Ch. 768.13(3) (Harrison Supp. 1997) (containing a requirement that the veterinarian act as a prudent person so that it could be found that this additional requirement would not be met by a negligent veterinarian).

64. *But cf.* VA. CODE ANN. § 54.1-3811 (Michie 1998) (regardless of the interpretation of good faith, a veterinarian who is grossly negligent in Virginia does not qualify for immunity).

65. ALASKA STAT. § 09.65.097 (Michie 1996); CAL. BUS. & PROF. CODE § 4826.1 (West 1990); 225 ILL. COMP. STAT. ANN. 115/18 (West 1998); IND. CODE ANN. § 15-5-1.1-31 (Michie 1993); MD. CODE ANN., AGRIC. § 2-314 (1999) [relying on the standard set forth in MD. CODE ANN., CTS. & JUD. PROC. § 5-343 (1995)]; 42 PA. CONS. STAT. ANN. § 8331.1 (West 1998); TEX. REV. CIV. STAT. ANN. art. 8891 (West Supp. 1997); VA. CODE ANN. § 54.1-3811 (Michie 1998).

66. The veterinarian would also need to meet the other prerequisites of the immunity statute, such as giving treatment in an emergency situation.

67. COLO. REV. STAT. ANN. § 12-64-118 (West 1996) (repealed effective July 1, 2001); R.I. GEN. LAWS § 4-15-5 (1987).

68. COLO. REV. STAT. ANN. § 12-64-118 (West 1996) (repealed effective July 1, 2001).

69. R.I. GEN. LAWS § 4-15-5 (1987).

70. Blackstone notes the claim that the right of the poor to enter another's ground after harvest to glean a crop without being guilty of trespass may exist "by the common law and custom of England." William Blackstone, 3 COMMENTARIES 212 (1768).

As noted in the English case of *Steel v. Houghton*,⁷¹ historic support for gleaning comes from Mosaic law, with the biblical books of Leviticus and Deuteronomy identified as sources.⁷² Yet the act of gleaning opens a door to fraud,⁷³ generally imposes inconvenience on a property's owner, and is contrary to an owner's possession.⁷⁴ Thus, although gleaning may have been sanctioned in parts of England,⁷⁵ it was not part of English common law. Permission is generally required before a person may glean a crop on the property of another.⁷⁶

Twelve states have adopted statutory provisions to cover persons allowing gleaning activities on their property.⁷⁷ Following the agrarian connotations of gleaning, such statutes concern harvesting or collecting "farm products from the fields of a farmer who grants access to the fields without charging a fee."⁷⁸ Pursuant to historical principles, these statutes limit their gleaning provisions to the removal of farm crops.⁷⁹ One statute contains a limitation whereby only persons picking fruit and vegetables "for the participant's own benefit . . ." may qualify for the statutory dispensation.⁸⁰ Such a provision may exclude coverage of persons belonging to charitable, civic, or religious groups that are harvesting produce for benevolent purposes.⁸¹

More recently, an expansive meaning for gleaning has been employed to cover the donation of goods and distribution activities that accompany these donations.⁸² Persons

71. 126 Eng. Rep. 32 (1788) (describing an historical summary of gleaning).

72. *Steel v. Houghton*, 126 Eng. Rep. at 34 (Gould, J.).

73. *Steel*, 126 Eng. Rep. at 38 (Heath, J.).

74. *Steel*, 126 Eng. Rep. at 37 (Heath, J.). This justice also felt that sanctioning gleaning "would introduce fraud and rapine, and entail a curse on the country." *Steel*, 126 Eng. Rep. at 38 (Heath, J.). Blackstone recognized that the act of gleaning could facilitate a trespass without the gleaner being guilty, but his reference to common law and custom was couched with the phrase "it hath been said . . ." suggesting that it was not clear whether gleaning was permitted without an owner's permission. Blackstone, *supra* note 70, at *212.

75. *Steel*, 126 Eng. Rep. at 37 (Heath, J.).

76. *Steel*, 126 Eng. Rep. at 37-39 (Heath & Wilson, J.J.) (finding by two justices that gleaning was not part of the common law due to the problems such a right would create).

77. ARK. CODE ANN. § 18-60-107 (Michie Supp. 1997); CAL. CIV. CODE § 846.2 (West Supp. 1998); FLA. STAT. ANN. Ch. 768.137 (Harrison Supp. 1997); LA. REV. STAT. ANN. ch. 9, §§ 2799, 2800.4 (West Supp. 1998); MD. CODE ANN., CTS. & JUD. PROC. § 5-404 (Supp. 1997); MICH. COMP. LAWS ANN. § 324.73301(3) (West Supp. 1998); NEV. REV. STAT. §§ 41.491, 41.510 (1997); N.C. GEN. STAT. § 106-706 (1997); OHIO REV. CODE ANN. §§ 2305.35—38 (Anderson Supp. 1998); TENN. CODE ANN. §§ 70-7-102, -103 (1995); UTAH CODE ANN. §§ 4-34-1 to -6 (1995); WASH. REV. CODE ANN. §§ 69.80.031—900 (West 1997). Tennessee does not use the terms glean or gleaning but rather pick and picking. TENN. CODE ANN. §§ 70-7-102, -103 (1995). Since no consideration is permitted for the Tennessee provisions, TENN. CODE ANN. § 70-7-104 (1995), it is more analogous to a gleaning statute than a pick-your-own statute. Nevada also lists gleaning in its recreational use statute. NEV. REV. STAT. § 41.510(4) (1997).

78. MD. CODE ANN., CTS. & JUD. PROC. § 5-404(a)(6) (1999).

79. *See, e.g.*, N.C. GEN. STAT. § 106-706 (1997); OHIO REV. STAT. ANN. § 2305.35 (Banks-Baldwin Supp. 1998). Nevada defines glean to mean gathering agricultural crops, but the liability provisions limit gleaning to food. NEV. REV. STAT. § 41.491(1)(c), -(2), -(4)(b) (1997).

80. TENN. CODE ANN. § 70-7-103 (1995).

81. The possibility exists that use of the produce for a benevolent purpose does not meet the requirement that the produce be used for "the participant's own benefit." *Id.*

82. *See, e.g.*, ALA. CODE § 20-1-6 (1997); ARK. CODE ANN. § 20-57-103 (Michie 1991); CONN. GEN. STAT. ANN. § 52-5571 (West Supp. 1998); GA. CODE ANN. § 51-1-31 (Supp. 1998); HAW. REV. STAT. ANN. §§ 145D-1 to -5 (Michie 1993); IDAHO CODE §§ 6-1301 to -1302 (1998); 745 ILL. COMP. STAT. ANN. 50/3 to 50/4 (West Supp. 1998); IOWA CODE ANN. § 672.1 (West 1998); KAN. STAT. ANN. § 65-687 (1997); ME. REV. STAT. ANN. tit. 14, § 166 (West Supp. 1997); MICH. COMP. LAWS ANN. § 691.1571 (West Supp. 1998); MINN. STAT. ANN. § 604A.10 (West Supp. 1998); MISS. CODE ANN. §§ 95-7-1 to -13 (1994); MO. ANN. STAT. § 537.115 (West Supp. 1998); MONT. CODE ANN. § 27-1-716 (1997); NEB. REV. STAT. § 25-21,189 (1995); N.J. STAT. ANN. §§ 24:4A-2 to -5 (West 1995); N.M. STAT. ANN. §§ 41-10-1 to -3 (Michie 1989); N.Y. AGRIC. & MKTS. LAW §§ 71-y, 71-z (McKinney 1991 & Supp. 1998); N.D. CENT. CODE §§ 19-05.1-01 to -05 (1997); OKLA. STAT. ANN. tit. 76, § 5.6 (West 1995); OR. REV. STAT. § 30.890 (1988); 42 PA. CONS. STAT. ANN. § 8338 (West 1998); S.C. CODE ANN. §§ 15-74-10 to -40 (Law. Co-op. Supp. 1997); S.D.

who donate products to needy individuals, including grocery products that are not crops or even food items, are excepted from liability.⁸³ Moreover, a donation that qualifies under a gleaning statute may involve the collection of a fee if the fee is significantly less than the cost of the item.⁸⁴

The statutory gleaning provisions for property owners are varied.⁸⁵ Some statutes follow the Good Samaritan immunity model,⁸⁶ while a few follow a recreational use model.⁸⁷ Two states recognize special gleaning provisions in the same statute that contains the state's pick-your-own provisions.⁸⁸ Given the different understanding of gleaning and the two distinct statutory models, the immunity provided by these statutes varies considerably. Of course intentional conduct resulting in injury to a recipient of a product remains actionable.⁸⁹ The gleaning statutes following the Good Samaritan immunity model provide protection and then delineate a standard of conduct that, if exceeded, would defeat the statutory dispensation.⁹⁰ The most common provision is that the immunity is not available if the injury arose from an act or omission that constituted gross negligence or willful misconduct.⁹¹ Two of the statutes provide that certain negligent acts defeat the statutory immunity granted to donors of free-of-charge food items.⁹² Thereby, these statutes offer little protection to donors.

Three statutes following a recreational use model prescribe the duty of care owed by persons to those involved in gleaning activities.⁹³ Qualifying persons do not have a duty of care to keep the premises safe for harvesting activities and have a reduced duty re-

CODIFIED LAWS §§ 39-4-22 to -35 (Michie 1996); VT. STAT. ANN. tit 12, §§ 5761, 5762 (Supp. 1998); W. VA. CODE § 9-8-2 (1998); WIS. STAT. ANN. § 895.51 (West 1997).

83. *See, e.g.*, NEV. REV. STAT. § 41.491(1)(a) (1997) (covering the donation of food and grocery products).

84. *Id.* § 41.491(4)(a)(2) (1997) (defining "donate" to mean selling a product "for a fee that is significantly less than the cost of the item sold"); *see also* WASH. REV. CODE ANN. § 69.80.031(2)(c) (West 1997) (defining "donate" to include situations where a nonprofit organization charges a nominal fee to a donee nonprofit organization as long as the ultimate recipient is not required to give anything of monetary value).

85. Note the distinctions between the gleaning statutes (*supra* notes 77-81) and the food donation statutes (*supra* notes 82-84).

86. *See, e.g.*, ARK. CODE ANN. § 18-60-107 (Michie Supp. 1999); CAL. CIV. CODE § 846 (West Supp. 1999); LA. REV. STAT. ANN. § 9:2799, 9:2800.4 (West 1997 & Supp. 1999); MICH. COMP. LAWS ANN. § 324.73301 (West 1999); NEV. REV. STAT. § 41.491 (1997); N.Y. AGRIC. & MKTS. LAW §§ 71-y, 71-z (McKinney 1991 & Supp. 1998); OHIO REV. CODE ANN. § 2305.35 (Anderson 1998); 42 PA. STAT. ANN. § 8338 (West 1998); UTAH CODE ANN. § 4-34-5 (1995); WASH. REV. CODE ANN. § 69.80.031 (West 1997).

87. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 159-A (West 1964 & Supp. 1998); N.C. GEN. STAT. § 106-706 (1997); TENN. CODE ANN. §§ 70-7-102 to -104 (1995). *See infra* notes 108-119 for a discussion of the recreational use model.

88. ARK. CODE ANN. § 18-60-107 (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.73301 (West 1999).

89. This often occurs through a statutory provision that excepts gross negligence or willful misconduct. *See, e.g.*, MICH. COMP. LAWS ANN. § 324.73301(3) (West 1999).

90. *See, e.g.*, CAL. CIV. CODE § 846.2 (West Supp. 1998) ("[n]o cause of action shall arise against the owner, tenant, or lessee . . . for injuries . . .").

91. ARK. CODE ANN. § 18-60-107 (Michie Supp. 1997); CAL. CIV. CODE § 846 (West Supp. 1999); MICH. COMP. LAWS ANN. § 324.73301 (West 1999); NEV. REV. STAT. § 41.491(1) (1997). The Utah statute provides that "an injury resulting from gross negligence, recklessness, or intentional conduct . . ." will disqualify a person from the statutory immunity. UTAH CODE ANN. § 4-34-5 (1995). In addition to gross negligence, the Washington statute provides that intentional misconduct will disqualify a person from the immunity. WASH. REV. CODE ANN. § 69.80.031 (West Supp. 1997).

92. LA. REV. STAT. ANN. § 9:2800.4 (West 1997) (providing that the gleaning provisions do not apply if the "damage, injury or death was caused by an intentional act or gross negligence of the owner"); OHIO REV. CODE ANN. § 2305.35(B)(2)(a) (Anderson 1998) (providing that the failure to warn of a hazard or the creation or enhancement of a hazard may constitute negligence that would disqualify a person from the immunity).

93. ME. REV. STAT. ANN. tit. 14, § 159-A (West 1964 & Supp. 1998); N.C. GEN. STAT. § 106-706 (1995); TENN. CODE ANN. § 70-7-102, -103 (1995).

garding warning of any hazardous condition.⁹⁴ Under the Tennessee provisions, persons remain liable for gross negligence.⁹⁵ Under the North Carolina statute, a farmer allowing a gleaner to remove crops only owes the gleaner the same duty of care as owed a trespasser.⁹⁶ The Maine statute notes that it does not create "a duty of care or ground of liability for injury to a person or property."⁹⁷

A few states insert a good faith requirement into their gleaning statutes.⁹⁸ Under the New York statute, a good faith requirement applies to the donor and the donation.⁹⁹ The Washington statute prescribes good faith for the action of the donor.¹⁰⁰ Moreover, a requirement that the donation consist of "apparently wholesome food"¹⁰¹ or a product "apparently fit for human consumption"¹⁰² may apply. While good faith is an abstract quality that encompasses the absence of malice or design to defraud,¹⁰³ and may also involve "being faithful to one's obligation,"¹⁰⁴ these statutory requirements of good faith do pose an issue of whether good faith refers to the subjective state of mind of the Samaritan¹⁰⁵ or an objective limitation on the immunity.¹⁰⁶ The absence of a definitive meaning for the good faith provision means it is not clear whether a Samaritan's negligent conduct would disqualify a defendant from the statutory immunity.

III. Expanding the Protected Classes and Activities

The immunity from negligence provided by the Good Samaritan and gleaning statutes offers models for relief from liability that may be appropriate for other worthy persons. This section examines four categories of statutes providing legislative exceptions from common law liability: recreational use, equine liability, pick-your-own, and sport responsibility statutes. Persons who may qualify for immunity under these categories are quite unlike physicians, volunteer firemen, policemen, veterinarians, or others who are involved in the provisions of services for the public good. Commercial businesses and

94. *See id.* In addition, the Nevada statute adopts a similar liability standard by exempting conduct that constituted a "[w]illful or malicious failure to guard, or to warn against, a dangerous condition, use, structure, or activity." NEV. REV. STAT. § 41.510 (1997).

95. TENN. CODE ANN. § 70-7-102, -103 (1995). Prior to the 1987 amendment, the Tennessee statute provided immunity for gross negligence due to the fact that the conditions under which liability was unaffected were limited to "willful or wanton conduct. . . ." *See Cagle v. United States*, 937 F.2d 1073, 1075 (6th Cir. 1991) (considering the Tennessee recreational use statute and its provisions that landowners were not shielded from liability if their willful or malicious action caused a plaintiff injury).

96. N.C. GEN. STAT. § 106-706 (1995).

97. ME. REV. STAT. ANN. tit. 14, § 159-A(5) (West Supp. 1998).

98. N.Y. AGRIC. & MKTS. LAW § 71-z (McKinney 1991 & Supp. 1998); UTAH CODE ANN. § 4-34-5 (1995); WASH. REV. CODE ANN. § 69.80.031 (West 1997).

99. N.Y. AGRIC. & MKTS. LAW § 71-z(1&2) (McKinney 1991 & Supp. 1998); *see also* UTAH CODE ANN. § 4-34-5 (1995) (requiring participation and donation in good faith).

100. WASH. REV. CODE ANN. § 69.80.031 (West Supp. 1997) (prescribing that a person or gleaner donate in good faith).

101. N.Y. AGRIC. & MKTS. LAW § 71-z (McKinney 1991 & Supp. 1998).

102. WASH. REV. CODE ANN. § 69.80.031 (West 1997).

103. Black's Law Dictionary 693 (6th ed. 1990).

104. *Lowry v. Henry Mayo Newhall Mem'l Hosp.*, 229 Cal. Rptr. 620, 624 (Cal. Ct. App. 1986).

105. Under a subjective standard, a court could conclude that although a property owner was negligent, the efforts to keep the premises safe were in good faith. Under this analysis, the property owner would qualify for the statutory immunity. In the alternative, a court could find under a subjective standard that the property owner's negligence involved the lack of good faith. Under this finding, the property owner would not qualify for the statutory immunity. *See, e.g., Lowry v. Henry Mayo Newhall Mem'l Hosp.*, 229 Cal. Rptr. 620, 625 n.7 (Cal. Ct. App. 1986) (noting that gross negligence may well constitute the lack of good faith in a proper case, as such are separate issues under a subjective standard).

106. *Anderson v. Little & Davenport Funeral Home, Inc.* 251 S.E.2d 250, 252 (Ga. 1978) (finding that agreement between the plaintiff and the defendant that the Samaritan acted in good faith meant there could be no liability under an objective standard).

others may be immune from damages in tort under some of these statutes.¹⁰⁷ The array of the statutory provisions suggests considerable dissatisfaction with traditional liability standards.

A. Recreational Use Statutes

Conservation groups and persons interested in recreational activities on rural lands convinced the Michigan Legislature in 1953 to adopt a recreational use statute.¹⁰⁸ In 1965, a model recreational use statute¹⁰⁹ was drafted that generally was used in the adoption of statutes in those states lacking such legislation. Today, every state has a recreational use statute governing enumerated activities.¹¹⁰ Rather than providing statutory immunity, recreational use statutes alter the duty of care for recreational providers, including property owners, lessees, and the occupants of premises.¹¹¹ Through various provisions, the statutes designate that providers of recreational activities owe a limited duty of care to keep their premises safe.¹¹² A few statutory provisions for recreational activities digress from the traditional recreational use model's focus on the duty of care

107. The equine liability, pick-your-own, and sport responsibility statutes allow commercial businesses and persons charging fees to qualify for the statutory immunity.

108. 1953 Mich. Pub. Acts 201.

109. Church, *supra* note 10. The duty owed depends on the status of the entrant on the land. In some states, the judiciary has altered this historic duty to provide a standard of reasonable care more consistent with other tort actions. See *supra* notes 8 & 9 and accompanying text (describing the change from status to a basic test of reasonableness); see also Joan M. O'Brien, Comment, *The Connecticut Recreational Use Statute: Should a Municipality Be Immune from Tort Liability*, 15 PACE L. REV. 963, 973 (1997) (discussing the adoption of the 1979 Model Act).

110. See Appendix 1: State Recreational Use Statutes.

111. For example, the California recreational use statute delineates the altered duty of care:

An owner of any estate or any other interest in real property, whether possessory or non-possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

... An owner of any estate or any other interest in real property, whether possessory or non-possessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of any invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner. CUT Nothing in this section creates a duty of care or ground of liability for injury to person or property.

CAL. CIVIL CODE § 846 (West Supp. 1999).

112. For example, the North Carolina statute directs recreational users be treated in a similar fashion as trespassers for determining a landowner's liability:

Except as specifically recognized by or provided for in this chapter, an owner of land who either directly or indirectly invites or permits without charge any person to use such land for educational or recreational purposes owes the person the same duty of care that he owes a trespasser, except nothing in this chapter shall be construed to limit or nullify the doctrine of attractive nuisance and the owner shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge.

N.C. GEN. STAT. § 38A-4 (1995).

to address the assumption of risk.¹¹³ Because of the decreased potential of liability for recreational injuries, providers are encouraged to make their land available to others for recreational uses.¹¹⁴

The immunity of the recreational use statutes is generally available when a defendant raises the statute as a defense. However, such immunity is not absolute.¹¹⁵ A majority of the statutes maintain that persons providing recreational activities incur liability "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. . . ."¹¹⁶ Thereby, recreational use statutes may allow defendants who were grossly negligent to escape liability for injuries.¹¹⁷ Some statutes digress from this general rule and retain liability for gross negligence.¹¹⁸ The defense provided by the recreational use statute means that causes of action in negligence can be dismissed, and in some cases, causes of action in gross negligence also may be dismissed.¹¹⁹

As one might expect, individual state recreational use statutes have digressed from their historic model so that some provide quite different coverage in one state as opposed to another state.¹²⁰ Activities that qualify under a statute as recreational activities¹²¹ and whether land or premises are covered by a statute are two issues that have been dealt with differently by state legislatures.¹²² Another important issue is whether

113. See, e.g., WIS. STAT. ANN. § 895.525 (West 1997); WYO. STAT. § 34-19-123 (Michie 1997).

114. CAL. CIVIL CODE § 846 (West Supp. 1999).

115. See, e.g., O'Brien, *supra* note 109, at 973 (noting that recreational use statutes do not preclude plaintiffs from bringing lawsuits).

116. CAL. CIVIL CODE § 846 (West Supp. 1999). See Laura J. Perkins, Comment, *A Practical Guide to Recovery for Injured Air Sport Participants*, 62 J. AIR L. & COM. 559, 589-90 (1996); see also *Golding v. Ashley Cent. Irr. Co.*, 793 P.2d 897, 901 (Utah 1990) (suggesting that gross negligence defined as reckless indifference was not sufficient to show willful or malicious conduct).

117. For example, the California recreational use statute says that liability is not limited whenever there is "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. . . ." CAL. CIVIL CODE § 846 (West Supp. 1999). This suggests that instances of gross negligence may not lead to liability.

118. For example, the Tennessee recreational use statute provides that: "This chapter does not limit the liability which otherwise exists for: (1) Gross negligence, willful or wanton conduct which results in a failure to guard or warn against a dangerous condition, use, structure or activity." TENN. CODE ANN. § 70-7-104 (1995).

119. See, e.g., *Hubbard v. Brown*, 785 P.2d 1183, 1184 (Cal. 1990) (ordering reinstatement of a judgment of dismissal of a negligence claim due to the state's recreational use statute); *Hoye v. Illinois Power Co.*, 646 N.E.2d 651, 654 (Ill. App. Ct. 1995) (approving the dismissal of a complaint based on actions in negligence due to the state's recreational use statute); *Johnson v. Lloyd's of London*, 653 So.2d 226, 231 (La. Ct. App. 1995) (concluding that passive or active negligence was insufficient to show liability under the state recreational use statute); *Bragg v. Genessee County Agric. Soc'y*, 644 N.E.2d 1013, 1018 (N.Y. 1994) (affirming the dismissal of a plaintiff's cause of action due to the immunity from negligence under the state's recreational use statute).

120. See Becker, *supra* note 10 (discussing several important issues handled differently by states); Stuart J. Ford, Comment, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491 (1990) (describing the Wisconsin recreational use statute); Jeffrey C. Kestenband, Note, *Conway v. Town of Wilton: Statutory Construction, Stare Decisis, and Public Policy in Connecticut's Recreational Use Statute*, 30 CONN. L. REV. 1091 (1998) (analyzing a court's decision that the Connecticut statute did not apply to municipal property); see also *Bledsoe v. Goodfarb*, 823 P.2d 1264, 1268 (Ariz. 1991) (noting that a limitation of recreational use statutes based on the type of land covered is an exception to the general provisions of these statutes).

121. See, e.g., Becker, *supra* note 10, at 1600-02 (discussing the various activities covered by state statutes); Glen Rothstein, Note, *Recreational Use Statutes and Private Landowner Liability: A Critical Examination of Ornelas v. Randolph*, 15 WHITTIER L. REV. (1994) 1123, 1134-40 (examining whether the plaintiff engaged in a recreational activity); see also *Farnham v. Kittinger*, 634 N.E.2d 162, 164 (N.Y. 1994) (discussing whether the use of a four-wheel-drive, multipurpose vehicle was within the category of "motorized vehicle operation for recreational purposes" as required by the state recreational use statute, N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989)).

122. See, e.g., *Bledsoe v. Goodfarb*, 823 P.2d 1264, 1270 (Ariz. 1991) (finding that a roadway was not covered by the Arizona recreational use statute); *Turgeon v. Commonwealth Edison Co.*, 630 N.E.2d 1318,

minor compensation disqualifies a recreational provider from immunity under the statute. Historically, the statutory coverage only applied in the absence of a charge or fee.¹²³ Since 1979, the prohibition against fees includes admission fees so that various compensatory acts, charges, and services are permitted without compromising the protection offered by individual state statutes.¹²⁴

B. Equine Liability Statutes

Within the past ten years, approximately forty states have drawn upon the Good Samaritan paradigm to enact provisions for qualifying persons associated with equine activities.¹²⁵ An agglomeration of statutes, called the "equine liability statutes," affords encouragement for equine activities by providing equine owners and other persons protection against civil liability suits for injuries to riders.¹²⁶ Equine liability statutes set forth a statutory command whereby qualifying persons "shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities."¹²⁷ Inherent risks are dangers or conditions that are an integral part of equine activities, including equine behavior, unpredictability of reactions, hazards such as surface and subsurface conditions, and collisions with other equines and objects.¹²⁸ Variations in some statutes assert that no person is liable¹²⁹ or a person is not liable¹³⁰ for injuries of participants. Such directives are similar to the directives of Good Samaritan statutes in

1327-28 (Ill. App. Ct. 1994) (finding that a public utility was the owner of land with respect to the lake water near its land and such was subject to the Illinois recreational use statute); *Michalovic v. Genessee-Monroe Racing Ass'n, Inc.*, 436 N.Y.S.2d 468, 470 (N.Y. App. Div. 1981) (finding that a parking lot was not covered by the New York recreational use statute); *Tijerina v. Cornelius Christian Church*, 539 P.2d 634, 637 (Or. 1975) (finding land not to be agricultural and thus not covered by the Oregon recreational use statute).

123. *See, e.g.*, Becker, *supra* note 10, at 1602-05 (discussing fees and qualifying under recreational use statutes).

124. *See* Church, *supra* note 10 (discussing the changes considered with the 1979 Model Recreational Use Act). *See, e.g.*, 1998 Ariz. Sess. Laws 22 (allowing nominal fees by public entities and nonprofit corporations); ARK. CODE ANN. § 18-11-302(4) (Michie 1987 & Supp. 1999) (allowing sharing of products and contributions in kind to offset costs and eliminate losses); ILL. COMP. STAT. ANN. 65/2(d) (West 1993) (providing that a charge does not include sharing of game or fish, contributions in kind, or cash made for the purpose of properly conserving the land); IND. CODE ANN. § 14-22-10-2(b) (Michie 1995 & Supp. 1999) (providing that a monetary consideration does not include sharing of game or fish, services rendered for wildlife management, or contributions in kind made for the purpose of wildlife management); N.C. GEN. STAT. § 38A-3 (1995) (allowing contributions for remedying damages caused by education or recreational use); TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.001—.004 (West 1997 & Supp. 1999) (permitting charges if they are less than an amount as determined by the premises' ad valorem taxes); VA. CODE ANN. § 29.1-509(A) (Michie 1997) (allowing incidental sales of forest products and actions to improve the land or access); VT. STAT. ANN. tit. 12, §§ 5791—5795 (Supp. 1999) (allowing contributions for damages or to insure against damages caused by recreational use); WASH. REV. CODE ANN. § 4.24.210 (West 1988 & Supp. 1999) (allowing an administrative fee accompanying the removal of firewood); WIS. STAT. ANN. § 895.52 (6)(a) (West 1997) (permitting minor consideration in a variety of forms); *see also* *Hafford v. Great N. Nekoosa Corp.*, 687 A.2d 967, 968 (Me. 1996) (finding defendant protected by the Maine recreational use statute despite the charge of a fee). In another situation, a fee for parking was found to be distinct from a fee to use the recreational facilities so that the statutory exception applied. *Hogue v. Stone Mountain Mem'l Ass'n*, 358 S.E.2d 852 (Ga. Ct. App. 1987).

125. *See* Appendix 2: State Equine Liability Statutes.

126. *See* Centner (1995), *supra* note 11 (using the term "equine liability statutes").

127. TENN. CODE ANN. § 44-20-103 (1993).

128. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1662(f) (West Supp. 1998).

129. *See, e.g.*, N.M. STAT. ANN. § 42-13-4 (Michie Supp. 1998).

130. *See, e.g.*, N.D. CENT. CODE § 53-10-02(1) (Supp. 1997).

establishing standards of conduct; however, the immunity is circumscribed by the requirement that the injury result from an inherent risk.¹³¹

The provisions of the equine liability statutes are difficult to generalize, as some vary considerably. A few statutes delineate provisions whereby persons remain liable for negligence.¹³² Such statutes do not provide much assistance to providers of equine activities in avoiding liability for damages incurred by riders. Some statutory provisions address providers' duties of care,¹³³ others establish duties.¹³⁴ Provisions in the same statute may delineate different standards of conduct that are requisite to liability depending on the basis of the injury.¹³⁵ The most common prototype provides exceptions from liability for injuries resulting from the inherent risks of equine activities with specific exceptions under which normal state tort principles apply. In general, many equine liability statutes that establish standards of conduct that cannot be exceeded provide five major exceptions.¹³⁶

First, intentional injury is not condoned so that any allegation that includes an intentional act is outside of the immunity of the equine liability statutes.¹³⁷ Second, the statutes generally do not excuse faulty equipment or tack.¹³⁸ Next, anyone who commits an act or omission that constitutes willful or wanton disregard for the safety of a participant, and that act or omission causes the injury, is not entitled to statutory immunity under the general standard prescribed by equine statutes.¹³⁹ This has the potential to

131. Because equine liability statutes involve inherent risks, they may have some similarities with the sport responsibility statutes. *See infra* notes 170-274 and accompanying text. Yet equine liability statutes are not as ardent in displacing or establishing duties compared to the sport responsibility statutes, so are quite different.

132. *See, e.g.*, FLA. STAT. ANN. Ch. 773.03(2)(d) (Harrison 1994 & Supp. 1997) (providing liability for an act or omission that a reasonably prudent person would not have done or omitted); MO. ANN. STAT. § 537.325(4) (West Supp. 1999) (providing liability for failure to use the degree of care that a prudent person would use); MONT. CODE ANN. §§ 27-1-725, -727(2) (1997) (providing liability for foreseeable injuries where there was negligence and a duty to act in a safe manner); R.I. GEN. LAWS § 4-21-12 (Supp. 1997) (providing liability if the person failed to exercise due care under the circumstances); UTAH CODE ANN. § 78-27b-102(d) (1996) (providing liability for an act or omission that constitutes negligence).

133. *E.g.*, the suitability exception, whereby immunity is not available if a provider failed to evaluate the ability of the participant, deals with a failure to use care. *See infra* notes 141-143 and accompanying text.

134. *E.g.*, for latent defects a provider may need to post signs. *See infra* notes 144-147 and accompanying text.

135. A provider may be liable for injuries from faulty tack under a negligence standard, but for an injury on the trail a provider may only incur liability if there was an act or omission constituting willful or wanton disregard for the safety of the participant.

136. A number of other specific exceptions may apply, depending on the specific statute. In some states, horse racing is specifically exempted from coverage of the equine liability statute. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 87.002 (West 1997). Several statutes specifically exempt products liability laws (*e.g.*, IND. CODE ANN. § 34-31-5-2(c) (Michie 1998)), and some states exempt trespass (*e.g.*, S.D. CODIFIED LAWS § 42-11-4 (Michie Supp. 1998)), or animal trespass (*e.g.* COLO. REV. STAT. ANN. §§ 13-21-119(4)(c)(II), 35-46-102 (West. 1997)).

137. *E.g.*, MO. ANN. STAT. § 537.325(4) (West Supp. 1999): "The provisions of subsection 2 of this section shall not prevent or limit the liability of an equine activity sponsor, an equine professional or any other person if the . . . person: . . . Intentionally injures the participant." *Id.*

138. *E.g.*, MINN. STAT. ANN. § 604A.12 subd. 3 (West Supp. 1998) ("Subdivision 2 [immunity from liability] does not apply if any of the following exist: . . . (2) the person provided equipment or tack for the livestock and knew or should have known that it was faulty to the extent that it caused the injury or death. . . .").

139. For example, the Oregon equine liability statute characterizes this exception:

Nothing in subsection (1) of this section shall limit the liability of an equine activity sponsor or an equine professional: (A) If the equine activity sponsor or the equine professional commits an act or omission that constitutes willful or wanton disregard for the safety of the participant and that act or omission caused the injury. . . .

OR. REV. STAT. § 30.691(2)(b)(A) (Supp. 1996).

excuse gross negligence relating to injuries resulting from the inherent risks of equine activities.¹⁴⁰

A suitability exception, a fourth category, means that negligence or gross negligence is not excused in all instances.¹⁴¹ A suitability exception provides that a person providing an equine who fails "to make reasonable and prudent efforts" is not entitled to the statutory immunity.¹⁴² The suitability exception enables a plaintiff-participant to maintain an action against the defendant-provider of an equine if any one of three fundamental allegations is raised by appropriate pleadings.¹⁴³

Finally, a fifth category of exception often exists for land or facilities with a dangerous latent condition.¹⁴⁴ This exception is usually conditioned on the posting of a sign warning of the condition.¹⁴⁵ Such a sign requirement is in addition to a more general requirement that equine activity sponsors and equine professionals must post warning signs and use written warning notices in order to qualify for the statutory immunity.¹⁴⁶

140. *See, e.g.*, *Muller v. English*, 472 S.E.2d 448, 454 (Ga. Ct. App. 1996) (concluding that evidence of actions by a horse and rider were insufficient as a matter of law to support a finding of conduct manifesting a willful or wanton disregard for the safety of the plaintiff).

141. To discern the meaning of the suitability exception, it needs to be read with antecedent text. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 47/20 (West Supp. 1998):

(b) Except as provided in Section 15 [regarding participants' responsibility], nothing in this Act shall prevent or limit the liability of an equine activity sponsor, an equine professional, or any other person if the equine activity sponsor, equine professional, or person: . . . Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and determine the ability of the participant to manage safely the particular equine based on the participant's representations of his or her ability.

Id.

142. *Id.*

143. The three different allegations involve a participant's ability with equines, participant's ability with the selected equine, and the equine activity. Under the first category, the person providing the equine must have made an inquiry of the participant's ability. *See, e.g., id.* An allegation that a defendant failed to employ reasonable and prudent efforts to inquire of the participant's ability to safely engage in equine activities would raise a triable issue. The second category involves failure of a person providing an equine to determine the participant's ability to safely manage the selected equine. *See, e.g., id.* A third category involves allegations that the person providing the equine negligently failed to determine the participant's ability to engage safely in the equine activity. *See, e.g.*, UTAH CODE ANN. § 78-27b-102(1)(b)(ii)(A) (1996).

144. For example, the Illinois equine liability statute specifies an exception for dangerous latent conditions:

Except as [otherwise] provided . . . , nothing in this Act shall prevent or limit the liability of an equine activity sponsor, an equine professional, or any other person if the . . . person: . . . Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition that was known to the equine activity sponsor, equine professional, or person and for which warning signs were not conspicuously posted. . . .

745 ILL. COMP. STAT. ANN. 47/20 (West Supp. 1998).

145. *See, e.g., id.*

146. The statutory warning notice requirement mandates that sponsors and professionals post warning notice signs at visible locations near areas where the equine activities are conducted. The Illinois equine act requires defendant equine professionals to post warning signs and use written notices in order to qualify for the statutory immunity. 745 ILL. COMP. STAT. ANN. 47/25 (West Supp. 1998). Professionals also must provide a warning that is clearly readable in written contracts for professional services, instruction, and rental of equipment. *Id.* The suggested language needed for the written contract requirement is identical to that mandated for signs. *Id.*

Several of the equine liability statutes show a statutory configuration that does not follow a Good Samaritan model. Some of these statutes enumerate provisions whereby participants have statutory responsibilities or assume risks,¹⁴⁷ similar to the specialized immunity statutes for sport activities.¹⁴⁸ Generally, the statutes provide that persons assume the risks and legal liability for injuries arising out of hazards inherent in equestrian activities. Thus, a defendant could advance a defense to the effect that the plaintiff had assumed the risk of the plaintiff's injuries so that the defendant did not incur liability.¹⁴⁹ Two statutes simply address presumptions concerning standards of care relating to liability.¹⁵⁰

C. Pick-Your-Own Statutes

Several states have adopted pick-your-own statutes to limit liability for situations where the injured party should have used care while harvesting agricultural and farm products for their personal use.¹⁵¹ While picking fruit or vegetables, or cutting a Christmas tree, may be very different from more active recreational activities, the pick-your-own statutes are part of the burgeoning immunity statutes being adopted by state legislatures.¹⁵² A majority of the statutes grant immunity unless a condition creates an unreasonable risk accompanied by enumerated conditions.¹⁵³ This follows the *Restatement (Second) of Torts* concerning dangerous conditions known to or discoverable by possessors of property who cause harm.¹⁵⁴ A possessor of property is only liable if such possessor meets all of the enumerated requirements: (1) knowledge of a condition or a risk by the defendant,¹⁵⁵ (2) the failure to exercise reasonable care with respect to the condition or risk,¹⁵⁶ and (3) the injured plaintiff must not have had knowledge or reason to

147. See, e.g., CONN. GEN. STAT. ANN. § 52-577p (West Supp. 1998) (providing that persons assume the risks and legal liability for injuries arising out of hazards inherent in equestrian sports); 745 ILL. COMP. STAT. ANN. § 47/15 (West Supp. 1998) (providing for the assumption of risks and legal liability for injuries and damages from participating in an equine activity, except in specific situations); KAN. STAT. ANN. § 60-4002 (1994) (providing for the assumption of the inherent risks of domestic animal activities); W. VA. CODE §§ 20-4-4 & -5 (1996) (providing that persons are liable for acts or omissions which constitute gross negligence and that participants assume the risk and legal responsibility for injuries and losses in equestrian activities); WYO. STAT. ANN. § 1-1-123 (Michie 1997) (providing for the assumption of legal liability for injuries from the inherent risks of the sport).

148. See *infra* notes 210-18 and accompanying text.

149. Some of the statutes have "assumption of risk" in the title of a statutory section. See, e.g., KAN. STAT. ANN. § 60-4002 (1994); WYO. STAT. ANN. § 1-1-123 (Michie 1997).

150. See, e.g., HAW. REV. STAT. ANN. §§ 663B-1 to -2 (Michie 1995) (providing for a presumption that there was no negligence); ME. REV. STAT. ANN. tit. 7, § 4103 (West Supp. 1998) (providing a rebuttable presumption that conduct was not negligent).

151. See Appendix 3: State Pick-Your-Own Statutes. It might be argued that Maine and Tennessee have pick-your-own statutes, but the provisions do not apply to harvesting activities if consideration was present. ME. REV. STAT. ANN. tit. 14, § 159-A (West Supp. 1998); TENN. CODE ANN. §§ 70-7-102, -104 (1995). Thus, the Maine and Tennessee provisions are not considered to be pick-your-own statutes.

152. See, e.g., Centner, *supra* note 12 (analyzing the pick-your-own statutes).

153. For example, the Michigan pick-your-own statute says that "[a] cause of action shall not arise . . . for injuries to a person . . . who is on the land or premises for the purpose of picking and purchasing agricultural or farm products . . . unless the person's injuries were caused by a condition that involved an unreasonable risk of harm. . . ." MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1998). Additional conditions apply. *Id.* But see N.J. STAT. ANN. § 2A:42A10 (West Supp. 1999) (delineating the absence of a legal duty rather than immunity).

154. RESTATEMENT (SECOND) OF TORTS § 343 (1965) (subjecting a possessor of land liability for harm to his invitees only if the dangerous condition was known to or discoverable by the possessor).

155. This requirement focuses on whether the defendant knew or had reason to know of a condition or risk that caused an injury.

156. A defendant would qualify for the statutory dispensation if said defendant exercised reasonable care to make the condition safe or to warn the plaintiff of the condition or risk. E.g., MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1998) ("The owner, tenant, or lessee failed to exercise reasonable care to make the

know of the condition or risk that caused the injury.¹⁵⁷ Four statutes follow a different strategy and provide immunity unless the defendant engaged in willful, wanton, or reckless conduct.¹⁵⁸ Under these statutes, defendants may escape liability for gross negligence.

An initial feature concerning protection under a pick-your-own statute is who may qualify for immunity. The New Hampshire statute limits qualification to the owners of land,¹⁵⁹ which might not be very helpful to operators, occupants, tenants, lessees, and employees. The other pick-your-own statutes have broader coverage so the immunity may be expected to apply to individuals involved in pick-your-own operations.¹⁶⁰

A second feature involves a qualification concerning the location of an accident. Immunity under the Massachusetts statute only applies if the injury occurred on a "farm."¹⁶¹ Some small pick-your-own operations might not qualify within a definition of a farm. A pick-your-own statute that limits application to farms may be overly restrictive and not provide assistance for some operations.

A warning sign to advise participants of the immunity protection is a third feature that has been incorporated in the Massachusetts pick-your-own statute.¹⁶² An owner or operator of a pick-your-own operation is required to post and maintain signs with a warning notice explaining that the owner is not liable for injuries in the absence of willful or reckless conduct.¹⁶³ Similar to equine liability statutes, a warning requirement serves as a precondition to qualifying for immunity.¹⁶⁴

The question of how employees and contractors are affected by the pick-your-own statutes is another feature that varies among the pick-your-own statutes. Generally, the statutes provide that the rights of employees and contractors are not affected.¹⁶⁵ This

condition safe, or to warn the person of the condition or risk.") This seems analogous to a negligence standard; see also ARK. STAT. ANN. § 18-60-107(b) (Michie Supp. 1998); 42 PA. CONS. STAT. ANN., § 8339(a) (West Supp. 1998).

157. *E.g.*, the Michigan statute requires that "[t]he person injured did not know or did not have reason to know of the condition or risk." MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1998); see also ARK. STAT. ANN. § 18-60-107(b) (Michie Supp. 1998).

158. The Massachusetts statute provides that qualifying persons shall not be liable "in the absence of willful, wanton, or reckless conduct on the part of said owner, operator, or employee." MASS. GEN. LAWS ANN. ch. 128 § 2E (Supp. 1999); see also N.H. REV. STAT. ANN. § 508:14 (1997); OHIO REV. CODE ANN. § 901.52 (Banks-Baldwin Supp. 1998).

159. N.H. Rev. Stat. Ann. § 508:14 (1997).

160. *See, e.g.*, ARK. STAT. ANN. § 18-60-107(b) (Michie Supp. 1998) (covering owners, tenants, and lessees); MASS. GEN. LAWS ANN. ch. 128, § 2E (Sup. 1999) (covering owners, operators, or employees); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1998) (covering owners, tenants, and lessees); 42 PA. CONS. STAT. ANN. § 8339 (West Supp. 1998) (covering owners, tenants, and lessees).

161. MASS. GEN. LAWS ANN. ch. 128, § 2E (Supp. 1999).

162. The Massachusetts statute states:

Said owner or operator of said farm shall post and maintain signs which contain the warning notice specified herein. Such signs shall be placed in a location visible to persons allowed to enter said farm for the purpose of agricultural harvesting. The warning notice shall appear on a sign in black letters, with each letter to be a minimum of one inch in height and shall contain the following notice:
WARNING

Under section 2E of chapter 128 of the General Laws the owner, operator, or any employees of this farm, shall not be liable for injury or death of persons, or damage to property, resulting out of the conduct of this "pick-your-own" harvesting activity in the absence of wilful, wanton, or reckless conduct.

Id.

163. *Id.*

164. *See supra* note 146 and accompanying text.

165. *See* ARK. STAT. ANN. § 18-60-107(b) (Michie Supp. 1998); MICH. COMP. LAWS ANN. § 324.73301(5) (West Supp. 1998); 42 PA. CONS. STAT. ANN. § 8339(a) (West Supp. 1998); *contra* MASS. GEN. LAWS ANN. ch. 128 § 2E (Supp. 1998).

means that operators remain liable for injuries to employees and contractors. Such dispensation is consistent with the purpose of the pick-your-own statutes, which is to address injuries to customers harvesting produce.¹⁶⁶

The New Jersey pick-your-own statute deviates significantly from the above components.¹⁶⁷ Rather than provide immunity, the New Jersey statute negates legal duties.¹⁶⁸ The absence of a duty only applies to natural risks or hazards inherent to agricultural or horticultural land so that persons remain liable for other tortious activities.¹⁶⁹

D. Sport Responsibility Statutes

To provide for participant safety and to preclude lawsuits against persons providing specialized risky sport activities,¹⁷⁰ some states have adopted specialized statutes concerning skiing,¹⁷¹ roller skating,¹⁷² snow-moiling,¹⁷³ sport shooting,¹⁷⁴ amusement rides,¹⁷⁵ or other risky sport activities.¹⁷⁶ The provisions seek to curtail liability and lawsuits related to injuries from the inherent risks of sport activities so participants bear the burden of damages from such injuries while engaging in the sport.¹⁷⁷ Inherent risks are defined in some of the statutes. For the New York General Obligations Law, inherent risks for skiing include:

the risks of personal injury or death or property damage, which may be caused by variations in terrain or weather conditions; surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities;

166. See *supra* note 153.

167. See N.J. STAT. ANN. §§ 2A:42A10 (West Supp. 1998).

168. The New Jersey statute states:

[A]n owner, lessee or occupant of agricultural or horticultural land shall not have a legal duty to protect a person who is invited onto the land for the purposes of picking or taking agricultural or horticultural products from the natural risks or hazards that are inherent characteristics of agricultural or horticultural land. . . .

Id.

169. See *id.*

170. A recent analysis of a ski liability statute noted three legislative objectives: promoting safety, reducing injury litigation, and stabilizing economic conditions for a sport industry. *Barr v. Mount Brighton*, 546 N.W.2d 273 (Mich. Ct. App. 1996), *appeal denied* 562 N.W.2d 779 & 568 N.W.2d 671 (1997). Another state court, evaluating the coverage of an Idaho ski statute, found a legislative purpose of limiting rather than expanding the liability of ski area operators. *Northcutt v. Sun Valley Co.*, 787 P.2d 1159, 1162 (Idaho 1990).

171. See Appendix 4: State Sport Responsibility Statutes for Skiing.

172. See, e.g., GA. CODE ANN. § 51-1-43 (Supp. 1998); 745 ILL. COMP. STAT. ANN. 72/1 to 72/30 (West Supp. 1998); IND. CODE ANN. §§ 34-31-6-1 to -4 (Michie 1998); ME. REV. STAT. ANN. tit. 8, §§ 601—608 (West 1997); MICH. COMP. LAWS ANN. §§ 445.1721—1726 (West Supp. 1998); N.J. STAT. ANN. §§ 5:14-1 to -7 (West 1996); N.C. GEN. STAT. §§ 99E-10 to -14 (1997); OHIO REV. CODE ANN. §§ 4171.01—10 (West 1994 & Supp. 1998); S.C. CODE ANN. §§ 52-21-10 to -60 (Law. Co-op. Supp. 1997); TEX. HEALTH & SAFETY CODE ANN. §§ 759.001—005 (West Supp. 1998).

173. See, e.g., MONT. CODE ANN. §§ 23-2-651 to -656 (1997); S.D. CODIFIED LAWS ANN. § 32-20A-21 (1998).

174. See, e.g., MICH. COMP. LAWS ANN. § 691.1544 (West Supp. 1998); UTAH CODE ANN. §§ 47-3-1 to -3 (Supp. 1998).

175. See, e.g., ME. REV. STAT. ANN. tit. 8, §§ 801—806 (West Supp. 1997); NEV. REV. STAT. §§ 455B.010—.100 (1997).

176. See, e.g., COLO. REV. STAT. ANN. § 13-21-120 (West 1997) (baseball); GA. CODE ANN. §§ 27-4-280 to -283 (Supp. 1998) (fishing); IDAHO CODE §§ 6-1201 -1206 (1998) (outfitters and guides); 745 ILL. COMP. STAT. ANN. 52/1 - 52/99 (West 1993 & Supp. 1998) (hockey facilities); W. VA. CODE §§ 20-3B-1 to -5 (1996) (whitewater rafting).

177. See, e.g., *Skene v. Filecchia*, 539 N.W.2d 531, 534 (Mich. Ct. App. 1995), *overruled in part by Dale v. Beta-C, Inc.*, 574 N.W.2d 697 (Mich. Ct. App. 1997) (interpreting the roller-skating act [MICH. COMP. LAWS §§ 445.1721—1726 (West Supp. 1998)] *in pari materia* with the Ski Area Safety Act [MICH. COMP. LAWS §§ 408.321—344 (West 1985 & Supp. 1998)] to provide that an injury resulting from a collision with another participant must be borne by the injured participant).

and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility. . . .¹⁷⁸

Under the statutory directives concerning inherent risks, participants assume responsibility for many obvious and necessary dangers.¹⁷⁹ Operators retain liability for negligence outside statutory protection,¹⁸⁰ including non-obvious man-made hazards.¹⁸¹

These duties may be called the "sport responsibility statutes."¹⁸² Persons providing enumerated sport activities for participants,¹⁸³ as well as the participants themselves,¹⁸⁴ have statutory duties. Because these duties are important in fostering safety, participants and providers who fail to subscribe to their duties may be liable for injuries to themselves or others.¹⁸⁵

178. N.Y. GEN. OBLIG. LAW § 18-101 (McKinney 1989 & Supp. 1998).

179. *See, e.g.*, *Schaefer v. Mt. Southington Ski Area, Inc.*, No. CV 970340387S, 1997 Conn. Super. Ct. LEXIS 2824, at *6-7 (Conn. App. Ct. Oct. 22, 1997) (approving summary judgment for a defendant where a plaintiff's injury was from a rut in a slalom course); *Rousseau v. Beckley*, No. CV 95465970, 1996 Conn. Super. Ct. LEXIS 3509, at 8-9 (Conn. App. Ct. Nov. 27, 1996) (noting a ski statute provided immunity in an action alleging that a variation in terrain caused an injury); *McHerron v. Jiminy Peak, Inc.*, 665 N.E.2d 26, 28 (Mass. 1996) (finding as a matter of law that a bare spot was an unavoidable risk inherent in the sport of skiing); *Barr v. Mount Brighton*, 548 N.W.2d 273 (Mich. Ct. App. 1996), *appeal denied* 562 N.W.2d 779 & 568 N.W.2d 671 (1997) (finding that summary judgment was appropriate for a defendant in a ski injury case in which the plaintiff had struck a tree).

180. *See, e.g.*, *Terry v. Ober Gatlinburg, Inc.*, No. 03A01-9701-CV-00026, 1998 Tenn. App. LEXIS 76, at *17 (Tenn. Ct. App., Feb. 3, 1998) (declining to grant summary judgment pursuant to a ski statute because the negligent rental operations was not afforded immunity by the statute).

181. *See, e.g.*, *Brett v. Great Am. Recreation, Inc.*, 677 A.2d 705, 718 (N.J. 1996) (finding that under the ski statute, the question of whether an obvious, man-made hazard existed was one for the jury); *Brough v. Hidden Valley, Inc.*, 711 A.2d 382, 388 (N.J. Super. Ct. App. Div. 1998) (concluding that the absence of guidance concerning the obviousness of an alleged man-made hazard meant the jury instruction was inadequate). The question of whether a hazard is obvious being one for the jury. *Brett*, 677 A.2d at 718; *Brough*, 711 A.2d at 386-87.

182. *See* Appendix 4: State Sport Responsibility Statutes for Skiing; Appendix 5: State Sport Responsibility Statutes for Sports other than Skiing.

183. The Colorado ski statute is fairly typical:

(1) Each ski area operator shall maintain a sign and marking system as set forth in this section in addition to that required by section 33-44-106. All signs required by this section shall be maintained so as to be readable and recognizable under conditions of ordinary visibility.

(2) A sign shall be placed in such a position as to be recognizable as a sign to skiers proceeding to the uphill loading point of each base area lift depicting and explaining signs and symbols which the skier may encounter at the ski area.

COLO. REV. STAT. ANN. § 33-44-107(1)&(2) (West 1995).

184. The Colorado ski statute may again be used to show duties:

(1) Each skier solely has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability. . . .

(2) Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him.

Id. § 33-44-109 (West 1998).

185. For example, the Massachusetts ski statute delineates participant assumption of risk for injuries: A skier skiing down hill shall have the duty to avoid any collision with any other skier, person or object on the hill below him, and, except as otherwise provided in this chapter, the responsibility for collisions by any skier with any other skier or person shall be solely that of the skier or person involved and not that of the operator, and the responsibility for the collision with any obstruction, man-made or otherwise, shall be solely that of the skier and not that of the operator, provided that such obstruction is properly marked pursuant to the regulations promulgated by the board.

A number of reasons may be offered to explain why commercial recreational operations secured a sport responsibility statute rather than amending provisions regarding fees in the recreational use statutes. First, there may have been a reluctance to interfere with established recreational use statutes due to a fear that changes would interrupt established principles and might curtail the immunity in special cases. Second, recreational use statutes incorporated the assumption that they were limited to persons not charging an admission fee,¹⁸⁶ or at a minimum, circumscribing the remuneration allowed to qualify for the statutory immunity.¹⁸⁷ Broadening recreational use statutes to cover commercial enterprises would have required a major change.¹⁸⁸ Interest groups may have found it advantageous to proceed with specific legislation for individual sports that did not change or threaten existing dispensation provided for other recreational activities under recreational use statutes.¹⁸⁹

The recreational use model does not differentiate between inherent risks and other risks. Disjunctive statutory language would be needed to incorporate such a distinction.¹⁹⁰ A statutory strategy was needed that placed risks inherent in the sport on participants, while having property owners or recreational activity providers responsible for other risks under tort law provisions.¹⁹¹ It was easier to draft a separate new statute. Another reason for separate statutes is the distinct risks of different commercial recreational activities.¹⁹² Because a description of inherent risks for skiing is different from the inherent risks of other risky sports, it was easier to draft legislation on the inherent risks of a single sport.¹⁹³ Piecemeal legislation only applying to a given industry entails fewer exceptions so that sport-specific statutes were politically advantageous.¹⁹⁴

Although the various sport responsibility statutes have numerous specialized provisions, four significant features may be distinguished. The first two attributes involve duties: for participants and for providers. Prohibitions against recovery for some injuries and a grant of immunity for sport providers are two other important attributes.

1. Duties for Providers

A general provision of most sport responsibility statutes is to enumerate duties for persons making property or activities available to the public. Under ski statutes, provid-

... A skier shall be presumed to know the range of his own ability to ski on any slope, trail or area. A skier shall be presumed to know of the existence of certain unavoidable risks inherent in the sport of skiing, which shall include, but not be limited to, variations in terrain, surface or subsurface snow, ice conditions or bare spots, and shall assume the risk of injury or loss caused by such inherent risks.

MASS. GEN. LAWS ANN. ch. 143, § 71O (West 1991 & Supp. 1998).

186. The issue of persons charging fees qualifying for the dispensation provided by recreational use statutes is an issue for further consideration. However, rather than open this issue with an amendment to the recreational use statute, operators of commercial recreational activities seem to have found it easier to advance separate legislation.

187. Various other forms of compensation are permitted. *See infra* notes 317-36.

188. Recreational use statutes were not intended for commercial activities.

189. This has involved legislation on a sport-by-sport basis.

190. If recreational use statutes were revised to differentiate inherent risks, they might become rather long, especially if they attempted to enumerate specialized provisions for particular activities. *See, e.g.*, ALASKA STAT. §§ 05.45.010—210 (Michie 1994); COLO. REV. STAT. ANN. §§ 33-44-101 to -114 (West 1995) (delineating specialized provisions on skiing that are rather lengthy).

191. Again, specialized and detailed provisions are required for the responsibility statutes, and such provisions would be completely different from the recreational use provisions.

192. The numerous exceptions incorporated in many equine liability statutes disclose a desire to legislate different liability rules for different situations. *See supra* notes 137-150 and accompanying text.

193. *Contra* WYO. STAT. ANN. §§ 1-1-121 to -123 (Michie 1997).

194. By limiting coverage to a single sport, it could be written so fewer persons would object.

ers often bear responsibilities to have trained personnel,¹⁹⁵ inspect slopes,¹⁹⁶ and to post appropriate warning and informational signs or other safety features.¹⁹⁷ Because sport responsibility statutes enumerate duties for providers, they may increase liability due to specific duties set forth by the legislative grant.¹⁹⁸ Moreover, some statutes decline to overrule common-law duties,¹⁹⁹ while other statutory duties may be interpreted to preclude persons from obtaining releases from liability.²⁰⁰ In these cases, the provisions may restrict the options available to reduce liability for persons providing commercial recreational activities.

The connotations of statutory duties and releases were considered by the West Virginia Supreme Court in *Murphy v. North American River Runners, Inc.*²⁰¹ A plaintiff sued for injuries that occurred on a rafting trip,²⁰² an activity within the provisions of the West Virginia Whitewater Responsibility Act.²⁰³ Based upon the provisions of an anticipatory release signed by the plaintiff, the defendant outfitter moved for summary judgment, which was granted by the trial court.²⁰⁴ On appeal, the court found that the Whitewater Responsibility Act established a statutory standard of care.²⁰⁵ Commercial whitewater guides need to “conform to the standard of care expected of members of their profession.”²⁰⁶ Any release that purported to exempt an outfitter from liability to someone who was bound by the statutory duty was unenforceable.²⁰⁷ By averring that the defendant's guide had failed to conform with the statutory duty of care, the plaintiff established an issue of material fact.²⁰⁸ Because the Whitewater Responsibility Act established a standard of care that was the existing standard of care expected of whitewater guides, the Act did not meaningfully alter the standard of care owed to whitewater participants.²⁰⁹

2. Duties for Participants

A second feature of sport responsibility statutes involves specified duties or responsibilities for participants.²¹⁰ The most common provision says that sport participants

195. *E.g.*, N.Y. GEN. OBLIG. LAW § 18-103 (McKinney 1989 & Supp. 1998) (requiring employee training sessions).

196. *See id.* (mandating inspection of slopes and trails at least twice a day).

197. *See supra* note 183 (duties of providers under the Colorado ski statute).

198. *See, e.g.*, *Sytner v. State*, 645 N.Y.S.2d 654, 656 (N.Y. App. Div. 1996) (finding that the provider failed to comply with the state ski statute concerning appropriate signs of maintenance activities).

199. *See, e.g.*, *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 80 (Colo. 1998) (concluding that Colorado's ski statute did not supercede the common-law standard of care for ski lift operators).

200. *See, e.g.*, *Yauger v. Skiing Enters., Inc.*, 557 N.W.2d 60, 61 (Wis. 1996) (allowing plaintiffs to continue with a suit involving a ski accident despite an exculpatory contract because it was void as against public policy); *Murphy v. North Am. River Runners, Inc.*, 412 S.E.2d 504, 512-13 (W. Va. 1991) (finding that a standard of care was established by the statute and it could not be altered by a release form, meaning a whitewater outfitter was not entitled to summary judgment).

201. 412 S.E.2d 504 (W. Va. 1991).

202. *See id.* at 508.

203. W. VA. CODE §§ 20-3B-1 to -5 (1996). Under the Act, outfitters and guides are granted an exception from liability if they comply with statutory duties and applicable rules. *Id.* §§ 20-3B-4 & -5.

204. *Murphy*, 412 S.E.2d at 508.

205. *See id.* at 511-12.

206. *Id.* (citing W. VA. CODE § 20-3B-3(b) (1996)).

207. *Murphy*, 412 S.E.2d at 512.

208. *Id.* at 512-13.

209. Under the statute, the guide needs to conform the standard of care expected of members of the profession, which seems to be very similar to a reasonable duty of care. W. VA. CODE § 20-3B-3(b) (1996).

210. This may include passengers of tramways and ski lifts as well as skiers. *E.g.*, MONT. CODE ANN. §§ 23-2-735, -736 (1995): “No passenger may: (1) board or disembark from a passenger tramway except at an area designated for such purpose. . . .” *Id.* § 23-2-735. “A skier has the duty to ski at all times in a manner that avoids injury to the skier and others and to be aware of the inherent risks of the sport.” *Id.* § 23-2-736(1).

have a duty to engage in a sport within the limits of their ability.²¹¹ Participants may also have responsibilities to read and obey signs and directions so as to better engage in safe sport activities.²¹² Furthermore, cases have interpreted this duty to mean that participants are liable for injuries from obvious and necessary dangers.²¹³ This follows the historic common-law doctrine *volenti non fit injuria*.²¹⁴ This doctrine determines the presence or absence of a legal duty by employing an inherent risk analysis.²¹⁵

Participant duties operate with other provisions of the sport responsibility statutes to reduce situations in which participants can recover damages for injuries from providers.²¹⁶ For example, skiers straying from designated trails may compromise their ability to recover for injuries.²¹⁷ At the same time, participant duties may create liability for injuries to fellow participants under a statute's provisions.²¹⁸

3. Prohibitions Against Recovery

A third feature of sport responsibility statutes is a statutory provision that precludes participants from recovering for some injuries. In general, participants cannot "make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing."²¹⁹ In a few instances, sport responsibility statutes provide that spectators also assume inherent risks.²²⁰ The duty for sport participants means that they assume inherent risks of the sport in a similar manner as under equine liability statutes.²²¹

A critical issue under sport responsibility statutes is whether a court can determine what is an inherent risk or whether this issue will require a jury determination.²²² Although some courts have found that a sport responsibility statute enabled them to dismiss an injury case as a matter of law because the injury was from an inherent risk of the sport,²²³ other courts have left the issue for a jury.²²⁴

The consideration of a number of cases involving skiing injuries have allowed courts to grant summary judgment without a trial. In *Schaefer v. Mt. Southington Ski*

211. See *supra* notes 184-185 (participant duties under the ski statutes).

212. See, e.g., MASS. GEN. LAWS ANN. ch. 143, §71O (West 1991 & Supp. 1998) (directing skiers not to ski on closed trails and to have attached to skis a device to prevent a runaway ski).

213. *Schmitz v. Cannonsburg Skiing Corp.*, 428 N.W.2d 742, 743 (Mich. Ct. App. 1988) (finding that the legislature decided that skiers assume the obvious and necessary dangers of skiing under the Michigan ski statute, MICH. COMP. LAWS ANN. §§ 408.321—344 (West 1985 & Supp. 1996)).

214. By engaging in the action, the person accepts obvious and necessary dangers. See Hansen and Duerr, *supra* note 26, at 154-58 (presenting *volenti non fit injuria* as primary assumption of risk).

215. See Hansen-Stamp, *supra* note 13, at 251.

216. See *infra* notes 248-274 and accompanying text (discussing immunity for providers of sport activities).

217. See, e.g., *Long v. Bogus Basin Recreational Ass'n*, 869 P.2d 230, 233 (Idaho 1994) (finding that a skier had violated statutory duties when he went off designated trails).

218. See, e.g., *Duncan v. Kelly*, 671 N.Y.S.2d 841, 842 (N.Y. App. Div. 1998) (finding that a participant may be liable for injuries to a fellow participant due to a breach of the statutory duty to remain in control of speed and course so as to avoid contact with other skiers).

219. COLO. REV. STAT. § 33-44-112 (West 1995).

220. See, e.g., N.C. GEN. STAT. § 99E-13 (1997) (stating that "[r]oller skaters and spectators are deemed to have knowledge of and to assume the inherent risks of roller skating. . .").

221. See *supra* notes 127-131 and accompanying text.

222. As noted by Hansen-Stamp, if courts decide what is an inherent risk, a jury trial can be avoided. Hansen-Stamp, *supra* note 13, at 277.

223. See, e.g., *Schaefer v. Mt. Southington Ski Area, Inc.*, No. CV 970340387S, 1997 Conn. Super. Ct. Ct. LEXIS 2864, at *8-9 (Conn. App. Ct. Oct. 22, 1997); *Rousseau v. Beckley*, 1996 Conn. Super. Ct. Ct. LEXIS 3509, at *6-7 (Conn. App. Ct. Nov. 27, 1996); *McHerron v. Jiminy Peak, Inc.*, 665 N.E.2d 26, 28 (Mass. 1996); *Saldarini v. Wachusett Mountain Ski Area, Inc.*, 665 N.E.2d 79, 79 (Mass. 1996); *Giordano v. Shanty Hollow Corp.*, 617 N.Y.S.2d 984, 985 (N.Y. App. Div. 1994).

224. See, e.g., *Mead v. M.S.B., Inc.*, 872 P.2d 782, 789 (Mont. 1994); *Merrill v. Sugarloaf Mountain Corp.*, 698 A.2d 1042, 1044 (Me. 1997).

Area, Inc., a plaintiff was injured when she hit a rut on a slalom course.²²⁵ The defendant ski provider argued that it was immune because of the provisions of the Connecticut ski statute.²²⁶ Under the statute, the plaintiff assumed responsibility for the hazards inherent in the sport of skiing.²²⁷ The statutory description of inherent risks provided that such risks included variations in the terrain of the trail or slope and variations in snow conditions.²²⁸ Pursuant to the statute's definition and the plaintiff's allegations, the court found no issue of fact to be determined.²²⁹ As a matter of law, the plaintiff's injuries arose from an inherent risk.²³⁰

A Montana court concluded that the issue of whether a plaintiff's injuries were caused by risks inherent to skiing could not be determined as a matter of law.²³¹ The plaintiff was injured when he left a trail and hit a rocky outcropping.²³² Because he was not on the trail, he was not injured within the "skiing terrain" covered by the ski statute.²³³ Rather, the question presented was whether the rocky outcropping causing plaintiff's injuries was within the statutory definition of a bare spot.²³⁴ The court suggested that a jury needed to make the determination whether the injury resulted from an inherent risk.²³⁵

A lawsuit for skiing injuries in Maine led to a similar result:²³⁶ the court decided a jury was required to determine whether the skier's injuries were caused by risks inherent in skiing.²³⁷ However, the statute failed to specify these risks.²³⁸ Given the absence of a definition, the court drew upon case law to find that the issue of whether an injury was from an inherent risk depended on the factual circumstances.²³⁹ Thus, a trier of fact was needed. Because Maine's current ski statute defines inherent risks,²⁴⁰ a future case con-

225. *Schaefer v. Mt. Southington Ski Area, Inc.*, No. CV 970340387S, 1997 Conn. Super. Ct. LEXIS 2864, at *7 (Conn. App. Ct. Oct. 22, 1997).

226. CONN. GEN. STAT. ANN. § 29-212 (West 1990). The defendant also argued that it had not breached any duty to the plaintiff. *Schaefer*, 1997 Conn. Super. Ct. LEXIS 2864, at *7.

227. *Schaefer*, 1997 Conn. Super. Ct. LEXIS 2864, at *7.

228. The Connecticut statute states:

Each skier shall assume the risk of and legal responsibility for any injury to his person or property arising out of the hazards inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area by the ski area operator, his agents or employees. Such hazards include, but are not limited to: (1) Variations in the terrain of the trail or slope which is marked in accordance with subdivision (3) of section 29-211 or variations in surface or subsurface snow or ice conditions, except that no skier assumes the risk of variations which are caused by the operator unless such variations are caused by snow making, snow grooming or rescue operations. . . .

CONN. GEN. STAT. ANN. § 29-212 (West 1990).

229. *Schaefer*, 1997 Conn. Super. Ct. LEXIS 2864, at *8-9.

230. *Id.*

231. *Mead v. M.S.B., Inc.*, 872 P.2d 782, 789 (Mont. 1994).

232. *Id.*

233. *Id.*

234. MONT. CODE ANN. § 23-2-736(4)(b) (1995) ("Risks inherent in the sport of skiing are: . . . (b) bare spots and thin snow cover caused by limited snowfall, melting, wind erosion, skier action, grooming, or unconsolidated base. . . .").

235. *Mead*, 872 P.2d at 789.

236. *Merrill v. Sugarloaf Mountain Corp.*, 698 A.2d 1042, 1044 (Me. 1997).

237. *Id.*

238. *Id.* The statute in issue was replaced by Maine's current ski statute. ME. REV. STAT. ANN. tit. 32, § 15217 (West Supp. 1997). The absence of a detailed definition of inherent risks should not necessarily relegate the determination to a jury. See Hansen-Stamp, *supra* note 13, at 273 - 76 (claiming that the Wyoming statute and its absence of a detailed description of inherent risks should not preclude the court from determining whether a condition causing the injury was an inherent risk).

239. *Merrill*, 698 A.2d at 1044.

240. ME. REV. STAT. ANN. tit. 32, § 15217(1)(A) (West Supp. 1997).

sidering whether a skiing injury was from an inherent risk might be decided as a matter of law.²⁴¹

In addition to a recreational use statute, Wyoming has adopted a sport responsibility statute known as the Wyoming Recreational Safety Act.²⁴² With the most recent statutory amendment, the legislature declined to enumerate what risks were within the statutory definition of "inherent risks."²⁴³ In a detailed analysis of the Wyoming statute, Hansen-Stamp argues that the issue of whether an injury was a result of an inherent risk is a question of law.²⁴⁴ Pursuant to the statute, if an inherent risk caused an injury, the defendant would not owe a duty to the plaintiff.²⁴⁵ For a case where the plaintiff's injury resulted from an inherent risk, the pre-trial motion to dismiss or request for summary judgment would plead the Wyoming Recreational Safety Act as a defense of failure to state a claim for which relief can be granted.²⁴⁶ If the court determined an injury was caused by a condition that was an inherent risk, the absence of a duty by the defendant would require dismissal of the case.²⁴⁷

4. Immunity for Sport Providers

A fourth feature of some sport responsibility statutes involves a grant of immunity for sport providers. Sport participants may grant activity providers immunity for civil actions²⁴⁸ or the responsibility statute may say that persons providing sport activities are not liable unless injury or damage was caused by failure to comply with duties.²⁴⁹ In this manner, sport providers can avoid liability for some injuries.²⁵⁰ Of course, a person will

241. *Merrill*, 698 A.2d at 1044 n.3. The court noted that it was not deciding or anticipating the effect of the revised statute's definition of inherent risk because it was not an issue of the case. *Id.*

242. WYO. STAT. §§ 1-1-121 to -123 (Michie 1997).

243. *Id.* The statute does define "inherent risk": "'Inherent risk' with regard to any sport or recreational opportunity means those dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational opportunity." *Id.* § 1-1-122(a)(i).

244. Hansen-Stamp, *supra* note 13, at 272-77.

245. The Wyoming statute states:

Any person who takes part in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity.

WYO. STAT. § 1-1-123(a) (Michie 1997); *see also* Hansen-Stamp, *supra* note 13, at 273-74.

246. Hansen-Stamp, *supra* note 13, at 273.

247. *See id.*

248. For example, the Connecticut ski statute provides:

It shall be a special defense to any civil action against an operator by a skier that such skier: (1) Did not know the range of his own ability to negotiate any trail or slope marked in accordance with subdivision (3) of section 29-211; (2) did not ski within the limits of his own ability; (3) did not maintain reasonable control of speed and course at all times while skiing; (4) did not heed all posted warnings; (5) did not ski on a skiing area designated by the operator; or (6) did not embark on or disembark from a passenger tramway at a designated area. In such civil actions the law of comparative negligence shall apply.

CONN. GEN. STAT. ANN. § 29-214 (West 1990).

249. The West Virginia Whitewater Responsibility Act shows such statutory language:

No licensed commercial whitewater outfitter or commercial whitewater guide acting in the course of his employment is liable to a participant for damages or injuries to such participant unless such damage or injury was directly caused by failure of the commercial whitewater outfitter or commercial whitewater guide to comply with duties.

W. VA. CODE § 20-3B-5(a) (1996).

250. *See, e.g., Northcutt v. Sun Valley Co.*, 787 P.2d 1159, 1163 (Idaho 1990) (finding that by conspicuously marking the entrance to ski slopes or areas, the sport provider had met the statutory duty and did not incur liability for a skier's injuries).

need to be within the statutory purview of a provider to qualify for the immunity of a sport responsibility statute.²⁵¹ The potential for the sport responsibility statutes to achieve their stated purpose of reducing the liability of recreational operators may be observed by examining two cases that considered the Idaho ski statute.²⁵²

In *Northcutt v. Sun Valley Co.*,²⁵³ an injured skier sued the operator for negligence concerning a signpost.²⁵⁴ While both the plaintiff and the defendant agreed that the ski statute immunized the defendant from liability from risks inherent in the sport of skiing, they disagreed whether the plaintiff's injuries were caused by an inherent risk.²⁵⁵ Pursuant to a duty provided by the ski statute,²⁵⁶ the defendant operator had placed a sign marking the relative degree of difficulty of the slope and trails.²⁵⁷ The signpost holding this sign was the object with which the plaintiff had collided, and the plaintiff alleged the construction or placement of the sign involved negligence.²⁵⁸ In examining the ski statute, the Idaho Supreme Court found that operators have a statutory duty "not to 'intentionally or negligently cause injury to any person,'"²⁵⁹ but have no duty with respect to activities undertaken to lessen risks inherent in the sport of skiing.²⁶⁰ Because of the specific language that activities undertaken to reduce risks shall not "impose on the operator any duty to accomplish such activities to any standard of care,"²⁶¹ the court found that running into the signpost was an inherent risk for which the defendant was immune due to the statutory ski provisions.²⁶² Given the statutory reprieve, the defendant was entitled to summary judgment.²⁶³

In *Long v. Bogus Basin Recreational Ass'n*,²⁶⁴ the Idaho Supreme Court again considered issues about the Idaho ski statute. An injured skier brought suit against a ski operator for injuries from a ski accident.²⁶⁵ One of the plaintiff's arguments was that the defendant operator was negligent in not providing a sign indicating the relative degree of difficulty as required by the ski statute.²⁶⁶ The court found that the plaintiff was ski-

251. See, e.g., *Davis v. Sun Valley Ski Educ. Found., Inc.*, 941 P.2d 1301, 1304 (Idaho 1997) (finding that the Idaho ski statute did not provide immunity to a non-profit corporation and its employee for possible negligence in setting a ski course because they were not operators as defined by the statute).

252. See *Northcutt v. Sun Valley Co.*, 787 P.2d 1159 (Idaho 1990); *Long v. Bogus Basin Recreational Ass'n*, 869 P.2d 230 (Idaho 1994); IDAHO CODE §§ 6-1101 to -1109 (1990).

253. 787 P.2d 1159 (Idaho 1990).

254. *Northcutt*, 787 P.2d at 1160. Another skier had collided with the plaintiff and caused the plaintiff to then collide with the signpost. *Id.* at 1160-61. The skier who allegedly caused the accident left without being identified. *Id.* The plaintiff also alleged that the defendant had a duty to identify the skier who caused the accident, but the court found no duty. *Id.* at 1163-64.

255. *Northcutt*, 787 P.2d at 1161. Plaintiff argued that the sign was improperly placed and should have been properly padded. *Id.*

256. IDAHO CODE § 6-1103 (1990).

257. *Northcutt*, 787 P.2d at 1163.

258. *Id.* at 1161-63 (arguing that the sign should have been constructed with break-away poles).

259. *Id.* at 1162. (quoting IDAHO CODE § 6-1103(10) (Supp.1989)).

260. *Northcutt*, 787 P.2d at 1162 (analyzing IDAHO CODE §§ 6-1103, -1104, -1106 (1990)). Rather, skiers assume the inherent risks of skiing. IDAHO CODE § 6-1106 (1990).

261. *Northcutt*, 787 P.2d at 1163 (quoting IDAHO CODE § 6-1103(10) (Supp.1989)).

262. *Id.* at 1163. See IDAHO CODE § 6-1107 (1990).

263. *Northcutt*, 787 P.2d at 1166.

264. 869 P.2d 230 (Idaho 1994).

265. *Id.* at 231. Plaintiff's leg injuries resulted from the plaintiff performing a "rock drop off into other rocks." *Id.*

266. The Idaho statute states:

Every ski area operator shall have the following duties with respect to their operation of a skiing area: . . . (3) To mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty; and those slopes, trails, or areas which are closed, shall be so marked at the top or entrance.

IDAHO CODE § 6-1103 (1990).

ing in an undesignated area so there was no duty to mark the area.²⁶⁷ The plaintiff also argued he was not a skier as defined by the ski statute²⁶⁸ since he went off the designated trails.²⁶⁹ The court decided that the plaintiff skier had violated his statutory duties²⁷⁰ by going off the trail.²⁷¹ If skiers who went off trails were no longer subject to the ski statute, skiers would be allowed to nullify some of the statutory responsibilities for participants.²⁷² The court opined that the ski statute establishes duties and the standard of care for skiers and ski operators.²⁷³ The operator had not violated any statutory duties while the injured participant had assumed the risk for his accident by skiing into an unmarked area.²⁷⁴

IV. Topics for Further Consideration

An evaluation of the various immunity statutes suggests that they offer provisions that reduce the likelihood that providers of services and activities will be liable for damages from injuries. At the same time, the evaluation reveals five topics that might be further examined to assist in discerning a preferred strategy for statutory dispensation. First, statutory affirmative defenses for gross negligence raise the question whether these can be defended in a society that strives for a fair resolution of disputes. Second, limitations on admission fees in recreational use statutes, but not in sport activity and other recent immunity statutes, may be overly exacting. Third, immunity for some activities might be conditioned on encouraging safer recreational activities. Fourth, the reduction of litigation expenses, a goal of some immunity statutes, must be balanced against other issues of fairness. Finally, the array of immunity statutes shows an accumulation of diverse provisions and privileged activities that defies simple rules and categorization. By contrasting alternative strategies established in individual immunity statutes, ideas for reform and simplification are illustrated for further consideration.

A. Immunity Statutes Sanctioning Excessive Conduct

Statutory affirmative defenses present issues as to whether particular conduct qualifies for the granted immunity. A comparison of statutory provisions raises concern whether some statutes may be overgenerous in protecting persons who engage in egregious conduct, generally gross negligence. Many immunity statutes provide that qualifying persons are not liable for damages if they meet the conditions set forth in the statute.²⁷⁵ Most statutes provide that the affirmative defense applies only if the actor was not grossly negligent.²⁷⁶ Whenever a plaintiff alleges egregious conduct above the conduct protected by the statute, an issue of whether the defendant breached a duty of care is

267. *Long*, 869 P.2d at 232. Moreover, it was found that the defendant had no duty with respect to affirmative steps that could have averted the plaintiff's injuries. *Id.* 231. The court cited its finding from *Northcutt*, 787 P.2d at 1163, that there are no other duties other than those stated in IDAHO CODE § 6-1103 (1990). *Long*, 869 P.2d at 232.

268. IDAHO CODE § 6-1102(6) (1990). A skier is "any person present in the skiing area . . . engaging in the sport of skiing by utilizing the ski slopes and trails . . ." *Id.*

269. *Long*, 869 P.2d at 233.

270. Under the ski statute, skiers had a duty "to ski only on a skiing area designated by the ski operator." IDAHO CODE § 6-1106 (1990).

271. *Long*, 869 P.2d at 233.

272. *Id.* See also IDAHO CODE § 6-1106 (1990).

273. *Long*, 869 P.2d at 233.

274. *Id.*

275. For example, the New York Good Samaritan statute succinctly provides immunity for volunteer firefighters: "Members of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters. . . ." N.Y. GEN. MUN. LAW § 205-b (McKinney Supp. 1998).

276. See *supra* notes 45-46 and accompanying text.

established for consideration. Thereby, the plaintiff is entitled to a day in court, and the defendant will need to respond to the allegations. By retaining liability for gross negligence, the statutes may not be very significant in curtailing tort lawsuits.

As previously noted, the Good Samaritan paradigm only provided immunity for negligence, and this immunity was circumscribed by other provisions.²⁷⁷ The analysis of immunity statutes suggests that a few of the statutes retreat from the negligence standard that has historically been a part of the Good Samaritan paradigm. Under some of the veterinary Good Samaritan,²⁷⁸ recreational use,²⁷⁹ equine liability,²⁸⁰ and pick-your-own statutes,²⁸¹ persons can escape liability for actions involving gross negligence because the statutory provisions provide an affirmative defense except where the defendant engaged in willful, wanton, or reckless conduct.²⁸² Although these statutes may sanction gross negligence, it may be advanced that such statutory dispensation goes too far. For example, under some of these statutes persons engaged in profit-seeking business enterprises may qualify for the proffered immunity.²⁸³

An analysis of a recent case involving a horse accident shows the distinction between statutory immunity involving the absence of willful or wanton conduct as opposed to an absence of gross negligence.²⁸⁴ In *Muller v. English*,²⁸⁵ an experienced equestrian was injured when defendant Muller's horse kicked her without warning in the leg during a fox hunt.²⁸⁶ The plaintiff alleged that the horse was a habitual kicker and vicious, and that these facts established a willful or wanton disregard for the plaintiff's safety.²⁸⁷ Based upon the provisions of the Georgia equine liability statute,²⁸⁸ the defendants moved for summary judgment.²⁸⁹ They argued that there was no evidence that the defendants had engaged in an act that constituted a willful or wanton disregard for the

277. The Good Samaritan paradigm had five elements that needed to be met to qualify for immunity. *See supra* notes 36-48 and accompanying text.

278. *See supra* notes 67-69 and accompanying text.

279. *See supra* notes 116-17 and accompanying text.

280. For equine liability statutes, various statutory exceptions would cause a provider to be liable for gross negligence in many situations. Injuries resulting from gross negligence would not be compensated only if they involved an inherent risk. *See supra* notes 139-140 and accompanying text.

281. *See supra* note 158 and accompanying text.

282. For example, under an equine statute persons have a statutory defense against liability for damages from inherent injuries but the defense is not available if the "the person committed an act or omission with willful or wanton disregard for the safety of the participant and that act or omission caused the injury." TEX. CIV. PRAC. & REM. CODE ANN. § 87.004(4) (West 1997). Although other exceptions may mean a person incurs liability for some injuries, the potential remains that a defendant's gross negligence does not result in liability.

283. Immunity is available for profit-seeking businesses under the equine liability and pick-your-own statutes.

284. *See Centner, Modifying Negligence for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors*, *supra* note 11, at 650-52 (analyzing two cases to disclose potential immunity for gross negligence).

285. 472 S.E.2d 448 (Ga. App. 1996).

286. *Id.* at 450.

287. *Id.* at 452-54. The plaintiff was not able to substantiate the allegation of the animal being a kicker; rather the evidence showed the horse had kicked on two other occasions. *Id.* Plaintiff argued that Muller's horse was a dangerous latent condition because it was a vicious animal allowed by careless management to be at liberty. *Id.* The court dispensed with this argument through a reasoned analysis of the pertinent definitions. *Id.*

288. GA. CODE ANN. §§ 4-12-1 to -4 (1995).

289. *Muller*, 472 S.E.2d at 450. The defendants argued that the injury resulted from an inherent risk of the sport. *Id.*

safety of the participant.²⁹⁰ In the absence of such evidence, the defendants claimed immunity under the state's equine liability statute.²⁹¹

In considering the denial of defendants' summary judgment, the appellate court analyzed the conduct protected by the equine liability statute. The plaintiff needed to present evidence that defendant Muller had committed an act or omission that constituted willful or wanton disregard for the safety of the plaintiff.²⁹² To show wanton conduct, the conduct needs to be "so reckless or so charged with indifference to the consequences as to be equivalent in spirit to actual intent."²⁹³ Because the equine activity was a fox hunt, the conduct of the defendant's horse was ordinary equine behavior, and thus, did not meet the statutory standard of willfulness.²⁹⁴ Under the statute, the defendant qualified for immunity. There was no issue for consideration by a jury.²⁹⁵

If an equine liability statute did not excuse gross negligence, the *Muller* allegation of an injury from a kick of the defendant's horse would be analyzed differently. The evidence suggested that, on occasion, the horse had kicked others.²⁹⁶ Although the court found such conduct not to be willful or wanton disregard of the safety of others,²⁹⁷ the alleged facts introduce "room for difference of opinion between reasonable men . . . whether in degree the negligence amounts to gross negligence. . . ."²⁹⁸ Because the right to draw inferences from the evidence is within the exclusive province of the jury, the facts about an "occasional kick" would present a question²⁹⁹ for a jury as to possible gross negligence.³⁰⁰ Thus, a statute providing immunity in the absence of gross negligence rather than the absence of a willful and wanton injury standard would preclude courts from disposing of some cases by summary judgment.

The issue for consideration is whether adequate public justification exists for a statute to provide immunity for gross negligence. A basis submitted for the recreational use statute was to encourage the provision of land and facilities to others for recreational activities.³⁰¹ Another justification that may be advanced in support of such a statutory configuration is a desire to curtail litigation.³⁰² If an immunity statute only provides

290. *Id.* Proof of willfulness or wantonness was required due to the immunity provided by the equine liability statute. GA. CODE ANN. § 4-12-3(b)(3) (1995).

291. *Muller*, 472 S.E.2d at 450. See GA. CODE ANN. § 4-12-3(b) (1995).

292. *Muller*, 472 S.E.2d at 454. Case law interpretations of other statutes and common law revealed that willful conduct requires actual intent to do harm or inflict injury. *Id.* at 452 (citations omitted).

293. *Id.* (referring to *Chrysler Corp. v. Batten*, 450 S.E.2d 208 (1994)).

294. Witnesses testified that fox hunting involved horses that kick. *Muller*, 472 S.E.2d at 452-53. Through a footnote, the court recognized that an inference of willful or wanton disregard for the safety of a participant might be shown in a less hazardous equine activity or where children were involved. *Id.* at 452 n.6.

295. *Id.*

296. *Id.* at 453. Kicking by the horse had not occurred, however, numerous times. *Id.*

297. *Id.* at 452-53.

298. *Trustees of Trinity College v. Ferris*, 491 S.E.2d 909, 912 (Ga. Ct. App. 1997).

299. This shows how the incorporation of a willfulness standard can help curb litigation expenses. See *infra* notes 352-354 and accompanying text (discussing ways to curtail litigation expenditures).

300. See *Trustees of Trinity College*, 491 S.E.2d at 912.

301. See *Becker*, *supra* note 10, at 1589 (noting the desire to encourage private land owners to make their properties available to others).

302. For example, the Wisconsin recreational use statute asserts:

The legislature intends by this section to establish the responsibilities of participants in recreational activities in order to decrease uncertainty regarding the legal responsibility for deaths or injuries that result from participation in recreational activities and thereby to help assure the continued availability in this state of enterprises that offer recreational activities to the public.

WIS. STAT. ANN. § 895.525 (West 1997).

protection for qualifying negligent acts and retains liability for gross negligence, as occurs in most Good Samaritan statutes, the statute may not preclude many lawsuits.³⁰³

Because plaintiffs are able to allege gross negligence, a trier of the facts will be needed to determine whether the statutory immunity for negligence is applicable to the facts of the case.³⁰⁴ Statutes that adopt provisions granting immunity unless there was a willful and wanton disregard for the plaintiff's safety are more likely to reduce litigation. When evaluating a statute that precludes a plaintiff from maintaining an action for gross negligence, an inquiry might be made of whether such immunity is necessary and whether there are other appropriate safeguards that may limit the number of defendants who could qualify for immunity.³⁰⁵ A legislative body might decide that a scheme granting immunity in a few cases of gross negligence has merit due to a need to curb litigation by persons who should assume the risk of injury for their own actions.³⁰⁶

As an alternative, a statutory modification of duties, rather than directly addressing the level of care, offers another response to the issue of excessive litigation.³⁰⁷ The sport responsibility statutes place duties on participants to modify the obligations that providers of sports owe participants.³⁰⁸ By addressing duties with respect to inherent risks, an immunity statute may avoid precluding recovery for gross negligence.

B. Recreational Use Statutes' Provisions on Fees

Recreational use statutes, state that recreational providers do not have a duty to keep land or premises safe for use by recreational users. However, these statutes generally retain a historic limitation whereby immunity is available only when the provider provides land and water areas for recreational activities without an admission fee.³⁰⁹ Although several states have digressed from this prohibition,³¹⁰ it has meant that a recreational use model could not serve as the precursor of a new model to reduce liability of commercial providers of recreational activities.³¹¹ Rather, legislatures have resorted to a new statutory scheme called the sport responsibility statutes.

The analysis of immunity statutes in general shows that assorted statutory pronouncements authorize immunity for commercial businesses. Persons collecting remuneration are able to qualify for immunity in the veterinary Good Samaritan,³¹² equine

303. The statutory immunity for negligence will mean that it may be more difficult for the plaintiff to be successful in recovering damages. Some plaintiffs, however, may be expected to forgo litigation due to the heightened burden of proof for gross negligence.

304. A plaintiff simply needs to create the possibility of a difference of opinion between reasonable men. See *Trustees of Trinity College*, 491 S.E.2d at 912.

305. The Good Samaritan paradigm shows methods to do this. Limitations on persons who can qualify for the immunity is one possibility. Decreasing the zone of protection to an accident or inherent risk is another.

306. The determination does not address whether the legislative approval of a statute providing immunity for gross negligence has the support of a majority of a legislator's constituents.

307. This occurs in recreational use and sport responsibility statutes.

308. See *supra* notes 195-218 and accompanying text.

309. The Model Act precluded qualification for the protection against liability whenever compensation was paid by the recreational user. See Church, *supra* note 10, at 13; Becker, *supra* note 10, at 1602 (finding that the Model Act clearly was limited to situations where not charge was imposed on the user).

310. See *supra* note 124.

311. As noted by others, greater incentives may be needed to encourage persons to provide recreational activities. See, e.g., O'Brien, *supra* note 109, at 988.

312. See *supra* note 60 (listing ten state veterinary Good Samaritan statutes that decline to prohibit fees in their immunity grant).

liability,³¹³ pick-your-own,³¹⁴ and sport responsibility statutes.³¹⁵ Legislative bodies apparently have deemed that these commercial activities constitute special situations so that the prohibition of a fee is no longer a necessary or appropriate precondition for immunity.³¹⁶

Because commercial operators can qualify for immunity under these statutory provisions, interest groups and legislatures may want to assess the absolute prohibitions against remuneration in some of the state recreational use statutes. Through minor amendments to a recreational use statute, the general prohibition against compensation could be retained, but special situations could be identified where remuneration would not defeat the statutory immunity. Five specific special situations are offered for further consideration.

1. Ancillary Monies for Firewood

An exception in three recreational use statutes enables a recreational provider to collect limited funds for the sale of firewood without disqualifying the provider from the statutory immunity.³¹⁷ The removal of firewood could facilitate beneficial forestry practices or allow a provider to improve the property for certain recreational purposes. Removal could also constitute a method to eliminate debris as a preventive measure to lessen the hazard of forest fires. The Connecticut statute limits the amount of wood³¹⁸ whereas the Washington statute allows an administrative fee of up to twenty-five dollars.³¹⁹

2. Land Conservation and Wildlife Management

Another feature to improve lands is for a recreational participant to offer to help a provider with land conservation measures³²⁰ or to improve the property for wildlife.³²¹ This could involve services for the removal of brush or trees, planting appropriate plant species to provide a better habitat for game, or improving a stream habitat for fish.³²² It also might be in the form of a donation of money.³²³ A legislature might find that contributions for conservation and management of lands should be encouraged. An exception

313. All but one of the equine liability statutes sanction legislative dispensation in situations where a fee was paid. See Appendix 2: State Equine Liability Statutes. *Contra* MINN. STAT. ANN. § 604A.12 (West Supp. 1998).

314. The pick-your-own provisions allow compensation. Pick-your own provisions in recreational use statutes, such as Maine (ME. REV. STAT. ANN. tit. 14, § 159-A (West Supp. 1997)) and Tennessee (TENN. CODE ANN. §§ 70-7-101 to -105 (1995)), preclude compensation.

315. These statutes were written for commercial providers of sport activities.

316. Three major justifications have been noted for a sport responsibility statute: promoting safety, reducing injury litigation, and stabilizing economic conditions for a sport industry. *Barr v. Mount Brighton*, 546 N.W.2d 273 (Mich. App. Ct. 1996), *appeal denied* 562 N.W.2d 779 & 568 N.W.2d 671 (1997).

317. See, e.g., CONN. GEN. STAT. ANN. § 52-557(k) (West 1991); OR. REV. STAT. § 105.688(2)(b) (1990 & Supp. 1996); WASH. REV. CODE ANN. § 4.24.210(3) (West 1988 & Supp. 1998).

318. CONN. GEN. STAT. ANN. § 52-557(k) (West 1991).

319. WASH. REV. CODE ANN. § 4.24.210(3) (West 1988 & Supp. 1998).

320. For example, the Wisconsin recreational use statute considers land conservation measures: "The following do not constitute payment to a private property owner for the use of his or her property for a recreational activity: . . . A donation of money, goods or services made for the management and conservation of the resources on the property." WIS. STAT. ANN. § 895.52(6)(a) (West Supp. 1997).

321. For example, the Indiana recreational use statute addresses wildlife:

As used in this section . . . , "monetary consideration" means a fee or other charge for permission to go upon a tract of land. The term does not include . . . services rendered for the purpose of wildlife management; or (3) contributions in kind made for the purpose of wildlife management.

IND. CODE ANN. § 14-22-10-2(b) (Michie 1995 & Supp. 1998).

322. See, *id.*

323. See, e.g., WIS. STAT. ANN. § 895.52(6)(a) (West Supp. 1997).

allowing such remuneration could be incorporated into the state's recreational use statute to foster these activities.

3. Contributions for Educational Services

To encourage property owners to make their private lands available for educational purposes,³²⁴ contributions for education services could be added as a statutory exception that would not disqualify the provider from the statutory immunity of the recreational use statute. The North Carolina recreational use statute provides a specific exception for contributions for such services.³²⁵ A recently amended Arizona recreational use statute allows contributions to offset costs of educational or recreational premises and services for public entities and nonprofit corporations.³²⁶ The North Carolina and Arizona statutes show that contributions for educational services could be added as a statutory exception so that more property providers might be encouraged to make their private lands available for educational purposes.

4. Allowing Nominal Compensation

The Texas recreational use statute deviates more significantly from the prohibition against compensation. Recreational providers may charge for entry to their premises and qualify for the statutory immunity so long as the total charges are less than an amount determined by the property's *ad valorem* taxation.³²⁷ This provision shows a desire to allow persons to qualify for immunity despite collecting fees, but a desire that the fees be modest. The *ad valorem* taxation of the premises is selected as a reference point for determining what is nominal.³²⁸ Under this scheme, more valuable properties can collect greater amounts and still qualify for the immunity protection afforded by the recreational use statute.

The Wisconsin legislature established a limit of \$2,000 for compensation that does not void the immunity of the recreation use statute.³²⁹ This monetary amount is in addition to other forms of remuneration permitted by the statute, including gifts of wild animals, goods and services for management and conservation of resources on the property, and certain payments from nonprofit organizations.³³⁰ Washington State permits a

324. For example, the North Carolina recreational use statute acknowledges educational purposes: "Educational purpose" means any activity undertaken as part of a formal or informal educational program, and viewing historical, natural, archaeological, or scientific sites." N.C. GEN. STAT. § 38A-2 (1997).

325. The North Carolina statute states:

For purposes of this chapter, the term "charge" does not include: (1) Any contribution in kind, services or cash contributed by a person, legal entity, nonprofit organization, or governmental entity other than the owner, whether or not sanctioned or solicited by the owner, the purpose of which is to (i) remedy damage to land caused by educational or recreational use; or (ii) provide warning of hazards on, or remove hazards from, land used for educational or recreational purposes.

§ 38A-3.

326. 1998 Ariz. Sess. Laws 22.

327. TEX. CIV. PRAC. & REM. CODE ANN. § 75.003 (West 1997 & Supp. 1998). The dispensation granted by the statute is available to a person who:

(2) charges for entry to the premises, but whose total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than: (A) twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year; or (B) four times the total amount of ad valorem taxes imposed on the premises for the previous calendar year, in the case of agricultural land. . . .

Id.

328. *See id.*

329. WIS. STAT. ANN. § 895.52(6)(a) (West Supp. 1997).

330. *Id.*

charge of an administrative fee of up to \$25 without compromising qualification under the recreational use statute.³³¹

5. Insurance Coverage of Agricultural Land

An additional proposition is to allow recreational providers of agricultural land to charge as long as they have insurance coverage structured to compensate injuries occurring on their property.³³² The Texas recreational use statute contains a provision whereby providers of agricultural land who have adequate liability insurance coverage may qualify for statutory immunity.³³³ The statute limits monetary damages for qualifying private landowners of agricultural land up to \$500,000 for each person and \$1 million for each occurrence of bodily injury or death if they have adequate liability insurance coverage to compensate injuries occurring on their property.³³⁴ For each occurrence, the provider's insurance coverage under the Texas recreational use statute needs to be in the amount of \$1 million.³³⁵ Because liability coverage must be in effect for the limitation on monetary damages to apply, injured recreational users should receive compensation for their injuries.³³⁶

C. Suitable Immunity Prerequisites

Legislative bodies justified immunity statutes because of emergency, good deed, or needed assistance. Yet, most legislative bodies loathed incorporating obligations with their immunity provisions. For example, a majority of American Good Samaritan statutes did not incorporate a duty to rescue.³³⁷ Recreational use statutes reduced duties of

331. WASH. REV. CODE ANN. § 4.24.210 (West 1988 & Supp. 1998).

332. TEX. CIV. PRAC. & REM. CODE ANN. § 75.003 (West 1997 & Supp. 1999). The dispensation granted by the recreational use statute is available to a person who "(3) has liability insurance coverage in effect on an act or omission described by Section 75.004(a) and in the amounts equal to or greater than those provided by that section." *Id.*

333. The Texas statute states in relevant part that:

(a) Subject to Subsection (b), the liability of an owner, lessee, or occupant of agricultural land used for recreational purposes for an act or omission by the owner, lessee, or occupant relating to the premises that results in damages to a person who has entered the premises is limited to a maximum amount of \$500,000 for each person and \$1 million for each single occurrence of bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. In the case of agricultural land, the total liability of an owner, lessee, or occupant for a single occurrence is limited to \$1 million, and the liability also is subject to the limits for each single occurrence of bodily injury or death and each single occurrence for injury to or destruction of property stated in this subsection.

(b) This section applies only to an owner, lessee, or occupant of agricultural land used for recreational purposes who has liability insurance coverage in effect on an act or omission described by Subsection (a) and in the amounts equal to or greater than those provided by Subsection (a). The coverage may be provided under a contract of insurance or other plan of insurance authorized by statute. The limit of liability insurance coverage applicable with respect to agricultural land may be a combined single limit in the amount of \$1 million for each single occurrence.

Id. § 75.004.

334. *Id.* § 75.004(a). Separate from the personal injury lid is a statutory limit of \$100,000 for each single occurrence of injury to or destruction of property. *Id.*

335. *Id.* § 75.004(b).

336. *Id.* § 75.004(b). Moreover, the Texas provisions do "not affect the liability of an insurer or insurance plan in an action under Article 21.21, Insurance Code, or an action for bad faith conduct, breach of fiduciary duty, or negligent failure to settle a claim." *Id.* § 75.004(c).

337. See John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 872-77 (discussing the no-duty-to-rescue rule); Eric H. Grush, Comment, *The Inefficiency of the No-Duty-to Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. PA. L. REV. 881 (1998).

persons providing recreational services but generally did not create duties.³³⁸ In contrast, the new sport responsibility statutes impose obligations. Participants have an obligation to take care of themselves³³⁹ while providers also have responsibilities centered around the provision of safer activities.³⁴⁰ Given that some of the duties incorporated in the sport responsibility statutes are important in making the sport more safe, further consideration as to how other immunity statutes could be structured to encourage safer recreational activities might be appropriate.

Safety prerequisites have been advanced for the equine liability statutes.³⁴¹ Through an amendment of an equine statute, provisions could be added to encourage the use of helmets. One option would have the signs, required to be posted by equine sponsors, include reference to helmets.³⁴² A second possibility is to follow state bicycle safety statutes and require minors to wear helmets when riding horses on public property and rights-of-way.³⁴³

New York has recently amended its Vehicle and Traffic law to incorporate this idea of helmets for young persons on public rights-of-way.³⁴⁴ Persons under the age of fourteen are directed to wear helmets when riding or leading a horse on a highway and private roads open to public motor vehicles.³⁴⁵ Equipment standards are included in the New York law to ensure that the helmet should function properly in safeguarding the child's head.³⁴⁶ While the New York statute may be expected to lead to safer equine activities, further consideration might be given to individual immunity statutes to condition their grant of immunity on appropriate prerequisites that encourage safer activities.

D. Curtailing Litigation Expenditures

Reductions of liability and litigation are dual objectives of immunity statutes, with the reduction of liability being most obvious in the sport responsibility statutes.³⁴⁷ For example, the Montana ski statute specifically enumerates "a legitimate interest in maintaining the economic viability of the ski industry by discouraging claims based on damages resulting from risks inherent in the sport, defining inherent risks, and establishing

338. See, e.g., *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813, 818 (Cal. Ct. App. 1996) (finding under the primary assumption of risk in California that no duty of care may be owed some participants of active sports for normal experiences).

339. Under the sport responsibility statutes, the statutory grant often delineates responsibilities for participants. See *supra* notes 213-18.

340. Under the sport responsibility statutes, the statutory grant often delineates responsibilities for providers. See *supra* notes 195-98.

341. See Terence J. Centner, *Adopting Good Samaritan Immunity for Defendants in the Horse Industry*, 12 *Agric. & Human Values* 69 (1995) (arguing that equine liability statutes ought to include safety requirements such as wearing a helmet); Centner (1998), *Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors*, *supra* note 11, at 658 (advocating warnings and required use of a helmet by minors).

342. Centner (1998), *Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors*, *supra* note 11, at 656 (advancing a statutory amendment whereby warning signs could include a provision noting helmet safety).

343. *Id.* at 658 (suggesting an amendment to require persons under 16 years of age to wear a helmet when engaging in equestrian activities on public property).

344. 1999 N.Y. LAWS 457 (signed by the Governor on September 7, 1999).

345. *Id.*; N.Y. VEH. & TRAF. LAW § 1260(b) (Consol. 1996).

346. 1999 N.Y. LAWS 457. The law requires that the helmet meet or exceed the American Society for Testing Materials F1163 equestrian standard. *Id.* Furthermore, the helmet must be fastened securely upon the head pursuant to the manufacturer's fitting guidelines. *Id.*

347. E.g., the Idaho ski statute sets forth a purpose of "defin[ing] those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery." IDAHO CODE § 6-1101 (1999).

the duties of skiers and ski area operators.³⁴⁸ Although most sport responsibility statutes do not prevent plaintiffs from bringing a lawsuit, plaintiffs with injuries caused by inherent risks of the sport may be expected to not file suit because, under the statute, they cannot recover their damages.³⁴⁹ By setting forth participant duties and risks for which participants cannot recover, the statutes diminish liability of sport operators. Sport responsibility statutes also grant providers immunity.³⁵⁰ Moreover, as statutory parameters become understood, plaintiffs without a bona fide claim due to the immunity provided by a statute may be expected to be less likely to find an attorney willing to represent them in a lawsuit.³⁵¹

Related to the reduction of litigation expenditures is the issue of whether the determination of qualification under the statute is a question of law or a question of fact. As previously noted, courts in different states considering individual statutory provisions have reached different results.³⁵² If a court finds that a jury decision is required to determine whether an injury resulted from an inherent risk under a specific statute,³⁵³ it may be possible to amend the statute so that future courts could decide as a matter of law that an injury was or was not the result of an inherent risk.³⁵⁴ In this manner, cases involving inherent risks would not require a jury trial and associated expenditures.

E. Privileged Activities and an Array of Statutes

The piecemeal approach taken by states with separate provisions for different recreational and sport activities has created a myriad of different rules for addressing injuries. Because new statutory provisions and terminology raise unique issues to be answered, until the legislative assignment of duties and risks becomes more clear, parties may be expected to espouse their rights through litigation.³⁵⁵ While this may result in a short-term increase in litigation, the statutory directives stating that providers do not have a duty of care concerning inherent risks should lead some sport participants to forgo litigation concerning their injuries.

The equine liability and sport responsibility statutes suggest that legislative bodies have been open to the perceived needs of some interest groups.³⁵⁶ New sport-specific inherent risk statutes have been adopted due to the liability concerns of providers of risky sports.³⁵⁷ Yet, it is not clear that most legislative bodies have employed meaningful criteria in determining when a commercial sport activity should qualify for statutory

348. MONT. CODE ANN. § 23-2-731 (1999).

349. See *supra* notes 219-21 and accompanying text.

350. See *supra* notes 248-49 (quoting sport responsibility statute provisions that grant providers immunity).

351. Because such suits are often on a contingency basis, a lawyer with doubts about the likelihood of success may be expected to decline to represent the injured party.

352. See *supra* notes 222-4 and accompanying text.

353. This was the case in the Maine ski statute. See *Merrill v. Sugarloaf Mountain Corp.*, 698 A.2d 1042, 1044 (Me. 1997). Now the statute defines such risk. ME. REV. STAT. ANN. tit. 32, § 15217 (West Supp. 1999). See *supra* notes 236-241 and accompanying text.

354. E.g., for the Montana ski statute, a redefinition of bare spots to include a rocky outcropping might avoid a future jury trial. MONT. CODE ANN. § 23-2-736(4)(b) (1995). See *Mead v. M.S.B., Inc.*, 872 P.2d 782 (Mont. 1994). See *supra* notes 231-235 and accompanying text.

355. Thus, appellate courts are considering cases in which summary judgment due to qualification under a sport responsibility statute is appropriate. See, e.g., *Schaefer v. Mt. Southington Ski Area, Inc.*, No. CV 970340387S, 1997 Conn. Super. Ct. LEXIS 2824, at *7-9 (Conn. Super. Ct. Oct. 22, 1997) (finding that a rut on a ski slope did not establish negligence of the provider duty to ski statute); *Rousseau v. Beckley*, No. CV95465970, 1996 Conn. Super. Ct. LEXIS 3509, at *6-7 (Conn. Super. Ct. Nov. 27, 1996) (noting a ski statute provided immunity in an action alleging that a variation in terrain caused an injury).

356. See Appendices 2, 4, & 5.

357. See Centner (1998), *supra* note 11, at 639 n.8 (noting problems of securing insurance for businesses providing equine activities).

immunity. For example, legislatures have decided that profitable business enterprises providing horseback riding³⁵⁸ or skiing³⁵⁹ qualify for immunity, whereas similar businesses providing tennis³⁶⁰ and golf³⁶¹ do not. While tennis and golf may have fewer injuries than horseback riding and skiing, it is not clear that such numbers should translate into different treatment for liability purposes.

A dominant factor contributing to the enactment of some of the sport responsibility statutes has been the perceived ability of participants to control risks.³⁶² Participants need to use their knowledge and skills to avoid situations that may lead to an injury, and thus their statutory duties.³⁶³ Yet, participants in tennis and golf can control risks.³⁶⁴ Rather than proceed on a sport-by-sport basis, consideration might be given for all sport activities, as has occurred in Wyoming.³⁶⁵ Alternatively, general tort law may already have developed the assumption of risk doctrine so that participants are responsible for their actions. This may obviate the need for special sport responsibility statutes.³⁶⁶

A few states have attempted to simplify their immunity provisions for more than one activity. As previously noted, Wyoming's Recreational Safety Act³⁶⁷ provides a single statute for risky sport activities.³⁶⁸ Michigan has combined provisions for recreational uses, gleaned, and pick-your-own operations into a single statute.³⁶⁹ Although the Michigan statute establishes different provisions for the different activities, the employment of a single statute requires that the provisions be read together. As compared to three separate statutes, the Michigan statute may circumscribe arguments about the meaning of various provisions. Additional efforts to aggregate statutory provisions for sport activities may be worthwhile in simplifying liability rules.

V. Conclusion

Three distinct strategies altering long-standing tort law have been employed to provide immunity for qualifying persons. Statutes providing Good Samaritans and others an affirmative defense assist persons in avoiding liability for injuries to others. Recreational use statutes with their altered duties constitute a second strategy to offer protection for landowners against liability from recreational users. While such statutes are important in

358. See INJURY SURVEILLANCE SYSTEM, *supra* note 1 (estimating that there were 58,701 injuries due to horseback riding in 1997).

359. See *id.* (estimating that there were 84,190 injuries due to snow skiing in 1997).

360. See *id.*, product code 3283 (estimating that there were 22,294 injuries due to tennis in 1997).

361. See *id.*, product codes 1212, 1213 (estimating that there were 47,777 injuries due to golfing and golf carts in 1997).

362. Some of the equine liability and ski statutes specifically note that the risks inherent in the sport support the statutory dispensation. For example, the Montana statute states:

The legislature finds that skiing is a major recreational sport and a major industry in the state and recognizes that among the attractions of the sport are risks, inherent and otherwise. The state has a legitimate interest in maintaining the economic viability of the ski industry by discouraging claims based on damages resulting from risks inherent in the sport, defining inherent risks, and establishing the duties of skiers and ski area operators.

MONT. CODE ANN. § 23-2-731 (1999).

363. See *supra* notes 210-218 and accompanying text.

364. As an example, players of tennis and golf who wander off their court or green to look for a ball can avoid being in a position where they might be hit by another player's ball.

365. WYO. STAT. §§ 1-1-121 to -123 (Michie 1997).

366. See, e.g., *Allen v. Snow Summit, Inc.*, 59 Ca. Rptr. 2d 813, 818 (Cal. Ct. App. 1996) (finding under California law that skiers accept some of the risks of injury under the primary assumption of risk doctrine).

367. WYO. STAT. §§ 1-1-121 to -123 (Michie 1997).

368. See *supra* note 245 and accompanying text.

369. MICH. COMP. LAWS ANN. § 324.73301 (West 1999).

encouraging recreational activities on private lands, they fail to address liability issues of providers of active and more dangerous sport activities. The new sport responsibility statutes constitute a third strategy that precludes participants from collecting damages for injuries resulting from an inherent danger of a sport. This strategy may be expected to reduce lawsuits against providers of the applicable dangerous sports.

The analysis of immunity statutes shows that the gleaning, equine liability, and pick-your-own statutes have not followed a single immunity strategy. While some state gleaning and pick-your-own statutes provide an affirmative defense,³⁷⁰ others employ the recreational use model and address duties.³⁷¹ Some equine liability statutes offer an affirmative defense,³⁷² while other statutes embody provisions that follow the sport responsibility model whereby participants cannot collect damages for injuries resulting from an inherent danger of the sport.³⁷³ Because various statutory provisions employ contrasting models, the evaluation of a statute's objectives may disclose preferred strategies. The articulation of five topics concerning the immunity statutes in Section IV has established several important issues for consideration.

First, legislatures determine what type of conduct an immunity statute should shield. Interest groups and the general public need to realize that exceptions from conventional liability rules are possible. If sufficient concern exists about a statute that provides immunity for gross negligence, a reevaluation may be warranted to determine whether such protection is truly desired. It might be expected that the general public does not favor such broad immunity.

Second, long-standing provisions regarding disqualification of recreational providers due to compensation might be reevaluated given new sport responsibility statutes and the special exceptions that have been incorporated into a few recreational use statutes.³⁷⁴ If a legislature has provided statutory dispensation to commercial sport providers, perhaps other worthy individuals should be granted immunity in circumscribed situations. Several unique provisions are suggested by one or more existing state recreational use statutes to retain the prohibition against remuneration but to allow compensation in the form of: (1) a fee for firewood; (2) assistance with land conservation and wildlife management; (3) contributions for educational services; (4) nominal compensation; and (5) charges coupled with insurance coverage of agricultural land.³⁷⁵ Perhaps it is time to update recreational use statutes so that they can be more effective in encouraging private property owners to make their lands available to the public.

A third issue is the incorporation of suitable safety prerequisites. Immunity might only be offered if there is an accompanying statutory provision that encourages efforts to provide for safer activities. The equine liability statutes have failed to avail themselves of knowledge concerning the reduction of injuries by the proper use of helmets.

Fourth, some statutes may not be very successful in curtailing litigation and expenditures. While statutes providing an affirmative defense for negligence reduce situations where a plaintiff can recover from injuries, these statutes may shift the analysis to gross negligence so that litigation is still necessary. The recreational use and sport responsibility models offer methods to reduce litigation through statutory assignments of duties to participants. Perhaps some of the statutes providing an affirmative defense could be revised to assign duties for persons receiving assistance to help curb litigation.

370. *See supra* notes 86 & 153.

371. *See supra* notes 87 & 158.

372. *See supra* notes 127-31.

373. *See supra* notes 147-49.

374. *See supra* note 124.

375. *See supra* notes 317-36.

Although sport responsibility statutes may be expected to reduce litigation and recovery against providers of enumerated sports, additional reduction of litigation costs may be possible. The question of whether an injury was a result of an inherent risk may be a question of law or a question of fact. If a sport responsibility statute is written so that inherent risks are questions of law, the statute has the potential of reducing litigation expenditures.

Finally, consideration might be given to the reduction of different immunity statutes. Some of the Good Samaritan statutes might be combined or grouped together in a common section of a state's codified laws. Various sport responsibility statutes might be combined, or a general statute written to cover all risky sports as has occurred in Wyoming.³⁷⁶ Moreover, the coordination of a state's immunity statutes might lead to greater consistency of standards and conditions, thereby simplifying the law for practitioners and the general public.

376. WYO. STAT. §§ 1-1-121 to -123 (Michie 1997).

Appendix 1: State Recreational Use Statutes

- ALA. CODE §§ 35-15-20 to -28 (1991)
 ALASKA STAT. § 09.65.200 (1996)
 ARIZ. REV. STAT. ANN. § 33-1551 (West Supp. 1997), 1998 Ariz. Sess. Laws 22
 ARK. STAT. ANN. §§ 18-11-301 to -307 (Michie 1987 & Supp. 1997)
 CAL. CIV. CODE §§ 846, 846.1 (West Supp. 1998)
 COLO. REV. STAT. ANN. §§ 33-41-101 to -106 (West 1998)
 CONN. GEN. STAT. ANN. §§ 52-557f to -557k (West 1991)
 DEL. CODE ANN. tit. 7 §§ 5901—5907 (1991)
 FLA. STAT. ANN. § 375.251 (Harrison 1988 & Supp. 1997)
 GA. CODE ANN. § 27-3-1 (1984); §§ 51-3-20 to -26 (1982)
 HAW. REV. STAT. §§ 520-1 to -8 (Michie 1993 & Supp. 1997)
 IDAHO CODE § 36-1604 (1994)
 745 ILL. COMP. STAT. ANN. 65/1 to 65/7 (West 1993)
 IND. CODE ANN. §§ 14-22-10-2 to -2.5 (Michie 1995 & Supp. 1998)
 IOWA CODE ANN. §§ 461C.1—.7 (West 1997)
 KAN. STAT. ANN. §§ 58-3201 to -3207 (1994 & Supp. 1996)
 KY. REV. STAT. ANN. §§ 150.645, 411.190 (Banks-Baldwin 1994), 1998 Ky. H.B.
 717
 LA. REV. STAT. ANN. §§ 9:2791, 9:2795 (West 1997)
 ME. REV. STAT. ANN. tit. 14, § 159-A (West Supp. 1997)
 MD. CODE ANN., NAT. RES. §§ 5-1101 to -1109 (1997)
 MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1994)
 MICH. COMP. LAWS ANN. § 324.73301 (West Supp. 1998)
 MINN. STAT. ANN. §§ 604A.20—.27 (West Supp. 1998)
 MISS. CODE ANN. §§ 89-2-1 to -27 (1991)
 MO. ANN. STAT. §§ 537.345—.348 (West 1988)
 MONT. CODE ANN. §§ 70-16-301 to -302 (1997)
 NEB. REV. STAT. §§ 37-729 to -736 (1998)
 NEV. REV. STAT. § 41.510 (1997)
 N.H. REV. STAT. ANN. § 212:34 (1989)
 N.J. STAT. ANN. §§ 2A:42A-2 to -10 (West 1987 & Supp. 1998)
 N.M. STAT. ANN. § 17-4-7 (Michie 1995)
 N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989)
 N.C. GEN. STAT. §§ 38A-1 to -4 (1997)
 N.D. CENT. CODE §§ 53-08-01 to -06 (1989 & Supp. 1997)
 OHIO REV. CODE ANN. §§ 1533.18—.181 (Banks-Baldwin 1996)
 OKLA. STAT. ANN. tit. 2, § 1301-315 (West 1993), tit. 76, §§ 5, 11 (West 1995)
 OR. REV. STAT. §§ 105.670—.696 (1990 & Supp. 1996)
 PA. STAT. ANN. tit. 68, §§ 477-1 to -8 (West 1994)
 R.I. GEN. LAWS §§ 32-6-1 to -7 (1994 & Supp. 1997)
 S.C. CODE ANN. §§ 27-3-10 to -70 (Law. Co-op. 1991)
 S.D. CODIFIED LAWS ANN. §§ 20-9-12 to -18 (1995)
 TENN. CODE ANN. §§ 70-7-101 to -105 (1995)
 TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.001—.004 (West 1997 & Supp. 1998)
 UTAH CODE ANN. §§ 57-14-1 to -7 (Supp. 1998)
 VT. STAT. ANN. tit 12, § 5791—5795 (Supp. 1998)
 VA. CODE ANN. § 29.1-509 (Michie 1997)

Appendix 1 (continued): State Recreational Use Statutes

WASH. REV. CODE ANN. §§ 4.24.200—.210 (West 1988 & Supp. 1998)

W. VA. CODE §§ 19-25-1 to -7 (1997)

WIS. STAT. ANN. §§ 895.52, 895.525 (West 1997), 1997 Wis. Act 242

WYO. STAT. §§ 34-19-101 to -106 (Michie 1997)

Appendix 2: State Equine Liability Statutes

- Ala. Code § 6-5-337 (1993)
ARIZ. REV. STAT. § 12-553 (1998), 1998 Ariz. Sess. Laws 193
ARK. CODE ANN. §§ 16-120-201 to -202 (Michie Supp. 1997)
COLO. REV. STAT. ANN. § 13-21-119 (West 1997)
CONN. GEN. STAT. ANN. § 52-557p (West Supp. 1998)
DEL. CODE ANN. tit. 10, § 8140 (Supp. 1996)
FLA. STAT. ANN. §§ 773.01—.05 (Harrison 1994 & Supp. 1997)
GA. CODE ANN. §§ 4-12-1 to -5 (1995)
HAW. REV. STAT. ANN. §§ 663B-1 to -2 (Michie 1995)
IDAHO CODE §§ 6-1801 to -1802 (1998)
745 ILL. COMP. STAT. ANN. 47/1 to 47/999 (West Supp. 1998)
IND. CODE ANN. §§ 34-6-2-40 to -43, 34-6-2-69, 34-6-2-95, 34-31-5-1 to -5 (Michie 1998)
IOWA CODE ANN. §§ 673.1—.3 (West 1998)
KAN. STAT. ANN. §§ 60-4001 to -4004 (1994)
LA. REV. STAT. ANN. § 9:2795.1 (West 1997)
ME. REV. STAT. ANN. tit. 7, §§ 4101—4104-A (West Supp. 1997)
MASS. GEN. LAWS ANN. ch. 128, § 2D (Supp. 1998)
MICH. COMP. LAWS §§ 691.1661—.1667 (West Supp. 1998)
MINN. STAT. ANN. § 604A.12 (West Supp. 1998)
MISS. CODE ANN. §§ 95-11-1 to -7 (1994)
MO. ANN. STAT. § 537.325 (West Supp. 1998)
MONT. CODE ANN. §§ 27-1-725 to -728 (1997)
NEB. REV. STAT. §§ 25-21,249 to -21,253 (Supp. 1997)
1998 N.H. LAWS 24, 1998 N.H. H.B. 793
N.J. STAT. ANN. §§ 5:15-1 to -12 (West Supp. 1998)
N.M. STAT. ANN. §§ 42-13-1 to -5 (Michie Supp. 1998)
N.C. GEN. STAT. §§ 99E-1 to -3 (1997)
N.D. CENT. CODE §§ 53-10-01 to -02 (Supp. 1997)
OHIO REV. CODE ANN. § 2305.321 (Banks-Baldwin Supp. 1998)
OR. REV. CODE §§ 30.687—.697 (Supp. 1996)
R.I. GEN. LAWS §§ 4-21-1 to -4 (Supp. 1997)
S.C. CODE ANN. §§ 47-9-710 to -730 (Law. Co-op. Supp. 1997)
S.D. CODIFIED LAWS ANN. §§ 42-11-1 to -5 (Michie Supp. 1998)
TENN. CODE ANN. §§ 44-20-101 to -105 (1993)
TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001—.005 (West 1997)
UTAH CODE ANN. §§ 78-27b-101 to -102 (1996)
VA. CODE ANN. §§ 3.1-796.130—.133 (Michie 1994)
VT. STAT. ANN. tit. 12, § 1039 (Supp. 1998)
WASH. REV. CODE ANN. §§ 4.24.530—.540 (West Supp. 1998)
W. VA. CODE §§ 20-4-1 to -7 (1996)
WIS. STAT. ANN. § 895.481 (West 1997)
WYO. STAT. §§ 1-1-121 to -123 (Michie 1997)

Appendix 3: State Pick-Your-Own Statutes

ARK. STAT. ANN. § 18-60-107 (Michie Supp. 1997)

MASS. GEN. LAWS ANN. ch. 128 § 2E (Supp. 1998)

MICH. COMP. LAWS ANN. § 324.73301(4) (West Supp. 1998)

N.H. REV. STAT. ANN. § 508:14 (1997)

N.J. STAT. ANN. § 10 (West Supp. 1998)

OHIO REV. CODE ANN. § 901.52 (Banks-Baldwin Supp. 1998)

PA. CONS. STAT. ANN. tit. 42, § 8339 (West Supp. 1998)

Appendix 4: State Sport Responsibility Statutes for Skiing

- ALASKA STAT. §§ 05.45.010—.210 (1996)
COLO. REV. STAT. §§ 33-44-101 to -114 (West 1998)
CONN. GEN. STAT. ANN. §§ 29-211 to -214 (West 1990)
IDAHO CODE §§ 6-1101 to -1109 (1998)
ME. REV. STAT. ANN. tit. 32, §§ 15201—15227 (West Supp. 1997)
MASS. GEN. LAWS ANN. ch. 143, §§ 71H—71S (West 1991 & Supp. 1998)
MICH. COMP. LAWS §§ 408.321—.344 (West 1985 & Supp. 1998)
MONT. CODE ANN. §§ 23-2-731 to -736 (1997)
NEV. REV. STAT. §§ 455A.010—.190 (1997)
N.H. REV. STAT. ANN. §§ 225-A:1 to -A:26 (1989)
N.M. STAT. ANN. §§ 24-15-1 to -14 (Michie 1994)
N.J. STAT. ANN. §§ 5:13-1 to -11 (West 1996)
N.Y. GEN. OBLIG. LAW §§ 18-101 to -107 (McKinney 1989 & Supp. 1998)
N.Y. LABOR LAW §§ 865—868 (McKinney 1988)
N.C. GEN. STAT. §§ 99C-1 to -5 (1997)
N.D. CENT. CODE §§ 53-09-01 to -11 (1989 & Supp. 1997)
OHIO REV. CODE ANN. §§ 4169.01—.99 (Baldwin 1994 & Supp. 1998)
OR. REV. STAT. §§ 30.970—.990 (1988)
PA. CONS. STAT. ANN. tit. 42, § 7102 (West 1982 & Supp. 1998)
R.I. GEN. LAWS §§ 41-8-1 to -4 (1997)
TENN. CODE ANN. §§ 68-114-101 to -107 (1996)
UTAH CODE ANN. §§ 78-27-51 to -54 (1996)
VT. STAT. ANN. tit. 12, §§ 1036—1038 (Supp. 1998)
Wash. Rev. Code Ann. §§ 70-117.010—.040 (West 1992)
W. VA. CODE §§ 20-3A-1 to -8 (1996)
WYO. STAT. §§ 1-1-121 to -123 (Michie 1997)

***Appendix 5: State Sport Responsibility Statutes for
Sports other than Skiing***

- COLO. REV. STAT. ANN. § 13-21-120 (West 1997) (baseball)
 GA. CODE ANN. § 51-1-43 (Supp. 1998) (roller skating)
 GA. CODE ANN. §§ 27-4-280 to -283 (Supp. 1998) (fishing)
 IDAHO CODE §§ 6-1201 to -1206 (1998) (outfitters and guides)
 745 ILL. COMP. STAT. ANN. 52/1 to 52/99 (West 1993 & Supp. 1998) (hockey facilities)
 745 ILL. COMP. STAT. ANN. 72/1 to 72/30 (West Supp. 1998) (roller skating)
 IND. CODE ANN. §§ 34-31-6-1 to -4 (Michie 1998) (roller skating)
 ME. REV. STAT. ANN. tit. 8, §§ 601—608 (West 1997) (roller skating)
 ME. REV. STAT. ANN. tit. 8, §§ 801—806 (West Supp. 1997) (amusement rides)
 MICH. COMP. LAWS ANN. § 691.1544 (West Supp. 1998) (sport shooting)
 MICH. COMP. LAWS ANN. §§ 445.1721—1726 (West Supp. 1998) (roller skating)
 MONT. CODE ANN. §§ 23-2-651 to -656 (1997) (snowmobiling)
 N.C. GEN. STAT. §§ 99E-10 to -14 (1997) (roller skating)
 N.J. STAT. ANN. §§ 5:14-1 to -7 (West 1996) (roller-skating)
 NEV. REV. STAT. §§ 455B.010—.100 (1997) (amusement rides)
 OHIO REV. CODE ANN. §§ 4171.01—.10 (Banks-Baldwin 1994 & Supp. 1998) (roller skating)
 S.C. CODE ANN. §§ 52-21-10 to -60 (Law. Co-op. Supp. 1997) (roller skating)
 S.D. CODIFIED LAWS ANN. § 2-20A-21 (1998) (snowmobiling)
 TEX. HEALTH & SAFETY CODE ANN. §§ 759.001—.005 (West Supp. 1998) (roller skating)
 UTAH CODE ANN. §§ 47-3-1 to -3 (Supp. 1998) (sport shooting)
 W. VA. CODE §§ 20-3B-1 to-5 (1996) (whitewater rafting)