NDCA Newsletter Article

The Nebraska Agritourism Promotion Act and the Muddy Waters Of Recreational Liability

Dan Lindstrom
Jacobsen, Orr, Lindstrom & Holbrook, PC
P.O. Box 1060, 322 West 39th St.
Kearney, Nebraska 69949-1060

Introduction:

For those of us who represent farmers and ranchers, agricultural landowners, and the insurers of these fine folks, the risk of loss or injury arising out of non-farming and ranching uses of real property can present some interesting challenges. Often, this risk arises in the recreational use context. In defending such a case, or advising an owner about the possible risks of liability, it is important to start with the general analysis used in defending any premises case (i.e., status of the injured party such as invitee or trespasser, assumption of the risk, and etc.).[1] However, liability may also depend upon whether the recreational user paid anything for the opportunity to use the property.[2] This is because of the existence of, and interplay between, two statutes. The first is the Recreation Liability Act, passed in 1965 and later modified by case law and statutory amendments. The second is a statute passed in the 2015 legislative session entitled the "Nebraska Agritourism Promotion Act."[3]

One of the more traditional areas of concern relates to hunting or fishing. Although increasingly rare, it is still possible to obtain permission to use an owner's agricultural property to hunt or fish without payment of any consideration. Sometimes these uses arise out of a lease between the landowner and the recreational user. Sometimes, however, the landowner makes the property available on a "pay-as-you-go" basis, making it available to anyone who wants to use the property for the prescribed use, as long as they pay a daily use or other admission fee.

More recently, landowners have begun supplementing their agricultural income by making their land available to persons who want to make other recreational uses of the property, many of which fall under the "agritourism" label[4], or that of its close cousin, "ecotourism."[5] Examples of agritourism include riding horses or recreational vehicles, bird watching, sightseeing, pumpkin patches, corn mazes, hay rack rides, u-pick berry gardens or orchards, dude ranches, livestock petting zoos, and etc. In this age of "reality" TV and the local food movement, people from urban America seem to have a growing

---

[1] See, *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (Neb. 1996) (abolition of the invitee, licensee distinction).

[2] See Recreation Liability Act Neb. Stat. §§ 37-729 to 37-736

[3] LB 329, signed by the Governor May 27, 2015.

[4] Defined by Merriam-Webster as "the practice of touring agricultural areas to see farms and often to participate in farm activities."

[5] Defined by Merriam-Webster as "the practice of touring natural habitats in a manner meant to minimize ecological impact."

fascination with getting their hands dirty and getting manure on their boots, and they are willing to pay a fee to do so.[6]

Similarly, ecotourism is growing in popularity. In Nebraska, 97% of all real estate is privately held[7], with many important and unique natural resources thereby located on private land. In many cases, private landowners make their property available to canoeists, hikers, photographers and birdwatchers. For example, private property is often made available during the annual sandhill crane migration, as well as for the observation of grouse and prairie chicken mating dances and viewing of concentrations of bald eagles.

Agritourism and ecotourism are both a logical fit for Nebraska, given that both agriculture and tourism are two of the three largest drivers of our economy[8]. So now that we have all of these people, some of whom are absolute greenhorns[9], tramping around the farm and ranch, what happens when somebody gets hurt? Who is responsible when the sow attacks the kids, grandma trips over the pumpkin vine, grandpa is bitten by rattlesnake, Eddie falls out of the canoe, Susie accidentally shoots somebody, mom falls off of the hay wagon or dad falls over the cliff while trying to get that perfect picture of the waterfall?

Recreation Liability Act:

Recognizing the need to "encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability…"[10] the Nebraska Legislature enacted the "Recreation Liability Act" ("RLA") decades ago. Except for "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity, or for injury suffered in any case where the owner charges the persons…who enter or go on the land,"[11] an owner of land "owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes."[12] Further, such a person who "either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance

---

[6] "In the five year span from 2007 to 2012, the number of U.S. farms catering to city folk went up 42 percent, bringing in more than $700 million, according to the latest Census of Agriculture. Since 2007, the amount of money brought in under agritourism rose by 24 percent…. In Nebraska, from 2007 to 2012, the amount of money farms made from agritourism went up more than 65 percent."
http://netnebraska.org/article/news/922942/agritourism-growing-opportunity-farm

[7] US Fish and Wildlife Service: https://www.google.com/webhp?sourceid=navclient&ie=UTF-8&gws_rd=ssl#

[8] Nebraska Department of Economic Development Travel and Tourism Facts
http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwiF5cnbgvPJAhWprIMKHdLSALIQFgg3MAM&url=http%3A%2F%2Fwww.neded.org%2Ffiles%2Fresearch%2Ftourfact.pdf&usg=AFQjCNESb657aln3a13PRKi_0yRvCRmGYA&sig2=9y7jv5jkg0jEwCsEWoi73g

[9] Defined by Merriam-Webster as "a person who lacks experience and knowledge."

[10] Neb. Rev. Stat. section 37-730

[11] Neb. Rev. Stat. section 37-734

[12] Neb. Rev. Stat. section 37-731

that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons."[13]

The upshot of this statute is that, as long as the owner doesn't "charge"[14] for entry onto the premises, and the owner does not act or fail to act willfully or maliciously, the owner enjoys some limitation of liability from allegations of ordinary negligence. A number of Nebraska cases have been decided under the Recreation Liability Act and counsel is urged to study these cases before relying wholly upon the statutory language.[15]

Nebraska Agritourism Promotion Act:

Just this past year, the landscape changed concerning the question of whether any limitation of liability exists when one pays to enter the property of another for recreational purposes with the passage of LB 329 in the 2015 legislative session. The "Nebraska Agritourism Promotion Act" ("NAPA") became effective August 30, 2015, and now provides for some limitation of civil liability for owners of farms, ranches and other rural land, and for other related parties, even if a fee is paid in return for the invitation or permission to enter the premises.[16] However, a thorough reading of the NAPA will tell you that the protection to landowners and those connected with them is quite limited.

The NAPA states that one of its purposes is to "Encourage agritourism activities by limiting civil liability of owners of farms, ranches and other rural land."[17] It then defines agritourism with a list of over 30 types of activities that include hunting, fishing, swimming, boating… <u>and similar activities</u>."[18] While the NAPA does not specifically refer to "ecotourism," the activities listed in the definition would arguably encompass the same types of recreational uses.[19]

The operative portion of the statute reads as follows: "(1) Except as provided in section 82-605, an <u>owner</u> who allows a <u>participant</u> on the owner's <u>premises</u> for agritourism activities shall not be liable for injury to or death of the participant or damage to the participant's property <u>resulting from an inherent risk</u> on the owner's premises. (2) Except as provided in section 82-605, no participant or participant's representative shall maintain an action against or recover for injury or death of the participant or damage to the participant's property resulting from an inherent risk on the owner's premises when such

[13] Neb. Rev. Stat. section 37-732

[14] "Charge means the amount of money asked in return for an invitation to enter or go upon the land." Neb. Rev. Stat. section 37-729(4).

[15] For example, whether rent paid under a lease agreement was a "charge" was the subject of *Teters v. Scottsbluff Public Schools,* 1997, 567 N.W.2d 314, review sustained, affirmed in part, reversed in part 256 Neb. 645, 592 N.W.2d 155.

[16] Neb. Rev. Stat. section 82-602 through 82-607

[17] Neb. Rev. Stat. section 82-602(3)

[18] Neb. Rev. Stat. section 82-603(1) (emphasis supplied)

[19] For example, "nature study, birding, visiting and viewing… ecological…or scientific sites…." <u>Id</u>.

owner allows the participant on the owner's premises for agritourism activities."[20] Note that the underscored terms in the passage quoted above are all specifically defined in the NAPA at section 82-603. For example, the term "owner" is broadly defined to include a tenant, lessee, occupant, or person in control of the premises and "any agent of such a person whose gross annual income from agritourism activities does not exceed $500,000."[21] It is unclear from the language whether the income limitation applies to all persons under the ownership definition or just an "agent."

Note further that the protection from civil liability arises only from "inherent risk," which is defined as: "… conditions, dangers, or hazards that are an integral part of land or waters…, including the following: (a) surface and subsurface conditions and natural conditions of land, vegetation and waters; (b) the behavior of wild or domestic animals; (c) the ordinary dangers of structures or equipment ordinarily used in farming or ranching operations when such structures or equipment are used for farming or ranching purposes and (d) the potential of a participant to act in a negligent way that may contribute to injury to the participant or others whether by failing to follow safety procedures or failing to act with reasonable caution while engaging in an agritourism activity."[22]

Does this at least appear to provide protection from accidents arising from both open and obvious and latent conditions of the land? Probably. Does this at least appear to provide protection from injuries arising from the sow or the rattlesnake referenced above? Probably. Does this also at least appear to provide protection from injuries arising from the accidental shooting of one participant by another participant? Probably. But wait, there is more….

The analysis is not complete unless one first carefully reviews section 82-605, the exception to the operative provision. In this section, an owner can still be liable for: (1) failure to exercise reasonable care "to protect against the particular dangers of structures or equipment used or kept on the owner's premises;" (2) the owner's "actual knowledge of a particular dangerous condition on the owner's premises" and failing to warn of the condition; (3) an owner who "reasonably should have known of a particular dangerous condition of equipment used or kept on the owner's premises" and failure to warn of the equipment condition; (4) an owner who fails to "properly train or supervise or improperly or inadequately trains or supervises employees who are actively involved in agritourism activities," which failure results in injury or death or damage; or (5) an owner who "commits an act or omission that is a proximate cause of injury to or the death of the participant or damage to the participant's property if the act or omission: (a) constitutes willful or wanton disregard for the safety of the participant; (b) constitutes gross negligence; (c) was intentional; (d) does not constitute an inherent risk; (e) occurred while under the influence of alcohol or illegal drugs; or (f) would otherwise be a violation of any other statute or rule or regulation of the State of Nebraska, a state regulatory body, or a political subdivision."[23] It would therefore appear that there are still plenty of exceptions available to allow creative plaintiffs' counsel to avoid the liability limitations of the NAPA.

Finally, your reading of the NAPA is still not complete until you have studied section 82-606, which provides a further exception to the protections ostensibly provided in section 82-604 unless the owner:

---

[20] Neb. Rev. Stat. section 82-604 (emphasis supplied)

[21] Neb. Rev. Stat. section 82-603(4))

[22] Neb. Rev. Stat. section 82-603 (3)

[23] Neb. Rev. Stat. section 82-605

(a) posts and maintains conspicuous warning signs at or near the entrance of the property used for agritourism activities; or (b) includes a conspicuous warning in any written contract between the owner and each participant allowed on the premises for a fee.[24] The statute further provides specific language that the landowner must use in providing the warning:

> *WARNING—Under Nebraska law, an owner of property, including lands and waters, is not liable for the injury to or death of the participant in agritourism activities or damage to the participant's property resulting from the inherent risks of such activities. Inherent risks include, without limitation, the risk of animals and land and water conditions, the ordinary dangers of structures or equipment ordinarily used in farming or ranching operations, and the potential for you or another participant to act in a negligent manner that may contribute to your own injury or death. You are assuming the risk of participating in the agritourism activities for which you are entering the owner's premises.*[25]

Conclusion:

So, with all of that verbiage, what has the Legislature really done for our clients who own or operate land and make it available for recreational use for a fee, as well as for their insurers and their defense counsel? The exceptions to the grant of limitation of liability are so extensive that it is unlikely that most fact situations will actually provide the landowner with much assistance in defense of an active claim or suit. However, like pre-accident releases and waivers of liability that are sometimes not enforceable [26], the RLA and the NAPA may discourage lawsuits and may sometimes be helpful in establishing assumption of risk, to the extent that that defense has not been completely eroded by case law[27]. Compliance with the NAPA can still be valuable, if for no other reason than it can assist in defeating claims based on failure to warn. The warnings might also be helpful from an educational and preventative standpoint to owners, their employees and participants in simply understanding the risks inherent with the activity.

The downside of these statutes is that they sometimes create a false sense of security among landowners and operators who fail to do basic things to mitigate their risk, like buying appropriate types of insurance, maintaining adequate limits, basic entity planning and taking steps to prevent negligence. Plaintiff's counsel might also argue that the failure to post the warnings provided in the NAPA creates or enhances a claim against a defendant. It will be important to be sensitive to these issues when advising clients.

On the question of insurance, advise your clients to be very specific with their agents and brokers about the fee-generating activities they intend to conduct on their property. CGL and general farm liability packages may not provide coverage for such activities without the purchase of additional coverages.

---

[24] Neb. Rev. Stat. section 82-606 (1)

[25] Neb. Rev. Stat. section 82-606 (2)

[26] *See, Palmer v. Lakeside Wellness Center,* 281 Neb. 780, 798 N.W.2d 845 (Neb. 2011)(waiver that was clear, understandable and unambiguous enforceable as to negligence); *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (Neb. 1994) (exculpatory clauses may be upheld, but only for ordinary negligence and may not contravene public policy).

[27] See, *Pleiss v. Barnes,* 260 Neb. 770, 619 N.W.2d 825 (Neb. 2000) (knowledge of the specific danger); *McDermott v. Platte County Agr. Soc.*, 245 Neb. 698, 515 N.W.2d 121 (Neb. 1994) (subjective standard).

Time will likely give us the benefit of case law interpreting the NAPA. However, for the time being it is clear that the NAPA is not a “silver bullet” and it is wise to continue to tread cautiously to avoid those rattlers in the weeds.