

## **N.D.A.G. Letter to Jones (Oct. 11, 1991)**

October 11, 1991

Lloyd A. Jones  
Commissioner  
North Dakota Game and Fish Department  
100 North Bismarck Expressway  
Bismarck, ND 58501-5095

Dear Mr. Jones:

Thank you for your July 31, 1991, letter in which you requested an opinion regarding a landowner's liability under N.D.C.C § 53-08-03 in a variety of circumstances.

You have asked eight questions which I will address individually. As evidenced by the many possibilities you raise, the answers are highly fact dependent. I will assume for discussion that in each circumstance a person would be entering another's property for "recreational purposes" as defined in N.D.C.C. § 53-08-1.

N.D.C.C § 53-08-03 states:

Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance 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.
1. If a fee is not charged, does a landowner's liability vary if the land is posted against hunting or trespass vs. land left unposted?

I call your attention to the phrase in N.D.C.C. § 53-08-03 "who either directly or indirectly invites or permits." If the landowner has neither directly nor indirectly invited or permitted entry onto the property, the statute would not apply. However, N.D.C.C § 53-08-02 states:

Duty of care of landowner. Subject to the provisions of section 53-08-05, 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.

In O'Leary v. Coenen, 251 N.W.2d 746, 757 (N.D. 1977) the court stated that an occupier of the premises owes no duty to a trespasser other than to refrain from harming him in a willful or wanton manner. At such time as the trespasser's presence in a place of danger becomes known, the occupier's duty is to exercise ordinary care to avoid injuring the trespasser.

Therefore, in response to the first question, if a person has not been charged an access fee and is not directly or indirectly invited or permitted on the property, the owner owes no duty to keep the premises safe. The owner also does not have a duty to give warning of dangerous conditions as long as he does not willfully or wantonly fail to guard against a known danger.

2. If a fee is not charged and a person enters posted land without permission, is a landowner's potential for liability affected?

The court holding in O'Leary v. Coenen, supra, would also be applicable in this instance. In addition, a similar question was addressed in Friedman v. Grand Central Sanitation, 571 A.2d 373 (Pa. 1990), when a hunter sought damages from a landowner for injuries received when he entered posted property.

The Friedman court held that the owner of private property, although the land was posted "no trespassing" and the public was not invited, was entitled to immunity under the Pennsylvania "Recreational use of Land and Water Act". Therefore in Pennsylvania, a landowner whose land is used for recreational purposes without charge, whether or not he has invited them, is not liable nor does he have a duty to keep the premises safe or to warn against "a dangerous condition, use, structure, or activity on the premises". Again the landowner must not willfully and wantonly harm the trespasser or fail to guard against a known danger when the entering person's presence becomes known.

As in the response to question one, O'Leary and Friedman, coupled with N.D.C.C. § 53-08-02 indicate that if a person has not been charged an access fee and is not directly or indirectly invited or permitted on the property, the owner owes no duty to keep the premises safe or to warn against a dangerous condition, use, structure or activity on the premises. Again, the owner must not willfully or wantonly fail to guard against a known danger.

3. If no fee is charged, is there a difference in a landowner's potential for liability if land is specifically posted against hunting vs. being posted against all trespass?

The purpose of the statute is to encourage landowners to allow recreational use of their land. Although the statute was created to protect persons who "gratuitously" allow others to use their property for recreational purposes, nothing in the statute specifically limits its application to owners who do not grant permission and post their land to keep others out.

However, if the land is posted against hunting and the landowner allows other recreational activities such as hiking, biking, fishing, etc., N.D.C.C. § 53-08-03 may apply, depending upon the situation.

4. With significant absentee ownership, where a tenant has control of the land, what is the liability of the landowner vs. the tenant (no fee charged)?

The "owner" of land as defined in N.D.C.C. ch. 53-08 includes tenant, lessee, occupant, or person in control of the premises. Thus, immunity from liability would apply to the actual owner as well as the tenant.

5. What is the liability if the landowner specifically grants permission but charges a \$25 access fee?

As previously discussed, if a landowner grants permission but does not charge a fee, he is protected under N.D.C.C. § 53-08-05. You stated in your letter that the statute implies liability may be assumed if a fee is charged.

However, the immunity provided in N.D.C.C. §§ 53-08-02 and 53-08-03 does not impose automatic liability if a fee is charged.

Liability is assumed but is based upon whether a reasonable person would act in the manner the landowner acted. As stated in Stokka v. Cass City Elec. Co-op, Inc.:

In order to characterize an injury as having been willfully or wantonly inflicted, it is necessary to show knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; ability to avoid resulting harm by ordinary care and diligence in the use of the means at hand; and the omission of such care and diligence to avert threatened danger when to an ordinary person it must be apparent that the result likely would prove disastrous to another. (Quoting from Van Ornum v. Otter Tail Power Co., 2120 N.W.2d 188, 202 (N.D. 1973).)

373 N.W.2d 911 (N.D. 1985).

The determination of reasonableness will necessarily depend on the facts of the individual case.

6. What is the liability if the landowner specifically grants permission but does not charge an access fee?

If a landowner specifically grants permission but does not charge a fee, N.D.C.C. § 53-08-03 would apply, and the landowner would not be liable for ordinary negligence.

7. If the landowner does not grant permission, but the hunter enters unposted land to hunt and is injured what is the landowner's liability?

If the landowner has not granted permission for an individual to enter his land for recreational purposes, the landowner would not have protection under N.D.C.C. § 53-08-03 but would have protection under N.D.C.C. § 53-08-02.

8. If a hunter enters legally posted land without permission, hunts illegally and is injured, does the landowner have a potential for liability?

An occupier of premises owes no duty to a trespasser other than to refrain from harming him in a willful or wanton manner. Should the trespasser's presence in a place of danger become known to the occupier, the occupier then has a duty to exercise ordinary care to avoid injuring him. O'Leary, id. N.D.C.C. § 53-08-06, emphasizes the obligation of a person entering another's land to exercise care in his use and activities upon that land.

In summary, by allowing the free use of his land for recreational purposes, a landowner is generally protected from liability. By charging an access fee, the landowner has removed any protection given by the statute. However, whether a landowner is liable depends upon whether or not he was negligent or acted maliciously in failing to warn against dangerous conditions.

I hope this discussion will help to clarify your concerns.

Sincerely,

Nicholas J. Spaeth

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