

Reducing Liability Associated with Public Access



Public access to property for recreational uses—such as hiking, bird watching, fishing and hunting—raises concern about the possibility of liability on account of injury to a recreational user. Pennsylvania law provides some protection from liability associated with public use of property for recreational purposes. Also there are practical steps that can be taken to minimize risk of liability.

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Introduction

Pennsylvania's Recreational Use of Land and Water Act (referred to as "RULWA") provides that landowners who invite or permit and other statutes provide substantial protection from liability to landowners who permit the public to come onto their

land for outdoor recreation. These protections also apply to holders of trail and other easements. The best defense for landowners and easement holders, however, is preparedness: posting signs, obtaining releases, requiring indemnity, securing insurance coverage and taking steps to warn users of potentially dangerous conditions. This guidance discusses a variety of legal and other means to avoid or minimize liability.

Statutory Protection from Liability

Recreational Use of Land and Water Act

Defense of immunity

RULWA provides that landowners who invite or permit people to come onto their land for recreational uses do not, by doing so, assume responsibility for or incur liability for bodily injury or property damage suffered by any recreational user. If the landowners are sued, RULWA gives them the defense of immunity. Pennsylvania courts interpreting RULWA have found that an easement holder is entitled to the same scope of protection as a landowner.

Statutory exceptions

If an admission fee is charged in connection with the recreational use, the protection of RULWA will be lost. In addition, a landowner who willfully or maliciously fails to guard or warn of dangerous conditions is not protected by RULWA.

Judicial exceptions

Even though a landowner may assert the defense of immunity under RULWA, there is no guarantee that RULWA immunity will apply in any given situation. Since the enactment of RULWA in 1966, exceptions to the protection afforded by this immunity statute have been carved out by Pennsylvania courts in a body of continually evolving case law. Examples of such exceptions are where the injury occurred on land in close proximity to developed land or where the land has certain types of improvements, such as swimming pools, playgrounds or basketball courts.

The guide [Pennsylvania's Recreational Use of Land and Water Act](#), published by the Pennsylvania Land Trust Association and available at [ConservationTools.org](#), provides a fuller review of the types of lands and improvements that are covered by or exempted from RULWA.

Rails-to-Trails Act

Pennsylvania's Rails-to-Trails Act provides for rail-trails acquired under the Act a limitation of liability similar to that found in RULWA. Like RULWA, an owner may be open to liability if there is any charge made or usually made for entering or using the trail. Unlike RULWA, there is no exception for willful or malicious failure to warn or guard against dangerous conditions.

The guide [Liability and Rail-Trails in Pennsylvania](#), published by the Rails-to-Trails Conservancy and available at [ConservationTools.org](#), includes rail-trail case studies.

Equine Immunity Act

Landowners and easement holders who permit horseback riding should consider availing themselves of the protections afforded by Pennsylvania's [Equine Immunity Act](#) (Act 93 of 2005). The act applies "to an individual, group, club or business entity that... provides the facilities for an equine activity...." The act lists eight equine activities including "recreational rides." Signs must be posted to take advantage of the protections:

This act shall provide immunity only where signing is conspicuously posted on the premises on a sign at least three feet by two feet, in two or more locations, which states the following: "You assume the risk of equine activities pursuant to Pennsylvania law."

Immunity Available to the Commonwealth and Local Government

Both public and private entities can assert immunity under all of the statutory schemes identified above, but only the Commonwealth of Pennsylvania and its instrumentalities (for example, state-controlled agencies and authorities) can assert immunity under the [Sovereign Immunity Act](#). The Sovereign Immunity Act enacts by statute the ancient principle of case law that the sovereign (in this case the Commonwealth of Pennsylvania) cannot be sued. There are some exceptions to that general rule, among which are claims for bodily injury (or death) resulting from defective conditions derived or originating from Commonwealth real estate. (Exceptions do not include claims for injuries arising from negligent maintenance of real property. In *Nardella v. SEPTA* (Pa. Cmwlth. 2011), the court found that ice and snow are not defective conditions. Thus, the Commonwealth and its instrumentalities are immune from suit for slips and falls on ice or snow at locations they own, manage, possess or control.)

Only counties, townships and other municipal entities and instrumentalities can assert immunity under the [Political Subdivision Tort Claims Act](#). The Political Subdivision Tort Claims Act provides coverage similar to the Sovereign Immunity Act.

Both Acts provide monetary caps on damages and limit the kinds of claims that can be brought.

Steps to Minimize Risk

Besides asserting the defense of statutory immunity, there are steps that landowners (the "Owners") and, where a recreational access easement over a designated area (the "Easement Area") is in place, the easement holder (the "Holder") can take to lessen the

risk of liability for injuries arising from public access to private property for recreational uses.

Warnings and Temporary Closings

The most important step Owners and Holder can take to eliminate risk is to warn recreational users whenever they become aware of a potentially dangerous condition—especially one that a recreational user might not notice—and take reasonable steps to guard against injury even if that means closing the Easement Area temporarily. Avoiding potential liability is always better than defending claims—even if immunity may be available under RULWA.

Well-Drafted Easement Document

Prudently crafted trail and other recreational use easements can decrease the potential risk of liability and costs to Owners and Holder.

No duty imposed by easement documents

Given the strong recommendation to take reasonable steps to guard against injury, some may find it surprising that the model documents provided by the Pennsylvania Land Trust Association to afford recreational opportunities do not allocate responsibility to inspect for, or warn against, potentially dangerous conditions or to perform whatever maintenance or repair may be necessary or advisable to correct dangerous or defective conditions. Responsibility is either not mentioned at all ([Model Grant of Trail Easement](#)) or, as in §5.04 of the [Model Trail Easement Agreement](#), any duty to inspect, warn against or correct defective or dangerous conditions is expressly disclaimed.

Rationale

There is a tactical reason for the approach taken by the model easement documents. Information in a recorded document is available to everyone, including the attorney for the person allegedly injured using the Easement Area. The model easement documents purposely omit provisions that may incentivize a lawsuit or provide a path to get around the statutory defense of immunity. A covenant that imposes an affirmative duty to inspect, or warn against, or repair

defective conditions within the Easement Area may provide an avenue for a plaintiff’s attorney to claim that the injured recreational user had a reasonable expectation, based upon the terms of the easement document, that safe conditions would be maintained. Whether or not ultimately successful, the issues of fact and law become more complicated and, instead of being quickly dismissed, the claim may require litigation or a substantial cash outlay to settle.

Off-record agreement

If Owners and Holder want to allocate, as between themselves, rights and responsibilities pertaining to the safety of the Easement Area, they can do so but they are well advised to keep the content of that agreement off-record so as not to give rise to a claim that a recreational user relied upon that promise. A mention of the off-record document in the recorded easement document should be sufficient to put a successor to Owners or Holder on notice to inquire as to the contents of that document.

Indemnity

[The guide [Indemnity Agreements and Liability Insurance](#), published by the Pennsylvania Land Trust Association and available at [ConservationTools.org](#), looks at the use of indemnity for a range of conservation transactions.]

Shifting risk

An indemnity is a legal device to shift the risk of loss or liability from one person to another. For example, Owners may want to shift the risk of liability associated with an organized race to be held on the trail to the event sponsor. An indemnity is often coupled with an agreement to defend -- a phrase typically used is “indemnify, defend and hold harmless”. The agreement to defend is important because, while statutory immunity may ultimately result in a finding of no liability, thousands of dollars may be spent in court costs and legal fees to achieve that result. Why would a recreational user commence a claim that is probably covered by RULWA? Attorneys representing injured persons know that an insurance company may be willing to pay to settle a case rather than incurring the cost of defense.

Allocating risk in recreational use easements

In the case of trail and other public access easements, Owners may want to shift to Holder the risk of liability arising out of an injury to a recreational user. The [Model Trail Easement Agreement](#) takes the approach that, as to the Easement Area, Owners should take responsibility for the acts and omissions of Owners and anyone else who is on the property at the express or implied invitation of Owners. These are referred to as “Owner Responsibility Claims”. The safety of family, friends and people providing services or making deliveries to Owners remains the responsibility of Owners just as it would if no access easement had been granted. Liability for bodily injury or property damage occurring within the Easement Area (other than Owner Responsibility Claims) is allocated to Holder including the cost of defending the claim on behalf of both Owners and Holder.

Indemnity from recreational user groups

Landowners may require indemnity agreements from schools, clubs or other groups using a trail on a regular basis, or from an event sponsor who desires use of the trail for a “run” or competitive event. For example, Owners may be able to shift the risk of a student athlete being injured to the local school district by requiring an indemnity as a condition to allowing the cross-country team to use the trail system for daily practice. These indemnities are important because, as discussed in the next section, they provide access to the indemnifying party’s insurance coverage. The [Model Trail Easement Agreement](#), by requiring Owners’ written consent for certain uses, provides Owners the opportunity to require indemnity agreements for races and other organized activities.

Insurance

[The guide [Indemnity Agreements and Liability Insurance](#) looks at the use of liability insurance in conjunction with indemnification agreements.]

Defense of claims

The availability of the statutory defenses described above may insulate Owners from liability for claims arising from recreational use; nevertheless, a claim asserted in court needs to be defended and, until

dismissed or settled, attorneys’ fees and other costs will be incurred. Insurance coverage can mitigate the cost of defending the claim as well as any liability that may ensue.

Liability insurance

Owners typically carry policies of homeowners’ insurance, which include coverage for bodily injury (including death) and property damage occurring on or about the property owned by the persons named in the policy, called the “named insureds”. Similar coverage for injury and damage is furnished to organizations, whether for profit or nonprofit, under commercial general liability policies. Submitting a claim promptly to the liability insurer will ordinarily result in an attorney being engaged to defend the named insureds. The following subsections explain how liability coverage can be extended to persons other than the named insured on the policy -- for example, by extending Holder’s liability coverage to protect Owners as well -- and how to bolster the protections offered by an indemnity backed by insurance coverage

Contractual liability endorsement

If a recreational user asserts a claim against Owners, and if Holder has indemnified Owners for liability arising from such claims in the easement document, then the Owners (and their insurance company) may be able to call on Holder’s insurance company to defend both Owners and Holder. Holder’s insurer will be bound to do so only if Holder’s liability policy covers contractual liability (liability to others under an indemnity) as well as coverage of the claim asserted by the recreational user. The same applies if responsibility for that claim was allocated to Owners in the easement document. In that case, the Holder (and its insurance company) would be able to call on Owner’s insurance company to defend the claim on behalf of both if contractual liability coverage is included in Owners’ liability coverage. Liability policies generally exclude contractual liability from basic coverage but it can be added back in by endorsement.

Additional insured endorsement

Another way to furnish liability coverage to persons not originally named in the policy is to have the insurance company amend the policy by endorsement to name them as additional insureds. The endorsement is supposed to provide the additional insureds with the same coverage as the insured has with respect to a particular site or occurrence; however, endorsements vary widely and each must be carefully reviewed to see that the anticipated coverage is actually provided.

Waiver of subrogation

Once a claim is paid to an injured person, the insurance company has the legal right, called subrogation, to sue others who may share responsibility for the accident. For the unwary, this may have surprising consequences.

Using our earlier example, a school district indemnifies the owner of a trail for injuries that might occur to its cross-country team athletes who use the trail for daily practice. The school district has its insurer add contractual liability coverage to back this indemnity. If an injury then occurs, the school district's insurer might end up paying a claim. The school district's indemnification of the trail owner will protect the owner from the athlete's claim or an attempt by the school district to shift liability. However, the trail owner is not protected from the school district's insurer. Subrogation allows the school district's insurer to try to recover some of the money paid to the athlete from the trail owner.

In other words, even if a group indemnifies an Owner and agrees to pay any claim against an Owner via the group's contractual liability endorsement, the group's insurer may still sue the Owners to recover some of its costs. To bar that suit, and complete the protection intended by the indemnity, a waiver of subrogation should be requested as part of the indemnity package.

Certificates of insurance

A certificate of insurance is issued by an insurance company to the requesting party (called a certificate holder) to evidence the types and limits of coverage carried under policies issued by that company to the

named insured. Owners and Holder can require delivery of certificates of insurance before commencement of the easement and periodically, or on request, thereafter. Certificates of insurance will list endorsements to the CGL policy such as contractual liability, additional insured status and waiver of subrogation.

Off-record agreements

So as not to incentivize claims against Owners or Holder, none of the model trail easement documents provided by the Pennsylvania Land Trust Association reference insurance responsibilities. If Owners will not enter into an easement document without a written commitment from Holder to carry certain kinds of insurance with certain minimum requirements, this can be done outside the recorded document, perhaps with the stipulation that Holder is not permitted to transfer the easement to another entity without obtaining an assumption of that agreement. The commentaries to the models call for the insertion of a brief reference to the off-record document to be sure that the off-record agreement is not superseded by the easement document and to be sure that a successor or assignee of Holder is bound to the agreement.

Releases

Releases effective with adults

Another method to control risk is to obtain from recreational users a signed statement (called a "release") that absolves Owners and others (for example, activity sponsors) from any responsibility for personal injury suffered by that individual arising from the recreational use. A release signed by a legally competent adult is *highly effective* in Pennsylvania. Young people under the age of 18 are, however, not legally competent to waive their rights to seek compensation for injury. Releases signed by their parents or legal guardians are not effective to waive the constitutional rights of young people to a jury trial and due process of law.

The guide [Release of Liability](#), published by the Pennsylvania Land Trust Association and available at ConservationTools.org, discusses at length releases,

assumption of risk agreements and covenants not to sue. PALTA developed the accompanying [Model Release Agreement](#) to help nonprofits minimize the risk of being held responsible for injuries or property damage associated with organizing volunteer, educational, recreational and other events and activities (or opening up property for the same).

Releases and trail easements

The commentary to the [Model Trail Easement Agreement](#) notes the opportunity to require delivery of signed releases as a condition to use of the Trail under certain circumstances. For example, runs and other competitive events fall into the *license* rather than *easement* category; they are not permitted without Owners' consent. This is to allow Owners the opportunity to require releases and, perhaps, an indemnity from the event sponsor, as a condition to use of the Easement Area. Another way to obtain releases is to allow certain activities that may impose greater risk to be limited to members of a user club; for example, an equestrian or snowmobiling association. Club members must carry a membership card when using the Easement Area and the release can be printed on that membership card.

The Indemnity Wish List

In seeking to establish sufficient liability protection, a person or organization might pursue a wish list of tools described above:

- Indemnity agreement,
- Contractual liability endorsement,
- Additional insured endorsement,
- Waiver of subrogation,
- Releases.

However, these tools are complex in their details and in how they interact and overlap with one another. Depending on the situation, one or more of these tools may not be available; also, each tool may not be needed to achieve sufficient protection. The person or organization seeking to protect itself must review the particular facts and circumstances to determine whether its needs are being met.

Different Risks for Public and Private Entities

Greater statutory liability protections and the power of taxation make it less risky for public entities to own land or hold easements for recreational public use than private entities.

Regarding public access easements, the private landowner has the same statutory protections from liability available to them whether a nonprofit organization or government is identified as the Holder of the easement. However, in regards to liability risks to Holder, there are compelling reasons to favor governmental entities, rather than nonprofit organizations, as Holder.

Additional Protection from Liability for Public Entity

In addition to RULWA and other statutory defenses available to Owners and land trusts discussed in the opening section of this guide, other layers of protection are available only to state and local governments. The Commonwealth can assert immunity or limited liability under the Sovereign Immunity Act and counties, townships and other municipalities can similarly assert immunity or limited liability under the Political Subdivision Tort Claims Act. The availability of strong defenses can be expected to result in the quick dismissal of claims that are not well grounded. *See "Immunity Available to Commonwealth and its Agencies" above.*

Impact of Judgment on Public Versus Nonprofit Entity

In the case of a municipality owning the trail or holding a trail easement, if a court or jury finds liability, the burden of that liability can be borne by the public generally. However, in the case of a nonprofit, the assets of the nonprofit, including charitable contributions and funds set aside for recreation and conservation, will be exposed to collection of a judgment. Even if proceeds of insurance policies are available to pay the claim, the nonprofit will undoubtedly bear the burden of increased premiums (if it is able to obtain insurance at all) for a

long time to come. The public uses streets and sidewalks owned or maintained by government all the time. The costs of defending or insuring against claims arising from public use are not likely to change very much regardless of whether the injury occurred on a trail or on a sidewalk. Thus, the incremental cost of assuming responsibility for trails in addition to other public rights of way is, probably, not very significant. On the other hand, the cost of defending or insuring claims arising from public use could have a paralyzing and ruinous impact on a nonprofit and the nonprofit's mission.

Preserving Charitable Assets

Charitable organizations must be careful to preserve their endowment and other funds dedicated to furthering their mission over the long term. If a claim for serious injury or death is for some reason not barred by immunity, insurance proceeds may not be sufficient to satisfy the verdict or settlement reached. While this may be unlikely, it nevertheless could happen and, if it does, the funds that nonprofit organization needs to continue its programs and operations, will also be exposed to payments required by court order.

Limit Liability by Contract

In the case of easements for public access, one possibility that could be considered is to add to the easement document a provision limiting Holder's liability on its agreement to indemnify Owners from claims to the insurance proceeds available to defend the claim. But, even if that was acceptable to Owners, it only limits Owners' recovery from Holder for a judgment rendered against Owners. It does nothing to limit Holder's potential exposure for claims asserted directly against Holder by the recreational user.

Separate Entity for Public Access Assets

If a conservation organization is not satisfied with the protections from liability discussed above and wants to isolate its charitable assets from exposure to public access claims, another strategy to consider is the creation of a separate, but controlled, entity to hold the land and easements available for public use.

Single purpose entity

The first step to implement the strategy is for the primary organization (the "parent") to create an entity (the term used in commercial transactions is a single purpose entity or SPE) to own the assets involved in higher risk activities. In this case, the parent would transfer to the SPE some or all of its public access land and easements. The SPE is named as an insured on the policies of liability insurance carried by the parent so as to provide coverage for claims against the parent, the SPE and any indemnified parties. The SPE can be set up as a single-member non-profit organization, thus vesting in parent, as sole member, total control over the SPE.

Separate entity for liability purposes

So long as the formalities of separate existence are observed (for example, separate annual meetings, election of officers, bank accounts) the parent, and its assets, will be shielded from claims against the SPE. But if the directors and officers of the parent treat the two entities as if they were one, a court can "pierce the corporate veil" and allow recovery against the parent.

Single entity for tax purposes?

The SPE can take any form available under state law that provides protection for the parent. A non-profit corporation controlled by the parent as single member is an obvious choice for these purposes but there is a federal tax reason to consider forming the SPE as a single member limited liability company. Single member LLCs, unlike single member corporations, are "disregarded" for federal tax purposes; in other words, they are *not* recognized as an entity separate from the parent. The result is that contributions of land or easements to the SPE (if it has been formed as a single member limited liability company) are treated, for federal tax purposes, as if the donations had been made to the parent. The parent's status for purposes of determining tax deductibility under the Code (for example, recognition as a public charity under §501(c)(3)) automatically extends to the limited liability company it controls.

Does an SPE strategy make sense for a particular organization?

The issues surrounding the development and implementation of an effective strategy for isolating risk are complex. If an organization wants to further investigate or pursue such a strategy, it should hire competent legal assistance to help it navigate the complexities in the context of the organization's particular circumstances.

Conservation Easements

In the [*Model Trail Easement Agreement*](#), liability for bodily injury or property damage occurring within the Trail Easement Area (other than Owner Responsibility Claims) is allocated to Holder. In contrast, the indemnity provision in the [*Model Grant of Conservation Easement*](#) runs only from the Owners to the Holder. Because with a conservation easement the Holder generally has no care, custody or control of the Property, this is entirely sensible and appropriate.

When an easement for public access is granted as part of a conservation easement, the Holder gains some control over the portion of the Property available for public recreational use. This merits a review of who should indemnify whom for what. Some users may resolve matters by adjusting the conservation easement indemnity provision to simply make the indemnification mutual. But this does not take into account that Holder's indemnity ought to be limited only to specific public use claims within a specific area. A better alternative is to add to the conservation easement a provision, applicable to the public access area only, similar to the indemnity included in the [*Model Trail Easement Agreement*](#), which limits Holder's responsibility to the Easement Area only and carves out from that overall responsibility Owner Responsibility Claims. Users should consider this when deciding whether to establish a trail easement as part of a broader conservation easement document or via a separate trail easement document.

Related Resources at ConservationTools.org

Library Categories

[Liability Associated with Recreational Use](#)

Featured Library Items

[Model Release Agreement](#)

[Davis v. City of Philadelphia 1/13/2010 Decision](#)

[Liability and Rail-Trails in Pennsylvania](#)

[Equine Immunity Act](#)

[Sovereign Immunity Act](#)

[Political Subdivision Tort Claims Act](#)

[Rails to Trails Act](#)

[Easement Holder Enjoys Same RULWA Immunity as Land Owner](#)

[Model Grant of Conservation Easement and Commentary, 6th Edition](#)

[Model Grant of Trail Easement and Commentary: A Short Form Alternative to the Model Trail Easement Agreement](#)

[Model Trail Easement Agreement and Commentary \(3rd edition\)](#)

Related Guides

[Indemnity Agreements and Liability Insurance: Protection from Claims Brought by Third Parties](#)

[Pennsylvania's Recreational Use of Land and Water Act](#)

[Reducing Liability Associated With Public Access](#)

[Release of Liability: A Tool for Managing the Risk of a Volunteer or Participant in an Activity Suing the Activity's Organizer or Host](#)

[Trail Easement](#)

[Conservation Easement](#)

[Model Conservation Easement](#)

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Submit Comments and Suggestions

The Pennsylvania Land Trust Association would like to know your thoughts about this guide: Do any subjects need clarification or expansion? Other concerns? Please contact Andy Loza at 717-230-8560 or aloza@conserveland.org with your thoughts. Thank you.

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