

BY KEVIN G. FALEY AND KENNETH E. PITCOFF

## Proposed Amendments to the Recreational Use Statute

Several bills are before the New York State Assembly and Senate that call for crucial amendments to General Obligations Law §9-103, commonly referred to as the Recreational Use Statute.

GOL §9-103 seeks to encourage private landowners to open up their lands to the public for recreational purposes by providing protection from liability if an individual injures himself while on the land. Initially enacted in 1963 as an incentive for landowners to allow hunters to utilize their property, the statute has repeatedly been amended to include a wide variety of additional recreational activities. Some lawmakers rightly believe that the time has come to amend the statute once again so as to ensure that landowners are adequately protected.

### Current Statute

The Recreational Use Statute provides:

[A]n owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized glean-ing...canoeing, boating, trapping, hiking, cross-coun-try skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warn-ing of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes.<sup>1</sup>

Landowners are not liable for ordi-nary negligence on their part<sup>2</sup> but sur-render immunity if they require pay-ment for access to the land for recreational purposes. They also lose their immunity if a recreationalist injures another individual to whom the owner owes a duty to keep the premises safe or if the owner willfully or mali-



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iciously fails to guard or warn against dangers known to exist on the property.<sup>3</sup> Further, the land must be appropriate for the recreational activity being pursued.<sup>4</sup>

As it currently stands, GOL §9-103 provides the hospitable landowner with immunity from liability only if the plaintiff was engaged in one of the enumerated recreational activities while using the defendant's land. Accordingly, landowners are only protected from liability for merely a small fraction of the seemingly endless list of possible recreational activities in which an individual may engage. The inequity and the arbitrariness of the statute is illustrated in the unfortunate outcome in *Rochette v. Town of Newburgh*.<sup>5</sup> Because the court "decline[d] to interpret the statute in general terms so as to declare that iceboat racing is an activity encompassed by it," the landowner could not claim immunity offered by the statute. As this case demonstrates, the courts have strictly construed the statute and only those enumerated activities will be given protection.

Further, although the Legislature has amended the statute in the past to recognize a recre-ational activity (tobogganing), the courts have not given these amendments retroactive effect.<sup>6</sup>

Lawmakers are hoping to avoid such regrettable results in future cases with a simple amendment to the statute. Some proposed bills advocate the addi-tion of a "catch-all" provision to the enumerated activities in the statute. For example, Bills A2632 and S1427b suggest the use of the phrase "or other recreational activities" as well as the use of the term "described" rather than "enumerated" to refer to the activities within the statute.<sup>7</sup> Two other bills, A1579 and S3596, propose simply including recreational activi-ties such as surfboarding and scuba diving.<sup>8</sup> However, adding just another activity to an already lengthy list is an inefficient and inef-fective solution to the problem. Why only add surfboarding and scuba diving and not other prevalent activities, such as kayaking or tubing? Landowners prefer amendments of the former type which can further shift the burden of responsibility away from themselves to the recreationalist while emphasizing the need for individuals to engage in

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Continued on page 8

## Proposed Amendments to the Recreational Use Statute

was "appropriate for public use" and that it was "physically conducive to or suitable for the particular activity or sport" at issue.<sup>11</sup> They can accomplish this by demonstrating that the land had been used for that same activity in the past. For example, in *Albright v. Metz*,<sup>12</sup> because motorcyclists had frequently used a property that had been converted from a gravel pit to a landfill, both before and after the alteration, the court found that the property was suitable for the activity at the time of the plaintiff's injury even though the plaintiff fell down a 35-foot cliff, holding that "suitability must be judged by viewing the property as it generally exists, not portions of it at some give time."

Similarly, in *Iannotti v. Consolidated Rail Corp.*,<sup>13</sup> the court held that the property had been suitable for motorbiking despite the use of the land for commercial purposes (the bike trail was occasionally used by railroad workmen to gain access to the adjacent railroad tracks to make repairs). In any case, regardless of the type of property and its primary use, the landowner is responsible for allowing only those recreational pursuits for which he or she knows the property to be safe. If the landowner is aware that the property is not safe for a particular use and that individuals are engaging in that activity on his property, the landowner may

revive the proposed amendments that broadly define recreational activities. This would serve both the needs of the outdoor sportsman and protect the landowner.

the magnanimity of private landowners to meet their need for land use. Landowners are more likely to welcome these individuals onto their land if they are confident that they are protected from liability. The law currently does not foster such benevolence. It sends a mixed message to landowners, who are not expected to maintain their property for recreational use but are forced to scrutinize the activities in which the recreationalists engage in order to ensure that they fall within the statute's protection.

The proposed "catch-all" provision would relieve the landowner's anxiety significantly and reduce legal and insurance costs. The necessary requirements for establishing immunity would remain and the courts will continue to assess the facts and circumstances of the situation to determine whether the land was safe for public use and whether the activity was recreational in nature. At the time of publication, Bill A2632 was "held for consideration in judiciary" on June 13, 2006 while the other bills mentioned above were listed as "referred to judiciary" as of January 2006 on the New York State Assembly Web site with no further action.<sup>17</sup> Unfortunately, as this legislative session has since ended, all of these bills must be reintroduced in January 2007 if the Legislature is to reconsider them. It is the writers' opinion that the sponsors should

be under an obligation to fence the property, post signs, etc. in order to protect himself from liability.<sup>14</sup>

Even after the Legislature amends the statute, future courts will still have to decide whether the land is of the sort that was meant to be protected when the statute was originally enacted. When determining landowner's liability, the question is whether the property would have been opened to the public without the incentive offered by the statute. Recreational facilities that are maintained and supervised are not included as the landowner needs no incentive to allow individuals onto the property.<sup>15</sup> However, in *McCarthy v. New York State Canal Corp.*,<sup>16</sup> where the plaintiff fell into a hole while fishing on property within the State Canal System, the defendant was able to invoke the immunity provided by the statute because "the Canal Corporation and the Thruway Authority would no doubt [have felt] constrained to end the public's use of the terminal wall" for fishing without the protection of the statute. The court specifically found that the defendant did not supervise the fishing activities of the public.

### Magnanimity, Yet Liability

Approximately 85 percent of New York State is privately owned. Many outdoor recreationalists rely on

Continued from page 4

activities at their own risk.

Significantly, if one of these amendments passes, landowners will not gain complete immunity. A number of conditions still exist in order for the defendant to invoke the immunity provided by the statute. It must be shown that the plaintiff was in fact engaging in a recreational activity at the time of his or her accident. In *Rousseau v. County of Dutchess*,<sup>9</sup> the court found that "[w]alking 500 to 600 feet to get to a trestle is not enough to transform [the plaintiff's] activity into hiking." Conversely, in *Cornetti v. Hunter Mountain Festivals Ltd.*,<sup>10</sup> the court, in finding for the landowner, based its decision on its interpretation of the plaintiff's actions at the time of her injury. The plaintiff had entered the property to watch a bike race, ridden the chair lift and then descended the advanced ski trail to find a place to observe the event. Because she was wearing "good, sturdy boots," had prior hiking experience, and had voluntarily descended the trail (she had purchased a one-way ticket), the court found that the plaintiff was indeed hiking and that the landowner was protected under the statute.

### 'Appropriate for Public Use'

As in the past, landowners will still have to prove that their land

1. N.Y. Gen. Ob. Law §9-103(D)(a) (McKinney 2001).  
2. *Sena v. Town of Greenfield*, 91 N.Y.2d 611, 673 N.Y.S.2d 984, 696 N.E.2d 996 (1998).  
3. N.Y. Gen. Ob. Law §9-103(2)(a, b, c) (McKinney 2001).  
4. *Guttridge v. United States*, 927 F.2d 730 (2d Cir. 1991); *Wilson v. United States*, 669 F.Supp. 563 (E.D.N.Y. 1987).  
5. 88 A.D.2d 614, 449 N.Y.S.2d 1013 (1982).  
6. *Seideman v. County of Monroe*, 185 A.D.2d 640, 585 N.Y.S.2d 909 (4 Dept. 1992).  
7. *New York A. 2632 and S. 1427*, 228th Leg. (Jan. 28, 2005).  
8. *New York A. 1579 and S. 3596*, 228th Leg. (Jan. 21, 2005).  
9. 167 Misc.2d 568, 638 N.Y.S.2d 290 (1996).  
10. 241 A.D.2d 896, 660 N.Y.S.2d 511 (3 Dept. 1997).  
11. See *Guttridge*, supra.  
12. 88 N.Y.2d 656, 649 N.Y.2d 359, 672 N.E.2d 584 (1996).  
13. 74 N.Y.2d 39, 544 N.Y.S.2d 308, 542 N.E.2d 621 (1989).  
14. See *Iannotti*, supra.  
15. 267 A.D.2d 745, 699 N.Y.S.2d (3 Dept. 1999).  
16. 244 A.D.2d 57, 675 N.Y.S.2d 254, leave to appeal denied 92 N.Y.2d 815, 683 N.Y.S.2d 174, 705 N.E.2d 1215 (3 Dept. 1998).  
17. <http://assembly.state.ny.us/>.

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