



Liability Risk and Recreational Use of Land after *Hall v. Henn*: Illinois Landowners Beware

By D. L. Uchtmann and A. Bryan Endres*

When is a Landowner or tenant liable for the injuries of someone who enters the land for recreational purposes with landowner's permission?

The liability risk increased when the Illinois Supreme Court decided *Hall v. Henn*, 208 Ill. 2d 325, 802 N.E.2d 797 (December, 2003). The court held that the Illinois Recreational Use Act offers limited protection from liability only to those landowners who open their property to the *general public* for recreational use. The Act does not protect landowners who open their land to only invited guests, e.g., to select hikers or hunters to whom permission is given. (The Act is codified at 745 Ill. Compiled Statutes 65/1 as the "Recreational Use of Land and Water Areas Act.").

The court's holding is a shift from previous interpretations of the Act by Illinois appellate courts, as well as the U.S. Court of Appeals for the Seventh Circuit. In the aftermath of the *Hall v. Henn* decision, landowners and farm operators should take note of the new requirements to qualify for liability protection under the Recreational Use Act and reassess their willingness to allow others on their property for recreational purposes.

The following paragraphs discuss general principles of liability, how the Recreation Use Act can reduce a landowner's risk of liability, how the recent Illinois Supreme Court decision limits the protection previously available from the Act, and how the *Hall v. Henn* decision has created a new framework for Landowners in deciding whether to say "yes" when persons ask to use their property for recreational purposes.

I. General Principles – Landowner Liability for Injuries on the Premises

Liability Principles: When is a Landowner (in this article, "Landowner" includes a tenant in possession of the land) liable for the injuries of someone who enters the land with permission and is injured? In Illinois, the following legal principles are generally relevant to liability, *assuming the Recreational Use Act does not apply*:

1. Landowners are not automatically liable if someone is hurt on their property. Instead, to be legally liable for entrant's injuries, the Landowner must be "at fault" in a way that causes the injury.
2. Negligence is the most likely reason a Landowner would be at fault. In a legal sense, negligence occurs when the Landowner (a) has a duty to the entrant, (b) fails to fulfill that duty, and (c) thereby causes an injury. Two duties recognized by the law are
 - the *general duty of a landowner* to exercise "ordinary care" to keep the premises "reasonably safe" (liability arising from breach of this duty is technically "premises liability"), and
 - the *general duty of Landowners and others* to exercise reasonable care in their actions towards entrants and others (this duty is broader than the "premises liability" duty).
3. Being at fault may also be present in other ways more reprehensible than mere negligence. For example, a Landowner could be liable for an entrant's injury if the injury occurred because Landowner (a) with *willful and wanton* disregard for the safety of



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others, failed to make the premises safe or to warn entrant, (b) injured the entrant directly by acting in a *reckless and foolhardy way* (also referred to as *gross negligence*), or (c) injured the entrant directly with a *intentional act*.

Examples: The following examples *assume the Illinois Recreational Use Act is not applicable*. In each example, the entrant is assumed to be hiking on Landowner's woodlot with Landowner's permission.

1. Landowner is Not at Fault: While watching the sunset Hiker accidentally walks into the trunk of a tree and suffers injury. Assume a jury would conclude that a healthy tree standing in a woodlot is NOT an unreasonable risk to entrants (here, the tree is an "open and obvious" danger, if a danger at all!).

Likely result: Landowner is not liable for the injury because Landowner is not negligent or at fault in any way.

- 2A. Landowner Negligently Fails to Repair a Dangerous Condition on the Premises or Fails to Warn of the Danger: Landowner knows that hikers and hunters cross a fence at an old wooden gate where the boards are spaced like the rungs of a ladder. Landowner knows the gate looks stronger than it really is. Assume a jury would believe that Landowner was merely negligent, i.e., a landowner exercising ordinary care to make the property reasonably safe would either repair the gate or warn entrants not to climb on it, but failure to do so is not willful and wanton neglect. Landowner neither repairs nor warns. While Hiker is climbing over the gate, it collapses causing injury to Hiker.

Landowner's fault: The unsafe condition on the premises caused the injury, and Landowner was negligent by failing to either repair or warn of the

non-obvious danger on the premises – an action that a jury believes would be taken by a landowner exercising ordinary care to keep the property reasonably safe.

Likely result: Landowner (and perhaps Landowner's insurance carrier, as might also occur in the examples that follow) is liable for Hiker's actual damages accompanying the injury, e.g., medical expenses, lost wages, pain and suffering.

- 2B. Landowner's Negligent Actions Directly Harm Entrant: Landowner is using a Bush Hog (a tractor-mounted rotary mower). Landowner knowingly mows close to Hiker's position, sees a 3-inch diameter fallen limb but mows over it anyway, a piece of the limb flies out from the Bush Hog striking Hiker in the head, and Hiker suffers injury. Assume a jury would conclude that Landowner was negligent, i.e., that a reasonably careful person would have avoided mowing over the tree limb while Hiker was nearby because the likelihood of harm to Hiker was foreseeable.

Landowner's fault: Owner operated the Bush Hog in a negligent manner. Landowner's negligence in operating the Bush Hog caused the injury directly.

Likely result: Landowner is liable for Hiker's actual damages accompanying the injury, as in Example 2A.

- 3A. Landowner's Willful and Wanton Failure to Repair or Warn of a Dangerous Condition on the Premises: Landowner knew a vicious bull was in the woodlot pasture where Hiker would hike. Thinking that Hiker *might* be fast enough to run away from the vicious bull if it charged and realizing such an event would be exciting to watch, Landowner neither warned Hiker of the danger nor moved the vicious bull into



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the barn. The vicious bull charged, Hiker was not fast enough to escape, and injury resulted. Assume a jury would find that Landowner had exhibited a *willful and wanton failure* to guard against or warn Hiker of an unreasonably dangerous condition – the presence of the vicious bull.

Landowner's fault: The unreasonably dangerous condition on the premises caused the injury, and Landowner was at fault by neither confining the vicious bull in the barn nor warning Hiker of the danger. The fault goes beyond ordinary negligence because a jury, in these circumstances, would see this failure to make the premises safe or warn as a “willful and wanton” disregard for the safety of others.

Likely result: Landowner is liable for actual damages accompanying the injury. In addition, because of the more reprehensible nature of Landowner's disregard for Hiker's safety, a court also might award punitive damages (damages above and beyond actual damages, intended to further discourage such reprehensible conduct).

- 3B. Landowner's Grossly Negligent or Intentional Acts Harm Entrant. Hiker left a pasture gate open; without further provocation, Landowner intentionally punched Hiker, causing injury.

Landowner's fault: Landowner was at fault by intentionally hitting Hiker, with little provocation. Assume a jury would view this fault (an intentional act) as being more reprehensible than a negligent act.

Likely result: Landowner is liable for actual damages accompanying the injury. In addition, because of the more reprehensible nature of Landowner's disregard for the safety of Hiker, a court

also might award punitive damages. (Landowner might also be guilty of a criminal assault, but this is beyond the scope of our discussion.)

Ordinary Negligence Compared To More Reprehensible Levels of Fault: For Landowner to be liable for the injuries of an Entrant, the Landowner must be at fault in some way that causes the injury. Most people believe the fault illustrated in Examples 2A and 2B is less reprehensible than the fault in Examples 3A and 3B.

In 2A and 2B, the fault is mere ordinary negligence – the failure to exercise reasonable care under the circumstances. But in 3A and 3B, the fault is more blameworthy. It involves a willful and wanton failure, i.e., a reckless disregard for Hiker's safety (if Landowner failed to warn of the vicious bull, thinking Hiker *might* be fast enough to get away and the escape would be fun to watch), or intentional misconduct (if Landowner punched Hiker).

Landowner's greater culpability in 3A and 3B, might cause a jury to also award Hiker *punitive damages* in addition to actual damages. The award of punitive damages (damages beyond actual damages) is a tool to further discourage conduct that is more reprehensible than ordinary negligence.

II. How Does the Illinois Recreational Use Act Limit Landowner's Liability Risk

Purpose: The purpose of the Act is "to encourage owners of land to make land and water areas available to the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes." "Recreational and conservation purposes" is defined broadly in the Act.

To implement this purpose, Section 3 of the Act states that



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an owner of land owes no duty of care to keep the premises safe for entry or use by any person for recreational or conservation purposes, or to give any warning of a natural or artificial dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

The Act provides *additional liability safeguards*. For example, Landowner does not incur liability for any injury to one person caused by another person, where both have entered the land for recreation purposes (Section 4 (c)) or for any injury caused by any natural or artificial condition, structure or personal property on the premises (Section 4 (d)). In both cases, “injury” includes injury to the *person or property* of the entrant.

Section 6 sets forth *two important limitations* on the Act’s liability protection:

Nothing in this Act limits in any way any liability which otherwise exists:

- (a) For *willful and wanton failure* to guard or warn against a dangerous condition, use, structure, or activity.
- (b) For injury suffered in any case where the owner of land *charges* the person or persons who enter or go on the land for the recreational use thereof

General Impact. When it applies, the Act protects landowners from liability arising from their *negligent* (but not willful and wanton) failure to prevent or warn of a dangerous condition on the premises – a condition not obvious to the entrant.

In summary, Under the Recreational Use Act, if a farmer allows others on the premises for recreational purposes, and does not charge a fee, the farmer faces less liability risk should the entrant be injured because of an unsafe condition on the premises.

Review of Previous Examples (where the Act was assumed not to apply). In both Examples 2A (the old gate used as a fence crossing) and 3A (vicious bull on the premises), Hiker’s injury resulted from a dangerous condition on the premises and Landowner failed to take reasonable steps necessary to make the premises safe or to warn entrant of the non-obvious danger.

In 2A, the failure to make the premises safe or give warning was seen by a jury as mere ordinary negligence – the failure to exercise ordinary care to make the property reasonably safe. Liability for actual damages was the result. In 3A the willful and wanton failure to make the premises safe was more blameworthy than mere ordinary negligence. Thus Landowner had to pay punitive, as well as actual, damages.

The Recreational Use Act Changes the Liability Outcome in Example 2A, Encouraging Landowners to Open Lands for Recreational Purposes. Table 1, below, illustrates the impact of the Act as applied to the four examples. Example 2A falls into the NW Quadrant. If the Act applies, Landowner is protected from liability (Landowner’s fault in failing to provide a reasonably safe premises is *ordinary negligence only*). The liability risk in the NW Quadrant may be the risk most likely to discourage landowners from opening their property for recreational purposes. By lessening this significant liability risk, the Act encourages Landowners to open their lands to the public.

Example 3A, however, falls in the SW Quadrant of Table 1, because Landowner’s fault is the more reprehensible *willful & wanton* failure to make the premises safe or give warning. The Act offers no liability protection in such a circumstance.

What about the other examples? In both Examples 2B (Hiker hit by flying debris from Bush Hog operated by Landowner) and



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3B (Landowner punches Hiker), the *injuries were not caused by an unsafe condition on the premises; instead, the injuries were caused directly by Landowner's actions* – a negligent act or a more reprehensible

intentional act. Examples 2B and 3B represent the NE and SE Quadrants, respectively, of Table 1. The Act offers Landowner no liability protection in either of these Quadrants.

Table 1. Four Quadrants of Liability Risk When Entrant is Injured on the Premises; Impact of Ill. Recreational Use Act If Lands Are Open to the Public Without Charge

(Note: Landowner liability is based on fault. If there is no fault, there is no liability, as a general rule)	<i>Injury results from an unsafe condition on the premises, and Landowner is at fault in failing to make the premises safe or to warn of the danger</i>	<i>Injury does not result from an unsafe condition; instead, Landowner is at fault because Landowner's actions cause the injury</i>
<i>The fault is seen by a jury as mere ordinary negligence, not the more reprehensible fault described below</i>	<p>NW: Act Lowers Land-owner's Liability Risk</p> <p><u>If Act Applies: Landowner NOT liable for Injuries.</u> If Act Does Not Apply: Landowner IS liable for Entrant's actual damages</p>	<p>NE: Act Has No Effect On Liability Risk</p> <p>Landowner is <u>liable</u> for Entrant's actual damages, e.g., medical expenses, lost wages, pain and suffering</p>
<i>Fault is more reprehensible than ordinary negligence, e.g., a willful & wanton failure to make the premises safe or give warning, or gross negligence, or intentional misconduct</i>	<p>SW: Act Has No Effect On Liability Risk</p> <p>Landowner is <u>liable</u> for Entrant's actual damages</p> <p>Landowner <u>also</u> may be liable for <u>punitive damages</u></p>	<p>SE: Act Has No Effect On Liability Risk</p> <p>Landowner is <u>liable</u> for Entrant's actual damages</p> <p>Landowner <u>also</u> may be liable for <u>punitive damages</u></p>

The liability risk arising from negligent failure to make the premises reasonably safe or to give a warning (i.e., the NW Quadrant) is arguably the most onerous liability risk, and the risk most likely to discourage landowners from allowing others to use their property for recreational purposes. By reducing the liability risk in the NW Quadrant, the Illinois Recreational Use Act encourages Landowners to make their lands available to the public for recreational purposes.

However, the protections of the Act are limited. They do not apply where Landowner, in willful and wanton disregard for the safety of entrants, allows an unsafe condition on the premises or fails to give warning (SW). Nor does the Act provide protection if Landowner's negligent acts directly harm the entrant (NE), or where Landowner's grossly negligent or intentional acts directly harm the entrant (SE).

III. *Hall v. Henn* Limits the Applicability of the Ill. Recreational Use Act

Impact of *Hall v. Henn*. The Act's grant of immunity from negligence liability illustrated in the NW Quadrant of Table 1

only applies to landowners who open their land to "the public." When do landowners make land and water areas "available to the public" for recreational or conservation purposes? Is it only when landowners open their land to EVERY member of the public?



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Until the December, 2003, *Hall v. Henn* decision, the protection of the Act was thought to be available to a landowner who *selectively* gave permission to members of the public to use the premises for recreational purposes. If Landowner did not allow EVERY member of the public to enter, but instead only allowed SELECT members of the public to enter, the landowner would still enjoy the reduced liability risk afforded by the Act.

In *Hall v. Henn*, the Illinois Supreme Court held that the Act applies only to those landowners who open their property to the *general public (i.e., everyone)*. Without this narrower applicability, noted the Illinois Supreme Court,

the Act is sweeping in its scope, immunizing a landowner from negligence liability with respect to any person who enters the landowner's property for . . . just about every purpose, absent commerce, for which a person is invited onto another's property. [If we ignore the] express caveat that the property in question be made available for such purposes *to the public*, we would largely eliminate premises liability in this state. This clearly was not the legislature's intent.

The impact of *Hall v. Henn* is to deny landowners the liability protection of the Recreational Use Act unless they open their lands to EVERY member of the public.

IV. The New Decision-making Framework for Landowners

Landowners should reassess, perhaps in consultation with their legal advisor and insurance representative, whether they will continue to make their lands available to others for recreational purposes. Landowners have three options:

- **OPTION A – LANDS OPEN TO EVERYONE:** Landowner opens her lands up for recreational use by the public at large, i.e., everyone, in order to retain the liability protection of the Illinois Recreational Use Act; or
- **OPTION B – LANDS OPEN TO ALMOST NO ONE:** Out of caution, Landowner denies almost everyone access to his lands for recreational purposes. He is unwilling to open his lands to the public at large (as required by *Hall v. Henn*) to retain liability protection from the Act, and he is generally unwilling to accept the significant liability risk in the NW Quadrant of Table 1 if he continues to open his lands to most individuals; or
- **OPTION C – LANDS REMAIN OPEN TO MANY PERSONS AT SELECT TIMES:** Landowner is unwilling to open his lands to the public at large to gain protection from the Act, but he generously decides to allow most members of the public to access his lands for recreational purposes when they ask, **in spite of the increased liability risk.**

It may not be good public policy to force landowners into this more limited decision-making framework. However, the public policy issues and the potential legislative options for allowing the Illinois Recreational Use Act to better fulfill the public policy goal of making more private lands available for recreational purposes are beyond the scope of this article.

**Uchtmann and Endres are faculty members in the Agricultural Law Group of the Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign. AGRICULTURAL LAW AND TAXATION BRIEFS are available at www.farmdoc.uiuc.edu/legal/*