The Application of Recreational Use Statutes to Beaches: Trap for the Unwary

Michael Flynn

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol40/iss3/4

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
THE APPLICATION OF RECREATIONAL USE STATUTES TO BEACHES: TRAP FOR THE UNWARY

Michael Flynn*

Poseidon, who stirred tempest up against me, balked my passage and heaved up the sea to monstrous heights; I groaned aloud, but the waves would not let me keep to my raft; it was dashed to pieces by the gale.... With a last effort I threw myself out upon the shore and, with that, mysterious night came on.

—Homer, The Odyssey

INTRODUCTION

The lure of the beach has produced overcrowded beaches and, as an unfortunate result, an increasing number of beach accidents. The case of Robbins v. Department of Natural Resources illustrates the grave nature of many of these accidents. In July of 1976, eighteen-year-old Joey Robbins decided to go swimming at the beach. A retaining wall separated the sandy beach from the water. The depth of the water beyond the retaining wall varied from two to four feet. Embedded in the sandy bottom were some large rocks rising to

* Associate Professor of Law, Nova University Shepard Broad Law Center. B.A., 1973, Gonzaga University; J.D., 1977, Gonzaga University. The author wishes to thank Professor Steve Friedland for his patience, comments, and friendship in the preparation of this article, and Lauren Bayer, J.D., 1991, Nova University, and Steve Bell, J.D., 1992, Nova University, for their research assistance.

2. For example, California has approximately 300 miles of ocean beach. One of California's most popular beaches is Huntington Beach. Statistics regarding the number of visitors to Huntington Beach typify the dramatic increase in beachgoers. The statistics reveal that in 1935, 169,000 people visited Huntington Beach, compared with 6,381,857 people who visited Huntington Beach in 1988. City of Huntington Beach, Marine Safety/Lifeguards Statistical Composite, Huntington Beach Patrol (1989) (copy on file in DePaul Law Review office).
3. Id. Of the 6,381,857 people who visited Huntington Beach, California, in 1988, the beach patrol reported over 20,000 instances of treatment for beach-related accidents. In addition, according to the National Safety Council Records, for every 100,000 beach visitors, 1.8 beachgoers die from beach-related accidents, primarily drowning. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS, PUBLIC ACCIDENTS, 1983, at 72-73 (1984). Applying the National Safety Council figure to California's Huntington Beach reveals that in 1935 approximately three people died from beach-related accidents, while approximately 115 people died from beach-related accidents in 1988.
5. Id. at 1042.
6. Id.
7. Id.
within ten inches of the water's surface. In that area, the water is generally clear and the bottom usually visible; however, the afternoon sun or the splashing of other swimmers often clouds visibility. Watching his pals jump off the retaining wall into the water, Joey decided to do the same. After swimming around in the water, unable to touch bottom, Joey climbed out thinking it was safe to dive. On his first attempt, Joey's head struck an underwater rock. The accident left him permanently paralyzed from the neck down. According to Joey, it felt like he hit a "cement wall."

Joey literally never knew what hit him. On the day Joey and the others were at the beach, there were no "no diving" signs or markers indicating water depth. Furthermore, Joey had never been to that particular beach before.

In most states Joey would be unable to bring suit against the beach property owner to recover damages. The recreational use statutes in virtually every state preclude beachgoers from obtaining damages for their injuries from the beach owner despite the lack of warning signs or other efforts to prevent accidents. The recreational use statutes are intended to encourage landowners to

8. Id.
9. Id.
10. Id. at 1043.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 1042-43.
16. Id. at 1043.
17. Joey Robbins was in fact allowed to proceed with his claim. See id. at 1044. The Robbins case did not involve any issue of recreational use immunity because Joey was injured at a public swimming area operated by the State of Florida Department of Natural Resources. Id. at 1042. Florida's recreational use immunity statute does not exempt publicly owned lands. Cox v. Community Servs. Dept., 543 So. 2d 297 (Fla. Dist. Ct. App. 1989). But see FLA. STAT. § 260.012 (1989) (making the immunity accorded by FLA. STAT. § 375.251 applicable to persons who make lands available for the Florida Recreational Trails System). The facts of the Robbins case are presented merely to illustrate the typical scenario which occurs under the recreational use immunity statutes.

The issue in Robbins was the propriety of summary judgment in favor of the defendant on the grounds of express and implied assumption of risk. See Robbins v. Department of Nat'l Resources, 468 So. 2d 1041, 1043 (Fla. Dist. Ct. App. 1985). The appellate court reversed on both counts. Id. at 1044. On the issue of express assumption of risk, the court held that a genuine issue of fact existed as to the plaintiff's subjective appreciation of the risk. Id. at 1043. This holding was subsequently overruled in Mazzeo v. City of Sebastian, 550 So. 2d 1113 (Fla. 1989). In Mazzeo, the Supreme Court of Florida stated that the defense of express assumption of risk includes express contracts not to sue, as well as situations "in which actual consent exists as where one voluntarily participates in a contact sport." Id. at 1115. The court disapproved of Robbins to the extent that it expanded the definition of contact sports to include "aberrant forms of sporting activity," such as diving. Id. at 1115-16. Notably, the Robbins court had expressly stated that diving is not a contact sport. Robbins, 468 So. 2d at 1043.

18. See Public Recreation on Private Lands: Limitations on Liability, XXIV SUGGESTED STATE LEGISLATION (COUNCIL OF STATE GOVERNMENTS) 150 (1965) [hereinafter XXIV SUGGESTED STATE LEGISLATION]. The Model Act was promulgated over 25 years ago by the Council of State Governments. For
permit the public free access to land by granting landowners immunity from liability for negligent acts that injure recreational users.¹⁹

Despite thousands of beach related injuries each year, millions of people continue to visit beaches annually.²⁰ The attraction can be traced to the ancient Greeks’ worship of the sea.²¹ This cultural heritage continues to flourish in America.

As the number of beachgoers and beach injuries continues to climb, the question of whether to foster a further increase in beach access at the expense of those injured becomes more difficult to answer. More likely than not, recreational use immunity statutes promote increased beach use, but at what cost? Regardless of the cost-benefit analysis, prevention, or at least minimization, of


One state, North Carolina, has enacted a recreational use immunity statute with a much more limited scope. See N.C. Gen. Stat. § 113A-95 (1989). North Carolina’s statute is part of the North Carolina Trails System Act. The underlying policy of the Act is to promote public access to “outdoor, natural and remote areas of the state.” Id. § 113A-84. The Act provides that “An owner, lessee, occupant, or other person in control of land who allows without compensation another person to hike or use the land for recreational purposes as established under this Article owes the person the same duty of care he owes a trespasser.” Id. § 113A-95.

19. XXIV Suggested State Legislation, supra note 18, at 150.

20. See City of Huntington Beach, supra note 2; National Safety Council, supra note 3, at 72-73; infra note 66.

beach injuries is a significant concern. This Article is divided into three parts. The first part describes the beach culture phenomenon, focusing on why beaches and waterfront areas have, throughout history and modern times, occupied a unique status among recreationalists. The second part examines the legislative response to the beach culture, namely, the recreational use immunity statutes. In evaluating recreational use immunity statutes, the Article will examine how various states and geographic regions treat recreational lands. Lastly, the Article critiques the recreational use statutes. Such statutes provide a disincentive to beach property owners to adequately safeguard beach areas that are open to the public. However, the very reason people flock to the beach—to escape into the sun and the surf—obligates the law to protect beachgoers more, not less.

I. BACKGROUND—THE BEACH CULTURE PHENOMENON

A. Ancient Beach Traditions

From the earliest times in ancient Greece, the ocean and its beaches were an intimate part of the heritage and culture of western civilization. The ancient Greeks, as reflected in their mythology, worshiped the sea and the shoreline. This religious devotion grew out of the Greeks' dependence upon the sea. As fishermen, the ancient Greeks ventured into the sea to obtain food. As merchants, the Greeks used the sea to profit from the delivery of goods to distant ports. The Greek seashore, the first ocean beaches, became the hub of commercial and social activity. Many ancient Greeks began each day with a trip to the seashore to begin the daily search for food, to launch fishing and merchant vessels, and to welcome the arrival of cargo ships. But even more so, the sea and its shore served as a place to retreat and rest from the day's tasks. Nonetheless, the destructive force of the sea remained a constant reminder to the Greeks of their inability to tame the power of the sea.

It is little wonder then that the sea became a focal point of worship in Greek mythology. The God of the Oceans, the Lord of the Sea in Greek mythology, was Poseidon. Greek literature describes Poseidon as a bearded,
broad-chested, larger-than-life figure. Poseidon is traditionally pictured with a trident, a handheld harpoon used to spear ocean fish. Poseidon's savagery, as the Lord of the Sea, is frequently mentioned in ancient Greek myths. The ancient Greeks attempted to soothe the menacing nature of Poseidon through the construction and dedication of huge seashore temples. Sacrificial gifts, usually of horses and religious potions, were ceremoniously dumped from the beachfront temples into the sea as offerings to appease Poseidon. Yet, even these offerings failed to remove the risk and danger encountered by seafaring Greeks. Thus, paradoxically, ancient Greeks viewed the ocean as a friendly, life-giving source; yet, they remained constantly vigilant because of the violent disposition of Poseidon.

As the God of the Sea, Poseidon enjoyed a natural popularity and, necessarily, a high place among the Greeks and their worship. The largest sanctuary built to honor and worship Poseidon can be found on the Isthmus of Corinth. The seaside temple on the Isthmus of Corinth was the site of the Pan-Hellenic Isthmian Games, a stepchild of the Olympic Games. The highlight of the Pan-Hellenic Games was the tunny fish hunt in which Greek fishermen, using trident harpoons, roamed the beach area competing to gather these fish. The first catch of the tunny fishing contests was taken by the Corinthian community and offered to Poseidon as the festival meal. The Greeks believed that these offerings could persuade Poseidon to spare them from his wrath.

Poseidon was accredited with many natural catastrophes. For example, myth attributes the sinking of fleets of ships, the drowning of fishermen and traders, the submersion of miles of beachfront, and the washing away of cities for sacrilege to the Poseidon altar. Still, the Greeks viewed Poseidon as a savior. Myth reveals that Poseidon rescued ships at sea and spared beachfront areas from torrential storms, in recognition of the undying worship of a ship's crew or the people of a seashore community. According to Homer, Poseidon emerges as a paradoxical character—a seeming contradiction of greatness and power who is to be feared for his destructive force, yet revered as the protector

33. *Id.* at 136-37.
35. L. FARNELL, *supra* note 22, at 137.
36. *Id.* at 137-38.
37. *Id.* at 137.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*; *see also* E. BARTHELL, *supra* note 21, at 353-54 ("Poseidon sent strong waves toppling walls into mere mud.").
47. *Id.* at 138-39.
of Greek society. Despite Poseidon's stormy disposition, the ancient Greeks still looked to the ocean and the seashore as a getaway to enjoy the soothing tranquility offered by the relentless surf. The outer Greek Islands held the most precarious position. These outer islands were at the mercy of the sea and relied almost exclusively on the sea for survival. The most fanatic worship of Poseidon can be traced to these Greek Islands.

A prime example is the tiny island of Tenos. On this island one of the largest shrines to Poseidon was constructed. The Tenecian festivals, which were celebrated in honor of Poseidon, drew huge crowds from the Greek mainland and elsewhere and developed into some of the largest festivals in Greek culture. The Island of Tenos, with its enchanting seashore, refreshing ocean surf, magnificent temples and shrines, and island friendliness, provided the perfect backdrop for these beach festivals. The popularity of these festivals transformed the Island of Tenos into the first resort area in the Greek Isles. Soon, these Tenecian festivals became yearlong events. A whole new beach culture developed from the Tenecian and other similar festivals. People flocked to the island beaches to escape into a festival fantasy-land. These festivals continued to flourish to such an extent that they became the focal point of Tenecian society.

Historians suggest that the island of Tenos was repeatedly believed to be under siege from Poseidon. Myth has it that Poseidon became displeased as the Tenecian festivals turned away from worship gatherings and into beach parties. Undaunted by the continual battering, the island residents continued to rebuild and recapture the seaside beauty. As the islanders devoted their time and attention to the development of the resort areas, the Island of Tenos became the precursor of resort areas throughout the Greek Islands. The first

48. Id. at 139.
50. L. Farnell, supra note 22, at 137-38.
51. Id.
52. Id.
53. The Greek festivals, including the Tenecian Festival, served two primary purposes: religious ritual and restful entertainment for the populace. P. Easterling & J. Muir, Greek Religion and Society 100 (1985).
54. Aristotle viewed the island festivals as providing pleasant relaxation. Id.
55. L. Farnell, supra note 22, at 10-13.
56. The Greek festivals began to take on a secular character, capitalizing on the Greeks' quest for rest and relaxation. P. Easterling & J. Muir, supra note 53, at 102.
57. Id.
58. According to Plato, the seashore retreats provided rest for the laborers so that the laborers would return to work refreshed and "made whole" by the time spent at the beach. Id. at 101.
59. The islanders continued to believe that without Poseidon the island would be washed away.
60. Id. at 136-38.
61. Id. at 10-13; see also P. Easterling & J. Muir, supra note 53, at 102 (describing the process of secularization of the festivals).
lifeguards may have been the Tenecians who rescued waterlogged resort guests. Gradually, Tenos turned away from using the sea exclusively as a resource for food, and converted the beach into a haven of recreation and relaxation for all Greeks. These Greek island residents and visitors were constantly reminded through the countless catastrophes, invoked by the God of their Sea, that their shoreline and their very civilization were beyond man's control. Yet, the Tenecians and the island beachgoers repeatedly returned to the "safe harbor" provided by the island beaches.

B. Modern Beach Culture

Beach culture has continued to evolve since the time of ancient Greece. Millions of Americans annually flock to beach and seashore areas. A kind of...

63. Women on swings, sword dancing, and other games and attractions provided an opportunity for merchants to capitalize on the Greeks' beach culture. P. EASTERLING & J. MUIR, supra note 53, at 98-127.
65. "Places where the land and the sea meet not only hold contemporary recreational interest but also evoke nostalgia." C. GUNN, VACATIONSCAPE: DESIGNING TOURIST REGIONS 87 (2d ed. 1988).
66. Farley, A Record Summer for Travel, U.S.A. Today, May 24, 1990, at 1D (Life), col. 2. The travel forecast released in May of 1990 shows that the popularity of beaches has overtaken other destinations as the vacation of choice for the 1990s.

PLANNED SUMMER VACATION DESTINATIONS
% of Vacation Visits—1990
Ocean/beach ......................... 27%
City .................................. 20%
Small town/rural town ............. 13%
Lakes areas .......................... 11%
Mountain areas ..................... 10%
Theme and Amusement Parks ..... 10%
(including water parks)
State and National Park ........... 7%
Others ............................... 3%


In terms of the estimated total number of travelers from 1987 to the projected 1990 total, the United States Travel Data Center statistics show:

1987 ...................... 295 million person trips
1988 ...................... 321 million person trips
1989 ...................... 322 million person trips
1990 ...................... 329 million person trips

Id. at 3. A person trip is equivalent to one person traveling 100 miles or more away from home.

According to the foregoing figures, there were an estimated 88,830,000 person trips to the beach areas of the United States in 1990. According to the National Safety Council records, of the projected 88,830,000 beach visitors in 1990, approximately 1,600 beachgoers will die from beach-related accidents and approximately 277,000 beachgoers will be injured in beach-related accidents. See City of Huntington Beach, supra note 2; NATIONAL SAFETY COUNCIL, supra note 3, at 72-73.
worship still surrounds beach areas.\textsuperscript{67} Beach barbecues and picnics have replaced the ancient Greek festivals.\textsuperscript{68} Surfboards,\textsuperscript{69} sailboards,\textsuperscript{70} inner tubes,\textsuperscript{71} water skis,\textsuperscript{72} diving platforms,\textsuperscript{73} and jet skis\textsuperscript{74} have been added to the ancient Greeks' beach activities of swimming and fishing. The beach areas themselves have become pockets of American culture.\textsuperscript{75} Sunbathers,\textsuperscript{76} joggers,\textsuperscript{77} roller skaters,\textsuperscript{78} dune buggy riders,\textsuperscript{79} and wet T-shirt contests\textsuperscript{80} have been interwoven with the ancient Greek festivals. The boardwalk at Venice Beach, California, may provide the most eclectic pocket of American beach culture. At any moment on Venice Beach, a visitor may see sword swallowers, palm readers, skateboarders, and weight lifters flamboyantly vying for your attention. Cummings, \textit{Jet-Skiers Steer over Waving Courses}, L.A. Times, Apr. 24, 1988, Part VII (Travel), at 5, col. 1.

The boardwalk at Venice Beach, California, may provide the most eclectic pocket of American beach culture. At any moment on Venice Beach, a visitor may see sword swallowers, palm readers, skateboarders, and weight lifters flamboyantly vying for your attention. Cummings, \textit{Jet-Skiers Steer over Waving Courses}, L.A. Times, Apr. 24, 1988, Part VII (Travel), at 5, col. 1.


The boardwalk at Venice Beach, California, may provide the most eclectic pocket of American beach culture. At any moment on Venice Beach, a visitor may see sword swallowers, palm readers, skateboarders, and weight lifters flamboyantly vying for your attention. Cummings, \textit{Jet-Skiers Steer over Waving Courses}, L.A. Times, Apr. 24, 1988, Part VII (Travel), at 5, col. 1.


Sixteen million people participate in the leisure-time activity of roller skating. U.S. DeP't
into modern beach culture. The ancient Greek mythological worship of the sea and the seashore has been replaced by the modern worship of the leisure and society of beach visits.\textsuperscript{81}

However, modern beach worship, as in ancient times, is not without its risks. Traditional risks, such as drowning,\textsuperscript{82} hurricanes,\textsuperscript{83} thunderstorms,\textsuperscript{84} rip currents,\textsuperscript{85} undertows,\textsuperscript{66} and tidal waves,\textsuperscript{87} still provide serious hazards for any beachgoer. Modern beach hazards such as oil spills,\textsuperscript{88} toxic\textsuperscript{90} and medical

\textsuperscript{81} OF COMMERCE, supra note 77, at 215.

79. Dune buggy expedition is among the recommended forms of beach recreation at the Oregon Dunes National Recreation Area where the sand dunes can reach 300 feet high. Yenckel, Discovery of National Wilderness Playground, L.A. Times, July 8, 1990, Part L (Travel), at 3, col. 2.

80. Summers on the Beach, a Fort Lauderdale beachside bar, circulates advertising flyers that proclaim that they have "the wettest wet T-shirt contest at 4:00 p.m. Saturday and Sunday." Summers on the Beach advertising flyer (June 1990). In the author’s interview with the general manager of the Candy Store, another beachside bar in Fort Lauderdale, the general manager stated that "there is a huge interest in wet T-shirt contests . . . and it’s an all-American, wholesome thing." Interview with General Manager of the Candy Store (June 1990). See Parrott, Newsmakers: Trading Cards Aren’t a Class Act, L.A. Times, Jan. 30, 1986, Part I, at 2, col. 3.


82. City of Huntington Beach, supra note 2.


84. Nationwide statistics show that over 100 people are killed by lightning strikes per year. Weil & Harris, 3 Are Killed by Lightning in Ocean City; Victims Were Under Umbrella on Beach, Wash. Post, Aug. 4, 1986, at A1, col. 3.

85. Rip currents most often occur when the surf picks up because of tropical storms and hurricanes offshore. When the wind is blowing at a high velocity, the swells can start from four to five miles away and when the waves hit at an angle, swimmers can drift down the beach in a matter of seconds. Marcano, Currently Lifeguards in Hot Seat, L.A. Times, July 14, 1990, Part B (Metro), at 1, col. 1.

86. Besides rip currents, undertows present a potential danger for swimmers, according to the Red Cross. A person caught in an undertow should not panic but roll with it until he can push himself up from the bottom with his feet. Young, Water Safety; Your Health: Making Water Fun Go Swimmingly, United Press International, June 30, 1987 (LEXIS, Nexis library, Omni file).

87. Tidal waves are among the major natural forces with which residents of Hawaii must contend. Walters & Lee, Blocking Urge to Rebuild; Threat of Natural Disaster Hasn’t Stopped Development in High Risk Areas, But Fewer Cities Are Willing to Keep Picking up the Pieces, L.A. Times, Nov. 1, 1989, Part A, at 1, col. 1.

88. From 1980 to 1988, tankers in the United States waters were involved in 468 groundings, 371 collisions, 97 rammings, and 55 fires and explosions. Of particular note with regard to beach areas, on February 7, 1990 the tanker American Trader spilled over 394,000 gallons of oil onto Huntington Beach. Stammer, Major Oil Spill Called Inevitable; Environmental Studies by Two Groups Say that Industry and Government Have Failed to Protect the California and Eastern Shorelines, L.A. Times, Mar. 22, 1990, Part A, at 3, col. 7.


Contaminated water runoff carrying contaminants from the land into the nearest body of water will be vastly more expensive to control than other types of toxic wastes. Rather, Blue Skies, No Garbage: A Welcome Summer at the Beaches, N.Y. Times, Sept. 10, 1989, § 21 (Long Island
waste,\textsuperscript{90} and skin cancer\textsuperscript{91} present unconventional, high technology risks to the beachgoer. Yet, the lure of beach culture continues.\textsuperscript{92}

Beach culture knows no age limit.\textsuperscript{93} From wise old men playing checkers under the shelter of palm trees to the littlest child's first encounter with an ocean wave, from youngsters building sand castles and floating inner tubes to teenagers thirsty for the freedom of roaming beach areas, from families picnicking on the beach to lovers strolling the beach on a moonlit night—the beach culture embraces all of these people.\textsuperscript{94} The beach is a microcosm of modern society and our search for refuge from the struggles of daily life.\textsuperscript{95} As the popular T-shirts proclaim, “Life’s a Beach.”\textsuperscript{96}

Weekly), at 1, col. 1.

90. Syringes and other medical waste materials have been washing up on beaches at an alarming rate. See Kalette, \textit{Last Season’s Blight Leaves Bathers Wary}, U.S.A. Today, May 26, 1989, at 1A, col. 3.

The B-52’s, a popular music group, in a recent concert changed the words of one of their songs about a beach party to say “It wasn’t a rock, it was medical waste,” and “Don’t sit on that syringe.” Pareles, \textit{Anything Goes as the B-52’s Give a Shindig on Stage}, N.Y. Times, Feb. 10, 1990, § 1 (The Arts), at 12, col. 3.

91. According to Dr. G. Thomas Jansen, President of the American Academy of Dermatology, “You cannot get a tan without damaging your skin. They go together like love and marriage.” In 1987 there were 500,000 Americans diagnosed with skin cancer of which 8,000 died. See \textit{For Sun Lovers, Tan Is Worth the Risk}, supra note 76, at 31.

92. In 1988, Jones Beach State Park was forced to close for part of the Labor Day Weekend because syringes and other medical wastes had washed ashore. Despite the closure, 110,000 people still visited Jones Beach State Park over the Labor Day Weekend. A year later, 250,000 visited the Jones Beach State Park over the Labor Day Weekend. Rather, \textit{supra} note 89, at 1.

93. U.S. DEP’T OF COMMERCE, \textit{supra} note 72, at 218; see also Wiley, \textit{supra} note 67, at 17 (describing toddlers playing in the sand, older siblings bodysurfing, and parents holding infants high above the waves).

94. On June 8, 1990, the author visited Charnow Park in Hollywood, Florida. On that four-hour visit, the author observed several senior citizens engaged in spirited board games including checkers, backgammon, and shuffle board; a one-year-old baby sitting at the edge of the water playfully clapping at the water under the watchful eye of his mother; a group of preschool children using their hands, a small shovel and bucket to create sand castles; a group of teenagers relaxing on the sandy beach; and a family from Minnesota picnicking on the beach. See also Wiley, \textit{supra} note 67, at 17 (describing the beach scene as an “icon of summer”); Kleiman, \textit{Picnics: Declaring the Spirit of the People}, N.Y. Times, July 4, 1990, § 1, at 37, col. 1 (“[P]icnics [are] symbolic of the nation’s craving for natural beauty.”); Duke, \textit{Rooms with a View: Waterfront Restaurants Serve Glamour, Romance and the Sea}, L.A. Times, Oct. 1, 1988, Part IX (Orange County Life), at 1, col. 1 (stating that waterfront restaurants are a special breed, the view being the main attraction).

95. Even Club Med has started an advertising campaign designed to convey the message that Club Med is not only for singles but for families, couples, sports enthusiasts, and people who come to the beach for nothing more than relaxation. As the Club Med jingle states, “The Club Med vacation, the antidote to civilization.” See Wada, \textit{On the Eve of Its Fortieth Decides Changes Are in Order: Resort Chain Launches $1.8 Million Ad Campaign in Order to Redefine Its Image}, \textit{Travel Weekly}, Nov. 27, 1989, at 30.

96. “Life’s a Beach” is a clothing and surf accessory company that was started in 1984 by three self-proclaimed beach bums. The company grossed over $3,000,000 in 1986 and over $6,000,000 in 1987. Brass, \textit{Making Clothes a Little Different at Life’s a Beach}, L.A. Times, Oct. 20, 1987, at Part A, at 2, col. 1.
Likewise, modern beach culture knows no geographic limit.97 The unique conglomeration of people at Venice Beach in California98 and the rugged coastline of Maine99 entice visitors to experience beach culture first hand. The ancient pirate tradition of viewing the sunset in the Florida Keys100 and the magnificently sculptured sand dunes along the Oregon coast101 offer different but equally attractive versions of beach escape. Even noncoastal areas, with their lake and river beaches, add to beach culture. The crowded urban beaches along Chicago’s Lake Michigan shoreline102 and the pristine mountain lakes and streams in rural Montana103 provide the respite sought by the ancient Greeks, as well as the citizens of the modern world.

The number of people seeking the beach life increases annually. In 1988, over 83,000,000 people visited beach areas in the United States. Over 88,000,000 people were expected to visit beaches in 1990.105 The projection is that in the year 2000, over 140,000,000 people will visit American beaches.106 This trend is reflected worldwide. Modern transportation allows people to visit unique and different beach areas throughout the world.107 A whole industry designed to capitalize on the beach culture promotes and encourages people to visit beach areas.108 Whether it be spring break in Florida,109 a honeymoon in

97. See Summer of 89: Beach by Beach, supra note 67, at 9A.
98. See supra note 75. On a visit to Venice Beach, one can encounter athletes, musicians, mimes, fortune tellers, portrait painters, hair braiders, stand-up comics, skaters, and skateboarders. There are spiked-hair punks with tattoos and protesters with petitions, in other words, the same old counterculture, “let it all hang out” razzle-dazzle. Fleming, Points West: Seascape with Revelers and Mendicants, N.Y. Times, Jan. 31, 1990, § 3 (Living), at 10, col. 3.
99. See supra note 79.
100. Key West, an island city just three and a half miles long and two and a half miles wide, is the main attraction of the Florida Keys. Key West was an historical haven for bootleggers, wreckers, and pirates. Viewing the sunset from Mallory Dock is the evening’s best entertainment and a major preoccupation of visitors and residents of Key West. Baker, The Kids on the Keys: Even Key West Can Be an Ideal Destination for Family Vacations, Wash. Post, Nov. 8, 1987, at E3 (Sunday Travel), col. 5, E4, col. 4.
101. See supra note 79.
102. See Rudd, Dozens of Beaches Supply Rays of Fun, Chicago Tribune, May 27, 1988, § 7, at 52, col. 2; see also Franklin, Great Adventures: Lake Superior Shoreline Is Full of History and Unspoiled Spots, Chicago Tribune, May 6, 1990, § 12 (Travel), at 6, col. 1 (describing recreational activities available along the Lake Superior shoreline).
104. See supra note 66.
105. Id.
106. Id.
107. Id.
108. See P. Pearce, THE SOCIAL PSYCHOLOGY OF TOURIST BEHAVIOR 74-75 (1982); Schreyer, Knopf & Williams, supra note 81, at 10.

It is not just the travel industry that is moving to capitalize on the lure of the beach. For example, the fascination of the American public with the beach culture has motivated the shoe company, L.A. Gear, to associate its product with the California beach look. “The California sun
Hawaii, or a golfing vacation in North Carolina, promoters sell beach trips as "good for the soul." Beach culture is deeply imbedded in humankind. Despite the massive destruction wrought by Hurricane Hugo, South Carolinians remain captivated by the beach and rebuild stilt houses on the very spot where the hurricane came ashore. Grappling with torrential flooding along the Texas and Louisiana Gulf Coast, old and new beach residents treasure their beachfront homes. Battling earthquakes and mudslides that ruin beach homes in California, owners spare no expense or technology in reconstructing their beloved beach hideaways. Risking the dangers of skin cancer or exposure to toxic waste, vacationers continue to lie on the beach in quest of the perfect suntan and to swim in contaminated waters. Even with these hazards, the beach remains a magnet where people are determined to disregard their worries and cares. Such blind allegiance to beach culture may appear foolhardy. Regardless, the beach culture phenomenon, once a means of survival for the Greeks, has grown into an economic and social bonanza.

and fun emphasis helped L.A. Gear capture their part of the shoe market." McDaniel, L.A. Gear Tries a Full Court Press, N.Y. Times, July 16, 1989, § 3 (Financial), at 4, col. 3.
111. See Golfing in North Carolina, GOLF DIGEST (advertising supp., June 1990).
112. Peter Sontag, in addressing a national forum of the Institute of Certified Travel Agents, stated:
You're not just selling a travel product. You're selling relaxation, you're preventing the guy from getting a heart attack. Why not sell him the knowledge that he can go away with peace of mind, that he can enjoy himself without worrying about other things at home while he's relaxing on the beach.

Agents Advised to Offer Extra Services to Leisure Clients; Peter Sontag Addresses National Forum of Institute of Certified Travel Agents, TRAVEL WEEKLY, Sept. 23, 1985, at 93.
113. Wiley, supra note 67, at 17 (the beach exerts a powerful pull even on those who have never seen or visited the ocean).
114. See Yenckel, supra note 83, at E5, col. 2.
117. See For Sun Lovers, Tan Is Worth the Risk, supra note 76, at 31; Debate: Toughen Standards to Protect Beaches, supra note 89, at 12A.
119. Craig Elledge, a beach promoter with a team from Group Dynamics of Santa Monica, California, stated, "In Florida you won't see people arriving on the beach with towels, coolers, umbrellas, radios, and barbecues because everyone is on a tour or a vacation. Just when they are acclimated to the beach, it is time to go back to Wisconsin." Dean, Paul Dean: Beach Power Lounging: Go for the Bronze, L.A. Times, June 6, 1987, Part V, at 1, col. 6.
120. The impact of beach culture can be evidenced by both an economic calamity and an eco-
II. THE LAW OF BEACH CULTURE

A. The Recreational Use Immunity Statute

Recreational land, including beachfront areas, is a finite resource.\(^2\) The demand for recreational beaches far outstrips the supply.\(^3\) In an attempt to increase the availability of recreational land, including beachfront, legislatures responded with the enactment of recreational use statutes.\(^4\)

In 1953, the state of Michigan became the first jurisdiction to pass a recreational use immunity statute.\(^5\) Other states soon followed: New York in...
1956\textsuperscript{125} and Minnesota in 1961.\textsuperscript{126} The impetus for other states to pass such legislation can be traced to the Council of State Governments’ 1965 suggested model recreational use immunity statute (“Model Act”).\textsuperscript{127} The Model Act seeks to strike a bargain between landowners and the public by granting limited liability to a property owner who makes land available to the public for recreational use.\textsuperscript{128} Section 1 of the Model Act states that the purpose of a recreational use immunity statute is “to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners of the land liability towards persons entering thereon for such recreational purposes.”\textsuperscript{129} The recreational use immunity statute shields the owner from liability for injuries to recreational users from conditions or activities on the land opened to the public, provided the recreational user was not charged a fee for admission to the land nor injured on account of the owner’s willful or wanton misconduct.\textsuperscript{130} In particular, section 3 of the Model Act states that “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.”\textsuperscript{131} The Model Act goes on in section 4 to state:

Except as specifically recognized by or provided in Section 6 of this act, 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:

(a) Extend any assurance that the premises are safe for any purpose.
(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
(c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.\textsuperscript{132}

The rationale underlying this suggested legislation is that it is unreasonable to expect property owners (absent receiving some sort of compensation) to undergo the risk of liability for injury to strangers using their land for recreational purposes.\textsuperscript{133} From a strict cost-benefit view, this rationale appears sound.\textsuperscript{134} Recreational use immunity statutes benefit the public by increasing

\textsuperscript{125} N.Y. ENVT’L CONSERV. § 370 (McKinney 1956) (current version at N.Y. GEN. OBLIG. § 9-103 (McKinney 1984)).
\textsuperscript{126} MINN. STAT. § 87.01 (1977) (eff. 1961).
\textsuperscript{127} See XXIV SUGGESTED STATE LEGISLATION, supra note 18. For relevant portions of the Model Act, see infra notes 129-32 and accompanying text.
\textsuperscript{128} XXIV SUGGESTED STATE LEGISLATION, supra note 18, § 1, at 150; Note, Tort Liability and Recreational Use of Land, 28 BUFFALO L. REV. 767, 793 (1979).
\textsuperscript{129} XXIV SUGGESTED STATE LEGISLATION, supra note 18, § 1, at 150.
\textsuperscript{130} Id. § 6, at 151.
\textsuperscript{131} Id. § 3, at 151.
\textsuperscript{132} Id. § 4, at 151.
\textsuperscript{133} Id. at 150 (comments).
\textsuperscript{134} Note, supra note 128, at 792-94 (“recreational liability statutes represent a consensus among states that fear of tort liability will inhibit landowners from permitting public use of pri-
1991]

RECREATIONAL USE STATUTES 757

access to beachfront property for recreational use.\textsuperscript{138} The cost of this public benefit is the landowner's immunity from suit.\textsuperscript{136}

Unlike the common law, in which the status of the person entering the land determined the extent of the landowner's liability,\textsuperscript{137} the recreational use immunity statutes predicate the immunity from liability on the use of the land and the intent of the land user. Under the common law doctrine, the extent of the duty owed by the landowner to the entrant was based on characterizing the entrant as either a trespasser, a licensee, or an invitee.\textsuperscript{138} Although some jurisdictions have combined or abolished the categories of persons entering land, most jurisdictions still retain these categories as the basis for determining owner or occupier liability.\textsuperscript{139}

A trespasser, defined as any person who enters or remains upon the land in the possession of another without privilege to do so, is in the least protected of the three entrant classes.\textsuperscript{140} The landowner owes no duty to a trespasser\textsuperscript{141}
beyond that of refraining from inflicting willful or deliberate injury.\textsuperscript{144} There is no privilege to use force calculated to seriously injure a trespasser in protection of one’s land, such as by intentionally setting traps into which a trespasser might stumble.\textsuperscript{145} However, some courts have discarded the “willful or wanton” requirement in favor of imposing upon the landowner a duty to use ordinary care to avoid injuring the trespasser once the presence of the trespasser is discovered.\textsuperscript{146}

A licensee, defined as any person who is privileged to enter or remain on land by virtue of the possessor’s consent,\textsuperscript{147} is in a more protected class than the trespasser.\textsuperscript{148} An owner or occupier owes a limited duty to a licensee.\textsuperscript{149} A landowner becomes liable for injuries to a licensee only when the owner knew of the hazardous condition on the land, could reasonably have expected that the licensee would not perceive the risk, and the owner fails to eliminate or warn of the risk.\textsuperscript{150}

Finally, the invitee is in the category that generally enjoys the greatest protection.\textsuperscript{151} An invitee, which includes those who enter the premises for public or business purposes,\textsuperscript{152} requires the landowner to exercise reasonable care as to the conditions and activities conducted on the land.\textsuperscript{153} Although not an insurer of safety, the landowner must exercise reasonable care in protecting the well-being of invitees.\textsuperscript{154}

Recreational use immunity statutes turn the analysis away from the category of the entrant. Instead, these statutes focus upon the entrant’s use of the

\textsuperscript{144} Id. at 397 (the trespasser is the “[l]owest in the legal scale” of visitors upon land).
\textsuperscript{145} Restatement (Second) of Torts § 333 (1965); see also Prosser & Keeton, supra note 137, § 58, at 393-94 (the general rule is that a landowner is not liable for any injury which may occur to a trespasser caused by the owner’s failure to exercise reasonable care to put his land in a safe condition).
\textsuperscript{146} Prosser & Keeton, supra note 137, § 58, at 397 (a landowner is not free to inflict an intentional unprivileged battery upon the trespasser).
\textsuperscript{147} Id. § 21, at 132-33. The often cited case of Bird v. Holbrook, 130 Eng. Rep. 911, 4 Bing. 628 (C.P. 1828) is exemplary. In Bird, a landowner was held to act unjustifiably in using a deadly weapon, a spring gun, to injure uninvited intruders. Id.
\textsuperscript{148} Id. § 61, at 419-32. According to Professors Prosser and Keeton:

The occupier must not only use care not to injure the visitor by negligent activities, and warn him of hidden dangers known to the occupier, but he must also act reasonably to inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable . . . .
\textsuperscript{149} Id. at 425-26 (citations omitted).
land. The enactment of these statutes has created some difficult questions of interpretation. For example, do recreational use statutes apply to invited guests who are injured in a backyard swimming pool? Does it matter if the injured recreational user is a child rather than an adult? Does the immunity afforded by the recreational use statutes apply to private and public landowners? Rural and urban land? What if the landowner charges a parking fee

153. See Barrett, supra note 138, at 3 (recreational use statutes focus on the intent of the landuser and the character of the property in determining the owner's duty of care).

154. Those jurisdictions that have considered the application of recreational use statutes to backyard swimming pools have ruled that residential swimming pools fall outside the scope of the immunity provided by the recreational use statutes. See Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968) (to be liable under the Act, one must permit the free use of his facilities to the general public rather than a class of individuals, such as neighbors (emphasis in original)); Boileau v. De Cecco, 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973), aff'd, 65 N.J. 234, 323 A.2d 449 (1974) (the legislative change to the recreational statute was intended to better define the protected class and was not intended to enlarge the class of landowners subject to liability).

155. This has become known as the "attractive nuisance" rule. As explained in the Restatement of Torts, it has received almost universal acceptance on the part of the courts. Prosser & Keeton, supra note 137, § 59, at 402. Section 339 of the Restatement (Second) of Torts, entitled Artificial Conditions Highly Dangerous to Trespassing Children, provides in part:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(c) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Restatement (Second) of Torts § 339 (1965).

Some state recreational use immunity statutes exclude injury to children from coverage to the extent that the landowner maintained an attractive nuisance. E.g., Ariz Rev. Stat. Ann. § 33-1551(C) (1989); Colo. Rev. Stat. § 33-41-104(c) (1989); Wash. Rev. Code § 4.24.210 (1989). Other jurisdictions have reached the same result through case law. E.g., Jacobson v. City of Rathdrum, 115 Idaho 266, 766 P.2d 736 (1988) (recreational use immunity statute does not preclude liability of landowner under attractive nuisance doctrine, even though the child who uses the land for recreational purposes is not a trespasser). See generally Prosser & Keeton, supra note 137, § 59, at 399-411 ("Trespassing Children"). The attractive nuisance doctrine is followed in all but three courts which still reject the rule without qualification. Id. at 400.

or operates a concession stand? Is the collection of this money a charge for admission to the land? These and other questions have been critically examined by commentators and remain unanswered in many jurisdictions. Re-

(1990) (city protected by recreational use statute, thereby relieving it from liability since it permitted public to use land for recreational purposes without fee); Gallagher v. Omaha Public Power Dist., 225 Neb. 354, 405 N.W.2d 571 (1987) (recreational liability act applies to governmental subdivisions as well as private owners); Moss v. Department of Natural Resources, 62 Ohio-St. 2d 138, 404 N.E.2d 742 (1980) (state-owned lands are premises within the statute granting immunity from suit by recreational users). Other jurisdictions have ruled that owners of public land are not entitled to the immunity protection provided by recreational use statutes. E.g., Gibson v. Keith, 492 A.2d 241 (Del. 1985) (Recreational Use Act is intended only for the benefit of owners of private property who allow the public to enter for recreational use); Cox v. Community Servs. Dep't, 543 So. 2d 297 (Fla. Dist. Ct. App. 1989) (statute limiting liability of landowner who made available areas for public recreation does not apply to municipalities and counties); City of Bloomington v. Kuruzovich, 517 N.E.2d 408 (Ind. Ct. App. 1987) (city that maintained park open to the general public could not avoid liability under the recreational use statute which applies only to private landowners); Noel v. Town of Ogunquit, 555 A.2d 1054 (Me. 1989) (recreational land use statute was not applicable to recreational activity conducted on a public beach); Ferres v. City of New Rochelle, 68 N.Y.2d 446, 502 N.E.2d 972, 510 N.Y.S.2d 57 (1986) (statute does not provide immunity to a municipality which maintains property for a public use).


158. Jurisdictions are split with regard to what constitutes a fee or consideration for the use of recreational land so as to prevent the application of the recreational use immunity statutes. However, the trend among the jurisdictions is to construe broadly what constitutes a fee or consideration for purposes of excluding the property owner from the immunity provided by the recreational use statute. E.g., Hallacker v. National Bank & Trust Co., 806 F.2d 488 (3d Cir. 1986) (landowner who received consideration from a lessee could not use the immunity provided by the recreational use statute in a lawsuit by the lessee's invited guest for injuries sustained on the property); Kesner v. Trenton, 158 W. Va. 997, 216 S.E.2d 880 (1975) (holding that a landowner's marina was a money-making business and by allowing people to swim in the lake at no cost, the landowner could reasonably expect to attract new customers and increase his marina sales and rentals, thus constituting consideration for purposes of precluding the immunity provided by the West Virginia recreational use immunity statute). Other jurisdictions have construed the exception for the landowner who charges a fee or consideration narrowly, thereby recognizing the immunity provided by the recreational use statute. E.g., Smith v. United States, 383 F. Supp. 1076, 1081 (D. Wyo. 1974) (applying the Wyoming recreational use statute and stating that since Yellowstone Park allowed free admission for persons under 16, the United States would be permitted to claim immunity under Wyoming's recreational use statute in a suit by a 14-year-old passenger in the family car), aff'd, 546 F.2d 872 (10th Cir. 1976); Stone Mountain Memorial Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969) (determining that a $2.00 fee assessed per automobile was a parking or driving fee, in no way related to admission of people to a park and thus did not constitute a charge).

159. See sources cited supra note 158.

160. E.g., Barrett, supra note 138 (advocating that the model recreational use statute should be reassessed to determine if its scope has been exceeded by individual state legislatures, and whether
B. The Recreational Use Statute and Beaches


161. **XXIV SUGGESTED STATE LEGISLATION**, *supra* note 18, at 150 (comments). The Council of State Governments proposed a revised model recreational use statute in 1980. See *Public Recreation on Private Lands: Limitations on Liability*, XXIX SUGGESTED STATE LEGISLATION (COUNCIL OF STATE GOVERNMENTS) 107 (1980) [hereinafter XXIX SUGGESTED STATE LEGISLATION]. The revised Model Act retains the basic provisions of the original Model Act with the following significant revisions: (1) Section 2 of the 1980 Model Act defines “owner” to include public and private landowners. *Id.* § 2, at 107. (2) Section 5 of the 1980 Model Act disallows immunity for injuries sustained by children under the age of 12 based on the attractive nuisance doctrine. *Id.* § 5, at 108. (3) The major revision proposed by the 1980 Model Act includes a number of sections providing for civil penalties for prohibited acts. These prohibited acts include: (a) recreational trespass, that is, the entrance on the land of another despite the posting of notice prohibiting all kinds of trespass; (b) the destruction or removal of any property of the owner or vandalism of any sort while engaged in recreational use of the land; (c) littering while engaged in recreational use of the land; and (d) failure to leave any gates, doors, fences, roadblocks, or obstacles or signs in the condition they were found while engaged in recreational use of the land. *Id.* § 7, at 109; see also *id.* § 6, at 108 (recreational trespass defined); *id.* § 8, at 109 (penalties); *id.* § 9, at 109 (enforcement procedures); *id.* § 10, at 111 (restitution); *id.* § 11, at 111 (punitive damages); *id.* § 12, at 111 (aggravated violations).

162. Virtually all of the states that have enacted recreational use statutes include swimming, water sports, water skiing, and/or diving as recreational activities covered by the recreational use statute. See *ALA. CODE* § 35-15-21(3) (1989); *ARIZ. REV. STAT. ANN.* § 33-1551(B)(2) (1989); *ARK. STAT. ANN.* § 18-11-302(3)(3) (1987); *CAL. CIV. CODE* § 846 (West 1989); *COLO. REV. STAT.* § 33-41-1025(1) (1989); *CONN. GEN. STAT.* § 52-557(f)(4) (1989); *DELA. CODE ANN.* tit. 7, § 5902(3) (1983); *FLA. STAT.* § 375.251(5) (1989); *GA. CODE ANN.* § 105-404 (1984); *HAW. REV. STAT.* § 520-2(3) (1989); *IDAHO CODE* § 36-1604(b)(1) (1989); *ILL. REV. STAT. ch.* 70, para. 32, § 2(c) (1989); *IND. CODE* § 14-2-6-3 (1989); *IOWA CODE* § 111C.2(3) (1989); *KAN. STAT. ANN.* § 58-3202(c) (1989); *KY. REV. STAT. ANN.* § 411.190(c) (Baldwin 1989); *LA. REV. STAT. ANN.* §
The Washington Supreme Court affirmed the dismissal of a wrongful death action arising out of the death of a fourteen-year-old girl who struck her head while swimming in the defendant’s public park. The court rejected the contention that the recreational district had a duty to supervise the beach area and to provide lifeguards. The court ruled that the defendant was immune from liability for the swimmer’s injuries under Washington’s recreational use immunity statute. In a similar case, an Illinois appellate court in Johnson v. Stryker Corp. stated that liability will not be imposed on a defendant landowner for failure to inspect and maintain its waterfront property. The court made its ruling despite the fact that a reasonable inspection would have re-


Other states do not specifically mention water sports, swimming or other beach activities but merely make a general reference that recreational use statutes cover other “outdoor recreational activities” or “other similar types of recreational acts.” Arguably these jurisdictions would also include swimming, diving, water sports, and other beach activities within the coverage of the recreational use statute. See MASS. GEN. L. ch. 21, § 17(c) (1989); MICH. COMP. LAWS § 300.201 (1989); MO. REV. STAT. § 537.345(4) (1989); NEV. REV. STAT. § 41.510(1) (1989); N.M. STAT. ANN. § 17-4-7(b) (1989).

Alaska’s recreational use statute does not use the term “recreational activities” or specifically include swimming, water sports, or other beach activities within the purview of the statute. Rather, the Alaska statute refers to unimproved land and tort damages resulting from injuries to a person who enters or remains on unimproved land, if the person entered the land for recreational purposes. See ALASKA STAT. § 09.45.795 (Supp. 1990). The New York recreational use statute does not include a specific reference to swimming, water sports, or other beach activities or any reference to other recreational purposes but rather specifically sets forth a list of activities upon which the immunity granted by the recreational use statute will be applied. Those activities include “hunting, fishing, gleaning [sic], canoeing, boating, trapping, hiking, cross-country skiing, tobogganizing, sledging, spelaeological activities [cave exploration], horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreation purposes, snow mobile operation, cutting or gathering of wood for non-commercial purposes, training of dogs.” N.Y. GEN. OBLIG. LAW § 9-103(1) (McKinney 1989).

The recreational use immunity statute in the state of North Carolina does not define “recreational purpose,” but is more limited in its reach. See N.C. GEN. STAT. § 113A-95 (1989); supra note 18.

164. Id.
165. Id. at 371, 597 P.2d at 1363.
166. Id.
168. Id. at 722, 388 N.E.2d at 935.
revealed the hazardous beach condition to the defendant and the cost to remove the hazard was determined to have been minimal. By way of further example, the case of *Lostritto v. Southern Pacific Transportation Co.* involved a bridge constructed by Southern Pacific. The bridge spanned a river and a popular local beach. The defendant had known that the bridge was often used as a diving platform by area swimmers. Nonetheless, the defendant failed to post any signs or in any way deter the use of the trestle for diving—even after learning that previous divers had drowned in the river. The California Court of Appeals ruled that the recreational use statute immunized Southern Pacific from liability and the injured diver would be denied recovery absent a jury finding that Southern Pacific's failure to act was a deliberate attempt to injure the diver. These cases represent just a few of the various injuries which occur annually to unsuspecting beachgoers.

The foregoing cases, typical of most jurisdictions, reveal that the bargain offered to landowners by recreational use immunity statutes comes at the expense of a third party victim, the beachgoer. The injured beachgoer, se-

---

169. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 745, 140 Cal. Rptr. at 908.
175. Perhaps the best example of the harsh consequences of awarding such protection through the application of the recreational use statute can be seen in the case of *McCord v. Ohio Div. of Parks & Recreation*, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978). In this case, nine-year-old Willie McCord visited a public park in the State of Ohio. *Id.* at 72, 375 N.E.2d at 51. Willie went swimming at a public beach area where a lifeguard employed by the State of Ohio was on duty. Willie's friends informed the lifeguard that Willie had disappeared under the water. *Id.* at 73, 375 N.E.2d at 51. The lifeguard did not investigate Willie's whereabouts until 30 minutes later. Unfortunately, Willie drowned. Willie's estate brought suit, claiming negligence on the part of the State of Ohio and in particular, the lifeguard on duty at the public beach. The State of Ohio defended, based on Ohio's recreational use immunity statute, claiming that it had no duty of care to maintain the beach area in a safe condition. The Ohio Supreme Court held that the Ohio Recreational Use Immunity Statute eliminated any duty of care owed by a landowner, including the State of Ohio, to a recreational user. *Id.* at 74, 375 N.E.2d at 52.

The decision in *McCord* is particularly disturbing in that it was the State of Ohio that encouraged Willie McCord to visit the beach and rely on the state provided facilities and lifeguards while swimming at the beach. This decision appears to sanction the State of Ohio to employ and place lifeguards at public swimming areas with no legal obligation to exercise reasonable care to guard and protect the lives of the visitors. See Wilkins, *The Wrongful Death of Willie McCord—Or Beware of Free Public Parks—The Ghosts of Immunity and the Ohio Guest Statute Still Roam*, 47 U. CIN. L. REV. 591 (1979). Wilkins argues that statutory immunity should not be extended to state facilities.
duced by the beach culture and its promoters, is without a remedy against the landowner. Oddly enough, recreational use immunity statutes permit landowners to rely on their own negligence as a defense to liability. Initially conceived for a laudable purpose, the cost of the recreational use immunity statutes to the beachgoer is indeed high.

C. Excluding Beaches from the Recreational Use Statutes

Proponents of the recreational use statute argue that the benefits of the statute exceed the cost. The recreational use statute benefits the public by providing increased access to recreational land. The cost to the public is the immunity of the recreational landowner from suits for negligence. Proponents argue that the cost to the public or private landowner for the inspection, reasonable maintenance, and care of vast areas of recreational land is prohibitive burden. Absent the immunity granted by the recreational use statute, landowners arguably would have no incentive to open land for public recreation.

Even assuming that the cost-benefit test is the appropriate measure for assessing the desirability of these statutes, the application of the test to beaches is incomplete. The economics of the cost-benefit analysis fail to consider accurately that the beachgoer behaves differently. The lure of the beach

The state simply does not require the inducement of a quid pro quo to hold its lands open to public recreation. Its lands are already open to the public in most instances and, where state parks are concerned, are prepared, maintained and held out for public recreational use. When the state has so declared its intention [to allow public recreational use] and there appears to be no other justification for applying the incentives of the liability-limiting statute, it is unfair to force the individual who has been injured by otherwise actionable state conduct to bear the burden of that injury.

Id. at 601-02.

176. See XXIV SUGGESTED STATE LEGISLATION, supra note 18, §§ 3, 4, at 151; XXXIX SUGGESTED STATE LEGISLATION, supra note 161, §§ 3-5, at 108.

177. See XXIV SUGGESTED STATE LEGISLATION, supra note 18, § 4, at 151; XXXIX SUGGESTED STATE LEGISLATION, supra note 161, § 4, at 108 (Liability Limited).

178. See City of Huntington, supra note 2.


180. See XXIV SUGGESTED STATE LEGISLATION, supra note 18, at 150 (comments); Barrett, supra note 138, at 6; see also sources cited supra note 179.

181. See XXIV SUGGESTED STATE LEGISLATION, supra note 18; Barrett, supra note 138, at 6.

182. See XXIV SUGGESTED STATE LEGISLATION, supra note 18; Note, Minnesota Recreational Use Statute, supra note 160, at 118.

183. See Barrett, supra note 138, at 26 (interests of privacy or concern over moral if not legal responsibility can be important factors also); Note, Beyond Commonwealth v. Auresto, supra note 179, at 281-82 (arguing that several factors should be considered in determining if land falls within the scope of the Recreational Use Act including: the size of the land; the population and density of the area; and whether the land has undergone improvements or merely ancillary structures).

184. "We still like to go beachcombing, returning to primitive act and mood when all of the
renders the public most vulnerable to injury from hazardous or poorly maintained waterfront areas. Unlike other types of recreational land used for hunting, hiking, or other outdoor pursuits, the beachgoer comes to the beach unequipped to handle hazards. The beachgoer views the beach as a reprieve, a place where one's antennae may be momentarily lowered without the threat of catastrophe. Hypnotized by beach culture, the beachgoer is almost defenseless to the landowner's negligence.

The recreational use statutes, originally intended to increase the availability of recreational land, traps the unwary beachgoer between the negligence of the landowner and the lure of the beach. The beachgoer is forced to assume unidentified risks that often result in an uncompensated injury. The hidden cost of the recreational use statute is the decreased amount of care taken by the public when it escapes to the beach. The real cost of the recreational use statute is human injury.

A recent incident at a Florida beach dramatically illustrates the point.

 lands will be filled with people and machines, perhaps the last need and observance of man will be as it was in the beginning, to come down and experience the beach." C. GUNN, supra note 65, at 87; see also Schreyer, Knopf & Williams, supra note 81, at 15-16 (analyzing the role of environment in recreation choice behavior, and stating that "people do not search for specific elements of the environment as much as they search for settings which will allow them to behave in the ways they desire" (emphasis in original)).

186. Id. at 26-29; see also Dean, supra note 119, at 1.
187. Schreyer, Knopf & Williams, supra note 81, at 10; P. PEARCE, supra note 108, at 128-34.
188. Id. Governor Bob Martinez of Florida in his proclamation declaring July 3-9, 1990 "Beach Safety Week" in Florida stated, "The water is a magnet that attracts young and old alike to the beach, and water activities have a strong appeal suitable for wide public participation..." State of Florida Proclamation: Beach Safety Week, reprinted in OCEAN LIFEGUARD 7 (Summer 1990).

190. Schreyer, Knopf & Williams, supra note 81, at 10-14.
191. See supra note 3.
192. Braucher, Lazy Moment Brings Lifetime of Pain, Scars, Miami Herald, June 10, 1990, at 1BR, col. 2 (Broward ed.). The text of the newspaper article reads as follows:

After the beach barbecue, the man dumped the white-hot coals on the sand as usual. The little girl who fell into the embers will be scarred for life.

"She has second-degree burns, some very deep, from her toes to her thigh," said Dr. Thomas L. Zeoeller, the plastic surgeon treating Christina Samaniego, 2, in Ocala. "We can't exclude the probability of skin grafting."

Her parents, in Ocala for three months after moving from Ohio, have not worked long enough to buy medical insurance. Their South Florida Memorial Day weekend turned to tragedy.

"They're just young people, and they're devastated," Maureen Vass said of Toni Samaniego, 25, and her husband Tim, 24.

An employment and training director at the Broward Seminole Reservation, Vass became involved because of the family's Cherokee-Apache lineage. She hoped the litterer would come forward if he knew the extent of the harm done. Unable to walk, Christina is carried to her daily treatments as an outpatient at Marion County Medical Center. Her parents are applying for Medicaid.

"It's really hard to deal with," her mother said from Ocala. "In a panic, we didn't
Summertime is beach barbecue time in Florida. Beachgoers set up portable barbecues on the beach. On this particular weekend, a young man, with his dogs and barbecue gear in tow, staked out his place on the beach. While preparing his barbecue, the barbecuer's dogs roamed the beach. Two-year-old Christina and the barbecuer's dogs became fast friends. After finishing his picnic lunch, the barbecuer packed up his gear to leave. Before leaving the beach, the barbecuer dumped the hot barbecue coals into the sand. Although covered with sand, the coals still remained scorching hot. As Christina and her family were leaving, Christina ran up to say goodbye to her new canine friends. With her parents looking on, Christina tripped and fell on the camouflaged hot coals. Christina suffered second degree burns from even get the man's name, and I really couldn't describe him, except for a gray BMW he was driving. My husband works in a car body shop and knows the make. "There was coal stuck to my baby's feet and legs. This man helped us splash water on her, but that was all. He never even offered to go with us to the hospital. "Why would somebody do this? He didn't say he was sorry or anything like that. He said that was what he always did with his coals, just emptied them out in the open."

The family had driven from home to a beach near Tavernier in the Keys for a Memorial Day outing.

"This man had two dogs on the beach, and Christina had been playing with them. Just before we were leaving, she went to see the dogs. She was running after them when she tripped and fell on the coals. You couldn't see them in the sand. "She was burned from the left foot to the knee, on the right foot, the buttocks and between her legs. We were in a panic."

They phoned 911 from a nearby marina but were told that weekend traffic would delay rescue "about 20 minutes," her mother said. "We decided to drive the baby to a hospital."

Horn blowing, Tim Samaniego weaved north through heavy traffic to James Archer Smith Hospital in Homestead.

"It was a terrible trip, and about 10 miles at 4:30 in the afternoon," she said. "People wouldn't move over. We saw three police cars on the way. The officers just waved back at us."

Christina's wounds were cleaned, salve was applied and her legs were wrapped at the hospital. The family got back home about 2:00 a.m. Tuesday.

"The doctor says healing will be a long, drawn-out process," her mother said. "She's in awful pain and can take only Tylenol for fear of addiction. "I don't know if that man realizes the devastation he caused."

At her Seminole office, Maureen Vass was more emphatic.

"We're trying to keep South Florida clean. Some dirt bag just throws his stuff on the ground, and a little girl is scarred forever. People can be so callous. You wonder why their decency went."

Id. 193. Id. 194. Id. 195. Id. 196. Id. 197. Id. 198. Id. 199. Id. 200. Id.
her toes to her thighs.\footnote{201}

Although the barbecuer’s dumping of the hot coals in the sand of a crowded beach area may be negligence, there are equally compelling questions regarding the landowner’s liability.\footnote{202} The beach owner failed to post warning signs prohibiting beachfront barbecues or directing barbecuers to dump hot coals away from the beach area.\footnote{203} The beach owner failed to designate and rope off a barbecue area on the beach.\footnote{204} The owner was surely aware of the barbecue ritual occurring daily. How much can a sign and rope cost? For that matter, is the cost of designating a barbecue pit area away from the waterfront or even providing some minimal patrolling of the barbecue area so prohibitive that sparing one two-year-old and her family is not worth it?\footnote{205} When faced with the choice between human injury and society’s need for recreational land, can there be any question?

This situation brings to mind a recent Hollywood release. Michael Douglas, in portraying the character of Gordon Gekko in the movie *Wall Street*, stated that “the bottom line is money and the rest is just conversation.”\footnote{206} In the world of beach culture and beach injuries, the bottom line cannot be money. The need for the maintenance of safe harbors for recreational beach users is not just conversation. The costs of the recreational use statutes, both hidden and real, far outweigh the benefits from greater public access to beach areas, given the irreparable harm caused by many beach accidents.\footnote{207}

From submerged rocks and defectively constructed docks, to hidden sandbars and unknown rip currents, the kinds of hazards and traps that await innocent beachgoers warrant revision of the recreational use immunity statutes to provide only conditional immunity for beachfront and waterfront areas. A cost-benefit analysis supports a grant of conditional immunity to beach land-

\footnote{201}{Id.}

\footnote{202}{Restatement (Second) of Torts § 283 (1965) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”); see also Prosser & Keeton, supra note 137, § 31, at 169. Professors Prosser and Keeton speak of unreasonable risk:

In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will.

There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them.

Id. (citations omitted).

203. Braucher, supra note 192, at 1BR. Recreational use statutes do not require the landowner to keep the premises for safe entry or use by recreational users or to give any warning of a dangerous condition, use, structure, or activity on such premises. XXIV Suggested State Legislation. supra note 18, §§ 3-4, at 151.

204. Braucher, supra note 192, at 1BR.

205. See id.; cf. Barrett, supra note 138, at 29 (concluding that “[i]f the act demonstrably fails to further the public interest in opening private lands for recreational use and at the same time denies recovery to people who would otherwise be protected, then the statutory immunity should be abandoned”).


207. See National Safety Council, supra note 3, at 72-73.
owners. At the very least, a beach owner's immunity should be conditioned on the landowner not creating beach hazards. Furthermore, beachfront landowners' immunity should be conditioned upon the reasonable inspection of the property and the posting of specific warnings of dangerous beach conditions and activities. If the landowner had removed the embedded rocks or simply posted a "no diving" sign, Joey Robbins most likely would not be permanently paralyzed.

Conditional immunity retains the public benefit of increased access to beach areas and attempts to account for the escapist beach mentality. Statistics may reveal that the demand for public recreational land, including beaches, is ever increasing. However, unless conditional immunity for beach property owners is carved out, the cost of the recreational use immunity statute in terms of human life is too great.

III. Conclusion

Justice Brown of the Florida Supreme Court observed over half a century ago:

There is probably no custom more universal, more natural or more ancient, on the seacoasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the life giving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same. This primeval quality appeals to us. . . . The attraction of the ocean for mankind is as enduring as its own changelessness. The people of Florida—a state blessed with probably

208. Some commentators have described recreational use statutes as granting only a qualified immunity. However, the qualified immunity spoken of merely prohibits a landowner from receiving the benefit of the immunity provided by recreational use statutes in the event that the landowner intentionally acts in such a way as to injure a recreational user or receives some form of consideration for use of beach areas by a recreationalist. See Note, Minnesota Recreational Use Statute, supra note 160, at 117-21. The type of qualified immunity addressed by commentators differs substantially from the qualified immunity proposed in this Article. The qualified immunity proposed in this Article takes into account the beach mentality rather than basing the qualified immunity on the character of the landowner's act or the presence of consideration for use of beachfront areas.

209. Id.

210. In most jurisdictions the recreational use immunity statute does not require the beachfront owner to inspect or post warnings with regard to dangerous beach conditions. The proposed revision would require beachfront property owners to exercise a minimal amount of reasonable care in the inspection and posting of specific warnings regarding dangerous conditions. See XXIV SUGGESTED STATE LEGISLATION, supra note 18, § 3, at 150.


212. See supra notes 179-91 and accompanying text.

213. See Farley, supra note 66, at 1D.

214. See National Safety Council, supra note 3, at 72-73.
the finest bathing beaches in the world—are no exception to the rule . . . we love the oceans which surround our state. We, and our visitors too, enjoy bathing in their refreshing waters. The constant enjoyment of this privilege of thus using the ocean and its shore for ages without dispute should prove sufficient to establish it as an American common law right. 218

Recreational use immunity statutes fail to take into account the significance of the public's common law right and cultural attraction to enjoy beach areas. 216 Unlike other recreational pursuits, the public's enjoyment of beach areas, as a common law right, is entitled to protection. 217 The ancient Greeks sought to protect their beach culture by offering worship to Poseidon, the mythological god of the sea. 218 Although recognizing the need to maximize the availability of recreational beach areas, recreational use immunity statutes place the social and economic cost of beach hazards and beach injuries on those least able to recognize and bear the burden: the beachgoers. In addition, recreational use immunity statutes provide a disincentive to beach property owners to adequately safeguard beach areas. Under the law, the beach user's right to a safe beachfront should be paramount to the public or private landowner's economic cost. Otherwise, beachgoers may have no other choice but to hope that Poseidon has mellowed.

216. Id.; see also Wiley, supra note 67, at 17 (stating that "[p]eople come to see the ocean, even in winter").
217. White, 139 Fla. at 58-59, 190 So. at 448-49.