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Sallee v. Stewart and Iowa's Recreational Use Statute

The intent of this document is to share information on the meaning of Iowa's Recreational Use Statute and the Iowa Supreme Court's recent *Sallee* opinion. It's also meant to provide practical information for landowners hosting farm visitors. While this information is intended to provide general information, such legal discussions often require the use of nuanced language and legal terminology. Hopefully, this document provides a thorough examination of the legal issues while offering useful information and the potential for constructive reform.

Iowa's Recreational Use Statute

Recreational use statutes limit the liability of landowners if they allow others to use their land for recreational purposes. The Iowa statute limits this protection only to instances in which people do not pay for access and only for activities that are listed in the statute. (Iowa Code § 461C) It does not shield landowners from liability for acts or omissions that are willful or malicious.

The listed activities include "hunting, trapping, horseback riding, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, motorcycling, nature study, water skiing, snowmobiling, other summer and winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites while going to and from or actually engaged therein."

Sallee v. Stewart

In February 2013, the Iowa Supreme Court issued its opinion in Sallee v. Stewart, a case addressing Iowa's recreational use statute. Sallee was a chaperone for a kindergarten class's visit to the Stewarts' dairy farm. The Stewarts set up different stations for the kids to visit at the farm. The stations included a pen for riding a horse, a place to feed a calf from a bottle, and a place to view a tractor. The children then viewed several cows and a bull. From there, the children were guided to a barn to play in the hayloft.

At the hayloft, Matthew Stewart asked Sallee to go into the hayloft to supervise the children. He assured her the ladder would support her weight and did not advise her of holes in the loft that were covered with hay bales. Stewart had placed the bales on the holes and tested that they would support his weight. While Sallee was standing on a hay bale, the bale gave way, she fell through the hole, and she broke her wrist and leg.

Sallee filed a negligence claim against the Stewarts, and the Stewarts asserted that Iowa's recreational use statute shielded them from liability. The district court agreed with the Stewarts that Sallee was engaged in recreational activity and that the statute protected the Stewarts. Sallee appealed and the court of appeals agreed the recreational use statute applied to the activities, but because the Stewarts set up stations and guided the class to different stations they took themselves out from under the protection of the statute as they essentially acted as tour guides.

The Supreme Court of Iowa granted review and vacated the appellate decision and reversed the district court judgment. Unlike the district and appellate courts, the Iowa Supreme Court found that Sallee's injuries were not incurred while engaged in an activity covered by the recreational use statute.

What the Sallee Opinion Does

This case has created a significant amount of concern in the farming community and with individuals and organizations desiring to promote agricultural education. This is a lengthy case on a topic that, as the Iowa Supreme Court points out, is subject to a great deal of ambiguity. Examining the case in detail can render additional clarity on the meaning of the statute and on ways to move forward with on-farm recreation and education.

It Clarifies that Protection is Limited to Involvement In the Listed Activities.

The Court points out that the Iowa legislature in creating and later modifying its recreational use statute did not use expansive language but rather stated "'recreational purpose' *means* the following or any combination thereof …" (emphasis added). The Court noted the Iowa legislature did not use phrases such as "includes but is not limited to," which other states, as well as the 1965 model recreational use statute, included. This means the liability protection afforded by the law is limited to only those activities specifically listed in the statute.

It Clarifies the Meaning of "Nature Study" and "Other Summer Sport."

As provided above, the statute has an extensive list of activities and some have fairly clear meaning. There is, however, the potential for gray areas, and the Sallee opinion offers some clarification on what a couple of these activities mean. Significantly, the opinion only elaborates on the meaning of "nature study" and "other summer sport."

The Court concludes that nature study "may well include outdoor activities such as bird watching, butterfly observation, and the study of pond flora and fauna …." Perhaps more significantly, the Court specifically excludes "frolicking in a hay loft" as nature study and also positively references a Nebraska case that found observing livestock at a county fair is not nature study. This certainly limits whether viewing and play based around agricultural operations can be characterized as nature study, but as we'll see below, this does not necessarily exclude protection of all activity involving farm operations. It merely limits its characterization under one protected activity – nature viewing.

The Court interprets "other summer sports" as those similar in character to the other activities listed in the statute, which all relate to outdoor activity. The Court also states that sport is not merely a "pleasurable activity or a source of diversion." This suggests there must be some common recognition of the activity as a known outdoor sport.

It Emphasizes the Importance of the Outside Nature of the Activities Included.

It should also be noted that the Court focuses on the outside nature of the activities listed. It interprets the intent of the legislature to apply the statute's liability protection to structures or buildings only "when the structure itself is part of or incidental to the underlying recreational use." This exposes another significant limit to the recreational use statute.

The statute itself mentions that structures and buildings are included within the meaning of land, but here the Court is clarifying that they are included only as they relate to use for outdoor recreational activities. This means if there is a visitor on the land in an indoor activity that is not "incidental" to a protected outside activity, it almost certainly does not have immunity.

In short, under the facts of the Sallee case, the Court found that playing in a hayloft does not fit within any of the listed activities, and the Court refused to expand the law to include activities outside of those listed in the statute. This does create cause to reflect on what liability issues exist when allowing visitors to use private land and what protections exist for limiting such liability.

What the Sallee Opinion Doesn't Do

In light of concerns expressed about the impact of the Sallee ruling on farm educational and recreational activities, it may be just as prudent to discuss what the ruling does not do. First, this opinion does not make the statute effectively useless or irrelevant. As listed above there are many activities in which the public can participate on private land and the landowner still retains immunity from almost all liability. In addition, there are ways to continue to limit liability for activities that are not covered by this statute. Such methods are discussed in the following section.

As mentioned above, the opinion does place limitations on the liability protection found in Iowa's recreational use statute. It's important to note, the Court also discusses other limitations, but it only accepts as law those examined in the previous section. Immediately below is a discussion of the other limitations the Court addresses but does not expressly adopt.

It Doesn't Require Access to the General Public.

The Court examines the issue of whether recreational use statutes are intended to apply to any users of the property or whether they're intended to only apply if the land is made available to all members of the public. The Court certainly appears to favor the view that such laws only apply if the owner opens the land to the general public. In discussing the issue, the Court references a previous Iowa Supreme Court case (Peterson v. Schwertley, 460 N.W.2d 469 (1990)) in which the Court held the statute does apply to property that is not open to the public. The Court is very

critical of the earlier case and says that extending the statutory protections to property not open to the public defeats the purposes of the statute. However, while critical of giving the protection of the statute to land not open to the public, the Court expressly states that it is not confronting whether Peterson is good law.

It is also worth pointing out that the *Peterson* opinion dealt with trespassers and not a selective group of invitees rather than the public at large. The Court stated that "it can be argued that the purpose of the act was to establish quasi-parks on private lands where the public would have access …." However, it does not elaborate on this, and its not possible to say with certainty how the court may view cases involving events open to the public, but only at specified times or to members of a certain class of the public, such as farmers learning about different techniques or practices.

Though its worth noting the Court did not overturn P*eterson* and the law still applies whether the land is open to the general public or not, the Court's opinion leaves this a tenuous matter. Again, a list of the practical implications of this case is discussed below, and it should be again emphasized that consultation with your attorney and insurance provider is critical.

It Doesn't Limit Protection to Instances of Direct Participation in a Listed Activity.

The Court discusses the relationship that must exist between the activity engaged in when the injury occurred and the list of activities covered by the statute in order for the statutory protection to apply. *Sallee* makes clear that there must be an "obvious relationship." It does not necessarily mean that the injured party must have actually been engaged in the covered activity at the time of injury. Rather, the Court said the activity should be a "necessary incident" to the listed activity. For instance, the act of horseback riding is a listed activity and saddling and otherwise preparing a horse for riding is necessarily incidental to that activity. This example also gets at the core of the next item.

It Doesn't Limit Protection to Outside Activities

The Court again emphasizes "that the statute is designed to protect activities traditionally undertaken outdoors." It does recognize that the statute includes "structures" and "buildings" in its definition of protected land. However, the Court again uses the language "incidental to" to describe the necessary relationship that must exist for protection to apply between an activity that occurs within a structure or building and an activity listed in the statute. Again, activities, such as saddling a horse in a stable, are still likely covered by this statute and the opinion does not make the statute's listing of structures and buildings as protected land irrelevant.

It Doesn't Restrict Landowners from Interacting with Users

The Court clarified that the statute only deals with premises liability. This means the statute only relates to accidents that occur due to conditions of the property, not negligent actions taken by landowners or their employees. For example, someone tripping in a hole is a premises liability issue, while someone injured by the operation of farm equipment is not.

Its important to point out, that the appellate opinion in the *Sallee* case and the concurrence of a single justice in the Supreme Court's opinion found that the farmers could be held liable because they acted as "tour guides" by setting up different stations and supervising the activities engaged in by the visiting kindergarten class. It's worth pointing out that this is not the opinion of the Iowa Supreme Court, and as such, cannot be interpreted as part of the law. The majority Supreme Court opinion does indicate that the statute's protection only exists for premises liability, but it in no way indicates that the owners of the property cannot be present with visitors. As has always been the case, owners should take precautions and exercise due care when using farm equipment or creating activities for visitors that pose risks outside those found on the premises, such as hayrides.

It Doesn't Address Activities that have an Educational Component.

This is particularly worth noting for individuals and organizations promoting agricultural education and exposing the public to farm life and activities. Nothing in the opinion places an express limit on liability protection for activities that involve an educational component. While the statute doesn't include the word education at any point, it does include "viewing or enjoying historical, archaeological, scenic, or scientific sites …." The Court did not discuss what these terms mean in this case as the issue was not raised by the parties or suggested by others. This case dealt only with kindergartners *playing* in a hayloft.

What it Means for Farm Visits

First and foremost, the opinion shouldn't necessarily prohibit farmers, organizations, and other landowners from hosting visitors to their farm. It does mean that hosts should be cognizant of the limitations of the recreational use statute and how to minimize exposure to liability.

Avoid Negligence. The best way to avoid liability is to avoid negligent acts or omissions. Even without the protection of this statute landowners are not liable for any accident that occurs on their land. There must be some negligence on the part of the landowner. Significantly, avoiding negligence does not mean that you necessarily avoid a lawsuit, which can be more expensive, time consuming, and stressful than the injury itself. This is where insurance can be helpful and is discussed next. Avoiding negligent acts does, however, mean you can limit the likelihood of a lawsuit and be more likely to prevail in such a suit. This requires understanding the duty of care owed to different users of the land.

Again, if the activity that is taking place on the property is expressly listed in the statute or incidental to such an activity, the recreational use statute protections apply, and the owner can only be found liable for a willful or malicious failure to guard against or warn of danger. The Court relates that such a failure only exists where there is a "known or obvious risk" so great that its "highly probable" that harm will follow. In the facts of the *Sallee* case, even though the owners knew that Sallee was a "very large woman," the Court found there was not sufficient evidence to show that it was likely that Sallee would stand on the hay bales covering the holes or that the hay bales "would almost assuredly collapse" and cause injury. Therefore,

the Court maintains a very high burden for anyone making a claim under the willful or malicious conduct exception to the statute.

If visitors are invited onto the property for activities that are not listed, owners are required to fulfill the duty owed to invitees and licensees. This means the owner must use reasonable care to inspect the premises of dangers and to make the premises safe or to give warnings of any dangers that are not observable. In short, it's a good idea to know the condition of the land people will be traversing and using and to let everyone know of any dangers upfront.

In regard to trespassers, landowners only owe a duty not to willfully or wantonly cause injury. There is no duty to inspect the property or to give warnings of dangers to trespassers.

Ensure the Purpose of the Visit is Known by Land Users.

Its clear the purpose of the visit can dictate the duty of care owed by the landowner to the visitor. For this reason, if the landowner is wishing to enjoy the protection of the recreational use statute, its important to make clear that the invitation to use the property only extends to activities covered by the statute and that engaging in activities outside of those authorized acts as a trespass. One way to document the limited purpose of the visit is through a waiver.

Use Waivers but Don't Rely on Them.

Waivers can be useful tools for limiting some liability. Consenting adults may authorize waivers for themselves to some degree, though not minor children. Perhaps the greatest benefit from a waiver is simply as documentation that warnings of dangerous conditions are given and that the visitor is aware of these conditions. It can also be used to document the exclusive purpose of the visit as one of those listed in the recreational use statute and that other activities are strictly prohibited.

Ensure Your Insurance Covers Farm Visit Activities.

Having insurance that covers the activities taking place on the farm can protect against findings of liability and against the expense of a lawsuit. However, in order to gain this protection, it is essential to ensure the farm liability insurance covers the events you plan to have on your land.

Landowners should talk to their insurance agent and explain exactly what they intend to do and ask that these activities be covered. They should then read the policy and pay very close attention to the policy's definitions and exclusions. If there is any ambiguity in the language, or if something could be interpreted in more than one way, the owner should ask that it be clarified. Its best to clarify any language within the policy itself, but landowners should also document any conversations with their agent and the explanations provided. If a dispute arises, a court will first look at the language of the policy, but if it is ambiguous, they can look at evidence outside the document to determine the intent of the parties. Courts interpret ambiguities against the party that creates the document, here the insurance company that drafted the policy.

Potential for Reform

As mentioned, the Court here has provided clarity to a statute developed in order to provide additional outdoor recreation opportunities on private land. Iowa ranks 49th in the amount of public land in relation to private land. This lack of public land for the general public to enjoy and on which to recreate was a key concern when the recreational use statute was formulated and adopted in 1967.

While the state continues to have limited public space for such recreation, there is also a growing concern that members of the public lack knowledge about the practices and culture of farming, once common to most any Iowa citizen. Efforts have been made to expose children as well as adults to educational farm experiences. Individual farmers, landowners, and organizations have relied to varying degrees on an assumption that such educational activities received the special liability protections afforded by Iowa's recreational use statute. While this assumption may have been misplaced, the need and general acceptance of the benefits of an expanded role for this statute are only reinforced.

It is, as pointed out in the Supreme Court's opinion, the role of the legislature to take on such a task. Prudent reform remedying the need for public access to agricultural activities should clarify or expand the listed activities to ensure education about, and exposure to, agricultural activities are included. It may also be helpful to address the issue of whether the statute applies only to land open to the public at large or whether it also applies to events that may be limited to specific groups or at specific times. In order to fulfill the original intent of the statute in making general outdoor recreation opportunities available for the general public, while also allowing farmers to limit the number or times when visitors can access the farm operation, separate provisions may need to be considered for recreational and educational uses.

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