

Property owners, however, are often hesitate to allow the use of their property for such public recreation, due to the fear of being sued for injuries caused by dangerous conditions (not to mention the expense involved with making constant inspections and improvements to their property to make it safe).

The California Legislature understands these valid concerns, and has adopted law to encourage landowners to allow members of the public to come onto their land, free of charge, for recreational purposes, and to assure owners of privately owned property that they will be immune from liability, under certain circumstances, for their generosity. Civil Code section 846 creates both a qualified immunity for premises liability to recreational users of the owner's property, and an exception to the general rule requiring the exercise of reasonable care in the maintenance of their real property. Section 846 reads as follows:

An owner of any estate or any other interest in real property, whether possessory or non-possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, structures, or activities on such premises to persons entering of such purpose, except as provided in this section.

The effect of the immunity is that a property owner owes no duty of care to keep the premises safe for recreational users or to give them warning of hazards on the property (unless, as explained in more detail below, the owner willfully or maliciously fails to guard or warn against a dangerous condition, or he or she gives permission to enter for a recreational use for consideration, or he or she expressly invites the user to come upon the premises). The net effect of this statutory exemption from the general rule of liability is to relegate the owner's or occupier's duty of care to the same level as that which previously existed for trespassers, thus making recreational users responsible for their own safety and eliminating the financial risk that had kept land closed.

The immunity provided by section 846 extends to the owner of the land and to any person who has an estate or an interest in the real property, whether possessory or non-possessory. Accordingly, a tenant who has a right to possession, the owner of an easement who has a right of use, and a licensee who has a temporary right of use and possession, are each entitled to the immunity. It should be noted, however, that the immunity does not extend to an independent contractor who creates a condition on the land to satisfy contractual obligations to the owner, nor to an agent of the owner who creates the condition.

It should also be mentioned that the immunity provided by section 846 does not apply to a landowner who gives permission to enter for consideration (except where the consideration was given by the state or others for the same purpose). An owner is subject to the general duty of care (and is not immune from liability) to a person who is expressly invited to enter the premises rather than merely being permitted to come onto the property (in contrast to a general invitation to the public). "Consideration" refers to money or something of value and usually involves the payment of an entrance fee. It may be something other than money, but for these purposes it means present, actual benefit or detriment and something more than a remote potential benefit.

Furthermore, the owner is liable to non-paying persons who enter for recreational purposes who are injured as a result of a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. "Willful" means that the landowner committed intentional wrongful misconduct either with knowledge that serious injury would result to a third person or with a wanton and reckless disregard of the possible results. And, "malicious" refers to conduct which is intended to

cause injury or is carried on with a conscious disregard for the safety of others. Thus, if the evidence establishes that the activities causing the injury were known to the landowner, and there have been prior injuries, the landowner who fails to prevent the activity or warn of the danger may be held liable for the resulting injuries despite the statutory immunity from liability for injuries caused to recreational users.

Civil Code section 846 applies not only to horseback riding, but also includes the “recreational use” of fishing, hunting, camping, water sports, hiking, sunbathing, swimming, diving into water, spelunking, sport parachuting, riding (including animal, bicycle, motorcycle, and vehicle), rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural or scientific sites, conditions, or activities on the premises.

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