ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4682 HJUD HB 198

254

What is tort liability?

Black's Law Dictionary defines a tort as a: "private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." Three elements of a tort action are (1) existence of legal duty from defendant to plaintiff; (2) breach of duty; and (3) damage as proximate result.

To illustrate, the following case was settled out of court and resulted in the city of Chicago removing some of its parks' playground equipment. A two year old child fell off an eleven-foot slide. The city of Chicago owes that child a duty of reasonable care to provide safe equipment and a safe environment in which to play (1st element). The child's attorney claimed that this duty was violated by putting a playground on asphalt, instead of a softer surface (2nd element). The child was severely injured when he fell and he was injured because the City had violated its duty of reasonable care by putting a playground on asphalt (3rd element).

There are many causes of the liability crisis

In the summer of 1972, neighborhood children were playing on a swing set in the backyard of Morris and Rosalyn Friedman. One of the children—9-year-old Sylvia Ashwal—was being pushed on a swing by playmates Deborah and Lisa Rosenberg when she somehow broke her leg. Rosalyn Friedman took Sylvia to the hospital and assumed that the matter would be forgotten.

But three years later the Friedmans were sued by Sylvia and her parents when Sylvia's fractured leg stopped growing. Her parents also sued the Rosenberg children, Sears and Roebuck (which sold the swing) and Turco Manufacturing Company (which made the swing). A jury awarded Sylvia $2.5 million, but only Turco and Sears were held to be negligent.

This suit shows a willingness of the American public to seek compensation for accidents which used to be viewed as part of life. But at the same time that people are more willing to sue, they are also more willing to participate in high risk sports. Recreational activities with greater risk, such as hang gliding, rock climbing, and whitewater rafting, are increasing in popularity. While there are more risks that people are willing to "take", there are fewer risks that they are willing to "accept."

Unprofitable investment practices by the insurance industry during the late seventies and early eighties also helped contribute to the liability crisis by causing an increase in the price of premiums. Another factor is that insurance companies and others are increasingly willing to settle cases out of court to save time and money. This encourages frivolous lawsuits.

What can be done?

The general liability crisis is beyond the scope of this Commission's mandate. Some reforms being considered by others addressing the problem include caps on damages, changes in joint and several liability, and decreasing contingency fees. However, there are some specific actions which could be taken by providers and governments to minimize the impact on recreation opportunities.

Frivolous cases are being presented to insurance companies who are reluctant to bring a case to court at a high cost to the company. These cases are then settled out of court to save time and money, resulting in situations where innocent defendants lose untried cases and they lose their insurance coverage.

Katherine Baetjer
Boston hearing

What providers can do: risk management

One positive outgrowth of the liability crisis is increased emphasis on *safety* in the outdoors. Advances have been made in safety procedures, equipment, and guidelines—though room for improvement always exists. Although most recreation involves an element of risk, strict risk management practices can lower the possibility of injury and lawsuit. In one of our public hearings, the manager of two ski areas described risk management this way:

A lot of people don't want to hear it. But we solved it [the liability problem] eight years ago. We started a very, very strict policy of training of our personnel, our working people, our principal owners of ski areas. A lot of this was with the Forest Service cooperation. Safety programs, safety programs, safety programs.

Nick Badami
San Francisco hearing

Self-insurance is an option

Some recreation providers have either been unable to acquire insurance or to afford it. Hennepin Parks, an independent special district providing regional parks and trails for Suburban Hennepin County in Minnesota, decided to self-insure after its liability insurance premiums more than doubled from 1984 to 1985. To finance this program, Hennepin Parks set aside $175,000 for claim settlements. This amount compares with a 1985 premium for general liability of $99,000.

However, establishment of a self-insurance pool is not enough. Hennepin Parks also hired a professional independent risk manager to administer the self-insurance program, handle claims, coordinate and strengthen their safety program, conduct risk management training programs, and serve as a liaison to insurance companies.

While self-insurance is not a solution for everyone, it is a viable alternative for entities that can create a sufficient self-insurance pool (either

alone or in conjuction with other similarly situated groups) are for entities who will aggressively pursue techniques to lower their exposure to liability.

Better information is needed

There is little hard data on the number of lawsuits, amount of damages, numbers of cases settled out of court, reasons for liability, and other factors. Without information, providers and insurers of recreation make poor decisions.

Kirk Bauer, executive director of the National Handicapped Sports and Recreation Association, told us about a state-owned ski area in New Hampshire where new devices have been used that allow paraplegics and quadraplegics to "sit ski." However, sit skiing has been banned because insurance companies will not cover sit-skiers. But Baur provided results of one study which showed that disabled skiers are 50 percent less likely to suffer injury than non-disabled skiers. Presumably, if the insurance company had the proper information, it would cover sit-skiers.

A recreational law institute could be created to provide a clearinghouse for information on risk management and defense of liability claims. A nonprofit institute could be housed at a university and could be self-supporting by charging for the information that it disseminates.

What states can do: recreation use statutes

A recreational use statute provides protection to someone—a private individual, organization, or government—who allows people to use his or her land for recreation without charge. This is done by shifting the standard of care from mere negligence to gross negligence. *Mere negligence* is defined as failure to use such care as a reasonably prudent and careful person would use under similar circumstances. *Gross negligence*, on the other hand, goes beyond mere carelessness; it is outrageous behavior which demonstrates an utter disregard for the physical well being of others.

The justification for altering the standard of care is that the recreation provider is making his or her land available for little benefit to himself; and since the outdoors contains natural hazards, the person receiving the greatest benefit should accept the greatest amount of responsibility.

In addition, it is impossible to protect people from all natural hazards in the outdoors. A national forest is not Disneyland. The dangers are real. While the government should make the experience as safe as possible, visitors must accept responsibility for their own safety.

Approximately 47 states have recreational use statutes which provide protection for private landowners when the public uses their land for recreation. Lease agreements between the landowners and a public agency may also help to relieve private landowners of exposure to liability. Some states also have recreational use statutes which protect public entities that provide recreation.

We recommend that states enact recreational use statutes to protect volunteers as well, by making them liable only for gross negligence and not mere negligence. Volunteers involved in activities where injuries are likely to happen should be required to know first aid techniques.

Another tort reform recommendation is recreational responsibility statutes. These are similar to recreational use statutes, but they list the responsibilities of both the recreation provider and the recreation user. For example, Colorado has a skier responsibility statute, which defines the responsibilities of the ski resort and the skier. If the ski resort has fulfilled its responsibilities, then there is a presumption that the resort was not negligent. Many user groups support this type of legislation in an effort to create more opportunities to enjoy the particular sport.

What the federal government can do

We recommend that Congress amend the Federal Tort Claims Act to include a recreational use statute that would alter the standard of care for the federal government to gross negligence. We also recommend that entrance and user fees not constitute consideration. In the typical recreational use statute, the requirement of no consideration is inserted to prevent a for-profit operation from enjoying greater protection. However, the federal government does not make a profit on user fees and should not be held to the higher standard.

This amendment will not alter the federal government's responsibility in many states. Under the FTCA, the federal government is treated as an individual in the state where the accident occurred. Many courts have found that if the state has a recreational use statute protecting the private landowner, the federal government is protected under that statute.

How will the crisis be resolved?

As recreational law attorney Jim Kozlowski says, "There is no silver bullet which will bring the crisis to an end." The problem has many causes and will require the exploration of many remedies. Risk management, tort reform, and insurance reform are just a few.

Recreation providers should also look to others affected outside the recreation field. Only through a comprehensive approach will a long term solution be found.

Kansas Recreational Use Statute

Kansas and Virginia, among other states, have implemented recreational use statutes. The Kansas Statute section 75-6104 (n) reads as follows:

"A governmental entity or employee acting within the scope of the employee's employment shall not be liable for damages resulting from . . . (n) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or

open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury."

This law was applied in the case of *Lee v. City of Fort Scott*, 710 P2d 689 (Kan. 1985). The plaintiffs, Frank and Mary Lee, sued the City of Fort Scott after their son, Frank Lee, Jr., died of injuries received when their son's motorcycle struck steel cables strung between trees in Gunn Park.

The cables had been in place for seven years to keep vehicles off of the golf course. At the time of the accident there was no sign warning of the cables and there was no history of any prior accident caused by the cables. The lower court and the Kansas Supreme Court both agreed that the City's conduct did not constitute gross negligence and therefore the City was not held responsible for the accident.

The Issue

Liability issues are causing recreation opportunities to be lost or diminished.

The Options

- Strengthen the laws which limit the liability of recreational land owners, administrators and providers.
- Establish a public relations program to recognize private and corporate efforts which allow public use of private property.
- Pass legislation and funding for recreational use easements.

COLORADO OUTDOOR RECREATION RESOURCES AND ISSUES

Chapter 4

We Can Keep Our Communities Attractive Places to Live, Work and Play, and Maintain Open Space

We recommend

- Communities target key parts of their local heritage, including open space and natural, cultural, scenic and wildlife resources, and build prairie fires of action to encourage that growth occur in appropriate areas and away from sensitive resources.
- All governments and the private sector make imaginative use of a wide range of growth-shaping tools to identify and protect prime assets in growth planning processes, which also define areas most appropriate for more intensive development.
- States help lead the way by establishing registries of outdoor resources with statewide significance, such as rivers, wildlife areas, historic sites, unique ecological areas, coastal lands, and scenic countrysides; and assist localities to develop and implement growth-shaping plans and policies.
- The federal government coordinate its public investment decisions with state recreation priorities and local growth plans to avoid conflicts and encourage private-public partnerships in protecting key areas.

The choice is ours

We each have the choice of whether we want our communities as they grow to become a jumble of unsightly development and noisy concrete deserts, or whether we will preserve fresh, green pockets and corridors of living open space that cleanse our air and waters and refresh our populations. We have the responsibility and the capacity to choose, for ourselves, our neighbors, and for future generations.

Growth is a reality and can be a positive force in our nation. As new areas are constructed, we must look for ways to produce the parks and

lands, historical artifacts, and wildlife, or advertising local events, lodging and outfitting and guiding services.

Report of the Commission on
Idahoans Outdoors
June 1986

Eighteen states explicitly call for programs to improve public understanding of and behavior in the outdoors. Ten states call for better environmental and outdoor education programs in elementary or secondary schools, the remainder emphasize efforts to reach the general public in parks and other resource areas. Five states outline programs that involve both school and park locations, like New Mexico's approach to the national "Project Wild" program for fish and wildlife areas and "Project Respect" for private lands.

New Hampshire, Idaho and others relate the lack of an outdoor ethic to specific problems such as littering, vandalism and conflicts between motorized and non-motorized trail users. Some programs call for actions by private user groups, equipment managers and dealers as part of an overall strategy to educate the public.

Liability concerns

Issue:

- *Liability issues are causing recreation opportunities to be lost or diminished.*

Options:

- *Strengthen the laws which limit the liability of recreational land owners, administrators and providers.*

- *Establish a public relations program to recognize private and corporate efforts which allow public use of private property.*

- *Pass legislation and funding for recreational use easements.*

Colorado Outdoor Recreation
Resources and Issues
1986

Legal Liability and Insurance:

1. Develop and implement comprehensive risk management plans. Public, private and independent providers.

2. Establish a recreation insurance marketing program. Ohio Department of Insurance.

3. Support legislation to enable recreation providers to establish insurance pools, joint authorities or other joint risk management systems. [Ohio General Assembly, Ohio Department of Insurance, public, private and independent park and recreation providers].

Outdoor Recreation in Ohio
A Report to the Governor from
the Commission on Ohioans Outdoors
March 1986

Almost half the states expressed concerns about liability problems that limit recreation opportunities:

- fears about lawsuits reducing the availability of private lands for recreation (e.g., farmlands for hunting).

- unavailability or high cost of liability insurance causing closure of key private facilities or service concessions (horseback stables, river outfitters).

- liability fears closing areas and reducing programs aimed at providing otherwise desirable high-risk recreation opportunities (rock-climbing, wilderness backpacking, sailing, kayaking and other water sports).

Recreation workforce

Park and recreation maintenance has grown beyond the need for just a "mop and bucket" janitor. Maintenance, in general, has become a complex, year round operation dependent on efficient and knowledgeable management practices. . . .

As in all other industries in both the public and private sectors, natural resource managers are faced with new problems and new challenges. Answers to these modern dilemmas are to be found in new techniques and technologies as well as creative and professional application of time tested management practices. Regardless of the approach, training personnel to keep up with the times is essential. There must be commitments at all levels of government to maintaining staff levels in our park and recreation departments.

Delaware Report to The Presidents
Commission on Americans Outdoors
September 1986

The Tennessee General Assembly should establish a Volunteer Act, as proposed by the interagency Volunteer Committee, to facilitate the use of private citizens in all phases of government.

We need to better recognize our volunteers and the quality and importance of their work by offering them better institutional support from

H. Jud. file

TESTIMONY OF ROBERT W. LOESCHER
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON HOUSE BILL 198
March 29, 1988

MY NAME IS ROBERT W. LOESCHER. I AM THE SENIOR VICE PRESIDENT RESOURCE MANAGEMENT FOR SEALASKA CORPORATION, THE NATIVE REGIONAL CORPORATION FOR SOUTHEAST ALASKA. SEALASKA PRESENTLY OWNS APPROXIMATELY 238,000 ACRES OF SURFACE AND 493,000 ACRES OF SUBSURFACE LOCATED THROUGHOUT SOUTHEAST ALASKA. SEALASKA WILL ALSO RECEIVE APPROXIMATELY 100,000 ACRES OF SURFACE AND SUBSURFACE AS PART OF ITS FINAL ENTITLEMENT UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT. ALMOST ALL OF SEALASKA'S LAND IS REMOTE, UNIMPROVED, BUT ACCESSIBLE BY LAND, AIR AND WATER. AS THE MAJOR PRIVATE LAND OWNER FOR SOUTHEAST ALASKA, SEALASKA WOULD LIKE TO EXPRESS ITS SUPPORT FOR HOUSE BILL 198.

SEALASKA CORPORATION, IN CONCERT WITH THE ALASKA FEDERATION OF NATIVES, HAVE REVIEWED THE COMMITTEE SUBSTITUTE FOR THE SPONSOR SUBSTITUTE OF HB 198. IN RESPONSE TO THE CONCERNS EXPRESSED BY MEMBERS OF THIS COMMITTEE, WE NOW OFFER THE PROPOSED DRAFT AS A SUBSTITUTE FOR THE PRESENT COMMITTEE SUBSTITUTE FOR HB 198. BOTH SEALASKA AND AFN FELT THAT HB 198 CONTAINED SOME AMBIGUITY AND DUPLICATION WHICH NEEDED TO BE ADDRESSED. OUR DRAFT, WHICH IS OFFERED TO THIS COMMITTEE, IS OUR EFFORT TO PROVIDE A MUCH CLEANER VERSION OF THIS BILL. THIS DRAFT, HOWEVER

STILL PRESERVES THE PROVISIONS WHICH PROTECT THE LANDOWNER FROM CERTAIN TYPES OF LIABILITY.

THE NEW DRAFT OF HB 198 HAS CONDENSED THE PROVISIONS CONCERNING RECREATIONAL USE IN SECTION 1 OF HB 198. ADDITIONALLY, WE PROPOSED THAT NEW SECTIONS BE ADDED TO INSURE THAT NO PROPERTY RIGHTS WILL BE CREATED OR CONVEYED THROUGH RECREATIONAL USE OF PROPERTY.

SECTION 2 OF HB 198 CONCERNING TREBLE DAMAGES FOR GEOLOGICAL TRESPASS REMAINS THE SAME IN OUR DRAFT. SECTION 3 OF HB 198, WHICH SOUGHT TO AMEND AS 09.45.795, HAS BEEN ALTERED TO ADDRESS THE CONCERNS OF THIS COMMITTEE AND TO BRING THE AMENDMENT INTO CONFORMITY WITH THE PROPOSED VERSION OFFERED BY SENATOR DUNCAN.

OUR RE-DRAFT OF HB 198 REDUCED THE SPECIFIC INSTANCES OF TRESPASS TO INCLUDE ONLY THOSE ACTS WHICH HAVE BEEN AMBIGUOUS AS TO WHETHER SUCH ACTS CONSTITUTED TRESPASS. UNDER OUR RE-DRAFT, THOSE ACTS WOULD NOW BE CONSIDERED TRESPASS. SECTION 7 OF HB 198 HAS BEEN ALTERED TO CLEARLY ESTABLISH THE REQUIREMENTS FOR POSTING OF SIGNS TO PROHIBIT TRESPASS. THIS LANGUAGE HAS BEEN PREVIOUSLY PROPOSED BY SEALASKA IN ITS EARLIER COMMENTS REGARDING HB 198.

WE FEEL THAT THIS NEW DRAFT OF HB 198 PRESERVES THE SAME CONCERNS ADDRESSED IN THE EARLIER VERSION OF HB 198. HOWEVER, WE

BELIEVE THAT THIS VERSION IS MORE SUCCINCT AND CLEARER. IT RESOLVES THE AMBIGUITIES WHICH EXISTED IN HB 198. WE ENCOURAGE THIS COMMITTEE TO REVIEW THIS NEW DRAFT AND ADOPTED IT AS THIS COMMITTEE'S SUBSTITUTE FOR HB 198.

THANK YOU FOR YOUR TIME AND INTEREST.

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611

August 11, 1987

Mr. John Sund
State House of Representatives
2504 Second Street
Ketchikan, Alaska 99901

Dear Representative Sund:

Enclosed for your review and use are copies of National Recreation and Park Association Law Review articles that address issues relevant to public recreational use of private land. I believe the material addresses several of the issues that were brought forward by the judiciary committee on House Bill 198.

I appreciate your interest in this issue. I am available to work with you or your staff on HB 198 at your convenience. I am hopeful that progress can be made on the bill early on in the coming session.

Thanks again. I hope your summer has been enjoyable.

Best regards,

Lawrence H. Kimball, Jr.
Land Manager

cc: Representative Lyman Hoffman

NRPA Law Review

President's Commission Examines Public Recreation on Private Lands

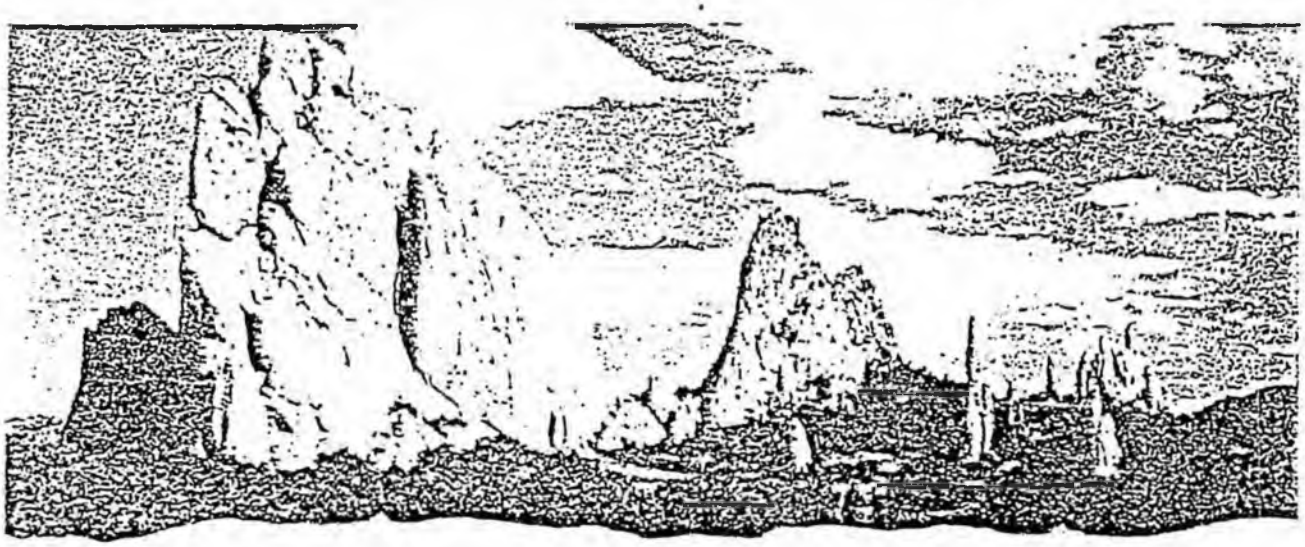
James C. Kozlowski, J.D.

On March 10, 1986, Senator Malcolm Wallop (R-WY) conducted a workshop in Washington, D.C. to examine recreation on private lands. The Task Force on Recreation on Private Lands, an ad hoc group of some twenty organizations and agencies including the President's Commission on Americans Outdoors, sponsored the workshop. The purpose of the workshop was described as follows:

> Private lands constitute nearly two-thirds of our nation and host many recreational activities. The potential for private lands to provide even more recreation opportunities is great. Yet many private landowners have concerns, ranging from liability to vandalism, which prevent them from opening their lands for recreational use. Incentives capable of counterbalancing these concerns are not well understood. This workshop seeks to explore the issues related to recreation on private lands. Topics addressed will include private lands ownership patterns and the availability of those lands for public recreation, problems that attempt to restrict access and incentives for increasing recreational access and opportunity.

By bringing together experts in the field, the Task Force on Recreation on Private Lands seeks to understand the concerns of private landowners, the actual issues which need to be confronted, and the possible solutions to these problems which will realize the potential contribution of these

Continued



lands to America's recreation needs. The workshop will be conducted in conjunction with the President's Commission on Americans Outdoors and will be moderated by members of the Commission.

I was a member of a panel addressing "The Challenges" of recreation on private lands. Members of my panel included individuals representing small woodland owners, ranchers, the electric power industry, and the forest products industry. My assigned topic was "Legal Views on Liability." What follows is a summary of my remarks prepared for the workshop.

Look to Existing Recreational Use Statutes[1].

There is nothing new under the sun. We have been this way before. In 1965, *Suggested State Legislation* by the Council of State Governments advocated a model recreational use statute. This statute was designed to encourage private individuals to open their lands for public recreational use. Similarly, the stated purpose of this workshop, more than twenty years after the model recreational use statute was published, is to facilitate public recreational opportunities on private lands.

In jurisdictions where a recreational use statute exists, there is no landowner liability for recreational injuries attributable to ordinary negligence i.e. mere carelessness. To recover damages, the injured recreational user, who entered the premises free of charge, must prove willful or wanton misconduct. Unlike ordinary negligence, such misconduct is much more outrageous behavior demonstrating an utter disregard for the physical well-being of others.

At present, forty-seven jurisdictions have enacted recreational use statutes. Most of these laws are based upon the 1965 model act. The original intent of this model legislation was to provide limited immunity to private landowners. However, these state recreational use statutes have also been held applicable to public entities. Under the terms of the Federal Tort Claims Act, the federal government is liable for negligence "like a private individual" under the law of the state where the injury occurred. As a result, these recreational use statutes intended for private individuals have uniformly been held applicable to the federal government.

In addition, state recreational use statutes are applicable to the state and local governmental entities in approximately twelve jurisdictions. In some instances, these statutes are limited to recreational activities conducted on rural lands. However, some state courts have found the recreational use statute applicable to urban lands. For example, the cities of Omaha and Detroit have successfully raised the state recreational use statute as a defense to alleged ordinary negligence liability for injuries sustained in a public park.

Why is the applicability these state recreational use statutes to public entities relevant in a discussion of recreation on private lands? In my opinion, public recreational access to private land is more likely when viewed within the context of public recreational immunity. Specifically, a significant provision in the model recreational use statute adopted by

---

The National Recreation and Park Association announces the

1986 Park and Recreation Series of Seminars

The National Recreation and Park Association, in conjunction with various universities and professional organizations, offers park and recreation administrators and managers the opportunity to advance their knowledge and job skills through intensified coursework in several specialized fields. The following summary outlines 1986 educational opportunities scheduled as of this date. Additional courses will be announced in future issues.

Executive Development Program for Park and Recreation Administrators
March 23-28, 1986
Indiana University, Bloomington, IN

An extensive advanced education course designed for park and recreation executives with general management responsibilities, and for specialists about to assume general managerial responsibilities. Sponsored by NRPA and Indiana University in cooperation with Indiana Graduate School of Business. Tuition: $575.00 double occupancy, $645.00 single occupancy (includes registration, housing, and meals). Contact James A. Peterson, School of HPER, Room 133, Indiana University, Bloomington, IN 47405. Tel. (812) 335-8037.

National Aquatics Management School
Tempe, Arizona —April 6-10, 1986

An NRPA-sponsored two-year education program for administrative and supervisory personnel responsible for managing swimming pool and aquatic programs and facilities. Tuition: TBA. Contact Jane Hipps Adams, Regional Director, 1400 K Street, Suite 302, Sacramento, CA 95814. Tel. (916) 441-0445.

TR Management School
Oglebay Park, Wheeling, WV
March 16-23, 1986

The TR Management School is co-sponsored by the Wheeling Park Commission and the University of Maryland in cooperation with the National Recreation and Park Association. The purpose of the school is to provide the participant with an overview of the contemporary issues affecting the therapeutic recreation profession from a management level perspective. Contact: Dr. Diana Richardson, University of Maryland, College Park, MD 20742. Tel. (301) 454-3290.

Fifth Leisure and Aging Management School
Oglebay Park, Wheeling, WV
March 16-23, 1986

The Leisure and Aging Management School is sponsored by the National Recreation and Park Association, the Wheeling Park Commission, and the University of Maryland Center on Aging and Department of Recreation. The two year curriculum is divided into a community tract and a clinical/extended care tract with some integration within the two tract framework. Contact: Fred Humphrey, Department of Recreation, University of Maryland, 2367 PERH Building, College Park, MD 20742. Tel. (301) 454-3290.

Pacific Revenue Sources Management School
University of California, San Diego, CA
July 12-16, 1986

A two-year education program for managerial personnel who administer or plan to administer revenue producing facilities and programs. A Graduate Forum is available for graduates of any of the NRPA Revenue Sources Management Schools. Tuition: TBA. Contact Jane Hipps Adams, Regional Director, 1400 K Street, Suite 302, Sacramento, CA 95814. Tel. (916) 441-0445.

Park Planning & Maintenance School
Colorado Springs, CO
August 17-20, 1986
NRPA Certificate & Diploma Program
CEU's Awarded

A two-year development program with a graduates institute. Here you will learn the latest techniques and methodologies being used in the field by those responsible for maintaining, developing and planning park and recreation facilities. Tuition: TBA. Sponsored by NRPA. Contact Frank D. Cosgrove, Regional Director, Western Service Center, P.O. Box 6900, Colorado Springs, CO 80934. Tel. (303) 632-7031.

Park and Recreation Safety School
Colorado Springs, CO
August 21-22, 1986
NRPA and National Safety Council
Certificate Program, CEU's Awarded

A one-year program. To teach you how to conduct safety audits of your park and recreation facilities and how to set up a safety program for your department. Tuition: TBA. Contact Frank D. Cosgrove, Regional Director, Western Service Center, P.O. Box 6900, Colorado Springs, CO 80934. Tel. (303) 632-7031.

most states preserves limited immunity for lands leased to the state or local government for recreational purposes. Further, any payment received by the private landowner from the state or local government for leasing the land is not considered a charge or fee within the meaning of the recreational use statute. Thus, lease payments from public entities, unlike entry fees paid to the private landowner, would not deprive the landowner of limited immunity under the recreational use statute.

If the framework for providing private landowners with recreational immunity was developed more than twenty years ago, why is public access still an issue today? My own experience has been that most landowners as well as attorneys do not know that recreational use statutes exist. As a result, the statutes do not necessarily encourage private landowners to allow public access by limiting liability. On the contrary, if landowners become aware of the recreational use statute, it is after an injury occurs and counsel raises the statute as a defense to negligence liability.

In those few instances where landowners know about the statute, there is a perception that recreational use statutes do not provide sufficient immunity to act as an incentive for public access. Private landowners do not want to know if they will have a successful defense to a recreational injury lawsuit. Their concern is much more basic; they want to know: "Can I be sued?" Unfortunately, the answer invariably is "yes" with or without limited immunity provided by a recreational use statute. As a result, the lower landowner standard of care (from ordinary negligence to willful or wanton misconduct) imposed by the recreational use statute will not encourage most private individuals to open their lands to public recreational use.

I would, therefore, suggest that any solution to the private recreational lands issue must address the private landowners very real concerns about being sued. Whether you win or lose, it has been said that a lawsuit is the worst thing that can happen to an individual with the exception of death or serious illness. Therefore, the challenge to encouraging public recreational access to private lands is to somehow insulate the private landowner from the costs attendant to a lawsuit.

To encourage public access to private lands, public agencies must exhibit the same degree of commitment and fervor usually associated with land acquisition programs. As an alternative to fee simple acquisition, lease agreements with private landowners can provide public recreational land whereby the public agency agrees to defend and indemnify the private landowner. Therefore, the private landowner may still be sued, but the public will hold the private landowner harmless, absorbing the cost of defending the lawsuit. In this way, private landowners will feel less threatened by potential liability when they open their lands to public recreational use. Further, there needs to be a public awareness campaign to educate private landowners to the immunity available to them under existing recreational use statutes.

In my opinion, existing recrea-

tional use statutes can adequately address the public access problem. We, therefore, do not need some type of inappropriate "silver bullet" legislation on the federal level, or a whole new set of statutes on the state level conferring some type of limited recreational immunity. We can work with what we already have on the books with little or no change to the existing statutory framework.

Where necessary, however, I would suggest that recreational use statutes be amended to make it clear that such immunity applies to public entities, as well as private individuals. In a recreational injury lawsuit involving private land leased to a public entity, the private landowner as well as the governmental agency may be sued. It would, therefore, be preferable that the lower standard of care associated with the recreational use statute be applicable to all potential defendants, public as well as private.

A uniform standard is desirable because the state or local agency will be more willing to enter into a lease agreement whereby the public entity agrees to defend and hold the private landowner harmless when liability must be based upon proof of willful or wanton misconduct. A lower standard of care requiring proof of willful/wanton misconduct for both the public and private parties in a lease of recreational land increases the likelihood of a summary judgment. A summary judgment dismisses or resolves a case prior to a full trial. This significantly lowers the costs attendant to litigation.

Coordinated Effort Needed

Attorneys defending recreational injury lawsuits tend to be jurisdiction specific. They are, therefore, not necessarily aware of the status of recreational immunity in other jurisdictions. As a result, recreational use statutes are being interpreted by state courts in various ways. Many of these judicial interpretations do nothing to encourage private landowners to open their lands to public recreational use.

History has taught us that it is not enough to get the statutes on the books. There are 47 recreational use statutes, but potential landowner liability for allowing public recreational access is still an issue. No doubt, we have come a long way since 1965. However, much needs to be done to ensure that these recreational use statutes are favorably interpreted by the courts.

In my opinion, the recreation field needs to coordinate its efforts in the area of recreational injury liability. Specifically, some sort of institutional base needs to be developed to share information and resources on the overall issue of recreational injury liability. For want of a better term, this proposed think tank has been referred to as the "Recreation Law Institute."

I am certainly not advocating another federal agency like the Bureau of Outdoor Recreation or a Heritage Conservation and Recreation Service. On the contrary, I think the proposed Institute would be better suited to a university environment supported by those agencies utilizing its services. One would expect that the insurance industry would be interested in supporting a coordinated effort by the recreation field to address the problem of recreational injury liability.

I would, therefore, hope that one of the recommendations by the President's Commission on Americans Outdoors would be for the private sector to create such a Recreation Law Institute. In so doing, the President's Commission can ensure that any momentum created in the area of recreational injury liability can continue beyond the life of the Commission. Absent a coordinated institutionalized approach to the issue of recreational injury liability, I would suggest that twenty years from now we will be back once again to explore the liability challenge, including public recreational access to private lands.

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

NRPA LAW REVIEW

A "Cut and Paste" of Model Rec Use Law to Include Public

By James C. Kozlowski, J.D., Ph.D.

At its meeting in Anaheim, California on October 21, 1986, the Board of Trustees of the National Recreation and Park Association endorsed the following policy: "It is the policy of the Trustees of the National Recreation and Park Association to encourage and help promote the enactment of state recreational use statutes." This policy was one of several statements adopted regarding the perceived "liability crisis." Under a recreational use statute, the landowner owes no duty of care to a recreational user on the premises free of charge. Although there is no liability for ordinary negligence, liability will be imposed for willful or wanton misconduct. Willful or wanton misconduct, unlike ordinary negligence goes beyond mere carelessness: it is more outrageous behavior which demonstrates an utter disregard for the physical well being of others.

Despite the NRPA policy statement, enactment of recreational use statutes is not the real issue. Forty-nine jurisdictions have already enacted recreational use statutes. My research on this topic identified the following state code citations for existing recreational use statutes. To the best of my knowledge, each of these statutes is still good law.

Alabama: Ala. Code § 15-1.

Arizona: Ariz. Rev. Stat. Ann. § 3351.

Arkansas: Ark. Stat. Ann. §§ 50-1101-1107 (1971).

California: Cal. Civil Code § 846 (West Supp. 1981).

Colorado: Col. Rev. Stat. §§ 33-41-101-105 (1974).

Connecticut: Conn. Gen. Stat. Ann. §§ 52-557f-557i (Supp 1981).

Delaware: Del. Code Ann. tit. 7, §§ 5901-5907 (1975).

Florida: Fla. Stat. Ann. § 375.251 (West 1974).

Georgia: Ga. Code Ann. §§105-403-409 (1968).

Hawaii: Haw. Rev. Stat. §§ 520-1 to -6.

Continued

Idaho: Idaho Code § 36-1604 (Supp. 1981).

Illinois: Ill. Ann. Stat. ch. 70 §§ 31-37 (Smith-Hurd Supp. 1981).

Indiana: Ind. Code Ann. § 14-2-6-3.

Iowa: Iowa Code Ann. §§ 111C.1-111C.7 (West Supp. 1981).

Kansas: Kan. Stat. Ann. §§ 58-3201-3207 (1976).

Kentucky: Ky. Rev. Stat. Ann. § 150.645 (Baldwin Supp. 1980).

Louisiana: La. Rev. Stat. Ann. § 9:2795 (West Supp. 1981).

Maine: Me. Rev. Stat. Ann. tit. 12, §§ 3001-3005 (Supp. 1981).

Maryland: Md. Nat. Res. Code Ann. §§ 5-1102-1108 (1974).

Massachusetts: Mass. Gen. Laws Ann. ch. 21 § 17C (West 1973).

Michigan: Mich. Comp. Laws Ann § 300.201 (1967).

Minnesota: Minn. Stat. Ann. §§87.01-87.026 (1977).

Mississippi: Miss. Code Ann. § 89-2-1- et seq. (1985).

Missouri: Mo. Stat. Ann §§ 537.345-537.347.

Montana: Mont. Code Ann. §§ 70-16-301-302.

Nebraska: Neb. Rev. Stat. §§ 37-1001-1008 (1978).

Nevada: Nev. Rev. Stat. § 41.510 (1979).

New Hampshire: N.H. Rev. Stat. Ann. § 212:34 (1978).

New Jersey: N.J. Stat. Ann. §§ 2A:42A-2-42A-5 (West Supp. 1981).

New Mexico: N.M. Stat. Ann. § 17-4-7 (1978).

New York: N.Y. Gen. Oblig. Law § 9-103 (McKinney Supp. 1981).

North Carolina: N.C. Gen. Stat. §§ 113-120.5-120.6 (1975).

North Dakota: N.D. Cent. Code §§53-08-01-06 (1974).

Ohio: Ohio Rev. Code Ann. 1533.181 (Page 1978).

Oklahoma: Okla. Stat. Ann. 76, §§ 10-15 (West 1976).

Oregon: Ore. Rev. Stat. §§105.655-105.680 (1979).

Pennsylvania: Pa. Stat. Ann. tit. 68. §§ 477-1-477-8 (Purdon Supp. 1981).

Rhode Island: R.I. Gen. Laws §, 32-6-1- to -7.

South Carolina: S.C. Code §§27-3-10-70 (1977).

South Dakota: S.D. Comp. Laws Ann. § 20-9-5 (Supp. 1979).

Tennessee: Tenn. Code Ann. §§ 51-801-805 (1977).

Texas: Tex. Rev. Civ. Stat. Ann. art. 16 (Vernon 1969).

Utah: Utah Code Ann. §§ 5714-1 to -7.

Vermont: Vt. Stat. Ann. tit. 10 § 5212 (1973).

Virginia: Va. Code § 29-130.2 (Supp. 1981).

Washington: Wash. Rev. Code Ann. §§ 4.24.200-210 (Supp. 1981)

West Virginia: W.Va. Code §§ 19-25-25-6 (1977).

Wisconsin: Wis. Stat. Ann. § 2968 (West 1973).

Wyoming: Wyo. Stat. § 34-19-101-106 (1977).

With minor variations, many of the above cited forty-nine laws

adhere to the format of a model statute described below. This model statute, entitled "Public Recreation on Private Lands: Limitations on Liability," appeared in the 1965 edition of *Suggested State Legislation* from the Council State Governments. To date, state courts in only nineteen jurisdictions have considered directly or indirectly the applicability of these statutes to public entities. Of this number, twelve jurisdictions have extended limited recreational use immunity to public entities. Under the terms of the Federal Tort Claims Act, these statutes are uniformly held applicable to the federal government. (For a further discussion of the applicability of recreational use statutes to public entities, see the "NRPA Law Review" for October and November 1986, and February 1987.)

Perhaps the real policy issue before the National Recreation and Park Association is, therefore, to encourage and help promote the modification of existing recreational use statutes to broaden existing immunity to include public park and recreation agencies. With this objective in mind, I have superimposed language from existing recreational use statutes in various jurisdictions. The purpose of this rather crude "cut and paste" endeavor is to illustrate the manner in which minor modifications to the 1965 model statute can broaden the immunity of this legislation to expressly include most public entities. Further, these suggested modifications would extend such immunity to most lands and activities involving public park and recreation agencies. (Modifications to the 1965 model statute appear in italicized capital letters. The state statutes from which this language is derived are also noted in parentheses.)

1965 Model Act as Modified

[Title should conform to state requirements. The following is a suggestion: "An act to encourage

landowners to make land and water areas available to the public by limiting liability in connection therewith."]

(Be it enacted, etc.)

Section 1. The purpose of this act is to encourage owners of land to make the land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

Section 2. As used in this act:

(a) "Land" means *PRIVATE OR PUBLIC. (Idaho, Washington)* land, *IMPROVED OR UNIMPROVED (Maine), WHETHER URBAN OR RURAL, (Washington),* [including] roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(b) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the

Continued on next page

premises, *including ANY PRIVATE CITIZEN, A MUNICIPALITY, THE STATE OR THE FEDERAL GOVERNMENT, AND ANY EMPLOYEE OR AGENT OF THE FOREGOING. (Wisconsin)*

, OR ANY PUBLIC ENTITY AS DEFINED IN THE (applicable provision of the state code) WHICH HAS AN INTEREST IN LAND. (Colorado)

"PERSON" INCLUDES ANY INDIVIDUAL REGARDLESS OF AGE, MATURITY OR EXPERIENCE, OR ANY CORPORATION, GOVERNMENT OR GOVERNMENTAL SUBDIVISION OR AGENCY, BUSINESS TRUST, ESTATE, TRUST, PARTNERSHIP, OR ASSOCIATION, OR ANY OTHER LEGAL ENTITY. (Colorado).

(c) "Recreational Purpose" includes, but is not limited to, any *SPORTS OR RECREATIONAL ACTIVITY OF WHATEVER UNDERTAKEN BY A PERSON WHILE USING THE LAND, INCLUDING PONDS, LAKES, RESERVOIRS, STREAMS, PATHS, AND TRAILS APPURTENANT THERETO OF ANOTHER AND INCLUDES, BUT IS NOT LIMITED TO, ANY HOBBY, DIVERSION, OR OTHER SPORTS OR OTHER RECREATIONAL ACTIVITY SUCH (Colorado)* the following, or any combination thereof: hunting, fishing, CAMPING (Colorado), swimming, boating, camping, picnicking, hiking, *HORSEBACK RIDING, SNOWSHOEING, CROSS COUNTRY SKIING, BICYCLING, RIDING OR DRIVING MOTORIZED RECREATIONAL VEHICLES, SWIMMING, ROCK CLIMBING... OR ENGAGING IN ANY OTHER FORM OF SPORTS OR OTHER RECREATIONAL ACTIVITY (Colorado), INCLUDING PRACTICE AND INSTRUCTION IN ANY THEREOF (New Jersey),* pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites, *OR OTHER SIMILAR ACTIVITIES UNDERTAKEN FOR RECREATION, EXERCISE, EDUCATION, RELAXATION, OR PLEASURE ON LAND OWNED BY ANOTHER (Missouri) IT SHALL INCLUDE ENTRY, USE OF AND PASSAGE OVER PREMISES IN ORDER OT PURSUE THESE ACTIVITIES (Maine)*

(d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land. *However, charge or consideration DOES NOT INCLUDE ... THOSE ENTRANCE FEES PAID TO THE STATE, ITS AGENCIES OR DEPARTMENTS, MUNICIPALITIES, OR THE U.S GOVERNMENT. (Wisconsin)*

Section 3. Except as specifically recognized by or provided in Section 6 of this act, 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.

Section 4. 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 persons or property caused by an act or omission of such persons.

Section 5. Unless otherwise agreed in writing, the provisions of Section 3 and 4 of this act shall be deemed applicable to the duties and liability if an owner leases to the state or any subdivision thereof for recreational purposes.

Section 6. Nothing in this act limits in any way any liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

Section 7. Nothing in this act shall be construed to:

(a) Create a duty of care or ground of liability for injury to persons or property.

(b) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this act to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

Section 8. [Insert effective date

Remove Statute Ambiguity

It has been said that no one should witness how laws or hot dogs are made. Because if you do, you will not be able to stomach either. One of the ways laws are made is to adopt language from similar statutes in other jurisdictions. This is the approach taken in the "cut and paste" public immunity statute described above. In determining whether a particular recreational use statute applies to public entities in a given jurisdiction, state courts will look primarily to the expressed language of the statute. Consequently, the modifications described above are intended to remove any uncertainty or ambiguity that the state legislature intended to confer broad public immunity under an existing recreational use statute.

Expand "Land" definition. Expanding the definition of land to

Continued on next page

expressly include public land effectively rebuts the original presumption of the model statute that such statutory immunity was intended for private landowners, not governmental units. In addition, the inclusion of references to urban and improved land would reverse the interpretation by some state courts (e.g. New York, New Jersey, Louisiana) that this statutory immunity is limited to rural or unimproved land. Further, the statutory definitions of "owner" and "person" have been modified with language from recreational use laws in Wisconsin and Colorado to expressly include governmental units.

Expand Scope of "Recreational Purpose": Some jurisdictions, most notably Louisiana, have limited the scope of recreational use immunity to activities traditionally conducted in the "true outdoors," i.e. primarily rural in nature. Expanding the enumerated list of recreational activities to include sports, hobbies, diversions, and any other recreational activity with language from the Colorado effectively rejects this narrow construction of the statute.

Entrance Fees not a "Charge": Ordinarily, recreational use immunity is lost if a fee is charged for the use of the premises. Including language from the Wisconsin statute expressly excludes entrance fees from this statutory definition of "charge" as an exception to recreational use immunity.

Dr. Kozlowski is an attorney-consultant in recreational injury liability in Springfield, Virginia. He is the author of the Recreation and Parks Law Reporter.

NRPA Law Review

Minnesota Bill Provides Limited Public Recreational Immunity

James C. Kozlowski, J.D., Ph.D.

The January 1986 "NRPA Law Review" column described statutes in Kansas and Virginia which provide public entities with limited immunity for injuries occurring on land open to recreational use. Specifically, these statutes require the injured recreational user to prove gross negligence or willful/wanton misconduct, rather than ordinary negligence, to hold a public entity liable. Now, it appears that Minnesota has enacted similar legislation.

On January 30, 1986, the Minnesota Recreation and Park Association sponsored a professional development institute to discuss the liability and insurance problem. My

presentation at the institute explained the general principles of recreational injury liability. Referring to the January law review column, I advocated the enactment of a public recreational immunity statute based upon the Kansas model as one means of addressing the liability problem.

Another presentation at the institute included a description of proposed legislation for Minnesota which would also lower the standard of care for the recreational user to public lands. In an April 16 letter, Marty Jessen, Associate Superintendent, Suburban Hennepin Regional Park District, informed me that the proposed legislation had passed the state legislature. Jessen was one of the organizers of the January institute. He expressed the opinion that this new legislation "will help considerably in containing the costs of

Continued

liability relating to parks and recreation."

Under the new Minnesota legislation, general tort liability for municipalities would not apply under the following circumstances:

> Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or for any claim based upon the clearing of land, removal of refuse, and the creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of the park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

As defined in the legislation, the term "municipality" includes cities, counties, towns, public authorities, special districts, school districts, and other political subdivisions. Generally, a private person is liable to a trespasser for injuries caused by willful or wanton misconduct. As a result, the trespasser standard adopted by Minnesota should have the same effect as the Kansas statute in providing limited recreational immunity to public entities.

Another presentor at the Minnesota institute was NRPA Trustee Don Jolley. Jolley is the Director of Community Services for, Salina, Kansas. In his presentation, Jolley described the impact of the Kansas recreational immunity statute on his liability insurance rates since the law was enacted in 1979. Unlike many other jurisdictions which are experiencing skyrocketing premiums and the unavailability of insurance coverage, Jolley noted that Salina has experienced minimal increases in its liability insurance coverage. In part, Jolley attributed this to the availability of limited public recreational immunity in Kansas.

To illustrate the effect this statute has had on recreational injury liability for public entities in Kansas, Jolley provided a copy of the most recent state supreme court case which interpreted the law. In this case, the Kansas Supreme Court reaffirmed limited recreational immunity for public entities.

This case followed the precedent of two earlier state supreme court decisions on point, *Bonewell v. City of Derby* and *Willard v. City of Kansas City*. Both of these decisions were reported in the *Recreation and Parks Law Reporter* (RPLR). Generally, cases reported in RPLR do not appear in this column. However, the significance of this line of Kansas cases in the area of public recreational immunity warrants presenting this latest state supreme court case in this column as well as its inclusion in a forthcoming edition of RPLR.

RPLR Report No. 86-13

In the case of *Lee v. City of Fort Scott*, 710 P.2d 689 (Kan. 1985), plaintiffs Frank and Mary Lee brought a wrongful death action against the defendant City of Fort Lee after this son, Frank Lee, Jr., was fatally injured in a municipal park. Frank Lee, Jr. was injured "when his motorcycle collided with steel cables strung between trees in Gunn Park in the City of Fort Scott." The circumstances surrounding the incident were as follows:

> In the mid-1970s Fort Scott was faced with a problem of vandalism on a golf course maintained by the City in Gunn Park. The City was concerned with persons driving their vehicles off the road and onto the fairways and greens. In response to this concern, in 1975 the City strung steel cables around the golf course. The cables were located off the road and posed no hazard to anyone properly using the roadway. As an additional restraint, the City enacted an ordinance prohibiting any motor vehicles from driving off of regularly traveled roadways. However, no notice of this prohibition was posted anywhere in Gunn Park.
>
> On April 10, 1982, eighteen-year-old Frank James Lee, Jr., while riding his motorcycle in Gunn Park, collided with steel cables strung between two trees. Frank, Jr. had ridden motorcycles for at least two years prior to the accident and about two months before the accident he had bought his own motorcycle. It is not known whether Frank Lee, Jr. had ever ridden a motorcycle in the area of Gunn Park where the accident occurred; however, he was familiar with the park.

As a result of the accident, Frank, Jr.

sustained lacerations of the liver. Seven surgical operations were conducted in a futile attempt to repair the damaged liver. On May 18, 1982, Frank, Jr. died of continued liver hemorrhage.

The trial court granted the City's motion for summary judgment because Lee "had failed to produce any evidence of 'gross and wanton negligence' as required by K.S.A. 75-6104(n)." Lee appealed to the state supreme court. The issue was, therefore, "whether the trial court erred in finding as a matter of law that defendant [City] was not guilty of gross and wanton negligence."

Section 75-6104(n) of the Kansas Tort Claims Act (KTCA) imposes governmental liability for wrongful conduct subject to the following exception:

> A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from . . . any claim for injuries resulting from the use of any public property intended or playground or open area for recreational purposes unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing injury.

Therefore, if the City was to be held liable for the wrongful death of Frank, Jr., the state supreme court found that Lee "must show the City's action in erecting steel cables constituted gross and wanton negligence" which caused the injuries resulting in death. As described by the court, "the test for gross and wanton negligence" was as follows:

> Proof of a willingness to injure is not necessary in establishing gross and wanton negligence. This is true because a wanton act is something more than ordinary negligence but it is something less than willful injury. To constitute wantonness the act must indicate a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.

established gross and wanton misconduct on the part of the City:

> [T]he City had posted no signs in Gunn Park warning of the presence of the cables, nor were there any signs prohibiting the operation of motorcycles off the roadway. Additionally, the City was aware motorcycles and other vehicles were operated off the roadway, since the City had issued a number of traffic citations for driving off the roadway in Gunn Park.

The state supreme court disagreed. In the opinion of the court, Lee had "failed to produce any evidence which would establish gross and wanton conduct, other than the fact the City strung cables between the trees in the park."

> The fact that the City had issued a number of traffic citations for driving off the roadway does not prove the City had notice of the potentially dangerous placement of the steel cables. Lee failed to offer any evidence which would establish that the City realized the

Continued on page 58

WASHINGTON SCENE

Continued from page 14

duced results.

There has been some concern that passage of this legislation would infringe on development plants for a New York hospital. The National Park Service evaluated the proposed legislation and confirmed that the bill contained no authority to prevent any development activities.

The Olmsted Heritage Landscape Act establishes an inventory process to commemorate the parks and public works of Federick Law Olmsted and his associates.

Bill Authorizing Establishment of "Risk Retention" Groups Passes Senate Committee: The Senate Commerce, Science and Transportation Committee passed legislation on March 27 that expands the scope of the Risk Retention Act of 1981. The bill, S. 2129, allows "risk retention" groups to be established to provide coverage for any of their liabilities. S. 2129 makes it possible for municipalities, businesses, and trade organizations to set up such a group and provides that it need only file in one state. This state would then regulate the group, except in extraordinary circumstances.

Proponents hope that having to file in just one state will enable them to start groups more quickly. Opposition forces are concerned that these groups will not have the financial requirements placed on them necessary to guarantee solvency and protect the consumer, also allowing unfair competition.

S. 2129 now goes to the Senate floor.

Executive Study Group on the Liability Crisis Issues Report: The Tort Policy Group established last October by the U.S. Attorney General to study the insurance crisis has delivered its recommendations to President Reagan. Among the eight recommendations made is a proposal to eliminate the doctrine of joint and several liability under which the plaintiff can recover the full amount of a judgment from a defendant which is minimally at fault. Moreover, the study group recommended that a $100,000 cap be put on all non-economic damages (pain and suffering, mental anguish, punitive damages, etc.).

NRPA LAW REVIEW

Continued from page 23

> imminence of danger and exhibited a complete disregard of the consequences. Rather, the evidence showed that at the time the accident occurred, the steel cables had been in place for approximately seven years. The cables were erected to deter vandalism to the golf course and were located off the roadway. No other accidents involving the steel cables had been reported to the City. There is no evidence of a reckless disregard of a known danger and thus no gross and wanton negligence.

The state supreme court, therefore, affirmed the judgment of the trial court in favor of defendant City of Fort Scott.

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

ASSESSING THE AVAILABILITY

Continued from page 38

when we get farmers, ranchers, hunters, cyclists, and biologists in agreement as to how to best proceed in a given state or locality will we get the kind of political attention needed to take advantage of the great untapped reservoir of recreation potential on the private lands of America. □

NRPA Law Review

Rec Use Law Applies to Public Land in NY, NE, ID, OH, & WA

James C. Kozlowski, J.D., Ph.D.

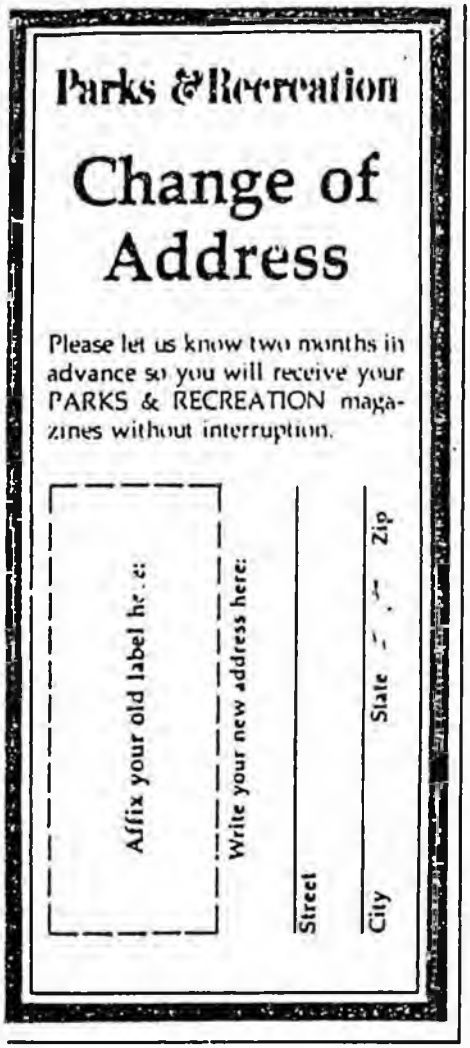
Under a recreational use statute, the landowner owes no duty of care to recreational users to guard or warn against known or discoverable hazards on the premises. This statutory immunity is lost, however, where a fee is charged for the use of the premises or the landowner is guilty of willful or wanton misconduct. In other words, there is no landowner liability to the recreational user for ordinary negligence, only willful/wanton misconduct. Unlike mere carelessness constituting negligence, willful/wanton misconduct is more outrageous behavior demonstrating an utter disregard for the physical well being of others.

RPLR

To date, 47 jurisdictions have enacted recreational use statutes. Most of these recreational use statutes are based upon model legislation developed by the Council of State Governments in 1965 to encourage private landowners to open their land for public recreational use. At this point in time Alaska, Mississippi, Missouri, and the District of Columbia are the only jurisdictions which have not enacted recreational use statutes similar to the model act. Prior to 1965, only ten states had enacted legislation providing limited immunity to landowners who open their land free of charge for public recreational use.

Under the Federal Tort Claims Act (FTCA), the federal government is held liable like a private individual under the law of the jurisdiction where the injury occurred. Consequently, in those jurisdictions

Continued



where private landowners enjoy recreational use immunity, the federal government is provided similar protection under the terms of the FTCA. As a result, federal courts have uniformly held state recreational use statutes to be available to the United States as a defense to negligence liability. (Federal courts have exclusive jurisdiction over causes of action brought against the United States.)

Unlike federal courts, state courts have been divided as to whether these state recreational use statutes apply to state and local government landowners. The following paragraphs describe cases where state courts have found the recreational use statute applicable to public entities. The jurisdictions examined are: New York, Nebraska, Idaho, Ohio, and Washington. Future columns in the "NRPA Law Review" will look at case law from other jurisdictions which have considered the applicability issue, including those states which have found the statute inapplicable to public entities. At this point in time, state courts in approximately 19 jurisdictions have considered the applicability of the state recreational use statute to the state and local governments.

New York

In the case of *Sega v. State*, 60 N.Y.2d 183, 456 N.E.2d 1174 (1983), the state supreme court considered "the scope and application of section 9-103 of the General Obligations Law," the state recreational use statute. In its decision, the state supreme court reviewed two lower court opinions which had considered this issue. In one case, plaintiff was hiking in a state forest preserve. He was injured when the railing he was sitting on collapsed and he fell 18 to 20 feet from a bridge into the creek below. In the absence of a willful or intentional act, the lower court found no liability pursuant to the state recreational use statute.

In the other case, plaintiff was injured while riding a three-wheeled all-terrain vehicle in another state forest preserve when he struck a steel cable strung across a road. In this instance, the lower court found the state recreational use statute applicable. Despite the lack of wanton or malicious misconduct, the court found the cable "constituted a trap or an inherently dangerous structure and that the State should have posted a warning sign on the road" approaching the cable. As a result, the state was found liable for such negligence.

Specifically, the issue before the state supreme court was "whether the State may invoke section 9-103 in defense of claims for injuries occurring on State-owned lands." Since there was "nothing to the contrary in the law," the state supreme court found "this protection is available to the State itself when no fee is charged."

> On its face, section 9-103 unambiguously includes public property within its purview. By its terms, section 9-103 refers to *any* "owner, lessee or occupant of premises" without limiting the scope of that clause to private landowners. In addition, the statute refers to ECL 11-2111 [section of state environmental conservation law]. ECL 11-2111 pertains to posting lands as fishing and hunting preserves, including "any lands or waters, rights or interests therein owned, leased or otherwise acquired by the state. . ." This confirms that the Legislature intended to provide protection to the State as well as private landowners.

Having found that the state recreational use statute applicable to state-owned lands, the court concluded "defendant's negligence, if any, is immaterial." Plaintiffs in both instances would, therefore, have to prove that "defendant willfully or maliciously failed to guard or to warn against a dangerous condition, use, structure, or activity." In both instances, the state supreme court found "nothing to support a finding that the State acted willfully or maliciously." Consequently, these claims against the state were dismissed.

Nebraska

In the case of *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), the state supreme court considered whether the state recreational use statute was applicable to the defendant city. Plaintiff, age 2 1/2 at the time of the accident, fractured her leg when she fell from a slippery slide with a missing handrail in a city park. In the opinion of the state supreme court, the recreational use statute had to be read within the context of the state tort claims act.

> [W]e must consider the language of the Political Subdivisions Tort Claims Act . . . which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances . . . [T]he liability of a political subdivision under the Political Subdivisions Tort Claims Act is not an absolute liability, but consists of such liability as would exist in a private person or corporation without that immunity . . . Therefore, the public entity is entitled to assert the defenses that a private property owner has in like circumstances.

Applying this "liable like a private individual" reasoning of the tort claims act, the state supreme court rejected plaintiff's contention that recreational use statute immunity was necessarily limited to private landowners.

> Whatever the Legislature's intent was at the time of the enactment of the Recreational Liability Act, we believe that the definition of owner [in the Act]—"the term owner includes tenant, lessee, occupant, or person in control of

the premises"—is sufficiently broad to cover a public entity. . .

> The Legislature, in enacting the Political Subdivisions Tort Claims Act and thereby declaring a political subdivision responsible for its torts in the same manner as a private individual, is presumed to have knowledge of previous legislation, including the Recreation Liability Act. Having placed no limitation upon this declaration or upon the definition of "owner" in the Recreation Liability Act, we believe that the inter of the Legislature, as reflected by the clear language of both statutes, was to grant the same rights and privileges to governmental and private landowners alike.

The state supreme court, therefore, concluded that "the term 'owner of land,' as used in the Recreation Liability Act, includes a political subdivision." As a result, the state supreme court determined that under the facts of this case "no liability attached to the City of Omaha." The lower court judgment in favor of plaintiff was, therefore, reversed and the case dismissed.

Idaho

In the case of *Corey v. State*, Idaho, 703 P.2d 685 (1985), the state supreme court found that the State of Idaho was an "owner" within the meaning of the state recreational use statute. Corey was injured when he struck a cable strung across a path while snowmobiling in a state park.

> I.C. § 36-1604 [the state recreational use statute] specifically provides that an owner of land who permits recreational use of that land without charge does not owe a duty of care to keep the premises safe for such use. *The State of Idaho is an "owner" as defined by the statute.* Farragut State Park is "public land" open for recreational use. It is uncontroverted that at the time of the accident appellant Corey was in an area of the park open for snowmobiling. Additionally, Corey was engaged in snowmobiling, a recreational activity specifically mentioned in the statute. Thus, there can be no question that I.C. § 36-1604 is expressly applicable to the factual situation presented by this case.

The state supreme court, therefore, affirmed the judgment of the trial court in favor of the state.

Ohio

In the case of *McCord v. Ohio Division of Parks & Recreation*, 54 Ohio St.2d 72, 375 N.E.2d 50 (1978), the Supreme Court of Ohio considered for the first time whether the state recreational use statute, R.C. 1533.181(A), applied to the state. Plaintiff brought a wrongful death action after her nine-year-old son drowned in a lake within a state park. Plaintiff alleged that the state and its employees were negligent in failing to supervise the lake and properly train the lifeguards.

Prior to the enactment of the state tort claims act, the state enjoyed immunity from tort liability. The state tort claims act (R.C. 2743.02 (A)), however, provided injured parties with a cause of action subject to certain limitations. One such limitation was the "private party" rule:

> The state hereby waives its immunity from liability and consents to be sued, and have its liability, determined . . . in accordance with the same rules of law applicable to suits between private parties. . .

In the opinion of the state supreme court, "one such rule of law applicable to suits between private parties" was the state recreational use statute. Applying the state recreational use statute to the facts of this case, the state supreme court concluded that "the state, when viewed as if a private party, owes no duty to a recreational user of its land, such as appellee [McCord] who has paid no fee or valuable consideration." According to the state supreme court, the Ohio recreational use statute "does not create a new right of action against the state, but places the state upon the same level as a private party." Further, the state court refused to broaden the scope of state landowner liability for recreational use beyond the rules applicable to private parties. "If the immunity which the state has historically enjoyed is to be lifted further, it must be accomplished by the General Assembly and not by this court."

Washington

In the case of *McCarver v. Manson Park and Recreation District*, 92 Wash.2d 370, 597 P.2d 1362 (1979), the state supreme court considered the applicability of the state recreational use statute to a public swimming area. Plaintiff's daughter died as a result of a fall from a diving tower at the site. Plaintiff alleged that the defendant district was negligent in failing to supervise, maintain, and enforce reasonable rules in the area.

Continued on next page

The trial court granted defendant summary judgment based upon the state recreational use statute. McCarver appealed. The appeals court certified the applicability issue to the state supreme court.

Specifically, the issue before the state supreme court was "whether Manson Park is included in the class of protected landowners under the [state recreational use] statute." As noted by the court, the language of the statute expressly included "public or private landowners or others in lawful possession and control."

As described by the court, the state recreational use statute was first enacted in 1967. This statute was based upon model legislation proposed by the Council of State Governments. As noted by the court, this model legislation was "to encourage the availability of private lands by limiting the liability of owners."

In 1972, however, the Washington recreational use statute was amended and the words "public or private" were added before the word "landowners" in the statute. Further, snowmobiling and the driving of all-terrain vehicles (ATV) were added to the list of recreational activities covered by the statute. Plaintiff, therefore, argued that "limitations on the liability of *public* landowners under RCW 4.24.210 [state recreational use statute] should be restricted ATV and snowmobiling activities because of the purpose of the 1972 amendatory act is directed toward these activities. The state supreme court rejected this argument.

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction. RCW 4.24.210 draws no distinctions between public and private landowners, vis-a-vis the designated recreational activities. The placement of the 1972 amendatory language ("public or private") before the term "landowners" encompasses *all* outdoor recreational activities subsequently delineated. If the legislature intended the liability limitations to apply to public owners only as to incidents arising from the use of ATV and snowmobiles, it should have used more precise language to establish such an intent. Clearly, the statute, as amended, includes public landowners and occupiers within the recreational use immunity from liability.

As noted by plaintiff, the expressed purpose of the state recreational use statute was to *encourage* landowners to open their land for public recreational use. Plaintiff, therefore, argued that "limitations on liability are not necessary 'to encourage' public landowners, such as Manson Park, to devote public land to recreational use." Once again, the state supreme court disagreed noting that the 1972 amendment expressly included public landowners at a time when public entities "were not otherwise immune from tort liability." In addition, the court acknowledged that "other courts have found similar recreational use liability limiting statutes applicable to public landowners in the *absence* of express statutory language covering publicly-owned lands."

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

NRPA Law Review

Illinois Immunity for Negligent Supervision of Public Recreation

by James C. Kozlowski, J.D.

The January law review column described two recreational immunity statutes in Virginia and Kansas. This month's column continues the discussion of various types of statutes providing limited recreational immunity to public agencies. The *Ramos* decision described herein is the latest application of an Illinois statute which provides immunity for the negligent failure to supervise recreational activities on public property.

Bombs Away

In the case of *Ramos by Ramos v. City of Countryside*, Ill.App., 485 N.E.2d 418 (1985) plaintiff, Alfonso Ramos, Jr., was injured in a game of "bombardment" when struck in the eye by a "softball" thrown by defendant Steven Best.

In 1981, the city of Countryside sponsored and organized a summer recreation program for elementary aged children which was held on public property. The participants were charged a registration fee. Ramos and Best, who were 8 and 14 years old respectively, were participants in the program. The game of "bombardment" in which Ramos was injured was an activity in the program.

Ramos sought $15,000 in damages against defendants Best and the city of Countryside. Ramos alleged Best was negligent in failing to warn Ramos before throwing the ball and throwing the ball with excessive force.

Continued

Similarly, Ramos alleged that the City of Countryside was negligent or guilty of willful and wanton misconduct for allowing "children, regardless of the disparity of their age, strength and size, to participate together in the game." Considering these disparities Ramos argued further that the game created an "inherently dangerous and hazardous" condition to "a child of plaintiff's tender years." In addition, Ramos contended that the City "failed to supervise said event so as to afford protection to younger participants therein."

The trial court dismissed these claims; Ramos appealed. In the opinion of the appeals court, the trial court properly dismissed Ramos' negligence claims against defendant Best. Since the game of bombardment was organized according to specific rules, the court applied the following rule governing sporting events.

> [A] participant is not liable for injuries to other participants if the gravamen of the action is simple negligence . . . [T]he law should not place unreasonable burdens on the free and vigorous participation in sports by our youth . . . [T]he participants in organized sporting events can only be held liable under the willful and wanton misconduct standard.

The appeals court also considered Ramos' claims against the city of Countryside. As noted by the Appeals court, the Illinois Local Governmental Employees Tort Immunity Act provided in pertinent part:

> Except as otherwise provided by this Act . . . neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property. (Ill.Rev.Stat. 1981, ch 85, par. 3-108(a))

Ramos, however, contended that this statute did "not shield the city of Countryside from liability because: (1) the Immunity Act does not shield municipalities from willful and wanton misconduct; (2) the complaint adequately alleged a 'special relationship' between Ramos and the municipality to establish potential liability; (3) the municipality waived its immunity through participation in the Intergovernmental Risk Management Agency (IRMA)."

In the opinion of the appeals court, this statute was applicable "to shield the city of Countryside from liability for the asserted failure to adequately supervise a summer recreation program held on public property." Further, the court found that Ramos had "failed to allege any conduct on the part of the municipality which can properly be characterized as willful and wanton misconduct." According to the court, Ramos' complaint contained "the bald assertion of willful and wanton misconduct on the part of the city of Countryside, [while] the facts alleged can only sustain a possible failure to adequately supervise activities on public property, for which the municipality is not liable.'"

The appeals court also considered Ramos' contention that "his payment of a registration fee to the city of Countryside created a 'special relationship' between himself and

the municipality upon which liability may be based." The appeals court rejected this argument.

> Although the city of Countryside charged Ramos a registration fee for his participation in the city's summer recreation program, that program is not analogous to the operation of a business enterprise . . . In its sponsorship of the summer recreation program the city was acting within its governmental capacity and was not acting in a business or proprietary capacity. We therefore, conclude that the city did not create a "special relationship" with Ramos and, thus, was subject to the general rule of non-liability of municipalities.

Finally, the appeals court considered Ramos' argument that the city of Countryside waived its immunity through its membership in the Intergovernmental Risk Management Agency (IRMA). The court provided the following description of IRMA:

> IRMA is an organization comprised of small municipalities. Under the provisions of IRMA each municipality is responsible for the first $1,000 of liability that that municipality may incur. Any liability between $1,000 and $250,000 is paid by IRMA through a pool of money paid into the organization from revenues of the member municipalities. IRMA purchases insurance policies to cover any liability in excess of $250,000.

In the opinion of the appeals court, "membership in IRMA did not act to waive immunity granted to member municipalities under the Tort Immunity Act." The court distinguished "between the purchase of insurance from separate licensed insurance companies and self-insurance."

> The waiver of immunity provisions of section 9-103 (Ill.Rev.Stat.1983, ch. 85, § 9-103) is applicable only where municipalities have purchased insurance from conventional insurance companies which pay judgments from non-public funds.

According to the court, providing immunity for self-insured municipalities served the "public policy interest of protecting public funds and property and preventing the diversion of tax monies from their intended purpose to payment of damage claims." Applying this rule to the facts of the case, the appeals court concluded that "the city of Countryside has not waived its immunity."

> IRMA constitutes a joint self-insurance venture by its members for liability between $1,000 and $250,000. In his complaint, Ramos seeks $15,000 in damages. Neither the city of Countryside nor IRMA has purchased insurance to cover Ramos' injury. If Ramos were to recover, the judgment would be paid from a reserve of public money.

The appeals court, therefore, affirmed the judgment of the trial court dismissing Ramos' claims against defendants Best and the city of Countryside.

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

NRPA Law Review

No Ordinary Negligence Liability Under Recreational Immunity Statutes

by James C. Kozlowski, J.D.

This month the "NRPA Law Review" enters its fifth year of publication. As reflected in many of the articles, recreational injury liability continues to be the overwhelming law-related concern of the recreation and parks field. During the recent Congress for Recreation and Parks in Dallas, I attended a portion of a session on recreational injury liability. The question and answer period which followed the presentations by two attorneys was characterized by the same sort of anxiety and hand wringing I have encountered following my lectures on this topic.

In my opinion, the recreation field moans and groans about "liability," but does little in the way of a concerted effort to alleviate the problem in a systematic fashion. In the face of the perceived crisis eyes turn hopefully, but mistakenly, toward Washington for the one piece of "silver bullet" legislation which will slay the liability monster once and for all. In Dallas, I voiced this concern to Roy Feuchter, president of the National Society for Park Resources. He suggested that I devote one of the law review columns to a discussion of the issue and any possible solutions. I do not think that there is any one solution to the problem. The following paragraphs, however, attempt to respond to this request by presenting existing legislation which may have an impact upon the situation.

The bad news is that there is no one grandiose federal solution that will resolve this situation in one fell swoop. The good news is that the wheel has already been invented in several state models to make the perceived crisis more manageable, i.e. recreational immunity statutes. Specifically, there is already legislation quietly at work in several jurisdictions which provides public agencies with limited immunity for injuries occurring on recreational

facilities. Most notably, Virginia and Kansas have statutes which require a plaintiff to allege gross negligence or willful/wanton misconduct, rather than mere negligence, to sustain a claim for an injury sustained on public park and recreational facilities.

Virginia Model

Section 15.1-291 of the Virginia Code entitled "Liability of counties, cities, and towns in the operation of recreational facilities" reads as follows:

> No city or town which shall operate any bathing beach, swimming pool, park, playground or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility.
>
> The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

In the case of *Town of Big Stone Gap v. Johnson*, 184 Va. 375, 35 S.E.2d 71 (1945), the 8-year-old plaintiff was injured while playing on an unattended road grader in a public park. This piece of equipment was being used to level a running track in the park. Plaintiff alleged gross and wanton negligence as required by the Virginia recreational immunity statute. The town argued that their conduct "if negligent at all, does not amount to 'gross or wanton negligence' within the meaning and intent of the statute." A jury returned a verdict against the town; the town appealed to the state supreme court.

The issue before the state supreme court was, therefore, "whether the act of the town's employee in leaving this machine in the public park near the children's playground measures up to the standard of 'gross or wanton negligence' required by the statute." The court defined the standard of gross or wanton negligence as follows:

> Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. Wanton negligence is of even a higher degree than gross negligence . . . manifesting arrogant recklessness of justice, of the rights or feelings of others, merciless, inhumane.

Applying this standard to the facts of the case, the state supreme court

Continued

found that the conduct of the town through its employee did not constitute "gross or wanton" within the meaning of the statute.

> [T]here is no proof that the town officials or employee knew or ought to have known that the road scraper was attractive to children. While it had been left in the park over a long period, only on two previous occasions, so far as the record shows, had children been on it. Mrs. Barnett, who lived near the park, testified that about a week before the accident she saw some children playing on the machine. Ralph Smith, who was with Johnson at the time the plaintiff was hurt, testified that he had previously played on the scraper. But there is no showing that the town's employees knew of either of these incidents . . . [T]here is no proof that the machine was one which was dangerous to children . . . Not only was the machinery of the road scraper idle, but the blade was left on the ground in a safe position, and it was only by reason of the combined efforts of these two boys [Johnson and Smith] that it was hoisted in such a way as to become dangerous. Whether the act of the town employee in leaving this machine near the children's playground, under the circumstances stated, amounted to ordinary or simple negligence we need not decide. It is certain, we think, that it did not constitute "gross or wanton" negligence within the meaning of the statute.

The state supreme court, therefore, reversed the judgment of the lower court and entered judgment for the town.

Kansas Model

Similarly, section 75-6104 (n) of the Kansas Tort Claims Act provides:

> A governmental entity or employee acting within the scope of the employee's employment shall not be liable for damages resulting from: . . . (n) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of *gross and wanton negligence* proximately causing such injury.

In the case of *Willard v. City of Kansas City*, Kan., 681 P.2d 1067 (1984), plaintiff Willard was injured when he collided with a chain link fence around a baseball diamond in a city park in Kansas City." (This case was reported in the *Recreation and Parks Law Reporter* RPLR Report No. 84-35, Vol. 1, No. 4 at page 134.) Willard alleged that "the City was negligent in installing and maintaining a type of fencing with raw sharp cutting edges running along the top in an area where such accidents were likely to occur." The trial court found the City immune from liability under § 75-6104 (n) of the Kansas Tort Claims Act (KTCA), K.S.A.1983 Supp. 75-1601 et seq. Willard appealed to the Supreme Court of Kansas.

The state supreme court applied the following test for gross and wanton negligence:

> Proof of a willingness to injure is not necessary in establishing gross and wanton negligence. This is true because a wanton act is something more than ordinary

negligence but is something less than willful injury. To constitute wantonness the act must indicate a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.

According to the court, Kansas law defined wanton conduct as "an act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act." Since plaintiff Willard had provided no evidence of gross negligence or wanton misconduct on the part of the city in maintaining the ballfield, the state supreme court affirmed the summary judgment in favor of the city.

Effect on Plaintiff's Burden of Proof

The plaintiff in a civil (as opposed to criminal) suit has the burden of going forward with his claim. To sustain this burden, the plaintiff must allege the necessary facts to establish his claim. A recreational user injured on the premises would, most likely, allege negligence liability on the part of the public agency landowner.

To meet the burden of going forward with a negligence claim, plaintiff must allege facts demonstrating the following four elements: 1) a standard of care to which a duty is owed; 2) a violation or breach of the applicable standard of care; 3) causation, i.e. a foreseeable connection between the breach and the resulting injury; and 4) damages, actual (as opposed to purely speculative) injury to person or property. If plaintiff's complaint fails to allege sufficient facts to support the negligence claim, plaintiff has not met the burden of going forward. Under such circumstances, defendant may move the court to dismiss the suit for plaintiff's failure to state a claim. However, in reviewing the allegations in plaintiff's complaint, the court will resolve all doubt in favor of allowing the plaintiff an opportunity to go forward with his claim.

Having sustained the burden of going forward, the plaintiff has the burden of proof in a civil suit. In a civil suit, the plaintiff must establish or prove his claim by a preponderance of the evidence. A preponderance of the evidence means more likely than not, better than 50/50, that the credible facts support the claim.

A preponderance of the evidence is much lighter burden of proof than that applied in criminal cases, i.e. beyond a reasonable doubt. In criminal cases, the state must prove beyond a reasonable doubt that the accused committed the alleged crime. Any doubt whatsoever would, therefore, dictate a finding of innocence in a criminal case.

By changing the applicable standard of care from ordinary negligence to gross negligence or willful/wanton misconduct, a recreational immunity statute makes it much more difficult for the plaintiff to sustain his burden of going forward with his claim. As a result, it is more likely that recreational injury claims will be dismissed prior to trial. Furthermore, those claims that do go to trial will be less likely to sustain the burden of proof when the applicable standard of care is gross

Continued on next page

gligence or willful/wanton misconduct, rather than mere negligence.

As the term suggests, negligence is neglect or carelessness. It is a slight deviation from what the reasonable person would, or would not do under the circumstances. On the other hand, gross negligence or willful/wanton misconduct is extreme conduct which demonstrates a reckless disregard for the physical well-being of others.

There is a fine line between careful and careless when the applicable standard is ordinary negligence and the burden of proof is preponderance of the evidence (more likely than not, better than 50/50). This is particularly true when all doubt is resolved in allowing the plaintiff an opportunity to prove his claim. It is, therefore, very difficult to have a case dismissed prior to trial or prevail at trial when the recovery can be predicated upon ordinary negligence. However, when the burden of proof under a recreational immunity statute is gross negligence or willful/wanton misconduct, the likelihood of some wrongdoing on the part of the public entity has to be clear to sustain a claim. A momentary lapse or oversight by the public entity may constitute ordinary negligence, but not gross negligence or willful/wanton misconduct.

Faced with the burden of proving gross negligence or willful/wanton misconduct under the applicable recreational immunity statute, many plaintiffs' attorneys are less likely to even take the case, let alone proceed to trial. This is particularly true where the injury is relatively minor and the alleged negligence of the public park and recreation agency is less than outrageous. Therefore, it is easy to see that the recreational immunity statute, where available in a given jurisdiction, can be a powerful force limiting the number and success of recreational injury lawsuits against public agencies.

Statute Has the Effect of Waiver

A recreational immunity statute has the same legal effect as a valid waiver or signed release. In a valid waiver, the participant waives any claim he or she may have for mere negligence on the part of the provider of the recreational opportunity. A valid waiver, however, does not release any claim the participant may have based upon allegations of reckless misconduct or gross negligence by the provider of the recreational activity or facility. In similar fashion, the recreational immunity statute changes the applicable standard of care. It precludes recovery for ordinary negligence and requires allegations of gross negligence or other more extreme misconduct to sustain a claim.

In most instances, signed releases or waiver forms for public recreational activities are deemed to be against public policy and, therefore, void. On the other hand, a recreational immunity statute is a valid expression of public policy by the state legislature. Further, this statutory waiver is more comprehensive since it covers all recreational activities and/or participants within the scope of the recreational immunity statute, rather than a single individual who signs a release.

More Recreational Immunity

The Virginia and Kansas statutes described above are not the only laws providing recreational immunity for public entities. For example, an Illinois statute requires claims for injuries on playgrounds to be based upon willful/wanton misconduct. A South Dakota statute immunizes municipalities from "tort liability arising out of the construction and maintenance of public parks, recreation areas, and playgrounds." A California statute provides limited immunity to public entities for injuries occurring in hazardous recreational activities.

In addition, several jurisdictions have found state recreational use statutes applicable to states and political subdivisions. These statutes were originally enacted to encourage private landowners to open their land for public recreational use. These statutes provide that the landowner owes no duty of care to the recreational user who enters the premises free of charge. This immunity is lost, however, if the landowner is guilty of willful/wanton misconduct. On the other hand, a number of jurisdictions have denied that these statutes are applicable to public entities.

Under the Federal Tort Claims Act, the federal government is liable for negligence like a private individual under the law of the juris-

Continued on page 79

WI, NJ, & LA, Limit Public Rec Use Immunity to "True Outdoors"

By James C. Kozlowski, J.D., Ph.D.

Last month's "NRPA Law Review" presented case law from five jurisdictions (New York, Nebraska, Idaho, Ohio, and Washington) which had found the state recreational use statute applicable to public entities. This month's column continues the review of jurisdictions which have considered the applicability of the state recreational use statute to public entities. Specifically, case law from Wisconsin, New Jersey, and Louisiana is examined. In each instance, state courts in these jurisdictions have limited the scope of recreational use immunity to non-urban lands and activities which bespeak the "true outdoors."

Under a recreational use statute, the landowner who opens his land free of charge to public recreational use owes no duty of care to the user to guard or warn of hazards on the premises. As a result, the landowner will not be liable for ordinary negligence, i.e. mere carelessness, in failing to inspect and properly maintain the premises. The limited immunity referred by the recreational use statute, however, will not excuse liability for willful or wanton misconduct. Unlike ordinary negligence, willful or wanton misconduct is much more outrageous behavior demonstrating an utter disregard for the physical well-being of others.

Wisconsin

In the case of *Wirth v. Ehly*, 93 Wis.2d 433,287 N.W. 2d 140 (1980), plaintiff, a minor, was injured "when the trail bike on which he was riding struck a cable stretched across a roadway used by the public on recreational land owned by the state and operated by the Department of Natural Resources (DNR)." The trial court granted defendants motion for dismissal of plaintiff's negligence action based upon the state recreational use statute. "The defendants were all employees or agents of DNR at the time of the accident. Neither the State nor DNR was joined as a defendant. The defendants were sued in their individual capacities." Plaintiff appealed to the state supreme court.

As described by the state supreme court, the principal issue on appeal was whether the employee defendants named in the suit were "owners" as defined in the state recreational use statute. Plaintiff argued that "the state employees do not come within the statutory definition of owner in sec. 29.68,Stats., when sued in their individual capacities." The state supreme court rejected this argument. As described by the court, the "anticipated effect" of the 1975 amendment to the recreational use statute affording statutory protection for recreational lands owned by the State and local governments "would be to reduce the potential liability of these governmental units caused by employee negligence."

> The intent of the [1975] amendment to sec. 29.68, Stats. was to provide that in situations where previously a public officer or employee would be held liable for acts occurring within the scope of his employment on public land and for which the State would have been liable for payment. . .

The state supreme court, therefore, concluded that "the [public] employee now will be deemed an 'owner' for the purpose of sec. 29.68, Stats."

Plaintiff also argued that "the statute should only apply to remote and uncontrolled areas." Further, the plaintiff maintained that the public land where the injury occurred "was not remote and uncontrolled." The state supreme court also rejected this argument.

> Although the limits of the statutory definition of premises are not entirely clear, those limits have not been reached in this case. . . [T]he statute was initially proposed to protect owners of forest land from liability to deer hunters, the legislation was ultimately drafted to apply on a much broader scale. The intent was to encourage the use of forest and farm lands for many outdoor recreational sports by restricting the common-law liability of the landowner to such areas in various respects . . . The accident involved in this case did not occur in a densely populated residential area, but rather in a rural or semi-rural environment. Salmo Pond and the surrounding area clearly falls within the meaning of premises open for recreational use found in sec. 29.68, Stats.

Plaintiff also argued that "the duty from which the 'owner' of premises under sec. 29.68, Stats. is relieved, is only the affirmative obligation to inspect or post warning of dangerous conditions." As a result, plaintiff contended that "affirmative acts of negligence by individuals were never intended to be covered by the statute whether those acts of negligence were committed by an 'owner' or anyone else." The state supreme court disagreed.

> The statute does not contemplate that the land subject to public recreational use shall remain static. Since the purpose of the statute was to open land for recreational use, it would be inconsistent for

Continued

the statute to provide protection only if the owner or occupant does not perform any potentially negligent activities on the land. The statute contains an explicit reference to affirmative acts by providing that "owner . . . owes no duty to *keep* the premises safe for entry or use . . . or to give warning of any unsafe *condition or use of or structure or activity* on such premises. (Emphasis supplied by court.) The stringing of the cable was a condition or structure on the premises.

Given the terms of the recreational use statute, the state supreme court concluded that "there was no duty on the part of the state employees to keep the premises safe or to warn of the potential hazard created by the cable." The state supreme court, therefore, affirmed the judgment of the trial court dismissing plaintiff's claim.

In the case of *Quesenberry v. Milwaukee County*, 106 Wis.2d 685, 317 N.W.2d 468 (1982), plaintiff was injured when she stepped into a grassed covered drainage tile hole. Citing *Wirth*, the trial court dismissed plaintiff's claim against defendant county based upon the state recreational use statute. The appeals court affirmed. Plaintiff then appealed to the state supreme court.

On appeal, the state supreme court found that the state recreational use statute immunity was limited "to the type of recreational uses of land specified in the statute." As a result, the court found that "golf courses do not come within the scope of the statute."

> Sec 29.68, Stats., protects the owner of premises used by others for "hunting, fishing, trapping, camping, hiking, snowmobiling, berry picking, water sports, sightseeing, cutting or removing wood, climbing of observation towers or recreational purposes." "Recreational purposes" covers an almost limitless number of activities that could be so described. But the statute clearly limits the types of recreational activities meant to be covered. Golfing is not one of the enumerated uses, or types of use, described and therefore is not within the exceptions to owner liability described by the general term "recreational purposes."

In the opinion of the court, "the common feature of the enumerated words is that they are the type of activity that one associates being done on land in its natural undeveloped state as contrasted to the more structured, landscaped and improved nature of a golf course with its fairways, sand traps, rough and greens created for one purpose: to play the game of golf." The state supreme court, therefore, reversed the judgment of the trial court dismissing plaintiff's claim and remanded the case for further proceedings.

New Jersey

In the case of *Magro v. City of Vineland*, 148 N.J.Super, 34, 371 A.2d 815 (1977), the 14-year-old plaintiff was injured "while diving from a makeshift diving board into an abandoned pond or lake owned by the City of Vineland." At the time of the accident, the land was "predominantly rural, undeveloped, unoccupied, and unimproved." The land had been acquired by the city for later development as a park. The body of water where the injury oc-

curred had been formed "by the natural seepage of water into a 'sandwash.' " The trial court had granted summary judgment to the defendant city based upon the state recreational use statute. Plaintiff appealed.

In the opinion of the appellate court, "the summary judgment for defendant was warranted by virtue of the immunity created by N.J.S.A. 2A:42A-2 to 5 [the state recreational use statute]." According to the court, earlier decisions had held that the statute "was intended to apply to nonresidential, rural or semi-rural land whereon the enumerated sports and recreational activities [in the statute] are conducted." The court further rejected plaintiff's argument that the statute was not applicable to children. "Our study of the legislation and its history has failed to produce a single clue, direct or circumstantial, whereby it can be inferred that the Legislature intended to exempt infant claimants from the statutory immunity." In the opinion of the court, the recreational statute "grants immunity to a landowner under the facts herein." Further, the court found that such immunity was "equally available to a public entity and a private individual or corporation." The appellate court, therefore, affirmed the trial court's summary judgment in favor of the defendant city.

Louisiana

In the case of *Keelen v. State Department of Culture, Recreation and Tourism*, 463 So.2d 1287 (La. 1985), plaintiff's son drowned in a swimming pool in a state park. On appeal to the state supreme court, the issue was whether the state recreational use statutes conferred immunity from liability for a drowning in a swimming pool at a state park. Since the supreme court held that the statutes did "not confer immunity for a drowning in a swimming pool," the court found it unnecessary to decide "the question of whether the statutes apply to the State and its political subdivisions."

In the opinion of the state supreme court, "the legislature intended to confer immunity upon owners of undeveloped, nonresidential rural or semi-rural land areas."

The use of the language "land and water areas" is suggestive of open

and undeveloped expanses of
perty. Furthermore, the type
ecreational activities enumer-
in both statutes—hunting,
ng, trapping, camping, na-
study, etc.—can normally be
ommodated only on large
s or areas of natural and un-
eloped lands located in thinly-
ulated rural or semi-rural lo-
s. Specification of these types
tivities suggests a policy that
ld encourage landowners to
their property in a natural,
and environmentally whole-
e state. We would stray from
goal were we to construe that

statutes to grant a blanket immunity to landowners without regard to the characteristics of the property.

In categorizing property as rural or semi-rural, the state supreme court would consider "the size, naturalness and remoteness or insulation from populated areas."

The existence of some improvements on relatively undeveloped rural or semi-rural property does not change the

Continued on next page

character of the land so as to deprive its owner of the immunity granted by the statutes. Improvements such as shelters, toilet facilities, fireplaces, etc. are merely conveniences incidental to the use of the land for enumerated recreational activities and do not themselves take the property out of a rural, undeveloped classification. This view is reinforced by the fact that the definition of "premises" in La.R.S. 9:2791 and of "land" in La.R.S. 9:2795 [the state recreational use statutes] include "buildings, structures and machinery."

In addition to the characteristics of the land, the court would also scrutinize "the injury—causing condition or instrumentality" in determining "whether the statutes apply to a particular factual situation."

> [R]eference to the types of recreational activities specified in the statutes (hiking, boating, horseback riding, etc.) indicates that the legislature envisioned immunity for landowners who offer their property for recreation that can be pursued in the "true outdoors." When the injury-causing condition or instrumentality is of the type normally encountered in the true outdoors, then the statutes provide immunity. Conversely, when the instrumentality, whether found in an urban or rural locale, is of the type usually found in someone's backyard, then the statutes afford no protection.

Applying this principle to the facts of the case, the state supreme court stated "it is clear that a swimming pool is not the type of instrumentality commonly found in the true outdoors." On the contrary, the court noted that "swimming pools are most often found in residential backyards."

> We recognize that "swimming" is included in the list of recreational activities in La.R.S. 9:2795; however, the word should be construed by reference to the context in which it is found. Such consideration leads to the conclusion that the legislature intended to grant immunity for injuries incurred while swimming in lakes, rivers, ponds or other similar bodies of water. Thus, an injury which occurs in a swimming pool is not subject to a defense of immunity under La.R.S. 9:2791 and 2795.

The state supreme court, therefore, concluded that "the State cannot assert these statutes in order to avoid liability in the instant case."

In the case of *Brooks v. City of Lake Charles*, 488 So.2d 465 (La.App. 3 Cir. 1986), plaintiff sued the city after her husband drowned following a fall from the dock of the Lake Charles Civic Center. The trial court dismissed plaintiff's negligence claim based upon the state recreational use statute. Plaintiff appealed.

On appeal, plaintiff argued that "the immunity statute is inapplicable because the concrete dock behind the Lake Charles Civic Center is a man-made facility and is not the type of instrumentality to be found in the true outdoors." The defendant city responded that the lake, unlike the swimming pool in *Keelan*, was a natural body of water which would constitute the true outdoors. Applying the reasoning of *Keelen* to the facts of this case, the appeals court found the recreational use statute "inapplicable because an accident occurring at the Civic Center within the corporate limits of Lake Charles does not constitute the true outdoors as contemplated by the statute."

> Although the lake is a natural body of water, the injury-causing condition was part of the civic center complex and as such, in our view, it cannot be categorized as the true outdoors; therefore, it does not come within the purview of the statute, which the legislature intended to apply to owners of undeveloped, nonresidential rural, or semi-rural land areas. . . Accordingly, under the circumstances of this case, we conclude that the City does not have the benefit of landowner immunity or limitation of liability accorded by R.S. 9:2795 [the state recreational use statute].

The appeals court, therefore, reversed the judgment dismissing Brooks' claim and remanded the case to trial court to consider the allegations of negligence against the City of Lake Charles.

Dr. Kozlowski is an attorney and consultant in recreational injury liability in Springfield, Virginia. He is the author of the Recreation and Parks Law Reporter.

"The President's Commission has made an important contribution to our understanding of the nation's outdoor recreation needs and resources. It is a much needed initiative…I suggest that we take this report seriously."

WILLIAM K. REILLY
President
World Wildlife Fund and The Conservation Foundation

"The President's Commission on Americans Outdoors was a timely and needed assessment of the threats and opportunities in our out-of-doors. It is my hope that the President and Congress will enthusiastically embrace and move forward on this important blueprint for action."

ROBERT L. HERBST
Executive Director
Trout Unlimited, and
Former Assistant Secretary of the Interior

"Wildlife was a strong and consistent element in the public's testimony. The Commission's recognition of the importance of insuring abundant and diverse wildlife and protecting its habitat may well yield momentous results."

JOYCE M. KELLY
President
Defenders of Wildlife

"If there is an example of pulling victory from the jaws of disaster, this report is it. The Commission did more than anyone expected, especially the administration. It gave Americans something serious to think about if we are to begin saving our natural resources."

PAUL C. PRITCHARD
President
National Parks and Conservation Association

ISBN 0-933280-36-X

AMERICANS OUTDOORS
THE REPORT OF THE PRESIDENT'S COMMISSION

AMERICANS OUTDOORS

THE REPORT OF THE PRESIDENT'S COMMISSION

AMERICANS OUTDOORS

THE LEGACY, THE CHALLENGE

With Case Studies

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

character of the land so as to deprive its owner of the immunity granted by the statutes. Improvements such as shelters, toilet facilities, fireplaces, etc. are merely conveniences incidental to the use of the land for enumerated recreational activities and do not themselves take the property out of a rural, undeveloped classification. This view is reinforced by the fact that the definition of "premises" in La.R.S. 9:2791 and of "land" in La.R.S. 9:2795 [the state recreational use statutes] include "buildings, structures and machinery."

In addition to the characteristics of the land, the court would also scrutinize "the injury—causing condition or instrumentality" in determining "whether the statutes apply to a particular factual situation."

> [R]eference to the types of recreational activities specified in the statutes (hiking, boating, horseback riding, etc.) indicates that the legislature envisioned immunity for landowners who offer their property for recreation that can be pursued in the "true outdoors." When the injury-causing condition or instrumentality is of the type normally encountered in the true outdoors, then the statutes provide immunity. Conversely, when the instrumentality, whether found in an urban or rural locale, is of the type usually found in someone's backyard, then the statutes afford no protection.

Applying this principle to the facts of the case, the state supreme court stated "it is clear that a swimming pool is not the type of instrumentality commonly found in the true outdoors." On the contrary, the court noted that "swimming pools are most often found in residential backyards."

> We recognize that "swimming" is included in the list of recreational activities in La.R.S. 9:2795; however, the word should be construed by reference to the context in which it is found. Such consideration leads to the conclusion that the legislature intended to grant immunity for injuries incurred while swimming in lakes, rivers, ponds or other similar bodies of water. Thus, an injury which occurs in a swimming pool is not subject to a defense of immunity under La.R.S. 9:2791 and 2795.

The state supreme court, therefore, concluded that "the State cannot assert these statutes in order to avoid liability in the instant case."

In the case of *Brooks v. City of Lake Charles*, 488 So.2d 463 (La.App. 3 Cir. 1986), plaintiff sued the city after her husband drowned following a fall from the dock of the Lake Charles Civic Center. The trial court dismissed plaintiff's negligence claim based upon the state recreational use statute. Plaintiff appealed.

On appeal, plaintiff argued that "the immunity statute is inapplicable because the concrete dock behind the Lake Charles Civic Center is a man-made facility and is not the type of instrumentality to be found in the true outdoors." The defendant city responded that the lake, unlike the swimming pool in *Keelan*, was a natural body of water which would constitute the true outdoors. Applying the reasoning of *Keelen* to the facts of this case, the appeals court found the recreational use statute "inapplicable because an accident occurring at the Civic Center within the corporate limits of Lake Charles does not constitute the true outdoors as contemplated by the statute."

> Although the lake is a natural body of water, the injury-causing condition was part of the civic center complex and as such, in our view, it cannot be categorized as the true outdoors; therefore, it does not come within the purview of the statute, which the legislature intended to apply to owners of undeveloped, nonresidential rural, or semi-rural land areas. . . Accordingly, under the circumstances of this case, we conclude that the City does not have the benefit of landowner immunity or limitation of liability accorded by R.S. 9:2795 [the state recreational use statute].

The appeals court, therefore, reversed the judgment dismissing Brooks' claim and remanded the case to trial court to consider the allegations of negligence against the City of Lake Charles.

Dr. Kozlowski is an attorney and consultant in recreational injury liability in Springfield, Virginia. He is the author of the Recreation and Parks Law Reporter.

"The President's Commission has made an important contribution to our understanding of the nation's outdoor recreation needs and resources. It is a much needed initiative ... I suggest that we take this report seriously."

WILLIAM K. REILLY
President
World Wildlife Fund and The Conservation Foundation

"The President's Commission on Americans Outdoors was a timely and needed assessment of the threats and opportunities in our out-of-doors. It is my hope that the President and Congress will enthusiastically embrace and move forward on this important blueprint for action."

ROBERT L. HERBST
Executive Director
Trout Unlimited, and
Former Assistant Secretary of the Interior

"Wildlife was a strong and consistent element in the public's testimony. The Commission's recognition of the importance of insuring abundant and diverse wildlife and protecting its habitat may well yield momentous results."

JOYCE M. KELLY
President
Defenders of Wildlife

"If there is an example of pulling victory from the jaws of disaster, this report is it. The Commission did more than anyone expected, especially the administration. It gave Americans something serious to think about if we are to begin saving our natural resources."

PAUL C. PRITCHARD
President
National Parks and Conservation Association

ISBN 0-933280-36-X

AMERICANS OUTDOORS
THE REPORT OF THE PRESIDENT'S COMMISSION

THE REPORT OF THE PRESIDENT'S COMMISSION

AMERICANS OUTDOORS

THE LEGACY, THE CHALLENGE

With Case Studies

Library of Congress Catalog Number 87-80384
ISBN 0-933280-36-X
Printed in the United States of America

Published by:
Island Press
1718 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20009

Cover and book design by Tim Kenney Design, Inc.

Acknowledgement: Island Press gratefully acknowledges the permission granted by Market Opinion Research to include survey material produced by them for the President's Commission on Americans Outdoors. The survey was made possible by a generous contribution from National Geographic Society.

Contents

Case Studies

• Financial and technical assistance to encourage innovation in such areas as recruiting skilled adults and senior citizens to provide experienced guidance to young corps members, and establishing linkages between corps programs and volunteer organizations.

The creation of a public sector/private sector National Volunteer Corps would create an opportunity for the American public to contribute their time, talents, and skills in the conserving and managing of America's natural resources, and would involve all sectors of society: government, business and industry, conservation organizations; but the program would essentially be run by volunteers for volunteers. All sectors can provide leadership. Additionally, each has skills and expertise it can share with the others; the land managers can provide the opportunities and tools; the business community can provide organizational structure funding; and the volunteers the energy and enthusiasm.

Gerald Coutant
U. S. Forest Service
Concept Paper for the
Commission

Chapter 5

Volunteers Play Vital Roles

We recommend

• Local officials, mayors, governors and private sector managers support volunteering, develop incentives and remove barriers to encourage Americans to volunteer in outdoor recreation. The goal is to double volunteer efforts in conservation and recreation by the year 2000.

• Current laws and regulations be reviewed to enhance mechanisms for using volunteers in national parks, national forests, and all federal agencies.

Volunteering is part of our American heritage

From barn raising and crop harvesting to parents helping children and neighbors helping neighbors, Americans have always volunteered. An early incentive for helping others was the knowledge that at some point there would be the need for others to come to our aid. By helping others, we helped ourselves.

Budget and staffing cuts over the last decade have challenged the ability of professionals to meet recreation needs in a responsive way. Volunteering has increased, and managers now find themselves working with new partners in providing outdoor recreation.

Volunteers support communities and contribute to our economy

President Reagan stated in his 1986 State of the Union address that volunteers contributed an estimated $74 billion to the American economy. A 1985 study found that retired senior volunteers were better off socially, mentally, and physically than they would have been without the volunteer experience. Once again, by helping others we help ourselves.

Opportunities for community volunteer action vary widely, from Keep America Beautiful to the National Youth Sports Coaching Association, to the National Volunteer Project of the Appalachian Mountain Club to the Student Conservation Association. There are countless associations dedicated to a neighborhood or a particular park, and adopt-a-park and adopt-a-trail programs.

Volunteer organizations, with the assistance of providers, develop a community spirit and pride of accomplishment at the grass roots. The local level is where efforts to encourage volunteering should be strongest.

So much work remains to be done in this unfinished and imperfect world that none of us can justify standing on the sidelines. Especially in a society like ours, volunteering is an expression of democracy in its purest form. For the volunteer is a participant, not a looker-on, and participation is the democratic process.

EUNICE KENNEDY SHRIVER

. . . volunteerism is not a fad but a viable, long term solution to providing many recreation services. The success and importance of volunteer activities today are far exceeded by their potential for the future. Volunteer programs require a great deal of effort to initiate and sustain, and they are not free. However, when approached properly, these programs can have broad long term benefits that far outweigh costs.

ROGER MOORE
Appalachian Mountain Club

Volunteers are out there but we don't cultivate their talents

Organizations exist throughout all levels of government and the private sector to promote and support volunteers. However, we think we can do more. We need to double our efforts over the next decade to meet the challenges of tomorrow.

In 1985, of the 67 million hours donated by 348,000 National Retired Senior Volunteer Program volunteers, only 3.6 percent were in recreation related activities. A 1985 poll conducted by the Volunteers for Outdoor Colorado indicated that 40 percent of those surveyed would volunteer in the outdoors if asked. Eighty-two percent felt that local organizations are best suited to provide for community needs.

The 1982-83 National Recreation Survey found that 16 percent of people over age 60 said they had an outdoor recreation skill they could

teach. However, only a quarter of these people taught the skill, mostly to family and friends. The most common reason older people said they did not teach the skill was because they had not been asked.

Managers can better support volunteers

Though managers have begun to turn to volunteers in order to fill the void left by budget cuts to outdoor recreation programs, they are sometimes reluctant to delegate real responsibility to volunteers. Furthermore, employees have expressed concern that volunteers are replacing important employee functions, reducing opportunities for entry level positions and advancement. Volunteers must not be seen simply as a cure-all for staff cut-backs.

There is a thin line between effective utilization of volunteers and the negative effect volunteers can have on employee morale. Jeannette Fitzwilliams of the Virginia Trails Association observes:

At this time when people are fighting to keep their jobs, volunteers can be seen as a threat. Furthermore, it is not human nature for a manager to share responsibility; he has to make a conscious effort to do so. Yet [parks] do not exist in a vacuum; they are part of a community. Cooperation and partnership will do more for a manager's image than if he tried to do everything all by himself.

Volunteers can do more than menial tasks

The Appalachian Mountain Club believes that cooperation between volunteer organizations and public agencies offers many advantages. Agencies must spend a good deal of time on tasks that must be repeated year after year—recruiting, training, supervising. Volunteer organizations can perform these tasks along with many administrative ones and provide a continuity not easily achieved by the agencies.

Volunteer organizations are not always afforded equal opportunity to bid on public contracts. While some contracts have been awarded to nonprofit groups to manage park facilities, there are relatively few such cases. We recommend that public agencies and the private sector remove obstacles to competition for the chance to provide services to the American public. There should not be a penalty for being a nonprofit.

We need volunteer program leadership

Community, state, federal and private sector leaders must actively develop and encourage volunteering. We recommend that organizations, particularly those providing services or products for outdoor recreation, create staff positions responsible for the development of volunteer programs.

We recommend that policy statements and legislation be developed to nurture volunteering through:

- support for an expanded role by volunteer organizations in providing outdoor recreation opportunities;

- tax laws which allow deductions for contributions to volunteer organizations;

- deferment or partial forgiveness of student loans repayment, and/or work requirements, for students who volunteer in parks and outdoor corps;

- encouragement to government agencies and private groups to include volunteer programs in their organizational structures;

- training programs within agencies and organizations to develop understanding of volunteer program potential and to teach volunteer management skills;

- annual recognition, sponsored by governors, city and local officials and the federal government, of volunteers in outdoor recreation who have worked for the betterment of their communities;

- encouragement to the private sector to offer incentives to employees to volunteer their time to assist in providing outdoor recreation opportunities in their communities;

- protection for volunteers from legal liability and tort claims and coverage for injuries sustained while volunteering;

- provisions for minimal expense reimbursements to those volunteers less able to pay for their transportation or other incidentals (senior citizens and the less fortunate);

- encouragement to and authority for land managers to delegate real responsibility to volunteers.

Private organizations and businesses should encourage employees to serve their communities as volunteers. The IBM Corporation loans employees to community organizations as part of their community awareness and support ethic.

We need to review current laws to promote volunteering

The National Park Service's Volunteers in the Parks and the U.S. Forest Service's Volunteers in Forests programs are good examples of positive emphasis on volunteering by federal agencies. However, these laws do not

apply to all federal agencies. They do not encourage agency partnership development and cooperation with local profit and nonprofit groups and organizations, and they do not provide minimum budget levels for federal agencies to initiate and strengthen volunteer efforts. Neither the Bureau of Reclamation nor the Tennessee Valley Authority have volunteer authorities. Current statutes should be reviewed to address these opportunities.

The Bureau of Land Management received specific authority for volunteer programs through a 1984 amendment to the Federal Land Policy and Management Act. In 1981, 64,000 hours were donated to the agency. By 1985 the figure was 371,000 hours, valued at $3.2 million--a return of 10 to 1 over the costs to manage the program. This growth occurred without any full-time field staff devoted to development of volunteer programs. In two Bureau of Land Management districts the volunteer work-years were as much as 27 percent of the full-time staff work years.

Potential volunteers can't find the right information

Volunteers seeking opportunities to assist with outdoor recreation programs are not always able to get enough information. An agency or organization may not know about opportunities outside its own programs. There is no central volunteer information service for outdoor recreation.

Independent agency programs should develop direct working relationships with other agencies. When one agency cannot provide an opportunity for a volunteer, a referral should be made to another agency which can. This would require information sharing and cooperation—partnerships for the benefit of all. We recommend the establishment, with local communities, states and the federal government being equal partners, of a clearinghouse for volunteer information and opportunities.

Volunteering promotes respect for and knowledge about the outdoors and how people behave in the outdoors. Local volunteer groups are proving that people really believe Woody Guthrie's words, "This land is your land, this land is my land." Volunteers must be given leadership, real responsibilities and acknowledgment in order to foster a true feeling of accomplishment and to maintain viable ongoing programs.

National Leadership Helps Develop Local Action

The National Volunteer Project (NVP) of the Appalachian Mountain Club was formed in 1982 with private foundation grants to foster the development of local volunteer organizations. The NVP program founded six independent groups around the country—Volunteers for Outdoor Colorado, Outdoor Washington, Florida Trails Association, Trail Information and Volunteer Center, Volunteers for the Outdoors in New Mexico, and Tahoe Rim Trail Fund. The purpose of these organizations is to foster a partnership with federal, state, and local providers. The NVP does all recruiting, training, and supervising of the volunteers. The providers supply financial assistance through grants, concessions, or contracts. This kind of relationship between the local community and a national entity generates local impetus and interest in volunteer projects.

Volunteers Manage the Appalachian Trail

The Secretary of the Interior in 1984 gave the Appalachian Trail Conference overall responsibility for management and protection of the Appalachian Trail. The Conference and its 31 member clubs have long led volunteer efforts to provide public services that might otherwise be considered the responsibility of government. With 18,000 members nationwide, ATC's responsibilities include assigning sections of the Appalachian Trail to its member clubs and ensuring that they do a good job of management and maintenance. ATC's assuming management for the 60,000 acres along the Appalachian Trail was a unique effort in transferring broad management responsibilities for public lands to a private, nonprofit organization.

Traditionally, minority groups of all sorts have found it difficult to become involved in volunteering, sometimes because they were not made to feel welcome, sometimes because they did not have the carfare it took to reach or work in an agency across town or money for lunch. Neighborhood volunteer centers and reimbursement of expenses are two methods that have enabled these groups to volunteer.

Isolde Chapin Weinberg
National Center For Voluntary Action

For volunteers to perform well, they need to have a sense of responsibility. Too often government agencies have seen volunteers as inexpensive, unskilled laborers, not as a tremendous resource waiting to be tapped. Under-utilized volunteers rarely develop a solid sense of stewardship or participation. On the Appalachian Trail, where the clubs are clearly in the hot seat of responsibility, there is a remarkable level of commitment and resolve to do well. Public land managers must be willing to have faith

in volunteer organizations with good track records. In some cases specific legislation will be necessary to give volunteer groups significant responsibility.

Lawrence R. Van Meter
Potomac Appalachian Trail Club

Several urban recreation agencies could not function effectively without the public's efforts. With the initiation of the Gramm-Rudman Act and the general trend of reduced federal support for local services, the reliance on volunteerism will only increase in the coming years. The support and recognition of the public's effort must be continued at all levels of government.

Lawrence Allen
Temple University

be given to linking compatible uses in certain areas. Though certainly the natural resource recreation area would have to have multiple uses, it would seem that it could be planned in such a way that compatible uses are grouped and linked and non-compatible uses are separated.

Chapter 2

Private Landowners Have Opportunities and Needs

We recommend

- Private landowners recognize the opportunity to provide expanded recreation resources and services to the public.

- Local, state and federal governments consider incentives to private landowners to increase public access, and review existing statutes, policies, regulations and practices to assure that impediments to providing public recreation on private lands are removed.

- Recreation organizations actively encourage respect for private property rights and assist in managing use of private lands.

Private landowners: important partners for recreation supply

Private lands constitute nearly two-thirds of our nation's land base, and host many recreational activities. The potential for private lands to provide even more recreation opportunities is great. Yet, many landowners have concerns, ranging from liability to vandalism, which prevent them from opening their lands to the public for recreation use.

The pressures on the nation's lands and waters to provide recreation opportunities will continue to grow. Projections of overall recreation demand made in 1962 for the year 2000 were reached in 1980. Present budget limitations at the federal, state and local levels make dramatic increases in public recreational land holdings unlikely.

Today, most of the public lands are in areas of the country where people are not. Conversely, private lands are often located near population centers. This makes private lands especially important in certain regions of the country, notably the East and the South. Some private lands provide the only access to public lands.

Government finally came to the realization that there would never be enough money to purchase, develop and maintain sufficient land and facilities to meet the demand for outdoor recreation. There is a growing recognition that the private sector, owning a majority of the land and resources, must be considered a partner in meeting future recreational needs.

Private lands are integral to meeting future demands for recreation. Whether it be for the production of wildlife, integration of trail systems, provision of support businesses for recreational enterprises, the assurance of solitude or exclusivity or the maintenance of open space near centers of human population, the importance of these lands to the physical and psychological well being of the nation's citizens is indisputable. Recreation planners and supply and demand analysts must take into account the importance of private lands to the spectrum of recreation activity.

Herbert E. Doig
Assistant Commissioner
New York Department of
Environmental Conservation

What we must do . . . is create new institutional ways for farmers, foresters and other landowners to be able to deal with the "people" aspects of recreational use. If owners incur costs, and recreation users reap benefits, there has to be a way for the users to repay the owners, or there simply will not be the amount of recreation that would otherwise be possible. We pride ourselves in this country on our ability to let the free market regulate most of our activities, but this is one where we have not yet invented a market mechanism in many places, and we need to encourage that.

Neil Sampson
Executive Vice President
American Forestry Association

The system we have is not working, and the problems of creating quality sometimes seem insurmountable. If we are to save our wildlife and add new dimensions to recreational programs, we must turn to the private sector for answers. But, unfortunately, we are creating problems in this area faster than we can solve them.

Dayton O. Hyde
National Cattlemen's Association
Oregon

While we recognize the extent and the seriousness of the challenges to opening and reopening private lands to recreation, we also recognize opportunities to do so. Farming, ranching, timber production and other resource industries are experiencing difficult economic times. Adversity has prompted many in these industries to consider moving from single-purpose land management to multiple use management—from farming alone to farming and wildlife management, for example. As one witness told us, some landowners have arrived at a new view of recreation: "If it pays, it stays."

How recreation "pays" can vary. It can pay in community appreciation for the landowner, especially a corporate landowner. It can pay through reduced tax property payments, where a local jurisdiction provides credit for allowing public recreation access, or in reduced federal taxes resulting from donation of a public recreation easement. It can pay though a recreational use lease, typically entered into by a club or a unit of government. Or, it can pay through individual fees charged for services or facilities. Successful efforts to maximize recreational access to private lands must be voluntary and not coercive and originate at the state and local levels, because of the importance of state liability and trespass laws and local taxing practices.

Landowners have legitimate concerns about opening their lands

We participated in a workshop about recreation on private lands, convened by Senator Wallop, which revealed several reasons why private land owners are hesitant to provide public access.

- Managing land for public recreation is primarily managing for people. Many private landowners have neither the training nor the desire to manage visitors.
- Recreation use is sometimes not compatible with the main uses of land.
- Acts of trespass, vandalism and litter are reportedly increasing. "Willful trespass with firearm" is troublesome to many owners.
- Owners fear liability if people get injured on their property.
- Personal reasons for owning lands are changing. Many people seek privacy and discourage use by others.
- Incentives for the landowner are often lacking. In many cases, the land owner is unable to receive any compensation for public recreation uses.

For these and other reasons, substantial portions of the private lands may never be available for general public recreation use.

Land ownership patterns influence recreation opportunities

Patterns and structures of land ownership in this country are changing, especially in rural areas, and these changes affect public access. Much of the change results from uncertain economies for agriculture and forest products, two principal uses of rural, private land with multiple recreation values.

The number of small farms and forests is growing. Owners of small tracts often acquire them for personal recreation space and are less inclined to open their lands to other people. Smaller tracts often preclude certain types of recreation.

The number and size of larger farms and forests are also growing. These larger tracts generally are managed for maximum income production. While the majority of industrial forest land is open for some recreation, restrictions on access are increasing due to concerns over vandalism, liability, and costs.

The future availability of private lands for recreation is difficult to predict because of the lack of consistent information over time to determine these trends.

We must remove disincentives for public access

Some forty-six states have statutes protecting private landowners from liability suits when they provide free public access, except in cases of gross negligence. Legal experts believe these recreation use statutes provide substantial protection to owners; however, the laws have seldom been tested. The costs of successful defenses can be substantial in time and dollars. Some liability concerns in the future may be resolved by amending state and federal liability laws.

However, these statutes can also inhibit private landowners from providing recreation access. The economic costs of maintaining open lands are high, and many landowners must seek financial return for recreation access. But charging fees for access and use generally eliminates the landowners' legal liability protection. Recreation is a valuable commodity, and landowners should receive fair economic value for recreation access.

The Florida liability law provides continuing protection, even when a fee is charged, providing the landowner meets certain criteria for wildlife habitat management. Other states should consider similar expansion of protection.

Trespass is another challenge. Local enforcement officials generally look upon trespass as a nuisance and are reluctant to investigate and to prosecute offenses. In a number of cases, recreation groups have aided landowners through peer pressure, posting of signs and other means. Landowners, enforcement officials and enthusiasts need to develop local strategies for confronting and controlling recreation trespass.

- Recreation organizations should actively encourage respect for private property rights and assist in managing use of private lands.

We must establish incentives for private landowners

Several states encourage private landowners to plan for multiple uses of their lands. Wisconsin rewards land conservation by providing landowners with tax incentives to manage lands for forests. New Jersey gives grants to landowners to develop recreation facilities. Virginia develops agricultural and forestry districts which provide tax benefits and some protection from development to landowners. Many states reduce or postpone property taxes for certain open space purposes, including recreation.

A number of Internal Revenue Service policies and regulations significantly affect potential donors' willingness to consider making a gift of land or conservation easements. An example is the current requirement that donors assume the cost of a private appraisal of the value of a donated easement. These policies and their effects on conservation and recreation philanthropy should be examined.

Private lands have recreation value: make landowners aware

Often landowners do not realize the potential value of their land for recreation. Landowners need to understand how they can increase the value of their lands by providing public recreation access.

In times of economic pressure for agricultural uses, recreation may offer a way for private landowners to remain economically viable.

- States should create statewide councils of private landowners and recreation users to define mutual goals for conservation of private resources, enhancement of recreation access, and monitoring conditions of use.

- Extension agents and soil conservation districts should help landowners expand recreation access through technical assistance programs.

- A clearinghouse should be established to more efficiently monitor, assemble and distribute legal, regulatory and other technical information and advice about recreation on private lands.

The farm bill: potential to improve quality and quantity of land for recreation

The 1985 Omnibus Food Security Act will expand recreation opportunity on private lands. The Act creates two programs, "Conservation Re-

serves" and "Easements for Credit Exchange," that remove large amounts of land from annual crop production and dedicate them for an interim period to conservation, recreation, and wildlife purposes.

The law authorizes up to 45 million acres to be placed in conservation reserves and removed from farm production for ten to fifty years. Soil, water and vegetation quality are improved when these lands are withdrawn from production. This potentially improves recreation beyond the reserved area as well.

As of October 1986, the U.S. Department of Agriculture had enrolled 9.1 million acres in this program. Much of the reserved land is in the more sparsely populated Plains states. The Easements for Credit program is not yet operational.

The effects of conservation reserves on the supply of publicly available recreation lands is uncertain. The economic distress in agriculture which stimulated enactment of this statute also motivates some farm owners to allow access only to persons or organizations able and willing to pay substantial fees for recreation.

Presently, billions of dollars are paid to agricultural interests in price supports for surplus crops. If equivalent dollars were paid to the same interests for wildlife habitat and recreation access improvement, extraordinary changes might occur in access to private lands.

Coordination of government actions would help

Public actions to expand recreation use on private land are likely to involve coordinated efforts by different agencies—agriculture, parks and recreation, and fish and wildlife, for example. Several people have suggested to us that interagency cooperation is difficult to achieve, and even harder to maintain. For example, fisheries policy, research and management—an area of significant interest to recreationists—is fragmented, and at times contradictory.

- The secretaries of the U.S. Departments of Agriculture and the Interior should jointly create a special *ad hoc* task force to focus attention and make detailed recommendations on issues involving public recreation access to private lands.

Dialogue stimulates recreation on private lands

Landowners have experienced vandalism and other malicious behavior on their lands. This disregard for private property by some individuals can be quite costly to private landowners.

A timber company in Virginia threatened to close its lands for recreation. The Izaak Walton League provided a forum where company representatives and recreation users discussed their problems. As a result, the

company decided against closing their lands to the public. The hunters, anglers, hikers and birdwatchers who enjoyed the land agreed to adhere to a code of behavior developed by the landowner and themselves.

Several states have followed this model and officially adopted councils of landowners and users to prevent unnecessary closures and provide a forum to voice concerns.

- A broad coalition of recreation users and private landowners should adopt codes of ethics describing acceptable behavior on all private lands.

In those few instances where landowners know about the law there is a perception that recreational use statutes do not provide sufficient immunity to act as an incentive for public access. Private landowners do not want to know if they will have a successful defense to a recreational injury lawsuit. Their concern is much more basic, they want to know "Can I be sued?" . . . Unfortunately, the answer invariably is 'yes' with or without limited immunity recreational use statutes . . . Whether you win or lose, it has been said that a lawsuit is the worst thing that can happen to an individual with the exception of death or serious illness. The challenge to encouraging public recreation access to private lands is to some how insulate the private landowner from the costs attendant to a lawsuit . . . Absent a coordinated institutionalized approach to the issue of recreational injury liability, twenty years from now we will be back once again to explore the challenge, including public recreation access to private lands.

Louis C. Kozlowski, Esq.
Springfield, Virginia

So why do we keep our lands open to the public? Because we still feel that the goodwill we generate is worth the trouble. And because we have some concern that if the private sector withdraws its lands entirely, it will necessitate expanded government ownership to meet the demands of the public.

Clarence Streetman
Bowater Southern Paper Company

A concern voiced by college students that visit our ranch on field trips is about our rates. Wouldn't hunting get so expensive that the poor man will not be able to afford to hunt. My answer is, "If you give me one coke and one pack of cigarettes a day for a year I will give you a good hunt." It depends on where the priorities are.

Hugh Louis Wedge
Doss, Texas

In the nine Virginia counties served by the Piedmont Environmental Council, 14 percent of all private lands have been dedicated by their owners to continued rural use, at least in the short term. This represents protection of 300,000 acres—one and one half times the area of Shenandoah National Park. These lands have been protected through landowner response to incentives offered by government, primarily Virginia's agricultural and forestry district program, but including conservation easement provisions of the Federal tax code.

Robert T. Dennis
President, Piedmont
Environmental Council

How Three States Help Private Landowners

Wisconsin. Wisconsin's 'Managed Forest Law' provides a creative way to directly reward landowners for land conservation. The law encourages the management of private forest lands for commercial use, while recognizing the objective of individual property owners, compatible recreation uses, watershed protection, wildlife habitat and public access. The act provides lower taxes to owners of 10 acres or more who adopt and use an acceptable forest management plan. The plan may include approved, but not mandatory, actions to enhance wildlife, watershed or aesthetic values. The landowners may leave all or some of the area open to public hunting, fishing, hiking, skiing, sight-seeing or other recreation pursuits. Unauthorized access by motorized vehicles is prohibited.

Through 1992 the owner pays a fixed annual tax of $.74 per acre on open lands. On lands closed to the public the owner pays $.74 per acre, plus an additional annual tax of $1.00 per acre. Present taxes on forest land are about $2.00 per acre, so the economic benefits to landowners are especially high for open lands. Participants may not charge a user fee or lease managed lands. In 1992 and every fifth year, tax rates for open and closed areas will be adjusted.

The state pays local governments $.20 per acre in lieu of taxes from a state forestry fund. Participation in the 1987 signup, the state's first, encourages state officials. About 150,000 acres were designated for forest plans, with more than half of the owners choosing to keep lands open to the public.

New Jersey. New Jersey's 1984 'Open Lands Management Act' provides financial assistance to aid the development and maintenance of private property for public recreation. The Act was adapted from authority used by the Countryside Commission for England and Wales where a strategy of aiding private landowners is long-standing.

In New Jersey private landowners are given grants to make lands available to the public. Emphasis is on developing modest facilities to support passive recreation. Funding is also available for repair or replacement of damaged facilities and properties of the landowner or adjacent owners due to public use. Maximum grants are $10,000. Purchase of liability insurance by the landowner is an eligible expense for the length of the agreement.

Funds are used to open up new areas or provide added recreation activities that had not previously existed. Owners agree to a participate for a fixed period, not less than one year. The program guarantees public access for the full term, even with change of ownership. Fees can be charged for use of facilities, but only to cover costs of maintenance and repair.

Participants may be private individuals, businesses or organizations. Landowners benefiting the most from the program to date are nonprofit organizations. Farmland is poorly represented. Agreements with 17 owners have opened about 2,200 acres. The average cost of access covenants is $75 per acre for an average agreement of 5.5 years. Thus, the annual cost per acre is about $14. In the future program managers propose to 'take it to the cities and suburbs' and direct the program to newer private residential developments as well as vacant lands and waterfronts in economic transition.

Virginia. Virginia's authority to create local agricultural and forestry districts has resulted in about one-half million acres of private land voluntarily reserved as open space. About two-thirds of the acreage and perhaps 80 percent of the easements are in the nine counties organized by the Piedmont Environmental Council, a private nonprofit group. Public recreation access is not required, but is usually granted by landowners for hiking, horseback riding and cross-country skiing. "Firearms use is watched very closely," according to local officials, as is use of motorized vehicles.

The creation of districts is locally initiated by landowners and counties and is administered by the State Department of Agriculture and Consumer Services. Landowners, through county officials, generally determine the length of the agreements; 4 to 8 years is the present range. A proposal to amend state law to lengthen the contract term to 25 years will be advanced this year.

There are basically two incentives to landowners: districting "guarantees what the neighborhood will look like", and it provides for use value taxation, as opposed to potential development or market value tax rates. It is also more difficult procedurally to condemn reserved land for other purposes—roads, for example—so officials tend to give greater attention to proposed public projects.

Outdoor Recreation on Indian Lands

Native Americans have developed life-styles, cultures, religious beliefs and customs around fish, wildlife and other outdoor resources. These resources continue to provide sustenance, cultural enrichment and economic development for many tribes.

Native Americans own approximately 90 million acres of land. Native American lands are regarded as private lands, and decisions to develop public facilities rest exclusively with the tribe or pueblo. The opening of reservation lands for tourism and public access is relatively recent. However, these lands support approximately 10.5 million recreation days a year, including 8.5 million days of public use. Most of this recreation activity is water-based, especially fishing.

Reservation lands also provide critical wildlife habitat for endangered species, such as the bald eagle, as well as conservation of other plants and animals. Indian tribes are one of the nation's largest employers of fish and wildlife biologists.

As the population grows in the West, pressures on tribal lands for public recreation increase. As Mr. Cecil Antone from the Gila River Indian Community testified, "The public must be aware Indian lands are not public lands . . . Recreation on Indian lands is a privilege accorded to respectful guests, not a right that comes with American citizenship."

Access is a supply factor that might influence hunting participation at least as much as wildlife abundance. If wildlife is available but hunting is restricted, then there is no recreation provided. Factors related to the willingness of private landowners to permit hunting access have been studied by several researchers. These studies repeatedly show that the primary reason for posting of a land is for protection of property and control of trespass. About 62% of the variance in posting rates in New York was accounted for by three variables: percentage of permanent residents among property owners, educational level of landowners, and property value. These authors felt that a key factor involved with posting was prior experience of property owners with recreationists. Those who had negative experiences with hunters were more likely to post their land, compared to landowners that had not had conflicts with hunters.

The posting of land does not necessarily preclude hunting. Many private lands are intensively hunted by landowners, relatives, neighbors and friends. In fact, about 68 percent of the hunting effort in the United States during 1980 took place on private land. Hunters spent $36.7 million that year for fees to hunt on private land.

ED LANGBAUM

The Liability Crisis Threatens Outdoor Opportunities

We recommend

- Recreation providers (both public and private entities) improve risk management practices through better training and sharing of information.

- Federal and state governments enact or improve recreational use statutes to provide greater protection to governmental entities and private providers who allow the public to use their land for recreation.

What is the problem?

Throughout our history, self reliance has been an American hallmark. From the pilgrims of New England to the pioneers of westward expansion to the pilots of air and space, Americans always have been willing to accept risk in the hope of greater rewards. However, the year of 1986 marked a time of fundamental debate over who is responsible when someone is injured—who pays when something goes wrong.

Day care centers, skating rinks and beaches are being closed because liability insurance is either unavailable or too expensive. From airlines to zoos, all segments of our society are affected. As we held public hearings across the country, we heard time and again about the liability crisis. In 1985 1986, liability insurance premiums for recreation providers skyrocketed 200 300 percent - sometimes more.

In response, some cities cut back on recreation programs: Chicago removed playground equipment, Wheeling, West Virginia, stopped renting horses, Denver refused to let kids sled in the parks. Private recreation providers were also threatened—Seven Springs Mountain Resort in Champion, Pennsylvania, raised the price of ski lift tickets an average of 25 percent last season to compensate for a sixfold premium increase.

What is tort liability?

Black's Law Dictionary defines a tort as a: "private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." Three elements of a tort action are (1) existence of legal duty from defendant to plaintiff; (2) breach of duty; and (3) damage as proximate result.

To illustrate, the following case was settled out of court and resulted in the city of Chicago removing some of its parks' playground equipment. A two year old child fell off an eleven-foot slide. The city of Chicago owes that child a duty of reasonable care to provide safe equipment and a safe environment in which to play (1st element). The child's attorney claimed that this duty was violated by putting a playground on asphalt, instead of a softer surface (2nd element). The child was severely injured when he fell and he was injured because the City had violated its duty of reasonable care by putting a playground on asphalt (3rd element).

There are many causes of the liability crisis

In the summer of 1972, neighborhood children were playing on a swing set in the backyard of Morris and Rosalyn Friedman. One of the children—9-year-old Sylvia Ashwal—was being pushed on a swing by playmates Deborah and Lisa Rosenberg when she somehow broke her leg. Roslyn Friedman took Sylvia to the hospital and assumed that the matter would be forgotten.

But three years later the Friedmans were sued by Sylvia and her parents when Sylvia's fractured leg stopped growing. Her parents also sued the Rosenberg children, Sears and Roebuck (which sold the swing) and Turco Manufacturing Company (which made the swing). A jury awarded Sylvia $2.5 million, but only Turco and Sears were held to be negligent.

This suit shows a willingness of the American public to seek compensation for accidents which used to be viewed as part of life. But at the same time that people are more willing to sue, they are also more willing to participate in high risk sports. Recreational activities with greater risk, such as hang gliding, rock climbing, and whitewater rafting, are increasing in popularity. While there are more risks that people are willing to "take", there are fewer risks that they are willing to "accept."

Unprofitable investment practices by the insurance industry during the late seventies and early eighties also helped contribute to the liability crisis by causing an increase in the price of premiums. Another factor is that insurance companies and others are increasingly willing to settle cases out of court to save time and money. This encourages frivolous lawsuits.

What can be done?

The general liability crisis is beyond the scope of this Commission's mandate. Some reforms being considered by others addressing the problem include caps on damages, changes in joint and several liability, and decreasing contingency fees. However, there are some specific actions which could be taken by providers and governments to minimize the impact on recreation opportunities.

Frivolous cases are being presented to insurance companies who are reluctant to bring a case to court at a high cost to the company. These cases are then settled out of court to save time and money, resulting in situations where innocent defendants lose untried cases and they lose their insurance coverage.

KATHERINE BATTIN
Boston hearing

What providers can do: risk management

One positive outgrowth of the liability crisis is increased emphasis on *safety* in the outdoors. Advances have been made in safety procedures, equipment, and guidelines—though room for improvement always exists. Although most recreation involves an element of risk, strict risk management practices can lower the possibility of injury and lawsuit. In one of our public hearings, the manager of two ski areas described risk management this way:

A lot of people don't want to hear it. But we solved it [the liability problem] eight years ago. We started a very, very strict policy of training of our personnel, our working people, our principal owners of ski areas. A lot of this was with the Forest Service cooperation. Safety programs, safety programs, safety programs.

NICK BADAMI
San Francisco hearing

Self-insurance is an option

Some recreation providers have either been unable to acquire insurance or to afford it. Hennepin Parks, an independent special district providing regional parks and trails for Suburban Hennepin County in Minnesota, decided to self-insure after its liability insurance premiums more than doubled from 1984 to 1985. To finance this program, Hennepin Parks set aside $175,000 for claim settlements. This amount compares with a 1985 premium for general liability of $99,000.

However, establishment of a self insurance pool is not enough. Hennepin Parks also hired a professional independent risk manager to administer the self insurance program, handle claims, coordinate and strengthen their safety program, conduct risk management training programs, and serve as a liaison to insurance companies.

While self insurance is not a solution for everyone, it is a viable alternative for entities that can create a sufficient self insurance pool (either

alone or in conjuction with other similarly situated groups) and for entities who will aggressively pursue techniques to lower their exposure to liability.

Better information is needed

There is little hard data on the number of lawsuits, amount of damages, numbers of cases settled out of court, reasons for liability, and other factors. Without information, providers and insurers of recreation make poor decisions.

Kirk Bauer, executive director of the National Handicapped Sports and Recreation Association, told us about a state-owned ski area in New Hampshire where new devices have been used that allow paraplegics and quadraplegics to "sit ski." However, sit skiing has been banned because insurance companies will not cover sit-skiers. But Baur provided results of one study which showed that disabled skiers are 50 percent less likely to suffer injury than non-disabled skiers. Presumably, if the insurance company had the proper information, it would cover sit-skiers.

A recreational law institute could be created to provide a clearinghouse for information on risk management and defense of liability claims. A nonprofit institute could be housed at a university and could be self-supporting by charging for the information that it disseminates.

What states can do: recreation use statutes

A recreational use statute provides protection to someone—a private individual, organization, or government—who allows people to use his or her land for recreation without charge. This is done by shifting the standard of care from mere negligence to gross negligence. *Mere negligence* is defined as failure to use such care as a reasonably prudent and careful person would use under similar circumstances. *Gross negligence*, on the other hand, goes beyond mere carelessness; it is outrageous behavior which demonstrates an utter disregard for the physical well being of others.

The justification for altering the standard of care is that the recreation provider is making his or her land available for little benefit to himself; and since the outdoors contains natural hazards, the person receiving the greatest benefit should accept the greatest amount of responsibility.

In addition, it is impossible to protect people from all natural hazards in the outdoors. A national forest is not Disneyland. The dangers are real. While the government should make the experience as safe as possible, visitors must accept responsibility for their own safety.

Approximately 47 states have recreational use statutes which provide protection for private landowners when the public uses their land for recreation. Lease agreements between the landowners and a public agency may also help to relieve private landowners of exposure to liability. Some states also have recreational use statutes which protect public entities that provide recreation.

We recommend that states enact recreational use statutes to protect volunteers as well, by making them liable only for gross negligence and not mere negligence. Volunteers involved in activities where injuries are likely to happen should be required to know first aid techniques.

Another tort reform recommendation is recreational responsibility statutes. These are similar to recreational use statutes, but they list the responsibilities of both the recreation provider and the recreation user. For example, Colorado has a skier responsibility statute, which defines the responsibilities of the ski resort and the skier. If the ski resort has fulfilled its responsibilities, then there is a presumption that the resort was not negligent. Many user groups support this type of legislation in an effort to create more opportunities to enjoy the particular sport.

What the federal government can do

We recommend that Congress amend the Federal Tort Claims Act to include a recreational use statute that would alter the standard of care for the federal government to gross negligence. We also recommend that entrance and user fees not constitute consideration. In the typical recreational use statute, the requirement of no consideration is inserted to prevent a for-profit operation from enjoying greater protection. However, the federal government does not make a profit on user fees and should not be held to the higher standard.

This amendment will not alter the federal government's responsibility in many states. Under the FTCA, the federal government is treated as an individual in the state where the accident occurred. Many courts have found that if the state has a recreational use statute protecting the private landowner, the federal government is protected under that statute.

How will the crisis be resolved?

As recreational law attorney Jim Kozlowski says, "There is no silver bullet which will bring the crisis to an end." The problem has many causes and will require the exploration of many remedies. Risk management, tort reform, and insurance reform are just a few.

Recreation providers should also look to others affected outside the recreation field. Only through a comprehensive approach will a long term solution be found.

Kansas Recreational Use Statute

Kansas and Virginia, among other states, have implemented recreational use statutes. The Kansas Statute section 75 6104 (n) reads as follows:

"A governmental entity or employee acting within the scope of the employee's employment shall not be liable for damages resulting from . . . (n) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or

open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury."

This law was applied in the case of *Lee v. City of Fort Scott*, 710 P2d 689 (Kan. 1985). The plaintiffs, Frank and Mary Lee, sued the City of Fort Scott after their son, Frank Lee, Jr., died of injuries received when their son's motorcycle struck steel cables strung between trees in Gunn Park.

The cables had been in place for seven years to keep vehicles off of the golf course. At the time of the accident there was no sign warning of the cables and there was no history of any prior accidents caused by the cables. The lower court and the Kansas Supreme Court both agreed that the City's conduct did not constitute gross negligence and therefore the City was not held responsible for the accident.

The Issue

Liability issues are causing recreation opportunities to be lost or diminished.

The Options

- Strengthen the laws which limit the liability of recreational land owners, administrators and providers.
- Establish a public relations program to recognize private and corporate efforts which allow public use of private property.
- Pass legislation and funding for recreational use easements.

COLORADO OUTDOOR RECREATION RESOURCES AND ISSUES

Chapter 4

We Can Keep Our Communities Attractive Places to Live, Work and Play, and Maintain Open Space

We recommend

- Communities target key parts of their local heritage, including open space and natural, cultural, scenic and wildlife resources, and build prairie fires of action to encourage that growth occur in appropriate areas and away from sensitive resources.

- All governments and the private sector make imaginative use of a wide range of growth-shaping tools to identify and protect prime assets in growth planning processes, which also define areas most appropriate for more intensive development.

- States help lead the way by establishing registries of outdoor resources with statewide significance, such as rivers, wildlife areas, historic sites, unique ecological areas, coastal lands, and scenic countrysides; and assist localities to develop and implement growth-shaping plans and policies.

- The federal government coordinate its public investment decisions with state recreation priorities and local growth plans to avoid conflicts and encourage private public partnerships in protecting key areas.

The choice is ours

We each have the choice of whether we want our communities as they grow to become a jumble of unsightly development and noisy concrete deserts, or whether we will preserve fresh, green pockets and corridors of living open space that cleanse our air and waters and refresh our populations. We have the responsibility and the capacity to choose, for ourselves, our neighbors, and for future generations.

Growth is a reality and can be a positive force in our nation. As new areas are constructed, we must look for ways to produce the parks and

lands, historical artifacts, and wildlife, or advertising local events, lodging and outfitting and guiding services.

Report of the Commission on
Idahoans Outdoors
June 1986

Eighteen states explicitly call for programs to improve public understanding of and behavior in the outdoors. Ten states call for better environmental and outdoor education programs in elementary or secondary schools, the remainder emphasize efforts to reach the general public in parks and other resource areas. Five states outline programs that involve both school and park locations, like New Mexico's approach to the national "Project Wild" program for fish and wildlife areas and "Project Respect" for private lands.

New Hampshire, Idaho and others relate the lack of an outdoor ethic to specific problems such as littering, vandalism and conflicts between motorized and non-motorized trail users. Some programs call for actions by private user groups, equipment managers and dealers as part of an overall strategy to educate the public.

Liability concerns

Issue:

o *Liability issues are causing recreation opportunities to be lost or diminished.*

Options:

o *Strengthen the laws which limit the liability of recreational land owners, administrators and providers.*

o *Establish a public relations program to recognize private and corporate efforts which allow public use of private property.*

o *Pass legislation and funding for recreational use easements.*

Colorado Outdoor Recreation
Resources and Issues
1986

Legal Liability and Insurance:

1. Develop and implement comprehensive risk management plans. Public, private and independent providers.

2. Establish a recreation insurance marketing program. Ohio Department of Insurance.

3. Support legislation to enable recreation providers to establish insurance pools, joint authorities or other joint risk management systems. [Ohio General Assembly, Ohio Department of Insurance, public, private and independent park and recreation providers].

Outdoor Recreation in Ohio
A Report to the Governor from
the Commission on Ohioans Outdoors
March 1986

Almost half the states expressed concerns about liability problems that limit recreation opportunities:

o fears about lawsuits reducing the availability of private lands for recreation (e.g., farmlands for hunting).

o unavailability or high cost of liability insurance causing closure of key private facilities or service concessions (horseback stables, river outfitters).

o liability fears closing areas and reducing programs aimed at providing otherwise desirable high-risk recreation opportunities (rock-climbing, wilderness backpacking, sailing, kayaking and other water sports).

Recreation workforce

Park and recreation maintenance has grown beyond the need for just a "mop and bucket" janitor. Maintenance, in general, has become a complex, year-round operation dependent on efficient and knowledgeable management practices. . . .

As in all other industries in both the public and private sectors, natural resource managers are faced with new problems and new challenges. Answers to these modern dilemmas are to be found in new techniques and technologies as well as creative and professional application of time tested management practices. Regardless of the approach, training personnel to keep up with the times is essential. There must be commitments at all levels of government to maintaining staff levels in our park and recreation departments.

Delaware: Report to The Presidents
Commission on Americans Outdoors
September 1986

The Tennessee General Assembly should establish a Volunteer Act, as proposed by the interagency Volunteer Committee, to facilitate the use of private citizens in all phases of government.

We need to better recognize our volunteers and the quality and importance of their work by offering them better institutional support from

No trespassing — protecting private property in Alaska

by Janie Leask

Several members of a hunting party stray onto private land without realizing it. The land is unmarked, and each of the hunters assumes they are still on public land. At the end of the day, the hunters build a fire and camp overnight. Is this a trespass situation?

A contractor needs to clear some land for construction of a small structure on public land. Rather than keeping to the easement with the bulldozer he needs to do the work, he decides to take a shortcut across some privately owned land. What harm can there be in crossing just once?

In another area of the state, several men make their way furtively onto unmarked land they clearly know is privately owned. They vandalize the area by digging up some old gravesites, in search of native artifacts they can sell. They find nothing of value, and do irreparable damage to the site.

Everyone would certainly recognize the latter incident as a serious case of trespass, and few would argue the need for prosecution. But there is also the potential for serious harm in the first two cases cited. In the first, there is the potential for a forest fire, as well as some likelihood for adverse impact to the subsistence resources of the region. In the second, there is a possibility of serious damage to the land by heavy equipment. A bulldozer crossing the tundra only one time can cause severe surface degredation. In both of the first two cases, repeating the trespass violations over a period of time may have a much more adverse impact on the land, and on subsistence activity in the area.

My last column focused on trespass problems brought about by the complex and time-consuming process of land transfer initiated by the Statehood Act and the Alaska Native Claims Settlement Act. The need for public education on the issue was also discussed. Today's column will focus on efforts being undertaken to alleviate the problem of trespass in Alaska.

In January of 1985, the Alaska Land Use Council began work to address unauthorized use and trespass on both public and private land. A working group was established with representation from the state of Alaska, the federal government and a representative of the Alaska Federation of Natives.

The result of the working group's efforts was a formal set of Trespass Abatement Recommendations that was unanimously adopted by the ALUC in October of 1985.

The Trespass Abatement Recommendations took a "good neighbor" approach which encourages public and private landowners to cooperate to prevent trespass on adjoining land. The recommendations identify specific ways to offer public education intended to prevent unauthorized use of public and private land. For example, state and federal agencies are now providing trespass related information on agency maps, brochures and land planning documents. Private and public landowners are jointly establishing priorities for preparation of user information maps. They are also identifying and focusing attention on areas subject to high use and trespass.

The state's Department of Natural Resources, in cooperation with Bristol Bay Native Corporation, is developing an Easement Atlas for the Bristol Bay region. This joint mapping program will not only provide accurate land ownership information, but will also show the location of all valid public easements and right of way in the region.

These and other efforts to identify privately held lands adjoining public areas are the impossibility of marking the boundaries of the vast land tracts privately held in Alaska. For example, Doyon Ltd., one of the regional corporations created by ANCSA, is the largest private landowner in the United States. Some blocks of land held by Doyon, although not entirely contiguous, would well exceed the size of Rhode Island.

Other cooperative efforts brought about by the recommendations include coordination of information for public education; public service announcements; visitor center displays that illustrate land status through maps and publications; and development of formal agreements such as Land Bank agreements and land exchanges as vehicles to report suspected trespass incidents.

In addition to actions already being implemented, the working group's recommendations included establishing a central depository for land use policies and DNR easement information; school educational program that introduces materials on the history of the various land acts impacting Alaska and their effect on land ownership; and a landowner educational program that teaches sound land management principles and protection from trespass.

All of these recommendations are good ideas. They focus on public education of the issue, a much more reasonable approach to the problem than attempting to prosecute every person who inadvertantly crosses private land.

As a final suggestion, Alaska statutes need to be rewritten to better protect landowners under both authorized and unauthorized use situations. AFN, with input from private property owners, has drafted proposed legislation for introduction in the legislature. It is a first step to protecting private property interests.

Janie Leask, an Alaska native, is president of the Alaska Federation of Natives.

198

(907) 586-2890

STEPHEN F. SORENSEN
ATTORNEY AT LAW

BIRCH, HORTON
BITTNER, PESTINGER
& ANDERSON
A PROFESSIONAL CORPORATION

ONE SEALASKA PLAZA, SUITE 301
JUNEAU, ALASKA 99801

L.H. KIMBALL ASSOCIATES
3239 Hiland Drive • Anchorage, Alaska 99504

LAWRENCE H. KIMBALL, JR.

PLANNING & MANAGEMENT SERVICES
(907) 333-1876

ALASKA FEDERATION OF NATIVES, INC.

LAWRENCE H. KIMBALL, JR.
LAND MANAGER

411 W. 4th Avenue
Suite 301
Anchorage, Alaska 99501

(907) 274-3611

Mike Schneider
277-4551

PAUL COSSMAN
Attorney at Law

LAW OFFICES
BERNARD P. KELLY & ASSOCIATES
A PROFESSIONAL CORPORATION

310 K STREET, SUITE 506
ANCHORAGE, AK 99501
(907) 276-3188

SUND

Introduced: 1/23/85
Referred: Judiciary and
Finance

IN THE HOUSE BY DUNCAN

HOUSE BILL NO. 97

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to government liability for damage or injury resulting from hazardous recreational activities."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.-040(c). However, an [NO] action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander,

misrepresentation, deceit, or interference with contract rights;

(4) is an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity conducted on property owned or leased by the state.

* Sec. 2. AS 09.50.250 is amended by adding new subsections ~~to read:~~

(b) The provisions of (a)(4) of this section do not limit liability that would otherwise exist for

(1) the failure of the state or an employee of the state to guard or warn of a dangerous condition or of another hazardous recreational activity known to the state or the employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity from which the damage or injury arose;

(2) damage or injury suffered in a case in which permission to participate in the hazardous recreational activity was granted for a specific fee;

(3) injury suffered to the extent proximately caused by the negligent failure of the state or an employee of the state to properly construct or maintain in good repair a structure, recreational equipment or machinery, or substantial work of improvement used in the hazardous recreational activity from which the damage or injury arose;

(4) damage or injury suffered in a case in which the state or an employee of the state recklessly or with gross negligence promoted the participation in a hazardous recreational activity; for purposes of this paragraph, promotional literature or a public announcement or advertisement that merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion; or

(5) an act of gross negligence by the state or an employee of the state that is the proximate cause of the damage or injury.

(c) Nothing in (b) of this section creates a duty of care or basis of liability for personal injury or for damage to personal property.

(d) Nothing in this section limits the liability of an independent concessionaire, or any person or organization other than the state, whether or not the person or organization has a contractual relationship with the state to use the property owned or leased by the state, for injury or damage suffered as a result of a hazardous recreational activity operated by the concessionaire, person or organization on property owned or leased by the state.

(e) In this section,

(1) "hazardous recreational activity" means a recreational activity that creates a substantial risk of injury to a participant, and includes activities such as

(A) water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning has been given or the injured party should reasonably have known that there was no lifeguard provided at the time;

(B) diving into water from other than a diving board or diving platform, or at a place or from a structure where diving is prohibited and reasonable warning has been given;

(C) animal riding, including equestrian competition, archery, bicycle racing or jumping, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling, off-road four-wheel driving, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants, surfing,

trampolining, tree climbing, tree rope swinging, water skiing, white water rafting, and wind surfing;

(2) "participation in a hazardous recreational activity" includes assisting another to participate in the activity and being present at the site of the activity as a spectator who

(A) knew or reasonably should have known that the activity created a substantial risk of injury to the spectator; and

(B) was voluntarily in the place of risk or, having the ability to do so, failed to leave;

(3) "specific fee" does not include a fee or consideration charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee, as distinguished from a fee charged specifically for participation in the hazardous recreational activity from which the damage or injury arose.

* Sec. 3. AS 09.65.070(d) is amended to read:

(d) An [NO] action for damages may not be brought against a municipality or any of its agents, officers or employees if the claim

(1) is based on a failure of the municipality, or its agents, officers, or employees, when the municipality is neither owner nor lessee of the property involved,

(A) to inspect property for a violation of any statute, regulation or ordinance, or a hazard to health or safety;

(B) to discover a violation of any statute, regulation, or ordinance, or a hazard to health or safety if an inspection of property is made; or

(C) to abate a viclation of any statute, regulation or ordinance, or a hazard to health or safety discovered on property

inspected;

(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;

(3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning;

(4) is based on the exercise or performance during the course of gratuitous extension of municipal services on an extraterritorial basis; [OR]

(5) is based upon the exercise or performance of a duty or function upon the request of, or by the terms of an agreement or contract with, the state to meet emergency public safety requirements; or

(6) is an action for property damage or personal injury arising out of the person's participation in a hazardous recreational activity conducted on property owned or leased by the municipality.

* Sec. 4. 09.65.070(e) is repealed and reenacted to read:

(e) In this section

(1) "hazardous recreational activity" means hazardous recreational activity as defined in AS 09.50.250(e)(1);

(2) "municipality" means a home rule borough or city, a general law borough or city of any class, or a unified municipality under AS 29.68; the term includes a public corporation established by a municipality;

(3) "participation in a hazardous recreational activity" means participation as defined in AS 09.50.250(e)(2);

(4) "specific fee" means specific fee as defined in

AS 09.50.250(e)(3);

(5) "village" means an unincorporated community where at least 25 people reside as a social unit.

* Sec. 5. AS 09.65.070 is amended by adding new subsections to read:

(f) The provisions of (d)(6) of this section do not limit liability that would otherwise exist for

(1) the failure of a municipality or an agent, officer or employee of a municipality to guard or warn of a dangerous condition or of another hazardous recreational activity known to the municipality or to the agent, officer, or employee of the municipality that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity from which the damage or injury arose;

(2) damage or injury suffered in a case in which permission to participate in the hazardous recreational activity was granted for a specific fee;

(3) injury suffered to the extent proximately caused by the negligent failure of a municipality or an agent, officer, or employee of a municipality to properly construct or maintain in good repair a structure, recreational equipment or machinery, or substantial work of improvement used in the hazardous recreational activity from which the damage or injury arose;

(4) damage or injury suffered in a case in which a municipality or an agent, officer, or employee of a municipality recklessly or with gross negligence promoted the participation in a hazardous recreational activity; for purposes of this paragraph, promotional literature or a public announcement or advertisement that merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion; or

(5) an act of gross negligence by a municipality or an

agent, officer, or employee of a municipality that is the proximate cause of the damage or injury.

(g) Nothing in (b) of this section creates a duty of care or basis of liability for personal injury or for damage to personal property.

(h) Nothing in this section limits the liability of an independent concessionaire, or any person or organization other than a municipality, whether or not the person or organization has a contractual relationship with the municipality to use the property owned or leased by the municipality, for injury or damage suffered as a result of a hazardous recreational activity operated by the concessionaire, person, or organization on property owned or leased by the municipality.

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 97

Title: "An Act relating to government liability..."

Sponsor: Repr. Duncan

Requestor: House Judiciary

Date of Request: 1/31/85

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: General Government

BRU, Program or Subprogram(s) Affected: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill amends AS 09.50.250 to partially shield the state and municipalities from actionable claims growing out of hazardous recreational activities on property owned or leased by the state and municipalities. The bill would limit the state's liability for those hazardous activities outside its direct supervision or absent the state's failure to warn of dangerous conditins or to warn of another hazardous activity, or absent the state's negligent failure to construct or maintain recreational facilities, and absent the state's gross negligence.

Prepared By: Richard T. Peggues, Director Phone: 465-3672

Division: Administrative Services Date: 2/4/85

Approved by Commissioner: Richard L. Peggues/RE Norman C. Gorsuch Date: 2/4/85

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

ANALYSIS (Cont'd.)

As recreational uses of state property increase, this bill would protect the state from an increasing exposure to claims arising from hazardous recreational activities of individuals and private organizations that are, for the most part, outside of the state's direct control. Consequently, the bill would tend to limit the growing cost of such claims. Litigation costs will probably not decrease because of the very nature of tort claims.

ALASKA

STATE LEGISLATURE

MEMORANDUM

FEB 11 1985

February 8, 1985

TO: Representative Mike Miller, Chairman
House Judiciary Committee

FROM: Representative Jim Duncan

RE: HB 97

HB 97 concerning Government Liability for Hazardous Recreational Activities has been referred to your committee.

This bill is intended to limit the liability of governmental entities in situations where individuals are injured on public property.

Please schedule this bill for a hearing as soon as possible.

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 97

Title: "An Act relating to government liability..."

Sponsor: Repr. Duncan

Requestor: House Judiciary

Date of Request: 1/31/85

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: General Government

BRU, Program or Subprogram(s) Affected: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill amends AS 09.50.250 to partially shield the state and municipalities from actionable claims growing out of hazardous recreational activities on property owned or leased by the state and municipalities. The bill would limit the state's liability for those hazardous activities outside its direct supervision or absent the state's failure to warn of dangerous conditins or to warn of another hazardous activity, or absent the state's negligent failure to construct or maintain recreational facilities, and absent the state's gross negligence.

Prepared By: Richard L. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: 2/4/85

Approved by Commissioner: Norman C. Gorsuch Date: 2/4/85

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

ANALYSIS (Cont'd.)

As recreational uses of state property increase, this bill would protect the state from an increasing exposure to claims arising from hazardous recreational activities of individuals and private organizations that are, for the most part, outside of the state's direct control. Consequently, the bill would tend to limit the growing cost of such claims. Litigation costs will probably not decrease because of the very nature of tort claims.

Alaska Recreation and Park Association

P O Box 2664-DT
Anchorage, Alaska 99510

December 21, 1984

The Honorable Jim Duncan
P.O. Box 690
Juneau, AK 99802

Dear Representative Duncan:

Several months ago, we spoke concerning a possibility of seeking legislation for "public liability". Alaska is currently one of seven state's in the United States that does not have such legislation on the books. As a recreation professional in Alaska, I believe it would be very worthwhile to seek approval of such legislation. The public liability would aid in balancing out the responsibility for recreational activities between the participant or user of a facility vs. the governmental body offering that service.

Please review the California bill (attached), who many believe to be the nation's model in this area.

If I or Alaska Recreation and Park Association can be of assistance please advise. I would be willing to help in any way I can.

Continued Best Wishes.

Sincerely,

James R. Hall

James R. Hall, Director 6-5226-7-E
Parks & Recreation Department

cc: Alaska Recreation and Park Association Board

JRH/drb

Recreational Use Immunity Protection for Public Entities

Donn L. Black, Patricia Farrell, Donald A. McIsaac

ABSTRACT: Recent efforts by California park and recreation professionals have resulted in a unique recreational use immunity bill. It was enacted in 1983 by the California legislature and took effect as of January 1, 1984. Recreational immunity use is granted to public entities, but with some important limitations. The focus of the bill is on "hazardous recreational activities". The bill, known as AB 555, adds a section to California Tort Claims Act which governs public entity immunity and liability. A sound, reasonable balance appears to have been struck between personal responsibility in recreational pursuits and reasonable protection for the park user.

KEY WORDS: Liability, immunity, hazardous recreational activity, public entity, negligence, reasonable responsibility.

THE AUTHORS: Donn L. Black is legal counsel for the East Bay Regional Park District from the firm of Wendel, Lawlor, Rosen and Black. He graduated from the NYU School of Law.

Patricia Farrell is an associate professor at The Pennsylvania State University where she has served as department head for seven years. Her doctorate was from Penn State.

Donald A. McIssac is an associate with Wendel, Lawlor, Rosen and Black. He graduated from the University of California at Berkley, Boalt Hall.

On Easter Sunday in 1977, in the town of Gridley, California, Vernon Nelsen was on his motorcycle, heading home from the drugstore. As he entered a service road alongside the town park, a sign warned "NOT A THROUGH STREET". Farther along, the road was chained off. A sign hanging from the chain warned, "STOP". But Vernon didn't stop; he plowed through the chain barrier and was seriously injured. In the lawsuit that followed, California public entities came to the end of an era in which they had enjoyed "recreational use immunity".

The Public Interest in Recreational Use Immunity Protection for Public Entities

This uncertainty about recreation use immunity protection, or the lack of such protection, is an increasingly serious problem for park and recreation agencies throughout most of the country. Park providers' exposure to liability and lawsuits by recreational users is clearly growing. Increasing numbers of recreational enthusiasts are using the nation's parks each year. Many of them

are participating in a host of new, high-risk recreational activities.[2] In rural and mountain areas snowmobiles, off-road vehicles, and white water rafters are being used with increased frequency. Technology and human innovation is constantly producing new high-risk forms of recreational techniques in such increasingly popular sports as windsurfing, skydiving, and hang gliding. Recreational providers in urban settings are also experiencing an increase in risky sports and as a result, a greater potential for lawsuits.

The nation's parks and beaches might be just as safe as they ever were, but that is little consolation; these high risk activities put recreational users in greater danger of injury. If injured for any reason, these same recreational users are also more likely to sue as numerous articles and statistics in our increasingly litigious society have demonstrated. All of these factors - a growing number of recreational users, the advent of higher risk recreational activities, and the trend towards the courtroom - put park districts and other public entities in ever greater danger of expensive lawsuits.

The nation's parks and beaches might be just as safe as they ever were, but that is little consolation; these high risk activities put recreational users in greater danger of injury. If injured for any reason, these same recreational users are also more likely to sue as numerous articles and statistics in our increasingly litigious society have demonstrated. All of these factors—a growing number of recreational users, the advent of higher risk recreational activities, and the trend towards the courtroom—put park districts and other public entities in ever greater danger of expensive lawsuits.

At the same time that governmental agencies are encountering mounting litigation expense, many are also experiencing budget cutbacks. If dwindling revenues are being spent in defending personal injury suits and on costly liability insurance premiums, even less money is available to provide the recreational facilities sought after by the public, and to repair and maintain existing facilities. Government agencies today must be increasingly cautious in yielding to recreational demands. They may find themselves compelled to prohibit or restrict riskier forms of recreation, and may also find themselves allocating larger portions of their budgets for litigation reserves and insurance expense. Thus the litigation spiral tends to deflect park agencies away from offering services to the public and pulls them toward providing insurance protection.

Although court and legal commentators have assumed otherwise, recreational use immunity would encourage public entities to provide greater recreational opportunities to the public. Park and recreation agencies would be encouraged to accommodate the public's growing interest in more active and innovative recreational pursuits. They would also be secure in the principle that participants must assume greater personal responsibility for their own conduct and safety. The same immunity would also encourage park providers to commit more of their funds to recreational programs and facilities, both traditional and innovative, in the knowledge that marginal or specious lawsuits could be terminated in pre-trial proceedings so that fewer resources would be

diverted to litigation. When recreational use immunity for public entities is properly balanced between personal responsibility in recreational pursuits, and reasonable protection for the park user, the public interest is advanced. Indeed, that balancing is the core public issue in this whole liability debate.

In *Nelsen v. City of Gridley*[1], the court held that governmental entities are not covered by California Civil Code Section 846. That statute dating from 1963, gives "property owners" immunity from liability to injured recreational users of their property, under most circumstances. Forty-two other states have similar recreational use immunity laws. (Alaska, Arizona, Indiana, Missouri, North Carolina, Rhode Island, and Utah are the seven exceptions.) Like recreational use immunity statutes in most other states, California's C.C. 846 does not specifically say whether its protection extends to public as well as private landowners. (Only four of the statutes—Alabama, Ohio, Washington and Wisconsin—are expressly applicable to public entities; only Iowa's statute expressly excludes public entities).

The Courts: Application of Recreational Use Immunity Statutes to Government Agencies

Many court decisions and legal commentators have stated that recreational use immunity statutes have no application to public entities. Their rationale is typically that these statutes were enacted to encourage owners of private property to open their lands to public recreation; public agencies need no such encouragement, since their lands are already open to the public. This was one of the arguments the appellate court adopted in *Nelsen v. City of Gridley*.

The decisions of state courts opinions on the subject are about evenly divided. Florida, Illinois, and Oregon appellate courts have held or strongly suggested that parks or public entities cannot rely on recreational use immunity. Courts in New Hampshire, Georgia, and New Jersey have reached the opposite conclusion. In California, the *Nelsen* court disagreed with other California appellate courts that found protection for public entities under C.C. 846. But in the vast majority of jurisdictions the issue has not reached an appellate court, so that public entities remain blissfully uncertain as to whether they are protected by their state's recreational use immunity statute.

AB 555: California's New Approach.

Public park and recreation providers without specific recreational use immunity protection must be prepared to present their needs to their state legislatures. This was the approach recently taken by the East Bay Regional Park District (headquartered in Oakland, California) and other California local governments in the wake of *Nelsen v. City of Gridley*. The East Bay Regional Park District is an example of a public agency that has important needs when it comes to recreational use immunity. The district operates 44 regional parks

and 550 miles of trails on 58,000 acres of land in two California counties located in the San Francisco Bay Area. Its developed facilities and its undeveloped open spaces are used for a diverse spectrum of recreational activities. The district needs its own helicopters to conduct the search and rescue operations that are often necessary over its far-ranging parklands.

The East Bay Regional Park District was the first to propose a new statutory approach. It was an amendment to California's Tort Claims Act and came to be known as Assembly Bill 555 ("AB 555"). The bill became law on January 1, 1984, as Section 831.7 of the California Government Code. This statute is currently the only statute in the United States addressed solely to recreational use immunity coverage for public entities. AB 555 has many of the provisions found in other recreational use immunity statutes and also contains many other terms which improve and clarify the scope of the limited immunity. At the same time, AB 555 provides important protections for the park user. AB 555 represents a balancing of protections for public entities and recreational users which could serve as a model for examination by other states.

The Focus on "Hazardous Recreational Activities"

AB 555 is different from other recreational use immunity statutes in that it expressly addresses the problem of "hazardous recreational activities". Many recreational use immunity statutes apply simply to "recreational activities" in general. The intent of the authors in limiting AB 555 to "hazardous recreational activities" was to balance the public entities' need for reasonable protection from specious litigation against the recreational user's reasonable expectations of safety. AB 555 represents a judgment that the enthusiast who goes bicycle racing, tree climbing, trampolining, or plays football should be prepared to assume the risks that are inherent in high risk activities, and that park providers cannot be expected to make those activities risk-free. But AB 555 admits that the casual picnicker and the butterfly collector should be able to expect that they will not encounter any unusual risks—unless of course they go picnicking on the soccer field, or butterfly collecting on the archery range!

The "hazardous recreational activities" listed as examples in AB 555 include a wide variety of organized and individual sports and activities oriented to both rural and urban settings. They include: animal riding, archery, firearm shooting, bicycle racing, skiing, hang gliding, vehicle racing and off-road driving, rock climbing, rodeo, skydiving, body contact sports, trampolining, tree climbing, surfing and white water rafting. Water contact activities are given special attention. Diving from any object other than a diving board or platform is a "hazardous recreational activity". Diving where signs have been posted or other warnings have been given prohibiting diving is also hazardous. Swimming and other water contact activities are expressly defi-

nedas hazardous if conducted at a time or place where no lifeguard is present and the swimmer should have known that there was no lifeguard.

Some states such as Kentucky, New Hampshire and Virginia, have only a finite list of activities which are protected by recreational use immunity. The list of activities included as examples of "hazardous recreational activities" in AB 555 is not exclusive. The bill specifically extends its list to *any* recreational activity "which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury . . . ." This definition gives the courts the flexibility to apply the statute in all appropriate situations.

What is a recreational activity which creates a "substantial risk of injury"? While substantial risk of injury formula is open-ended, it is also a formula California courts are familiar with. In drafting its proposal for AB 555, the East Bay Regional Park District drew this "substantial risk of injury" formula from another part of the Tort Claims Act (Section 830), which deals with dangerous conditions of public property. The concept is to allow the judge or jury to consider whether the participant should have anticipated some risk of injury. It does not mean the court must find that the *injury* itself was foreseeable and probable. Rather, the focus is on whether a *risk* of injury was foreseeable. It is possible that courts or juries could be guided in this inquiry by injury statistics, or by the testimony of experts in a given recreational field. The basic standard is likely to be common sense.

It is also reasonably clear that AB 555 is intended by the legis[illegible]re to apply in the developed, supervised urban playground or park, as w[illegible] the isolated beach, or on undeveloped, open space grasslands. Some [illegible] activities listed in AB 555, such as trampolining or body contact sport[illegible]e far more likely to take place at the neighborhood playground or gym, t[illegible]n on an undeveloped hillside.

The differentiation between urban and rural recreational activities has an interesting history. In some states, the courts have taken it upon themselves to interpret the recreational use immunity to mean immunity only for those activities associated with rural undeveloped lands. For example, New Jersey Statutes Section 2A:42A-2 grants immunity to landowners who open their property to "hunting, fishing, trapping, horseback riding, training of dogs, hiking, camping, picnicking, swimming, skating, skiing, sledding tobogganing and *any other outdoor sport, game and recreational activity*. . . ." Yet, in *Harrison v. Middlesex Water Company*[3], the New Jersey Supreme Court decided that their recreational use immunity statute does not grant immunity to owners of land situated in residential and populated neighborhoods. The court felt that most of the enumerated activities normally take place upon natural and undeveloped lands located in thinly populated rural or semi-rural areas, and that the legislature's purpose had been to encourage the opening of lands to public use, where safeguards against injury could not be so easily afforded or instituted. Thus, even though the statute said it covered "any . . . outdoor sport, game and recreational activity," and even though swim-

ming was among the recreational activities specifically listed, the court refused to apply this immunity in the case of a drowning in a residential neighborhood.

Similar distinctions between urban/rural or developed/undeveloped lands have been created by appellate courts interpreting the recreational use immunity statutes in Georgia, Nevada, New York, Washington, and Wisconsin. Recreational use immunity statutes in seven other states—Colorado, Illinois, Iowa, Oklahoma, Oregon, South Dakota, Vermont and Virginia—expressly limit owner immunity to recreational activities on rural or non-residential, non-commercial lands. In most states, there is no specific decision on this issue by the courts or by statute. On the other hand, AB 555 focuses on the hazardous or nonhazardous nature of the activity—not where it takes place.

Participants, Assistants and Spectators

The sponsors of the new recreational use immunity law for California sought clarity in peripheral areas. Besides covering injury and damage to recreational participants, AB 555 specifically covers injury and damage to assistants (such as coaches and officials), and in some cases even spectators. In considering whether to include spectators within the immunity, the legislature again struck a balance between the spectator's reasonable responsibility for assumption of the risk, and the need to provide protection for the unaware. Under AB 555, the public entity is afforded immunity only if the spectator knew or should have known that there was a substantial risk of injury to spectators at the event and was voluntarily in the place of risk.

AB 555 sets up several exceptions to public entity immunity:

1. Exception: Known, Dangerous Conditions.

In almost all of the states that have recreational use immunity statutes, competing considerations of public policy dictate some exceptions to a blanket grant of immunity. The same is true of AB 555. In several situations, the California legislature decreed that the reasonable safety expectations of the recreator should be considered.

Liability is not limited when the public entity fails to warn or guard against a known, dangerous condition. No immunity is provided then. AB 555 expressly provides that such a known "dangerous condition" may be another hazardous recreational activity, or a dangerous condition of the public entity's property. This "known dangerous condition" exception is similar to the exception found in Alabama's RUI statute, Alabama Code Section 35-15-24.

If the recreational participant should have reasonably assumed the condition "as inherently a part of the hazardous recreational activity," it makes no difference that the dangerous condition was known to the public entity and the public entity failed to give warning. The immunity would still apply. At a reservoir, lake or stream the wader or swimmer would probably be held to have assumed the risk of stepping on a broken soda bottle, and he would

be considered solely responsible, if he risks a dive into such waters. These are reasonably forseeable risks which we all assume to be inherent in using the "ole swimmin' hole". This is the central idea of AB 555.

2. Exceptic · Specific Fee Paid.

All but one of the recreational use immunity statutes in the United States exclude from coverage, situations where there is a fee or "consideration" paid by the recreational user. AB 555 follows suit. There seems to be a universal understanding that when a fee is paid, the entity receiving the fee must exercise ordinary care. There is less than universal understanding as to what constitutes the fee which triggers that expectation. Under court decisions in some states, even the payment of an incidental fee will make the recreational use immunity inapplicable.[4] However in other states, the payment of an incidental fee has no effect under the recreational use immunity.[5]

Courts in other states have interpreted this exception more broadly, holding that a "charge" or "consideration" is paid whenever there is any mutual benefit for the participant and the property owner in the activity.[6] AB 555 is clearer on the subject of the fee exception than any other recreational use immunity statute. Immunity does not apply under AB 555 unless there has been a specific fee charged for participation in the specific hazardous recreational activity out of which the injury arose. This statute states that a specific fee "does not include a fee . . . charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee".

This bill makes it clear that its protection is intended solely for public entities and employees. The statute does not protect concessionaires or others operating a hazardous recreational activity on public proj. ty. This is true whether or not the person or organization has a contractual relationship with the public entity to use the public property.

3. Exception: The Agency's Gross Negligence.

In its final version of AB 555, the California legislature carefully included exceptions for other situations where it deemed immunity inappropriate. For example, the public entity will remain liable if the injury or damage was caused by the public entity's *gross* negligence (as distinguished from *simple* negligence). "Gross negligence" is not an easily defined concept. Black's Law Dictionary labels gross negligence as negligence of "aggravated character"[7]. Gross negligence has been termed "an extreme departure from the ordinary standard of conduct".[8]

Gross negligence usually involves two elements· extremely dangerous conduct on the part of the defendant and a very high risk or very serious injury to the plaintiff. In the common, everyday lawsuit for personal injury where no such elements of extreme conduct are involved (such as the failure to post "No Diving" signs on the railed boating ramp), the court might be expected to hold as a matter of law that there is no gross negligence, and

dismiss the case on a summary judgment motion. This motion will avoid the burdensome expense of a full trial. That is the central thrust of AB 555—to minimize the threat of nuisance settlements that recreational providers otherwise face. It would be generally noted that in many states, there may be little or no distinction between gross and simple negligence when it comes to injured young children.

4. Exception: Reckless or Grossly Negligent Promotion of the Activity.

As another exception under AB 555, the public entity will not be afforded immunity if it "recklessly or with gross negligence promoted the participation in or observance of a hazardous recreational activity". Under expressed terms in the statute, an announcement or advertisement by the public agency merely describing available services and facilities does not itself constitute a reckless or grossly negligent promotion. In order to fall into this exception, the public entity would presumably have to engage in highly active promotion of a recreational activity which the public entity knew or should have known was hazardous and likely to produce serious injuries. For example, if the public entity sought out and encouraged unqualified participants from the general public to register for a hang gliding competition it could lose immunity under AB 555.

5. Exception: Negligent Construction or Maintenance.

AB 555 does not relieve a public entity from its duty in using normal care to maintain and to repair its recreational equipment, machinery, buildings, or any other substantial works of improvement. In those situations the standard remains *simple* negligence.

The first area of focus is whether the public entity itself was negligent in the maintenance of the facility. Again, the mere fact that park facilities were involved in the injury is not sufficient by itself to create liability. For example, if an injury on the trampoline is caused not because of any failure to maintain the equipment properly, but because of a manufacturer's defect, AB 555 hopefully provides public entity immunity. The negligence is the manufacturer's, and the public entity should not be vicariously liable.

There is a second area of focus under this immunity exception. Any item causing the injury must have been "utilized in the hazardous recreational activity out of which the damage or injury arose". Thus, if a bicycle racer takes a short cut down a rutted (i.e., negligently maintained) sidewalk or path off the marked racing course, there is a good argument that the public entity should still enjoy the gross negligence standard otherwise applicable in a hazardous recreational activity.

Conclusion

As in the California's original recreational use immunity law (C.C. 846), immunity statutes of many states that do not expressly distinguish between

II-256

Assembly Bill No. 555

CHAPTER 863

An act to add Section 831.7 to the Government Code, relating to public liability.

[Approved by Governor September 15, 1983. Filed with Secretary of State September 16, 1983.]

LEGISLATIVE COUNSEL'S DIGEST

AB 555, Campbell. Public liability.

Under existing law, a public entity or public employee may be liable for an injury caused by a dangerous condition of public property in certain circumstances. However, existing law provides that a public entity or a public employee is not liable for an injury caused by a natural condition of unimproved property, or by an injury caused by the condition of a reservoir, or, in some circumstances, by an injury caused by the condition of canals, conduits, or drains.

This bill would provide that a public entity or public employee is not liable to any person who participates in a hazardous recreational activity, as defined or to any assistant or spectator as specified for any damage or injury to property or persons arising out of that hazardous recreational activity. However, that immunity would not apply for a failure to warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the activity, where a specific fee was charged to participate, or to the extent that injury was caused by the negligent failure to construct or maintain any structure or work of improvement, as specified, or to damage or injury suffered in any case where the public entity or employee recklessly or with gross negligence promoted the participation in or observance of a hazardous recreational activity, or an act of gross negligence by the public entity or public employee which is the proximate cause of the injury.

The bill would also specifically provide that nothing contained therein shall limit the liability of an independent concessionaire or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization.

The people of the State of California do enact as follows:

SECTION 1. Section 831.7 is added to the Government Code, to read:

831.7. (a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

(b) As used in this section, "hazardous recreational activity" means a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator.

"Hazardous recreational activity" also means:

(1) Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.

(2) Any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given.

(3) Animal riding, including equestrian competition, archery, bicycle racing or jumping, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging, water skiing, white water rafting, and wind surfing.

(c) Notwithstanding the provisions of subdivision (a), this section does not limit liability which would otherwise exist for any of the following:

(1) Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose.

(2) Damage or injury suffered in any case where permission to participate in the hazardous recreational activity was granted for a specific fee. For the purpose of this paragraph, a "specific fee" does not include a fee or consideration charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee, as distinguished from a specific fee charged for participation in the specific hazardous recreational activity out of which the damage or