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NO ORDINARY NEGLIGENCE LIABILITY UNDER RECREATIONAL USE STATUTES

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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

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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 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 . . .

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[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

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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 negligence 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

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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

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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 jurisdiction where the injury occurred. Consequently, where a recreational use statute provides limited immunity to private landowners, federal courts have uniformly held that this defense to ordinary negligence liability is also available to the federal government.

Proposed legislation based upon the Kansas or Virginia statutes may appear rather simple and potentially effective. However, this simplistic view ignores the individual peculiarities which govern public liability in every jurisdiction. Further, any attempt to lower the applicable standard of care from mere negligence to willful/wanton misconduct can expect fierce and highly organized opposition from the trial lawyers who represent plaintiffs in recreational injury claims. In many instances, public park and recreation interests will have to enlist the aid of other units of government and the insurance industry if any proposed recreational immunity legislation is to have the slightest chance of being enacted. As a result, the ultimate solution to the liability problem may be found in effective legislative advocacy at the state level.