PUBLIC PLAYGROUND INJURIES TEST RECREATIONAL USE STATUTE

At the request of Bob Griffith, Executive Director of the Pennsylvania Recreation and Park Society (PRPS), I recently addressed the 1990 PRPS Winter Membership Meeting & Legislative Reception in Harrisburg, Pennsylvania on the topic of limited immunity for public entities under the state recreational use statute. My session was entitled "Your Agency's Liability As a Landowner... Recent court cases appear to have a significant impact!". As described in the program brochure, this session would "focus on landowner liability as it affects recreation and park agencies." Specifically, the session would review "several recent court cases involving communities in Pennsylvania have resulted in judgments that were favorable to the communities." Two of the more recent cases reviewed in this session were the "DiMino" and "Weaver" decisions described below.

The applicability of recreational use statutes to public entities is one of the more significant and recurrent issues in recreational injury liability case law. With minor jurisdictional variations, forty-nine states have recreational use statutes based upon model legislation which was developed in 1965. (To the best of my knowledge, Alaska and the District of Columbia have yet to enact such legislation. I have been advised, however, that Alaska is in the process of considering draft legislation.) Generally, under a recreational use statute (RUS), a landowner owes no legal duty of care to recreational users on the premises free of charge to guard, warn or make the land reasonably safe for recreational use. An exception to RUS immunity, however, exists where willful (intentional) or wanton (utter disregard) misconduct on the part of the landowner causes injury to the recreational user.

Initially, a series of intermediate appellate court decisions had found the state recreational use statute in Pennsylvania inapplicable to public entities. However, in the case of Department of Environmental Resources v. Auresto, 511 A.2d 815 (Pa. 1986), the state supreme court reversed this finding by the appellate courts and found that the Commonwealth of Pennsylvania was immune from liability under the state recreational use statute. In this particular instance, plaintiff's snowmobile struck a snow-covered tree stump in a state forest. (This decision was presented in the Recreation and Parks Law Reporter, Report # 86-42.)

Unfenced Storm Drain

In the case of DiMino v. Borough of Pottstown, 564 A.2d 1329 (Pa.Cmwlth. 1989), plaintiff Nathan DiMino was seriously injured in a bicycle accident on a playground operated by defendants Borough of Pottstown and the School District of Pottstown. The facts of the case were as follows:

On September 9, 1981, Nathan, then fourteen years old, sustained severe injuries including a shattered kidney which was surgically removed, permanent brain damage and permanent disfigurement when he lost control of his bicycle in a gravel storm sewer ditch or ravine (storm ditch) and struck a concrete cylinder drain capped by a manhole...
DiMino alleged that "the Borough and School District were negligent in knowingly allowing a dangerous condition to exist on the playground and failing to take measures to protect children from possible injury." Specifically, DiMino alleged the following:

The dangerous and unsafe condition on the land consisted of a ravine, lined with rocks and loose dirt and gravel. Near the bottom of the ravine, there existed a large concrete cylinder capped by a manhole cover. Running roughly perpendicular to the length of the ravine was a bicycle path on both sides of the ravine which led directly into and out of the ravine and which had been used for a long period of time prior to September 9, 1981 by children such as minor plaintiff Nathan to play games. The children rode their bicycles on the bicycle path, down one side of the ravine and up the other side, failing to discover, realize and/or protect themselves against the danger of falling or otherwise being injured.

Both the Borough and School District filed motions for summary judgment based upon the state recreational use statute, the Recreation Use of Land and Water Act (68 P.S. § § 477-1 to 477-8). The trial court denied the motions. The Borough and School District appealed.

The issue before the appeals court was, therefore, "whether the Borough and School District owe a duty of care as landowners under the Recreation Act." In pertinent part, the state recreational use statute provided as follows:

[A]n 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 dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Nothing in this act limits in any way any liability which otherwise exists: (1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. (2) 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 of such lease shall not be deemed a charge within the meaning of this section.

"Land" Means land, roads, water, watercourses, private ways and buildings, structures and machinery or equipment when attached to the realty.

"Recreational purposes" includes, but it not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports and viewing or enjoying historical, archaeological, scenic or scientific sites.
As noted by the appeals court, "the Recreation Act has repeatedly been held to apply to actions for injuries sustained while engaged in recreational activities on lands intended to be used for recreational purposes."

In his complaint, DiMino had stated that the Maple Street Playground was "designed and used for recreational activities, principally the amusement, entertainment and enjoyment of children, including minor plaintiff, who were invited to play there." According to the appeals court, this statement indicated that DiMino was alleging that "the storm ditch constitutes a dangerous and unsafe condition on the playground." In so doing, the appeals court found that DiMino had effectively acknowledged that the land, upon which the storm ditch was located, was intended to be used for recreational purposes. Consequently, the appeals court found that "the Borough and the School District are immune from liability under the Recreation Act."

The appeals court also considered DiMino's argument that "the Recreation Act is inapplicable because Nathan's injuries resulted from the Borough and School District's willful failure to guard or warn against a dangerous condition, use, structure or activity." As noted by the appeals court, "Section 6 of the Recreation Act, 68 P.S. § 477-6 provides that the Recreation Act does not limit liability for willful or malicious failure to guard or warn against a dangerous condition on the owner's land." DiMino had argued that the following memorandum, written two and one half years before the accident in February 1979, from the borough's director of parks and recreation to the borough manager established the unsafe condition of the storm ditch:

Could you please inform me of any plans that the borough has for the completion of the open storm ditch in Maple Street Park as the storm drain and ditch in its present condition causes an extremely unsafe and hazardous situation within an otherwise safe neighborhood park. Because of the very real possibility of an injury occurring in or around this site, thereby generating a serious liability risk, I hope that the borough has plans to either complete the project, fill it in, or fence it off to keep children from having unobstructed access to this manmade condition to the park.

In the opinion of the appeals court, this memorandum indicated "knowledge on the part of the Borough of a dangerous condition," but it did not establish "a willful or malicious failure to guard or warn against the dangerous or unsafe condition presented by the storm ditch." On the contrary, the appeals court found that DiMino's complaint "alleges 'carelessness' or 'negligence' on the part of the Borough or School District and this is insufficient to bring the DiMino within the terms of the limitations set forth in Section 6 of the Recreation Act." The appeals court, therefore, concluded that "the Borough and School District owed no duty of care to Nathan because he was using the premises for a recreational purpose." Consequently, the appeals court reversed the judgment of the trial court and ordered that summary judgment be granted in favor of defendants Borough of Pottstown and the School District of Pottstown.

**Liability Double Disincentive**

In the case of *Weaver v. Neidermayer-Martin Co.*, Civil Action No. 87-1557 (USDC ED Pa. 1989) plaintiff Andrea Weaver was injured on playground equipment manufactured by defendant
Neidermayer-Martin Company doing business as "Timberform." Weaver alleged that he was injured as a result of the negligent installation and maintenance of the playground equipment. Neidermayer-Martin subsequently brought a third-party action against the City of Allentown. Allentown argued that it was immune from negligence liability based upon the state recreational use statute. Neidermayer-Martin maintained that an urban playground was not the type of recreational land intended for immunity under the state recreational use statute because the land in question was a small enclosed space in an urban area.

According to the federal district court, the state recreational use statute did not confer immunity on indoor recreational facilities like indoor swimming pools. On the other hand, the court found that limiting the applicability of the statute outdoor recreation on large unimproved land did not necessarily foreclose immunity for urban tracts. To deny applicability to urban lands, in the opinion of the court, would not advance the stated purpose of the state recreation use statute to open land for public recreational use free of charge.

In the opinion of the court, denying recreational use statute immunity and imposing ordinary negligence liability upon urban areas would "double the disincentive" to cities to provide public playground facilities. First, cities must resist development pressures and take land off the tax roles to establish public playgrounds. Second, once established, cities would face the threat of ordinary negligence liability and the prospect of paying damages to satisfy playground liability claims. The federal district court, therefore, found that the City of Allentown was immune from negligence liability under the state recreational use act because the accident in question occurred on land dedicated for recreational purposes and offered to the public without an admission fee. Consequently, the federal district court granted the City of Allentown's motion for summary judgment.

**PRPS Legislative Initiative**

While the Pennsylvania supreme court in the *Auresto* decision cited above found the state recreational use statute applicable to the Commonwealth, it has yet to consider the specific issue which was before the courts in both *DiMino* and *Weaver*, i.e. the applicability of this law to urban playgrounds. At present, the expressed language of the statute contains no specific reference to urban lands in general or playgrounds in particular. To ensure that the state supreme court follows the reasoning of the *DiMino* and *Weaver* decisions when, and if, it considers the urban playground issue, PRPS is advocating amendatory language to the existing law. Specifically, House Bill No. 643 would further define the lands to which the state recreational use statute is applicable to include playgrounds and outdoor sport facilities. In addition, the statutory definition of "owner" would be expanded to include specific references to the Commonwealth and its political subdivisions. Further, the statutory reference to "recreational purpose" would be amended to include sports and playground activities.

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