Journal of Legal Aspects of Sport, **4(2)**, 1994, 39-45

Recreational Land Use Immunity: A Connecticut Experience

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INTRODUCTION

Injuries to users of recreational facilities caused by facility conditions have been dealt with by the courts on the basis of both case and statutory law. A 1993 Connecticut Supreme Court decision in the case of *Scrapchansky v. Town of Plainfield* (1986), has held Plainfield immune from a negligence suit by extending private landowner protection (Connecticut General Statutes 52-557g) to local recreational entities. The statutes in question were enacted in 1971 and have withstood challenges of several Connecticut cases. Interpretations of the statutes have led to some degree of confusion by the Connecticut courts as these interpretations are in conflict with the legislative history of why the statutes were originally enacted. The legislative history has revealed that these statutes were enacted for private land owner immunity, in return for making private land available for public recreational purposes, free of charge. The courts have extended this immunity to municipal lands.

Generally, the status of the recreational user is categorized by the terms invitee, licensee, or trespasser. This status determines the legal duty owed by landowners to the recreational user. Both Kaiser (1986) and van der Smissen (1990) acknowledged that this system of categorizing the status of users of property is impetus behind a national trend to abolish the categories, although the distinction of trespasser is still being applied in most jurisdictions.

In 1968, the California Supreme Court in *Rowland v. Christian* abolished the user categories in California and held that it made no difference whether the plaintiff was a trespasser, a licensee, or an invitee; there is a duty owed for reasonable care under any circumstances. In essence, the concepts of ordinary, reasonable care and foreseeability became the standards by which the courts measured liability.

Many states have enacted recreational land use statutes which hold landowners immune in negligence suits. Basically, this is a reaction, on a national scale, to a perceived need for private land to be accessible to the public for recreational purposes. The recreational users forego the right to a law suit in return for the opportunity to use private land, free of charge for recreational purposes. Many of

these statutes were patterned after a 1965 Council of State Governments' Model Act entitled "Public Recreation on Private Lands - Limitations on Liability." This act suggested a reversal of a trend of raising the standard of care owed to recreational users on private lands (Kaiser, 1986).

THE CONNECTICUT GENERAL STATUTES

The General Statutes, Section 52-557f-j, were enacted in 1971 by the General Assembly of the State of Connecticut. In section 55-557f(3) and (4) the definitions of "owner" and "recreational purposes" are outlined. "Owner" was defined as the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises. The term "recreational purposes" includes, but is not limited to, any of the following, or combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, snow skiing, ice skating, sledding, hang gliding, sport parachuting, hot air ballooning, and viewing or enjoying historical, archaeological, scenic or scientific sites.

Section 52-557g outlines the exceptions to liability of the owner of the land available to public recreation. These exceptions include: (a) an owner of land who makes it available to the public without charge for recreational purposes owes no duty of care to keep the land safe for entry or use by others, or to give warning of dangerous conditions, and (b) does not make any representation that the premises are safe for any purposes, confer upon the user the legal status of an invitee or licensee to whom a duty of care is owed, or assume responsibility for a liability for an injury caused by a lack of omission of the owner.

Section 52-557h deals with the liability of the landowner who makes the land available to public recreation and does not limit liability for wilful or malicious failure to guard or warn against a dangerous condition or for injury which occurred where a fee was charged for the land use by the owner.

Finally, section 52-557i outlines the obligations of the user to exercise care in the use of the land and in the activities of the user.

LEGISLATIVE HISTORY OF CONNECTICUT'S STATUTE; 52-557G-I

The Legislative history of Connecticut's recreational land use statutes revealed that the clear purpose of section 52-557g was an attempt to satisfy the public's need for recreational and open space use, by encouraging private landowners to open their land to public use in exchange for limiting their liability. It was ascertained that the government alone (state parks) cannot meet the need for such use. The legislative history did not indicate that the statute would apply to existing parks and recreational facilities owned by the local or state governments. In *Genco v. Connecticut Light and Power Co.,* 1986, an injured swimmer using a private lake open to the public, filed a suit for failure to warn of the lake's unsafe depth. The plaintiff argued that a fee was paid for the use of the lake; therefore the defendant was liable and was not covered under the recreation land use statute. The court held the lake was available to the public for purposes of the statute and the owner need not exercise reasonable care to keep the area safe; that neither rent paid by towns to

the owner, nor charges which towns collected from the public to maintain marinas and beaches constituted admission fees for the purpose of the statute. The *Genco* case marked the first time that the legislative history was cited, and in subsequent cases since 1986, the courts generally have ruled in favor of the defendants.

■ CONNECTICUT CASES

There is some question of uncertainty among the courts which have decided whether or not section 52-557g applies to local municipalities. In a 1971 case (*Dougherty v. Graham*), the Connecticut court, in reference to a situation involving a tobogganer, reported that the possessor of land is liable for bodily harm caused by natural or artificial conditions only if the owner knows of an unreasonable risk and has reason to believe that a licensee will not discover the condition or realize the risk. The court held that the only duty owed licensees was not to wilfully or maliciously injure the user; the licensee takes the land as he or she finds it.

In *Balaas v. City of Hartford* (1940), the premises were not found to be of such a hazardous nature that notice of danger was required. The injured, a novice skier, went to a part of the park not designated for skiing and, in doing so, he was considered a licensee who must take the premises as he found them.

In *Drisdelle v. City of Hartford* (1985), the Superior Court granted a motion to strike the complaint of negligence which arose from a trail bike injury in a park owned by the defendant city. The plaintiff appealed with the Appellate Court holding that the city was a landowner within section 52-557j of the statute. This section of the statute shields the landowner from liability for injuries to an operator or passengers arising from the operation of certain vehicles, including mini-bikes unless a fee was charged by the landowner or the injury was caused by wilful or malicious conduct on the part of the landowner. The legislative history of the statute was again referenced with the court concluding that the commonly approved use of the word "owner" extended to municipal property as well as privately owned land, and that the legislature could have readily excluded municipalities from section 52-557j had it so desired.

In a 1984 case, *Jennett v. United States*, the court held that the recreational land use statutes covered public as well as private land owners and applied to the United States government. Yet on the other hand, the next two cases to reach the issue concluded that the statute applied only to privately owned land. (*Pierce v. City of Hartford,* 1987 and *Chmura v. City of Shelton,* 1989). In the *Pierce* case, after referencing the legislative history of the statute referred to in the *Genco* case, the court held that the legislative history did not indicate that the statute would apply to existing parks and recreational facilities of local or state governments.

The courts held that a municipality is covered by the statute and discounted the argument of legislative history in a number of other cases. In *Gauthier v. Town of Fairfield* (1990), the plaintiff brought action for damages as a result of an injury sustained when she fell from an allegedly defective swing set in a public park. The defendant moved to strike the complaint on the basis that the plaintiff's claim was barred by section 52-557g of the Connecticut General Statutes. The plaintiff opposed the motion on two grounds: (1) the maintenance of a public park, playground, or swing is not included within "recreational purpose" of the statute,

and (2) the statutes were not intended to, nor do they apply to governmental units, including municipalities. The court noted that the definition of "recreational purpose" includes but is not limited to the specified activities and that the utilization of a swing set in a playground area does come within the definition set forth in the statute. The court further noted that nothing in the language of section 52-557g or the definition of "owner" in section 52-557f(3) excludes municipalities or other governmental units from the terms of the statute and that the legislative purpose of the statute is not hampered by providing immunity for state or municipal land made available to the public for recreational purposes. Additionally, the court noted that while the legislative history does not refer to governmental owned land, neither does it state that the statute applies only to privately owned land.

A minor plaintiff was injured when using a slide at a playground in a park owned by the City of West Haven. In *Krasenics v. City of West Haven* (1990), the defendant city was granted a motion to strike the complaint after claiming that the action was barred under section 52-557g of the statute. The court held that while not specifically stated in the statutes, using a slide at a playground in a park comes within the definition of "recreational purpose" in section 52-557f(4).

A personal injury claim was filed on behalf of a two-year-old child who was injured when a metal box containing toys fell on his hand. The child was part of a summer recreation program at a municipal park (*Manning v. Barenz*, 1992). The Superior Court granted the municipality of Bloomfield and its employees motion for summary judgement. On appeal, the court affirmed and held that the recreational land use statute applied to municipalities and that municipal employees who were in control of the park, fell within the definition of "owners"; that it was not necessary that the child's injury fell within the enumeration of "recreational purpose" contained in the statute; and that the metal box was a "structure" on the land.

The latest challenge to Connecticut's recreational land use statutes involved the case of an American Legion baseball player who was injured chasing a fly ball and crashed into a stone wall boundary in the outfield (*Scrapchansky v. Town of Plainfield,* 1986). The defendant town filed for summary judgement under General Statute 52-557g. Scrapchansky argued that the defendant was not immune under the statute because the field was not open to the public (the game was played at the high school field) and that baseball was not under the purview of the statute and that a fee was charged for the use of the field. The court reasoned that the immunity provided owners under section 52-557g extended to municipalities and that, under section 52-557f(3), the owner is defined as both the possessor of a fee interest and an occupant or person in control of the premises; therefore the town is covered under the provisions of the statute. The defendant's motion for summary judgement was granted. Scrapchansky then appealed, with the majority of the Supreme Court justices (3-2) rejecting the appeal. The Supreme Court noted that even though the high school had placed restrictions on the public use and availability of the field, the limits were reasonable and necessary as only one game at a time could be played on any given field. The court further noted that while baseball was not specifically included in the statutes as one of the recreational purposes, the legislature did not limit the kinds of activity allowed, therefore the defendant was entitled to statutory immunity from liability and affirmed the lower court's ruling.

A dissenting opinion based on the legislative history was filed which argued that the land use statute was meant to hold harmless the owners of private land and was never intended that the statute would provide immunity for governmental agencies. Further, there was nothing in the legislative history to support that the legislature intended or even contemplated that the statute would provide immunity to governmental agencies.

■ CASES FROM OTHER STATES

A few cases, other than Connecticut cases, also involve ambiguities in statutory definitions which have created challenges to the statutes. In *Harrison v. Middlesex Water Co.* (1978), a New Jersey recreational land use statute was held not applicable when the court refused to apply the statute despite the fact that the case involved ice skating, an activity clearly specified in the statute. A Good Samaritan fell through the ice and drowned during a rescue attempt of two teenagers who had also fallen through the ice while skating.

In two other cases, the courts dealt with the issue of the application of recreational land use statutes to public parks and recreation agencies. In *Goodson v. Racine,* 1973, the Wisconsin court held that the recreational land use statute was limited to private individuals and does not protect municipalities. Likewise, in *Anderson v. Brown Brothers, Inc.* (1973), the Michigan court held that the Michigan statute was neither designed to nor intended to apply to the recreational lands of a municipality.

However, the opposite position was taken by the Federal Court in finding a Nevada statute extended coverage to the federal government in *Gard v. United States* (1979), where a sightseer was injured while exploring an abandoned mine on federal land. Additionally, in *Bailey v. City of North Platte, Nebraska* (1984), a league softball player was injured as he stepped into a hole in the outfield. The court held that the city came under the recreational liability act of Nebraska and since no fee was paid and there was no wilful or wanton misconduct on the part of the city, the decision was in favor of the defendant. In an Alabama case *(Edwards v. City of Birmingham,* 1984*)*, the plaintiff was playing ball in a city park, stepped into a hole between the left field foul line and a chain link fence, and was injured when he fell against the fence. The court ruled in favor of the city which claimed immunity under the landowner limited liability statute of Alabama.

In another case *(Perretti v. City of New York,* 1987*)*, an amateur softball player sued the city parks and recreation department for negligence in their failure to cancel a game, in failure to provide supervision, and for failure to provide a safe and proper area to play. The plaintiff was injured during a game in which the field site was shifted to a grassy area due to unplayable conditions of the regular field. The court held that the defendant parks and recreation department had a duty only to exercise reasonable care under the conditions and that the plaintiff, in electing to play the game, assumed the risk of the dangers.

In *DiMino v. Borough of Pottstown and School District of Pottstown* (1991), the plaintiff filed suit against the co-defendants for negligence in failing to eliminate a dangerous condition on the playground. The plaintiff lost control of his bicycle and struck a concrete cylinder drain capped by a manhole cover on the school play-

ground and sustained severe injuries. The co-defendants moved for summary judgement on the basis of immunity under the recreation use act of Pennsylvania, which was granted by the Court of Common Pleas. The plaintiff appealed to the Commonwealth Court of Pennsylvania which was called upon to determine whether the playground was a recreation facility and whether the co-defendants were entitled to immunity under the state statutes. The Commonwealth Court held that the defendants could not claim immunity under the statutes.

SUMMARY

Despite attempts at uniformity, the Connecticut statutes concerning landowner liability for injuries to recreational users is still uncertain. The application of the statute to public parks and recreational agencies is unclear, although the application has been upheld in many cases. In the *Krasenics* case, citing *State v. Bunkley* (1987), it was argued that the statutes should be applied as written. A court cannot create an exception to a statute which the legislature has not created either expressly or by implication. For the most part, given the rationale for passage of these statutes, which is to increase private land availability for public recreation, there seems to be little reason to extend the statutes to public municipalities or agencies.

Finally, in February, 1994, a seven-year-old Hartford youth severed the tops of two fingers while playing on a damaged metal playground slide at a municipal facility. Damage to the slide was reported during the summer of 1993 and after the slide was further damaged during the winter, it was cordoned off with tape and blocked with wooden barriers to keep children from playing on the slide. Recent deep snow had burried part of the slide which made it difficult to dismantle and remove. This incident will probably provide the next test of Connecticut's recreational land use statutes and its applications to municipal agencies.

It will be interesting to note if and/or how the court will apply the recreational land use statutes should a complaint be filed. In this potential case, it could be decided that: (1) the slide (sliding) is included in the definition of recreational purpose as was decided in the *Gauthier* and *Krasenics* cases, and, (2) the public park, owned by the City of Hartford falls under the category of "owner" as in the *Manning* case, thereby applying the Connecticut General Statutes to the local recreational agency. Yet, some question remains as to the slide not being dismantled in the summer of 1993 and left in a state of disrepair on municipal land. Should this instance end up in court, it would be difficult to prove wilful or malicious behavior, but there is some degree of responsibility to use ordinary care and to foresee the possibility of injury occurring through the use of the slide. Given the outcomes of the most recent applications of Connecticut's statutes to municipal parks and recreational facilities, it may be that the defendants will enjoy immunity in spite of the legislative history of the statutes.

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