

Understanding Park and Recreation Immunities and Risk Management Implications

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TODAY'S PRESENTATION

Review the Different Immunities
that Might Apply in a Park Setting

Focus on Parks and Recreation
Immunity

Review Some Actual Cases

Observations Related to Risk
Management



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What Is Immunity?

- Collection of “defenses” designed to prevent suits against governmental entities
- Some immunities created by courts: sovereign immunity; official immunity; vicarious official immunity; absolute immunity; qualified immunity
- Some immunities created by the legislature: “statutory immunity;” parks and recreation immunity; licensing immunity; those found in the statutes



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Why It's Important: Denials of Summary Judgment Can Be Appealed

- Immunity is a defense from suit, not just an ordinary defense
- Pre-trial appeal to Court of Appeals permitted
- Court encouraged to deal with immunity issues early in case
- Normally present questions of law for the court
- They contrast sharply with ordinary defenses asserted by private parties
- May bar all claims if they are a concurrent cause



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Immunities that Might Be Applicable to Park and Recreation Losses

- Park and Recreation Immunity
- Outdoor Recreation Immunity
- Discretionary Immunity
- Official Immunity
- Wild Animal Immunity



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Discretionary Immunity: Decisions Based on Public Policy

- Statutory in nature:

“Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”

Minn. Stat. § 466.03, subd. 6.



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Discretionary Immunity: Non-Park Examples

- Decision to route highway along route to save a landmark
- Decisions in prioritizing construction projects
- Decisions to reduce services in response to pressing budgetary concerns



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Discretionary Immunity: Examples

- Decision to use signs that blend in to surroundings
- Decision to minimize certain types of signs
- Decisions concerning prioritization of park improvements involving safety
- Decision to use utility vehicles on paved bike trail or multi-purpose trail in a certain manner



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Official Immunity

- Courts concerned about chilling the conduct of government employees
- Protects government officials from liability except where they are performing ministerial acts
- Does not apply where there is evidence of malice
- Key distinction is “discretionary” (protected) vs. “ministerial” (unprotected)
- “Ministerial” means “absolute, fixed, certain and imperative”



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Wild Animal Immunity

- State Tort Claims Act states all immunities applicable to the state (Minn. Stat. section 3.736) are also available to municipalities
- State Tort Claims Act include immunity for “**a loss caused by wild animals in their natural state**, except as provided in section 3.7371”
- 3.7371 deals with crop or fence damage caused by elk



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Wild Animal Immunity: Examples

- Park visitors injured by bison, elk, deer, or other animals at the park
- Injury caused by falling limb where the limb was caused to fall by termites
- Amoeba in water?
- Moose breaks out of thicket and attacks a dairy cow
- Failure to erect a sign warning of animals—deer crossing, e.g.



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Park and Recreation Immunity:

A municipality is immune from: “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 from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of 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.”

Minn. Stat. § 466.03, subd. 6e (emphasis added)



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Threshold Questions: What Facilities Are Protected and to Whom Does It Apply?

- Property owned or leased by “municipality”
- “Municipality” includes cities, counties, park districts, and other governmental entities that are not the State
- Applies to recreational services offered at parks
- If the property is defined as a state historic site it would be included too under the State’s similar outdoor recreation immunity
- Applies to bike paths even though they are improved trails and statute talks of “trails without artificial surfaces”
- Applies to a “user”—vendor driving to your facility to provide plumbing services would likely not be covered
- If your city runs a youth program where you take children to a park run by the State that would not be covered because the municipality is not the owner or lessor



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Park and Recreation Immunity—Hidden Issues

- Property owned or leased by the municipality
- “Creation of trails or paths without artificial surfaces”
- Loss incurred by user of the park and recreation services



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Restatement of Torts § 335 - Adults

Landowner liable when:

1. possessor of land knows or from facts within the possessor's knowledge should know that trespassers constantly intrude upon a limited area of land;
2. condition is one the possessor created or maintains;
3. condition is, to the possessor's knowledge, likely to cause death or serious bodily harm to trespassers;
4. condition is of such a nature that the possessor has reason to believe that such trespassers will not discover it;
and
5. possessor failed to exercise reasonable care to warn such trespassers of the condition and the risk involved



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Restatement of Torts § 339 – The Child Trespasser Standard

1. the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
2. the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
3. the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
4. the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
5. the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.



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Important Park and Recreation Cases

- Sirek v. State – If accident occurs where minors are normally under the supervision of adults, then adult standard (section 335) applies
- Johnson v. Washington County – artificial conditions that duplicate natural terrain do not give rise to liability; pond duplicates nature
- Martinez v. Minnesota Zoological Gardens – stacked railings were not hidden condition, since brief inspection would have revealed that they were not stable



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Park and Recreation Immunity Cases – Tough Ones

- Lishinski v. City of Duluth
– Claimed Defect in a bike trail used by rollerbladers near Lake Superior



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Park and Recreation Immunity Cases – Tough Ones

- Unzen v. City of Duluth
- Trip and fall on the stair at Lester Park golf course in Duluth
- History of prior falls
- Loose nosing



Spry v. City of Wadena -- Why We Exercise Due Care Even Though We Have Immunities



Spry v. City of Wadena—Bison Injury Case

- City park had enclosure with bison in it
- Caution sign: “FOR YOUR SAFETY, Please Keep A Safe Distance From Fence (15 Ft. Minimum), DO NOT TEASE OR PROVOKE THE ANIMALS.”



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Spry v. City of Wadena: Facts

- On day of incident city had put a garbage can right up against the fence, which prevented persons from using the garbage can from complying with the warning. Normally, garbage can was further away from fence, more than 15 feet away
- Plaintiff claims he was injured when he supposedly threw away a soda can in the garbage can and then lost his glasses near the fence and was head butted and injured by a bison
- Issues on appeal were whether City had knowledge of a dangerous condition; whether there was a hidden condition; and whether the City warned of the condition



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Spry v. City of Wadena: Result and Lessons

- Court applied adult trespasser standard, section 335
- Court conceded need for “actual knowledge” of dangerous condition likely to cause death or serious bodily harm”
- Court acknowledged condition must be highly dangerous condition—like an uninsulated electric wire dangling near the ground and concealed by brush
- Placement of garbage can meant the city had actual knowledge of a condition likely to cause death or serious bodily harm
- Placement of the garbage can near fence created a “hidden condition”
- Bad facts make bad law
- Clever plaintiffs can sometimes find ways around immunities
- Immunity will not always carry the day so avoid negligent acts



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Bike Path Accident Case



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Bike Path
Layout at
Time of
Accident



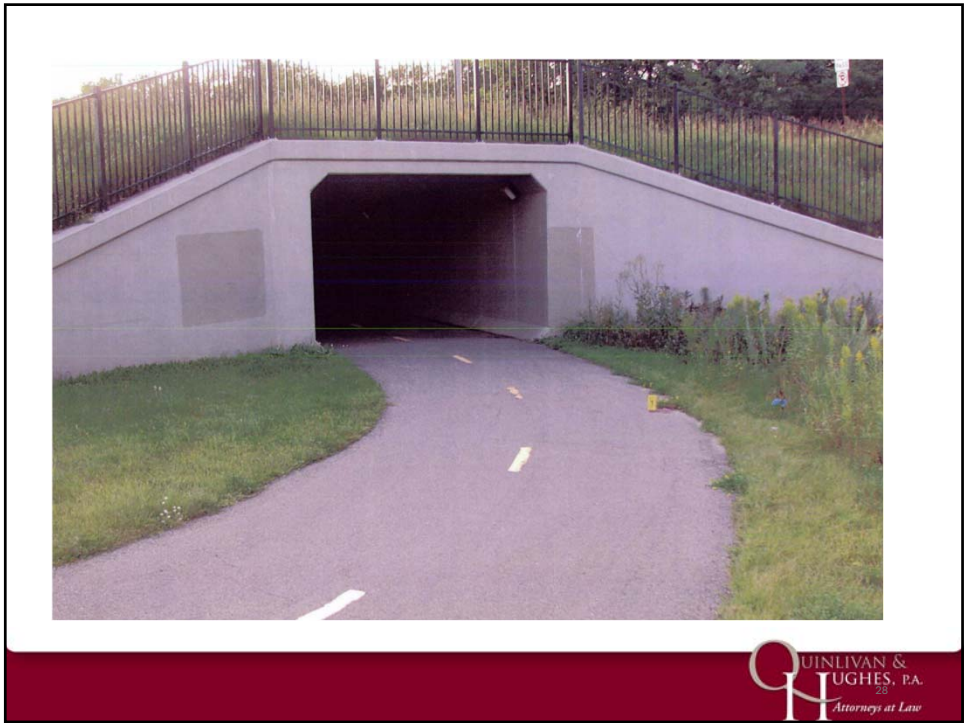
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Issues

- During design park wanted to minimize area used for curve to prevent loss of natural areas and native plants
- Curve was an exception to design standards for the tightness of the curve leading to the tunnel as noted on plans cover page, but the curve was not built to the design standard as promised to federal government when funds obtained
- Park made promises in plan documents to obtain funding that were not complied with—would stripe, use pavement warnings, and post warning signs of a specific type—not carried through to final plans by engineering firm
- Was not constructed to plan specifications: curve was even tighter; curve was not properly superelevated
- The party managing the construction did not notice the discrepancy between specified curve radius and superelevation issue during construction inspections



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Our Summary Judgment Motion and Result

- Park and Recreation Immunity
 - Actual knowledge of condition likely to cause death or great bodily harm
 - No “hidden condition”—condition was open and obvious for all to see
 - No condition “likely to cause death or great bodily harm”
- Discretionary Immunity re: speed limits on bike trails
- We argued the summary judgment motion to the judge; the motion hearing went well but while the judge had the case under advisement the case had to be mediated per court order



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Mediated Outcome

- Trail designer and builder settled for confidential sums
- Park paid \$25,000
- Project inspector paid \$12,500



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Aftermath: Post-litigation reconstruction



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Bleacher Case—Sobania v. Benton County Agricultural Society—the Bleacher Case



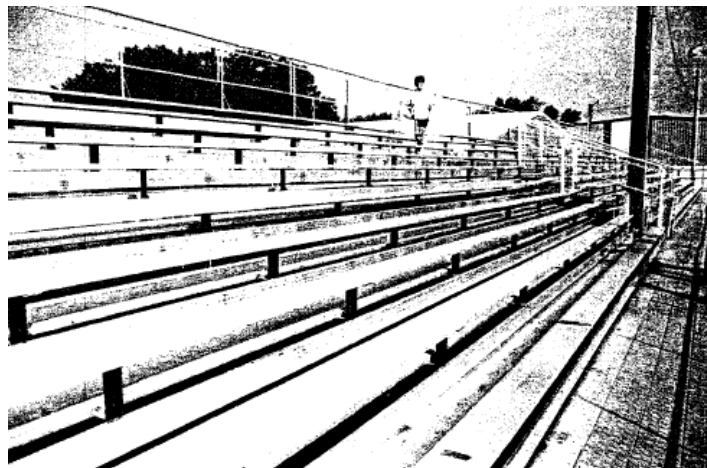
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Bleacher Case Background

- Plaintiff attended a Benton County Fair grandstand event when her foot went through a rotten board in the bleachers and she broke her leg
- Bleachers old, wooden, and exposed to elements
- Many boards over time rotted and were replaced as they rotted
- Each year before the County Fair the Ag Society would test the strength of the bleacher boards by having large members of the high school football team walk up and down them, stand on them, and jump up and down on them to see if they failed
- They spent many hours over three days to test the bleachers making sure that each board was looked at and replaced boards they thought needed replacing



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Bleacher Case--Analysis

- Actual knowledge
- Condition likely to cause death or serious bodily harm
- Decision not to replace old bleachers with new bleachers was protected by discretionary immunity because involved budgetary considerations



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Sledding Hills

- Likely to qualify on the threshold question of whether qualifies for application of park and recreation immunity—both the use of the land and if tubes or sleds offered then that activity as well
- Consider exculpatory agreement, particularly if you are leasing equipment like tubes or sleds (Note: these must be carefully drafted by an attorney and will not be a perfect solution given recent Minnesota case law)



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Sledding Hills

- Changes to grade that are consistent with similar natural conditions are not even considered “artificial conditions” that trigger immunity under the trespasser exception: “the sideward sloping hill alleged to have caused . . . death did not constitute an artificial condition. . . . Martin v. Spirit Mountain Recreation Area Auth., 566 N.W.2d 719, 723 (Minn. 1997)
- Barrel covering a fire hydrant was likely to be discovered—Schaffer v. Spirit Mountain Recreation Area Auth., 541 N.W.2d 357, 361 (Minn. Ct. App. 1995)



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Swimming

- Broad protections because most swimming ponds, even if created by the park, reflect natural conditions.
- Zacharias v. Minnesota Department of Natural Resources, 506 N.W.2d 313 (Minn. Ct. App. 1993). A seven-year-old child drowned in an artificial swimming pond at Flandrau State Park. The pond at issue was artificial, contained ropes separating the deeper from the shallower water, and had an artificial sand bottom. Lifeguards worked at the pond and on the morning of the drowning at least one lifeguard was on the premises. The child was found under water but could not be revived. His trustee sued and contended that the State was liable for the drowning. Held: Not liable because no “artificial condition” and because nothing was hidden within meaning of trespasser standard.



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Swimming—Beach and Pool Equipment

- Complicated analysis, under Minn. Stat. section 466.03, subd. 6f with respect to beach or pool equipment, such as a “diving board, diving platform, diving raft, water slide, nonwater slide, or dock installed at a beach or swimming pool owned, leased, or operated by a municipality other than a school district. . . .”
- Initially appears to say no liability if adult trespasser standard satisfied
- But then says nothing in the subdivision prevents liability if the child trespasser standard is met
- No case law on point regarding conflict between subd. 6f and subd. 6(e) and statement at end about child trespasser standard



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CONCLUDING POINTS

- Park and Recreation Immunity and other immunities applicable in a park or recreational setting provide parks broad protections
- Because cases often involve tragic losses—deaths, serious injuries—sympathetic nature of case may lead court to stretch the applicable standards
- Always best to use the “belt and suspenders” approach—have your immunities available but do your best to avoid injuries and claims



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QUESTIONS?

THE END

