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Recreational Immunity

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Recreational immunity bars suits against land owners for allowing recreational use of land without charge.

This immunity is available to all landowners under RSA 212:34 and RSA 508:14, with minimal exceptions, when land is made available to all persons for recreational use without charge. RSA 212:34 provides that a landowner owes no duty to keep premises safe for "outdoor recreational activity..." when there is no charge for use of the premises. RSA 508:14 provides that a landowner "shall not be liable for personal injury or property damage..." when it "permits any person to use land for recreational purposes..." without charge.

These statutes do not provide immunity to municipal government entities only. But government entities provide the lion's share of free recreational opportunities in most communities. Public parks, playgrounds in those parks and at schools, hiking trails and other facilities are commonly made available to the public by municipalities, at no charge. "Both the statutes [RSA 212:34 and 508:14] and their exceptions are logical because they encourage free and open use of recreational spaces." *Soraghan v. Mt. Cranmore Ski Resort, Inc.*, 152 N.H. 399, 404 (2005), quoting *Hardy v. Loon Mountain Recreation Corp.*, 276 F.3d 18, 19 (1st Cir. 2002).

RSA 508:14 explicitly applies to the state and its subdivisions/municipal entities. The statute's grant of immunity applies to "[A]n owner, occupant, or lessee of land, including the state or any political subdivision...." The two statutes have some differences, but they will both be discussed here as "recreational immunity" unless specific reference is made to only one of the statutes.

The New Hampshire Supreme Court has applied recreational immunity to bar claims in or on water, as well as land. See *Coan v. New Hampshire Department of Environmental Services*, 161 N.H. 1 (2010). The Court has applied recreational immunity to structures on land, as well as to raw land. See *Dolbeare v. City of Laconia*, 168 N.H. 52 (2015). The statutes apply when their two conditions are met: 1) the land/water be used for recreational purposes, and 2) the use be free to any person.

Practical Issues for Governmental Entities

The primary practical issue for a governmental entity is whether to charge for recreational activities. Each entity must weigh whether retaining immunity is more or less valuable than retaining a user fee. In plain English, does it make sense not to collect a fee for use, and retain immunity? Or does it make more sense to collect an access or user fee and lose the immunity which the statutes offer?

Recreational immunity has potentially broad application for a governmental entity. It could apply to ball fields, recreational leagues, a town beach (or lake, or river) after school facility use, parks, or a host of other facilities. Many governmental entities charge a fee for access to at least some of these facilities. Do these small charges mean enough to a town budget to continue applying them or is the risk of a \$275,000-\$925,000 lawsuit prohibitive?

If the revenue from recreational facilities is significant, the government entity must face the question of how it would make up for loss of revenue should it decide to preserve recreational immunity. For a town, or other entity with taxing authority, one solution is merely raising taxes. Another alternative may exist where facilities require many users to park nearby. Charging for parking, for example, could make up lost revenue and preserves recreational immunity so long as the parking fee is not required for use of the premises. That is, if the user can walk, bicycle, or get dropped off at the facility, the parking fee arguably is not a facility use fee. Some users may decide it is worth walking four hundred yards from the nearest free parking to a town beach while others may decide that it is worth paying a three-dollar parking fee to have their car near the town beach or other facility. Another alternative is to generate the revenue with concession stands where applicable. A snack bar covering much of the cost of the facility may be quite worthwhile for the town (or other governmental entity) to drop a facility use fee and try to retain immunity. Some Supreme Court decisions bring this strategy into question, however. Any profit-making venture increases the likelihood that even a governmental entity might be unable to use a recreational immunity defense.

Another strategy that is probably unavailing is eliminating fees but limiting a town facility for use by town residents and guests only. N.H. Supreme Court decisions require that land owners allow any member of the general public to use their land for recreational immunity to apply. Although *Estate of Gordon-Couture v. Brown*, 152 N.H. 265 (2005) pertained to a private land owner as defendant, limiting use to town residents very likely risks loss of recreational immunity defenses, based on the reasoning of this case.

A Closer Look at The Recreational Immunity Statutes

As noted there are two statutes under which recreational immunity can be sought. RSA 212:34, originally passed in 1961, provides immunity for specifically noted recreational activities, and for activities similar to those listed. RSA 508:14, originally passed in 1975, is more general in its application and therefore potentially more useful.

RSA 212:34

RSA 212:34 provides that an owner, lessee or occupant of premises owes no duty of care to keep the premises safe, for others for certain activities. It also provides that an owner does not assure that the premises are safe nor does the owner assume responsibility for injuries caused to a third person

by the person who was allowed use of the property.

The immunity is granted by the language indicating that the owner “owes no duty of care.” The first question in any lawsuit is whether the defendant owed a duty of care to the plaintiff. A person can walk by a lake and refuse to save a drowning person without incurring liability because people generally do not owe a duty to volunteer assistance to others. This is so even if the passerby is an expert swimmer. A passerby has no duty to dial for help on their cell phone, even if they could easily do so. Accordingly, eliminating a duty of care means there is no claim against a person.

The laundry list of activities for which immunity is granted by RSA 212:34 is important because it can limit the statutory immunity. To have immunity under this statute, the activity must be: 1) one of the specific activities listed, 2) fall under the more general categories listed such as water sports or winter sports, or 3) be a similar activity (see § I (c) of the statute, which states that the term “outdoor recreational activity” includes “but is not limited to” the activities listed). The list of activities also includes the “removal of fuelwood.” This is important because this activity probably is not covered under RSA 508:14, the second immunity statute, because it is probably not a recreational use. Note, also, that the inclusion of the category “water sports” is not only general but extends immunity beyond “land” and to activities in or on the water. The statute has exceptions. As with most immunities, willful or malicious acts are not immunized. There is also no immunity if a fee is charged for the activity (“permission ... was granted for a consideration....”).

RSA 508:14

RSA 508:14 is a simpler statute, easier to read, and generally broader in scope than RSA 212:34. It provides that an owner, occupant, or lessee of land “shall not be liable” for injury if they permit a person to use land without charge. However, the Supreme Court has narrowed immunity under this statute by holding that it is not sufficient to allow “any [particular] person” to use the land without charge, but the land owner must allow every person (that is, the general public) to use the land without charge.

RSA 508:14 is the broader of the two statutes because it covers all recreational use. This may seem unimportant until one thinks of the broad range of activities, which might be performed, and the potential dangers. Horseshoes and bocce ball might not be covered under RSA 212:34. They are certainly arguably “outdoor recreational activity,” but they are rather different than hunting and trapping. It should be comforting to those with a horseshoe pit that RSA 508:14 has more generalized language than RSA 212:34, since flinging horseshoes poses dangers to participants and bystanders. It does not take long to think of many activities which can more easily be covered by RSA 508:14, but which might not be covered by RSA 212:34. RSA 508:14 also specifically includes governmental entities, while RSA 212:34 is silent on that issue. Presumably, governmental entities were meant to be covered by RSA 212:34 as well, as they are not specifically excluded. However, it is that much easier to argue for immunity when governmental entities are specifically named in the statute.

CASE SUMMARIES

The relevant cases regarding recreational immunity are summarized in order from the newest to the oldest. Please note that these are only summaries, and small differences from case to case may have a very large impact on results.

Kurowski v. Town of Chester, 170N.H. 307 (2017)

Suit was brought on behalf of a minor who was injured when another person used a rope swing at a town-owned pond to access the water. The Town did not erect the rope swing but had notice of it and of the potential danger to persons using the pond. The New Hampshire Supreme court found

that the Town was immune because use of the pond was recreational, the use qualified as outdoor recreational activity (even though the minor who was injured was not in the water), and the Town did not act willfully (which would prevent immunity under RSA 212:34).

Dolbeare v. City of Laconia, 168 N.H. 52 (2015)

Ms. Dolbeare sued Laconia for a trip and fall in a public park. She alleged that she tripped over mats that were placed under swings, where she was pushing her granddaughter. She challenged whether a swing set or the mats under the swings in a city park were covered by the recreational immunity statutes, contending that the immunity applied to raw land only, but not to structures on land. The Supreme Court upheld the dismissal of a negligence claim but the case was sent back to the Superior Court on the issue of whether plaintiff's so-called "nuisance" claim for personal injury was subject to the recreational immunity statutes' bar on such claims.

Coan v. New Hampshire Department of Environmental Services, 161 N.H. 1 (2010)

This case involved the deaths of boys who were swimming in Silver Lake. The DES operates a dam on the lake, which can cause difficult currents during the release of water. Plaintiffs argued that the injuries occurred in water, not on land, so that they were not covered by recreational immunity. They also argued that DES did not actually "permit" use of the land or water because the State lacked the power to prevent the boys from crossing the land to get to the lake.

The Supreme Court ruled that using land to access water means that recreational immunity applies. The Court also found that the State has the authority to excluded persons from State owned waters. Accordingly, the Court upheld the dismissal of the claims.

Kennison v. Dubois, 152 NH 448 (2005)

Suit was filed by the estate of a snowmobiler who collided with a snowmobile trail grooming machine operated by a non-profit snowmobile club. The New Hampshire Supreme Court ruled that the non-profit club was not immune from suit because it was not an "occupant" of land. This case result was then modified by legislation in 2005.

Sorghan v. Mt. Cranmore Ski Resort, Inc, 152 NH 399 (2005)

A mother attended and volunteered at a youth ski meet where her daughter's ski club paid the \$2,000 reservation fee to Mt. Cranmore. The daughter paid \$55 to participate, but the mother paid no fee as a spectator or volunteer. The mother injured her knee while walking to her car to retrieve her ski equipment. The Court found that Mt. Cranmore was not immune despite the fact that the mother did not pay any charge to be on the property.

Gordon-Couture v. Brown, 152 NH 265 (2005)

Here, a young child drowned in a landowner's pond while attending a private birthday party at the property. The Court found that recreational immunity statutes do not apply to private land used for private activities.

Collins v. Martella, 17 F. 3rd 1 (1994)

The defendants here were owners or managers of a private beach which was held for the benefit of residents who had deeded right of access to the beach. The defendants were found immune from suit where the plaintiff dove off a dock on the private beach and incurred injury. Note: This case would probably be decided differently today, due to the lack of access to the general public and perhaps because of the cost of deeded access to the beach.

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