

A serene sunset over a body of water with a wooden dock in the foreground. The sky is a warm, golden yellow, and the water reflects the light. A line of trees is visible in the distance. In the bottom right corner, a wooden dock extends into the water.

Recreational immunity

**A continuing refuge for
governmental entities**

by Stephen P. Bond



Whether playing, running, swimming or cycling, the right to enjoy a park or public area is all fun and games—until someone gets hurt. When the unfortunate happens, who is liable?

“Sovereign immunity” was an age-old doctrine—you may have heard of it in law school—that, in the case of political subdivisions, was abolished by the Supreme Court of Ohio in 1982.¹ There was no small sense of concern by local government officials at the time as to how they should proceed; however, one defensive reaction by inventive government legal counsel was to assert that if we have the same theoretical liability exposure as a private enterprise, then we ought to also have the benefit of statutory immunity granted to landowners who allow their property to be used for “recreational” purposes.

To be specific, the statute being urged was R.C. 1533.181, which states, in pertinent part, that no owner, lessee or occupant of premises:

- (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
- (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
- (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

Which is to say, where there is no duty, there can be no liability for mishaps.

The legislature had further defined “premises” to mean “all *privately* owned lands, ways, and waters, and any buildings and structures thereon, and all *privately* owned and state-owned lands, ways, and waters leased to a *private* person, firm, or organization, including any buildings and structures thereon.”² While it may not seem convincing to someone reading the definition, the Supreme Court of Ohio agreed with this novel argument and held that, in theory, R.C. 1533.181 “recreational immu-



nity” *does* apply to political subdivisions, as well as the state itself.³ The major limitation on that protection lies in the statutory definition of who is deemed a “recreational user” whose claims will be affected by this immunity:

“Recreational user” means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.⁴

In the nearly 30 years since Ohio subdivisions lost *judicially* recognized sovereign immunity, much has happened, most notably the enactment of Chapter 2744 of the Revised Code, laying out a whole new body of *statutory* governmental immunity. Contemporaneously, a significant body of law has continued to develop and remain viable under RC 1533.181, expanding on the circumstances under which a governmental entity may be entitled to this independent defense.

For one thing, recreational immunity has prevailed against all manners of arguments, attacking the law or attempting to find loopholes of liability. Courts have held that R.C. 1533.181 does not create an equal protection violation and is not contrary to public policy, nor the right to jury trial.⁵ It has prevailed against claims that Chapter 2744 supersedes Chapter 1533 or that liability should be superimposed under R.C. 2744.02(B)(3) or R.C. 723.01.⁶ Courts have held that R.C. 1533.181 immunity prevails against a claim of nuisance (as opposed to negligence) or affirmative creation of a hazard, and against allegations of willful or wanton conduct or active or passive negligence.⁷ Recreational immunity continued after the adoption of comparative negligence.⁸ This immunity has been honored regardless of the complainant’s status as a trespasser, licensee, social guest, invitee or minor; regardless of claims that the “special duty rule” applied; and even if the claimant’s use was in violation of rules.⁹ Not insignificantly, the courts have held that it also extends to the *employees* of governmental entities.¹⁰

This immunity applies in a wide array of contexts (see sidebar on page 24): extending to those participating in sports, those watching sports, even those traveling on their way to sports activities.

Despite the liberal interpretation courts have been willing to take with this law, they

generally have not been willing to extend immunity where access to the site has been limited to residents of the subdivision.¹¹

In 2002, the Supreme Court seemed to acknowledge another exception, which was not readily apparent from the statute and which one may not have anticipated from the case law that had developed up to that point. Previously, the Court established the following principle:

If the *premises* qualify as being open to the public for recreational activity, the statute does not require a distinction to be made between plaintiffs depending upon the *activity* in which each was engaged at the time of injury. For example we recognize immunity to the owner of a park (which qualifies as recreational premises), whether the injury is to one who is jogging in the park, tinkering with a model airplane or reading poetry to satisfy a school homework assignment.¹²

However, in the case of *Ryll v. Columbus Fireworks Display Co.*, a spectator at a fireworks exhibition was killed when hit by shrapnel from an exploding shell.¹³ Two justices on the Court held that there was no “recreational immunity” available for the city because the injury was caused not

by the recreational premises per se, but by the *activity* conducted *on* the premises (two other justices felt that the reach of R.C. 1533.181 should no longer extend to political subdivisions at all).

At least one court felt that *Ryll* was establishing a new distinction between “recreational premises” and the activity conducted on those premises vis-à-vis R.C. 1533.181. In a 2006 case, *Henny v. Shelby City School District*, a pole-vaulter alleged he was injured when his body hit a hard surface rather than “side pads,” which he contended should have been installed by defendant.¹⁴ The court held that the case turned on the installation of the “portable” side pads; therefore, this was not a case about “premises,” to which recreational immunity would apply. In contrast, that same year, another court held that immunity would apply in a case where one discus thrower was hit in the nose with a discus from another participant—the court acknowledged *Ryll*, but held that the issue in the case before it was whether the premises where the discuses were being thrown was unsafe.¹⁵

In 2009, a court had before it a case in which plaintiff, like decedent in *Ryll*, went to a park to see fireworks and injured his hand on a rolling fence gate—the majority held that the injury related to the gate, which was part of the *premises* (to use *Ryll*'s reasoning)—the dissent noted that the gate had been activated by a person, so that the injury resulted from a person, not the premises.¹⁶

Several other courts seem not to have been concerned with the parameters of any exception suggested by *Ryll*, deciding immunity applies where:

- A motorcyclist in a park hit a tree which had fallen into the pathway;¹⁷
- A skater was injured while trying to avoid a stopped vehicle;¹⁸
- A park employee damaged a vehicle while operating a “weed eater” that propelled an object into the windshield; and¹⁹
- A rolling garbage receptacle damaged a parked vehicle after being emptied.²⁰

The foregoing make it clear that at this point in time, “recreational immunity” remains an available defense that counsel for both plaintiffs and governmental entities



need to evaluate when considering the viability of pending claims. Also, counsel to municipalities would be prudent to consider this statute when advising their clients concerning the set-up of governmental programs, inasmuch as they may benefit from this type of immunity if structured appropriately. ■



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Endnotes

- ¹ *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St.3d 26.
- ² R.C. 1533.18(A).
- ³ *Marrek v. Cleveland Metroparks* (1984), 9 Ohio St. 3d 194; *Johnson v. New London* (1988), 36 Ohio St. 3d 60; *McCord v. ODNR* (1978), 54 Ohio St.2d 72. (Note, the state had itself waived sovereign immunity with the enactment of R.C. Chapter 2743, in 1975.)
- ⁴ R.C. 1533.18(B).
- ⁵ *Moss v. ODNR* (1980), 62 Ohio St.2d 138; *Fetherolf v. ODNR* (10th Dist.), 7 Ohio App.3d 110; *Nelson v. Bd. of Park Commrs.*, 2002 WL 5356.
- ⁶ *Kendrick v. Cleveland Metroparks* (1994), 102 Ohio App.3d 739; *Ledwick v. Marion*, 1989 WL 145157; *LiCause v. Canton* (1989), 42 Ohio St.3d 109; *Miller v. Dayton* (1989), 42 Ohio St.3d 113; *Bell v. Cleveland*, 1989 WL 98766; *Vitai v. Sheffield Lake*, 1987 WL 5561; *Bien v. Cincinnati*, 1993 WL 381206.

- ⁷ *Ledwick*, supra; *Vitai*, supra; *Wicker v. ODNR*, 2003 WL 22765545; *Fetherolf v. ODNR* (1982), 7 Ohio App. 3d 110; *Look v. Cleveland Metroparks* (1988), 48 Ohio App.3d 135; *Phillips v. ODNR* (1985), 26 Ohio App.3d 77; *Russell v. Cleveland*, 1987 WL 5464; *Erbs v. Cleveland Metroparks System*, 1987 WL 30512.
- ⁸ *Florek v. Norwood* (1985), 25 Ohio App.3d 47.
- ⁹ *Fryberger v. Lake Cable Recreation Assn.* (1988), 40 Ohio St.3d 349; *Phillips v. ODNR* (1985), 26 Ohio App.3d 77; *Aumock v. State*, 2001 WL 95877; *Sorrell v. ODNR* (1988), 40 Ohio St.3d 141; *Squires v. ODNR* (10th Dist.), 1990 WL 21450; *Kaepfner v. ODNR* (10th Dist.), 1989 WL 99415 (the argument that, if the plaintiff was violating the rules, he was not using it “with permission” and, hence, did not meet the definition of “recreational user” was rejected).
- ¹⁰ *Rankey v. Arlington Bd. of Ed.* (1992), 78 Ohio App.3d 112.
- ¹¹ *Tomba v. Wickliffe* (2001), 114 Ohio Misc.2d 1 and 114 Ohio Misc.2d 10; *Jarrett v. South Euclid* (1990), 64 Ohio App.3d 743.
- ¹² *Miller v. Dayton* (1989), 42 Ohio St.3d 113, 115.
- ¹³ 95 Ohio St.3d 467.
- ¹⁴ 2006 WL 747475.
- ¹⁵ *Mason v. Bristol Local School Dist.*, 2006 WL 2796660.
- ¹⁶ *Mitchell v. Blue Ash* (2009), 181 Ohio App.3d 804.
- ¹⁷ *Estate of Finley v. Cleveland Metroparks* (2010), 189 Ohio App.3d 139.
- ¹⁸ *Gudliauskas v. Lakefront State Park*, 2005 WL 2711087.
- ¹⁹ *Meiser v. ODNR*, 2004 WL 885563.
- ²⁰ *Raymond v. Rocky Fork State Park*, 2003 WL 22765268.



When does recreational immunity apply?

Baseball/Softball Players

- Hurt in tournament game provided that the team paid the sponsor.

Miller v. Dayton (1989), 42 Ohio St.3d 113; and see *Boggs v. Bowling Green*, 2003 WL 21781644.

- Hurt in tournament game (if the team pays the city, immunity depends on the court of appeal).

Dinarda v. Louisville, 1991 WL 136101; *Pippin v. M.A. Hauser Enterprises* (1996) 111 Ohio App.3d 557; *Nowak v. Ries*, 1991 WL 271353.

Spectators

- Walking to, or from, watching a game if no fee is paid.

LiCause v. Canton (1989), 42 Ohio St.3d 109; *Dowdell v. Eastlake* (11th Dist.), 1990 WL 117083.

- Hit by a ball if no fee is paid.

Miller v. Broadview Hts. (8th Dist.), 1992 WL 19459.

- Hit by a tree branch if no fee is paid.

Opheim v. Lorain (1994), 94 Ohio App.3d 344.

- Child came to watch but wandered off and drowned.

Buchanan v. Middletown, 1987 WL 16062.

Bicycles

- Riding on a service road at a football stadium.

Zachel v. Mahaney, 1990 WL 97668.

- Traveling across public park land without intending to use park.

Goodluck v. Findlay, 1999 WL 156033.

- Riding down a roadway in a park.

Milliff v. Cleveland Metroparks System, 1987 WL 11969; but compare *Vinar v. Bexley* (2001), 142 Ohio App.3d 341, which reached a different conclusion when the roadway through the park was a “thoroughfare.”

Boating

- Rental of canoes.

Moss v. ODNR (1980), 62 Ohio St.2d 138.

Camping

- Family rented cabins at Buck Creek State Park and were injured walking across catwalk at a marina.

Howell v. Buck Creek State Park (2001), 144 Ohio App.3d 227. However, when a man paid a fee to camp at Mohican Park and was injured in hooking up electricity there was no immunity, *Huth v. ODNR* (1980), 64 Ohio St.2d 143; and, in *Meinking v. East Fork State Park*, 2006 WL 538140, payment of a fee by one person extended to family members, avoiding immunity.

Festival

- Attending a festival being held in a park.

Hubbard v. Norwood, 1995 WL 734053.

Fishing

- Boy entered public park to fish in Lake Erie and drowned.

Mitchell v. CEI (1987), 30 Ohio St.2d 92.

- Man walking on his way to go fishing.

Parks v. Eaton, 1995 WL 591148.

Football

- Boy playing football on school grounds.

Wheeler v. Lakewood Bd. of Ed. (1989), 61 Ohio App.3d 776; *Rencher v. Cleveland Bd. of Ed.*, 1991 WL 41743.

However, when a boy was injured while playing football on public land adjacent to right-of-way, it was a jury issue as to whether immunity would apply.

Brinkman v. Toledo (1992), 81 Ohio App.3d 429.

Golf

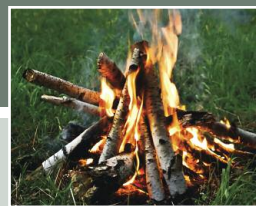
- Child playing in park hit by golf ball.

Kasunic v. Euclid, 1988 WL 136014.

Hiking

- Hiking through a park.

Look v. Cleveland Metroparks (1988), 48 Ohio App.3d 135; *Phillips v. ODNR* (1985), 26 Ohio App.3d 77.



Marina

- Marina owned by the federal government and leased to a private party; individual injured walking across the property.

Thatcher v. Holiday Point Marina, 1996 WL 682163.

- Boat hit submerged dredge pipe.

Masters v. ODNR, 2005 WL 3642703.

Motorcycling

- Riding a park trail in prohibited area.

Kaepfner v. ODNR, 1989 WL 99415.

Parking

- Car parked in front of a gate while the owner was working at a state park, and wind blew the gate into the car.

Loudermilk v. Buckeye Lake State Park, 2004 WL 550675; see also, *Shockey v. ODNR*, 2005 WL 376609.

Party in the park

- Picking up family at a party in the park.

Haviland v. ODNR (1987), 36 Ohio Misc. 2d 29.

Picnic

- Child drowned while at family picnic.

Kendrick v. Cleveland Metroparks (1994), 102 Ohio App.3d 739.

- Family paid to reserve a shelter, and family member fell into a hole in the ground.

Reed v. Miamisburg (1993), 96 Ohio App.3d 268.

Playgrounds

- Injury on playground equipment.

Bell v. Cleveland, 1989 WL 98766; *Esson v. Cleveland*, 1993 WL 425194; *Scimenes v. Cleveland*, 1993 WL 76880; *Hardy v. Miracle Recreation Equipment Company*, 1987 WL 11517; *Miller v. Sheffield Lake*, 1987 WL 9477.

Recreation Program

- Injury on swing set.

Christman v. Columbus Bd. of Ed., 1989 WL 61732.

Rollerblading

- Rollerblading in a parking lot.

Ross v. Strasser, 116 Ohio App.3d 662.

Sledding

- Sledding in a park.

Marrek v. Cleveland Metroparks (1984), 9 Ohio St.3d 194; *Ledwick v. Marion*, 1989 WL 145157; *Harman v. Fostoria*, 1994 WL 50259.

Snowmobiling

- Snowmobiling in a park.

Sorrell v. ODNR (1988), 40 Ohio St. 3d 141; *Johnson v. New London* (1988), 36 Ohio St. 3d 60; *Price v. New Madison*, (2nd Dist.), 1994 WL 587548 [even where plaintiff claimed he was not intentionally in the park].

- Note: "Snowmobiles" were expressly added to the definition of a recreational use by Senate Bill 106 in 2003.

Swimming

- Swimming in a lake.

McCord v. ODNR (1978), 54 Ohio St.2d 72; *Wheeler v. Port Clinton* (6th Dist.), 1988 WL 96184. However, when there was an injury in a lake posted as "no swimming" and not maintained, it was a jury issue as to whether the use met the definition of a "recreational use." *Jackson v. Plusquellic* (1989), 58 Ohio App.3d 67.

- Going to watch someone else swimming.

Fetherolf v. ODNR (1982), 7 Ohio App.3d 110.

- Rope-swinging into a lake where prohibited.

Squires v. ODNR, 1990 WL 21450.

- Diving into half-filled pool at night.

Russell v. Cleveland, 1987 WL 5464. However, for an injury at a city pool where a gate fee was paid, immunity was not applied. *Jarrett v. South Euclid* (1990), 64 Ohio App.3d 743.

Swinging

- Child on a swing falls on glass.

Vitai v. Sheffield Lake, 1987 WL 5561.

Tennis

- Injury on school tennis courts.

Kaplan v. Worthington, 1990 WL 174086.

Track

- Spectator at a track meet hit by a shot-put.

Rankey v. Arlington Bd. of Ed. (1992), 78 Ohio App.3d 112.

Walking

- Walking on a path in a park.

Wearn v. Cleveland, 1988 WL 47443; *Dusan v. Buckeye Lake State Park*, 2003 WL 23095947.

- Walking on park path on the way to somewhere else.

Shutrump v. Mill Creek Metropolitan Park District, 1998 WL 158864; *Yurkiewicz v. Cleveland*, 1993 WL 259931.

- Leaving park after fireworks.

Trina v. Warren, 1994 WL 321084.

- Walking in park to see a memorial.

Kendrick v. Cleveland Metroparks (1994), 102 Ohio App.3d 739.

- Walking at a roadside rest area.

Hoover v. State, 1993 WL 104896.

- Wading in a creek in a park.

Frantz v. Xenia (1988), 62 Ohio Misc. 2d 651. ■