

## Supreme Court Guts Recreational Immunity

By David Doughman

Local governments often make significant portions of their property available to the public free of charge for recreational use. To encourage such uses of property, the Oregon Legislature provided protection from lawsuits to property owners through what is commonly known as the legal concept of recreational immunity. This spring, the Oregon Supreme Court gutted this protection when it ruled recreational immunity does not extend to city employees.

### Background

The legislature enacted the Oregon Public Use of Lands Act, ORS 105.672-105.700, to provide certain immunities to owners of property who make their land available to the public to use for recreational purposes free of charge. Specifically, the Act shields an owner of land from liability in contract or tort for any personal injury, death or property damage that arises out of the use of the owner's land for recreational purposes, when the owner either directly or indirectly permits any person to use the land for recreational purposes free of charge.

In addition, due to the Oregon Tort Claims Act, ORS 30.260-ORS 30.302, as well as other legal principles, it was presumed that the legal protections that came with recreational immunity extended to city employees. Under the OTCA, cities are required to defend and indemnify employees who are acting within the scope of their employment or duties.

### The Decision: *Johnson v. Gibson*

This case arose when Johnson, who is legally blind, was injured when she stepped into a hole while jogging in a city park. Johnson sued the city and its employees, Gibson (the city park technician primarily responsible for maintenance of the park, who created the hole that caused Johnson's injury while fixing a malfunctioning sprinkler head), and Stillson (Gibson's supervisor), for negligence.

The city claimed the employees were immune from any liability for negligence due to the recreational immunity protections provided by the Public Use of Lands Act. The Oregon Supreme Court rejected these claims, concluding that the Act did not extend to city employees, but rather was limited to the city itself as the "owner" of the park.

To reach this conclusion, the court first examined the text of the Act, which expressly provided protection to only the "owner" of the land. Under the Act, the term "owner" was defined to include the possessor of any interest in any land including a "tenant, lessee, occupant or other person in possession of the land." The court concluded that this definition did not extend to employees or agents of an owner.

The court also recognized that the liability of a city as landowner was distinct from the liability of employees and agents of the city. The court expressly noted that whether a principal's immunity is personal to the principal or may extend to an agent is a matter of legislative choice subject to constitutional bounds, and that the legislature simply did not extend the Act to provide immunity to the city's employees. Thus, while the city could enjoy the benefits of recreational immunity under the Act, its employees could not. As a result, if the employee acted negligently, the city would be required to indemnify the employee for costs and expenses under the OTCA.

The court's decision could very well impact local governments' ability to continue to keep various lands open to the public for recreational use. In order to guard against similar claims in the future, insurance companies will likely raise rates as their exposure is much higher. With any luck, the Oregon Legislature will amend the Act to clearly provide the immunity to employees of the owner.

For now, local governments in Oregon should work closely with their legal counsel and risk managers to determine what can be done to provide additional protections from liability due to the loss of recreational immunity for employees. In addition, local governments are encouraged to work with their respective advocacy groups (League of Oregon Cities, Special Districts Association of Oregon, etc.) to seek a legislative fix to this decision.