Recreational Use Shields Owners from Liability

Irene Del Bono

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Introduction

The potential for liability for proposed open space and recreational areas are uppermost in the minds of private and public owners. Massachusetts General Law c. 21 sec. 17C, known as the "Recreational Use Statute", affords any owner who allows the public to use their land for recreation at no charge relief from liability so long as the owner has not been willful, wanton or reckless. The statute, revised as of April 14, 2009, now reads as follows (substantive changes in bold):

Chapter 21: Section 17C. Public use of land for recreational, conservation, scientific educational and other purposes; landowner's liability limited; exception

[Subsection (a) as amended by 2008, 513, Sec. 1 effective April 14, 2009.]

(a) Any person having an interest in land including the structures, buildings, and equipment attached to the land, including without limitation, **railroad and utility corridors, easements and rights of way**, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person.

[Subsection (b) as amended by 2008, 513, Sec. 2 effective April 14, 2009.]

For the purposes of this section, "person'' shall include the person having **any** interest in the land, his agent, manager or licensee and shall include, without limitation, any governmental body, agency or instrumentality, a nonprofit corporation, trust, association, **corporation, company or other business organization** and any director, officer, trustee, member, employee, **authorized volunteer** or agent thereof. **For the purposes of this section, "structures, buildings and equipment'' shall include any structure, building or equipment used by an electric company, transmission company, distribution company, gas company or railroad in the operation of its business.** A contribution or other voluntary payment not required to be made to use such land shall not be considered a charge or fee within the meaning of this section.

Related Court Rulings

The Court in *Sandler v. Commonwealth*, 419 Mass. 334 (1990) defined willful, wanton or reckless conduct for the purposes of the Recreational Use Statute to be the same as that required for criminal liability. "Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another [such that the] risk of death or grave bodily injury must be known or reasonably apparent…"

In other words, so long as owners who let the public use their land don't create a situation that is so dangerous that it is likely to cause serious bodily injury or death, they are shielded from liability to a recreational user.

Planning officials will be interested in knowing that the recreational use statute has even been applied to a "mall walker" where a mall allowed the public to walk early in the morning before stores were open. The walker had no intention of shopping. The court in *Nitishin v. The Musicland Group, Inc.*, 2005 WL 3627262 (Mass. Super. 2005; MacDonald, J.) found that the statutory purpose of the statute was furthered by limiting liability to encourage mall owners to permit recreational walking.

Some cases illustrating the broad range of protection afforded by the Recreational Use Statute:

Anderson v. Springfield, 406 Mass. 632 (1990). The recreational use statute is applicable to injuries on municipally-owned and other governmentally-owned recreational areas to the same extent as to private landowners.

Sandler v. Commonwealth, 419 Mass. 334 (1995). The persistent failure to remedy defects in a tunnel on a traveled bikeway was not wanton or reckless conduct imposing liability under c. 21, sec. 17C for injuries to bike rider who hit an uncovered 8-inch drain hidden by a puddle of water in an unlit tunnel (the drain was constantly coming uncovered and the lights were usually broken). The court found that "a persistent failure to repair defects in the tunnel on a traveled bikeway simply does not present a level of dangerous that warrants liability" under section 17C.

Seich v. Town of Canton, 426 Mass. 84 (1997) – charge for registration fee to participate in basketball league is not an entrance fee for public use of property, so no liability.

Hardy v. Loon Mountain Recreation Corp., U.S. Court of Appeals for the First Circuit, No. 01-1263, January 8, 2002. No liability to injured plaintiff who paid to ride a gondola to the top of the mountain, since anyone could hike up or get there by other means because "charge" means an actual admission fee paid for permission to enter the land for recreational purposes. (citing cases holding that private instructor fees, campground facility fees, parking fees per car, and not per occupant are not "charges" for purposes of recreational use statute so long as public may use the general area without charge).

Shu-Ra Ali vs. City of Boston, Docket No.: SJC-09124, March 15, 2004.

Plaintiff was riding his bicycle through Franklin Park in the early evening on the way home from a store, collided with an unlit park gate across the paved bicycle land, and suffered injuries. He argued that because he was not using the park for a recreational purpose he was entitled to damages. The gate spans the middle of the path, leaving unobstructed spaces of approximately three feet on either side for pedestrians and bicyclists to pass around it. The plaintiff argued his subjective intent should govern, but the court said his subjective intent did not matter.

A 2007 Berkshire Superior Court case, *Dami-Hearl v. City of North Adams,* involved a person injured by falling into a pothole while walking or exercising in a cemetery which was protected under the Recreational Use Statute. The cemetery was not designated for recreational use, but was nevertheless open to the public at no charge and the plaintiff was using it to recreate.

On a similar note, *Dunn v. City of Boston,* 07-P-1833, decided October 26, 2009, found the City of Boston not liable under the recreational use statute when the plaintiff fell and fractured her wrist while ascending the admittedly crumbling brick stairs at City Hall Plaza, even though the plaintiff was not using the stairs for recreation, but for "business purposes". The court looked to *Ali* and *Sandler* to determine that her intent did not deprive

the city of its protection. If she had been a contractor hired to do work in the area, the result may have been different.

The standard is different for maintaining an artificial condition which attracts children:

Ch. 231 Sec. 85Q. Any person who maintains an artificial condition upon his own land shall be liable for physical harm to children trespassing thereon if (*a*) the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, (*b*) the condition is one of which the land owner 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, (*c*) 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, (*d*) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (*e*) the land owner fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.