







Speakers

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Agenda

The Story of the Case	Kirk
Discretionary Immunity	Kirk
Risk Management Recommendations	Scott
Claims Documentation & Preparation	Jim
Q & A	



Johnson vs. Gibson: The Story

Question:

Does recreational immunity only apply to "owners" of recreational land?

Or, does it also apply to individual employees who repair, maintain, or operate improvements on city owned recreational land?



The Plaintiff:
Emily Johnson: legally blind jogger



Johnson vs. Gibson: The Story

The Defendants:

Scott Gibson:
Maintenance employee who dug hole to fix sprinkler

Robert Stillson:
Supervisor who called Gibson away from sprinkler project



Johnson vs. Gibson: The Story

- Judge denied motion to substitute City of Portland for individual employees
- But, the court did agree with City that recreational immunity applied to employees who maintain recreational land as part of their jobs – case over.
- Johnson appealed



Personal Employee Liability

- Oregon Supreme Court held that employees are no longer protected by recreational use immunity
 - Johnson can proceed with her lawsuit against the employees directly



Employees are Indemnified

- Portland must indemnify its employees
 - City is still financially responsible for the claim



CIS Has You Covered

- CIS still covers you and your city / county
- CIS expects a sharp increase in lawsuits filed against public employees who maintain or repair recreational areas
- Plaintiffs can make an end run around recreational immunity and go forward with cases that were completely blocked prior to Johnson v. Gibson



Alternative? Discretionary Immunity



Discretionary Immunity

Oregon Tort Claims Act Provides:

Discretionary Immunity: ORS 30.265(3)(c)

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



Discretionary Immunity

One of the more succinct formulations of the distinction between immune and non-immune actions under the doctrine of discretionary immunity is this:

1. Discretionary immunity applies to a choice
2. Among alternative public policies (not day to day actions)
3. By persons with the authority to make such policies decisions.

[Miller v. Grants Pass Irrigation District, 297 Or. 312, 316, 686 P.2d 324 \(1984\)](#)



Applies when you exercise discretion to set policy (which path to take)



Exercise Discretion to Set Policy

Decisions at the policy level of government, such as the design, location, and installation of traffic signals, or the make up of programs such as tree and sidewalk maintenance, are typically immune from liability.

- Morris v Oregon State Transportation Comm., 38 Or App 331 (1979)
- Gallison v City of Portland, 37 Or App 135 (1978)
- Bakr v Elliott, 125 Or App 1 (1993)



Discretionary Immunity

Does NOT apply when:

- Choosing to not follow policy
- Failing to implement established maintenance/inspection program

Discretionary immunity did not apply when city was negligent in implementation of traffic sign program. (Design of program would have been covered.)

- Tozer v. City of Eugene, 115 Or App 464 (1992)



Does NOT apply when you fail to go down the selected path



Discretionary Immunity

How to prove it applies:

1. Final decision at governing body level
2. Decision sets plan/program carried out by staff
3. Evidence that competing alternatives were investigated and considered
 - Staff Recommendations / Reports
 - Public Testimony
 - Experts or Consultants



Identification of all free facilities



Deferred Maintenance



Appoint "Owners"



Skateboard and BMX Parks



Signage



Recommended Signage

Park Hours: 6:30am to 10:00pm
Use of this facility could result in serious physical injuries up to and including paralysis and/or death. Use at your own risk.
Usage is intended for skateboards – BMX bikes prohibited
Be responsible - this park is not supervised
Safety first - helmets and other protective gear are recommended
Be respectful of others - no fighting or foul language
Clean up after yourself - do not leave trash on or around the skate park
Report any damage or hazards discovered to the City at the number below
Closed if wet
All other City Rules apply
For emergencies call 911
To report damage call xxx-xxx-xxxx
OREGON LAW (CHAPTER 105) LIMITS THE LIABILITY OF A GOVERNMENTAL UNIT FOR DAMAGES ARISING DIRECTLY FROM THE RECREATIONAL USE OF THIS PARK.



High Risk Activities



Charging?



ERM Treatment



Natural Land



Common Claims



Inspection



Documentation



How To Prepare for a Claim



Questions?