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Comment

The Connecticut Recreational Use Statute: Should a Municipality Be Immune From Tort Liability?

I. Introduction

States have recognized that public access to recreation is an important public policy,¹ and have sought cost-effective ways to increase access to recreational lands.² One way has been to encourage private landowners to make their lands available for public use by limiting landowner liability for personal injuries suffered by recreational users of private property.³ This landowner limited liability has been accomplished through recrea-

1. See CELIA CAMPBELL-MOHN ET AL., SUSTAINABLE ENVIRONMENTAL LAW § 1.2(H)(1), at 40 (1993). "The primary objective of the laws concerning public recreation is to furnish recreational and aesthetic resources for accessible enjoyment by a substantial segment of the population. A secondary objective . . . is the encouragement of human health through exercise." *Id.*

Despite the rise in recreation consciousness, public recreation law is relatively young, and there is no clear demarcation between public recreation and commercial opportunity. Public recreation includes "hiking, viewing scenery, taking photographs, picnicking, hunting, fishing, and swimming, . . . [but in general] excludes professional and school athletics, indoor amusements, and commercial recreational activities on privately owned lands." *Id.* § 5.1(A), at 202. This distinction is based on past practices, and the fact that fees have been traditionally charged for commercial recreation activities. *Id.*

2. See Cori Leonard Ford, *Digest of Selected Articles*, 19 REAL EST. L.J. 169, 171 (1990) (reviewing N. Linda Goldstein et al., *Recreational Use Statutes—Time for Reform*, PROB. & PROP., July-Aug. 1989, at 6).

3. *Id.* Under these statutes, the landowner is liable only for torts caused by the landowner's wilful, reckless or grossly negligent conduct. *De Milo v. West Haven*, 458 A.2d 362, 366-67 (Conn. 1983) (describing wilful conduct as encompassing both the physical act proscribed by a statute as well as the resulting injury). See also *Soucy v. Wysocki*, 96 A.2d 225, 228 (Conn. 1953) ("A wilful act is one that is 'intentional, wrongful and without just cause or excuse.'" (quoting *Rogers v. Doody*, 178 A. 51, 53 (Conn. 1935))).

tional use statutes.⁴ Under these statutes, the private landowner benefits because he or she is freed from potential liability and the state benefits because it is given a free resource—recreational land for its citizens—without the traditional burden of having to buy or maintain the land.⁵ Recognizing these advantages, the vast majority of states have passed versions of the recreational use statute.⁶

The landowner, however, does not have blanket immunity from liability. See, e.g., CONN. GEN. STAT. ANN. § 52-557h (West 1991). An owner is liable:

(1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

Id. Under most circumstances, therefore, a private landowner who opens his or her land to the public without charge for recreation, is given immunity from tort liability. This statutory modification of private-owner liability in tort is an important incentive to the landowner.

4. Ford, *supra* note 2, at 170.

5. COUNCIL OF STATE GOVERNMENTS, 1965 SUGGESTED STATE LEGISLATION 150-52 (1965) [hereinafter 1965 MODEL ACT]. In this publication, the Council of State Governments states that:

Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreage of private land could add to the outdoor recreation resources available. . . . [I]n those instances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them. . . . Th[is] suggested [Model] [A]ct . . . is designed to encourage availability of private lands by limiting the liability of owners to situations in which they are compensated for the use of their property and to those in which injury results from malicious or willful acts of the owner.

Id.

6. Stuart J. Ford, Comment, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491, 498 n.24. See ALA. CODE §§ 35-15-20 to -28 (1991 & Supp. 1994); ARIZ. REV. STAT. ANN. § 33-1551 (1990 & Supp. 1994); ARK. CODE ANN. §§ 18-11-301 to -307, 18-11-401 to -406 (Michie 1987 & Supp. 1993); CAL. CIV. CODE § 846 (West 1974 & Supp. 1995); COLO. REV. STAT. §§ 33-41-101 to -105 (1984 & Supp. 1992); CONN. GEN. STAT. ANN. §§ 52-557f to -557j (West 1991); DEL. CODE ANN. tit. 7, §§ 5901-047 (Michie 1991); FLA. STAT. ANN. § 375.251 (West 1988); GA. CODE ANN. §§ 51-3-20 to -26 (Michie 1982 & Supp. 1994); HAW. REV. STAT. §§ 520-1 to -8 (1985); IDAHO CODE § 36-1604 (Michie 1994); ILL. COMP. STAT. ANN. ch. 745, 10/3-106 (Michie 1993); IND. CODE § 14-2-6-3 (Michie 1990); IOWA CODE ANN. §§ 461C.1 to .7 (West 1990 & Supp. 1994); KAN. STAT. ANN. §§ 58-3201 to -3207 (1994); KY. REV. STAT. ANN. § 150.645 (Michie 1992); LA. REV. STAT. ANN. §§ 9.2791, 9.2795 (West 1991); ME. REV. STAT. ANN. tit. 14, § 159-A (West 1964 & Supp. 1994); MD. CODE ANN. NAT.

In 1971 the Connecticut Legislature passed the Connecticut Recreational Use Act,⁷ which limits the liability of private landowners who allow use of their lands by the public for recreational purposes.⁸ Under the statute, the term "owner" is defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises."⁹ Recent decisions by the Connecticut Supreme Court have extended the definition of "owner" to include municipal or public landowners as well. Contrary to the express intent of the Connecticut Legislature, such public landowners are extended the limited liability intended solely for private landowners.¹⁰

This Comment discusses the Connecticut recreational use statute, and the recent case law extending immunity to municipal landowners. Part II traces the general rule of tort liability for actions occurring on one's property, the origin and development of non-commercial public use of land for recreation, the legislative intent behind recreational use statutes, and issues of state sovereignty and municipal immunity. Part III discusses

RES. §§ 5-1101 to -1108 (Michie 1989); MASS. GEN. L. ANN. ch. 21, § 17C (West 1994); MICH. COMP. LAWS ANN. § 300.201 (West 1984 & Supp. 1994); MISS. CODE ANN. §§ 89-2-1 to -7, 89-2-21 to -27 (1991); MO. REV. STAT. § 537.345 to .348 (Vernon 1988); MONT. CODE ANN. §§ 70-16-301 to -302 (1993); NEB. REV. STAT. §§ 37-1001 to -1008 (1993); NEV. REV. STAT. § 41.510 (1991); N.H. REV. STAT. ANN. § 212.34 (1989); N.J. REV. STAT. §§ 2A:42A-2 to -8 (West 1987 & Supp. 1994); N.M. STAT. ANN. § 17-4-7 (1988); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989); N.D. CENT. CODE §§ 53-08-01 to -06 (Michie 1989 & Supp. 1993); OHIO REV. CODE ANN. §§ 1533.18 to .181 (Anderson 1986); OKLA. STAT. tit. 76, §§ 10-15 (West 1987); OR. REV. STAT. §§ 105.655 to .680 (1984); PA. STAT. ANN. tit. 68, §§ 477-1 to -8 (West 1994); R.I. GEN. LAWS §§ 32-6-1 to -7 (1994); S.C. CODE ANN. §§ 27-3-10 to -70 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 20-9-12 to -18 (1987 & Supp. 1993); TENN. CODE ANN. §§ 70-7-101 to -105 (1987 & Supp. 1994); TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.001 to -.003 (West 1986 & Supp. 1995); UTAH CODE ANN. §§ 57-14-1 to -7 (Michie 1994); VT. STAT. ANN. tit. 10, § 5212 (1993); VA. CODE ANN. § 29.1-509 (Michie 1992 & Supp. 1994); WASH. REV. CODE ANN. §§ 4.24.200 to .210 (West 1988 & Supp. 1995); W. VA. CODE §§ 19-25-1 to -7 (Michie 1993 & Supp. 1994); WIS. STAT. ANN. § 895.525 (West 1983 & Supp. 1994); WYO. STAT. §§ 34-19-101 to -106 (1990). Alaska, North Carolina and the District of Columbia do not have recreational use statutes.

7. 1971 Conn. Pub. Act. 249, codified at CONN. GEN. STAT. ANN. §§ 52-557f to -557j (West 1991).

8. CONN. GEN. STAT. ANN. § 52-557g(a) (West 1991) ("[A]n owner of land who makes all or any part of the land available to the public . . . for recreational services owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes . . .").

9. *Id.* § 52-557f(3).

10. See *infra* part III.B.2.

the current state of the law in Connecticut concerning immunity under its recreational use statute, and also examines the state of public recreation law in New York. Part IV focuses on the Connecticut Supreme Court's interpretation of the recreational use statute in the landmark case of *Manning v. Barenz*¹¹ as well as in the recent case of *Scrapchansky v. Plainfield*¹² which includes a persuasive dissent against the court's ruling on municipal immunity. Part V concludes that tort immunity should not be granted to municipalities under recreational use statutes, and that the legislature should redefine the statute and address separately the question of municipal tort immunity. Part V also recommends the value of the rationale set forth by Justice Katz's dissenting opinion in *Scrapchansky* as a guide in moving the law forward.

II. Background

A. *Tort Liability for Owners of Land*

Historically, owners and occupiers of land have enjoyed the privilege of the ownership and use of their land, but they also bear the concomitant responsibility of ensuring that no unreasonable risk of harm is imposed on anyone using that land.¹³ Liability for the breach of this obligation could rest on any one of the three categories of tort liability: (1) intentional conduct, where an owner knowingly fails to warn of a danger that may harm someone; (2) negligent conduct, where an owner allows an unreasonable risk of harm to exist and harm, in fact, occurs to another; and (3) strict liability, where an owner is liable simply because certain activities are considered dangerous by their very nature as a matter of social policy.¹⁴ Conditions on the land that are dangerous, but occurring naturally, however, are

11. 603 A.2d 399 (Conn. 1992).

12. 627 A.2d 1329 (Conn. 1993).

13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57, at 386-87 (5th ed. 1984).

14. *Id.* An example of intentional conduct is knowingly allowing some harm to occur such as allowing noxious fumes to escape on the land. An example of negligence is not exercising a reasonable amount of care which could prevent a harm from occurring such as frightening horses pulling machinery by running a gasoline engine in front of them, and causing them to bolt. An example of strict liability is liability regardless of intention or negligence, but simply because of the nature of the objects involved such as the keeping of dangerous animals who could

not considered part of the landowner's obligation to make the land safe.¹⁵ Therefore, the landowner would not be held liable for harm caused by such naturally occurring dangerous conditions.¹⁶

In addition, when an injury occurs on the premises of an owner, the extent to which the owner can be held liable will depend on whether the visitor is a trespasser, a licensee, or an invitee.¹⁷ A number of jurisdictions have replaced the strict classifications of trespasser, licensee and invitee in favor of a single reasonable person under the circumstances standard.¹⁸ In Connecticut, however, the three-tiered classification is still followed.¹⁹

A trespasser is defined as "a person who enters or remains upon land in the possession of another without a privilege . . . by the possessor's consent or otherwise."²⁰ Because trespassers come on land without permission, the possessor of land owes no duty, and cannot be held liable for any misfortune that may happen to the trespasser, even where the trespass was accidental.²¹ The owner is under no obligation to "guard a concealed pitfall, a pond . . . a dangerous electric wire, nor to keep a look-out for [a trespasser] as he operates his machinery" ²² The reasoning behind this rule appears to be that "in a civilization based on private ownership, it is considered a socially desirable policy to allow a person to use his own land in his own way, without the burden of watching [out for] those who come there without permission or right."²³ An exception to this rule applies, however, when a trespasser constantly trespasses on a limited area of the owner's land and thereby creates a "habit" of

attack people or certain abnormally dangerous activities like blasting with dynamite. *Id.*

15. *Id.* at 390.

16. *Id.*

17. *Id.* at 393.

18. *Maffeo v. Harbour Landing Condominium Ass'n, Inc.*, No. CIV 91-312944, 1994 WL 669701, at *1 (Conn. Super. Ct. Nov. 22, 1994).

19. *Id.* (citing *Morin v. Bell Court Condominium Ass'n, Inc.*, 612 A.2d 1197, 1199 (Conn. 1992)).

20. *KEETON ET AL.*, *supra* note 13, § 58, at 393.

21. *Id.*

22. *Id.* at 394.

23. *Id.* at 395.

being there.²⁴ In such cases of "tolerated intruders," the law has imposed liability on the owner where the balance of the risk of harm to the trespasser is much greater than the burden of guarding against harm to the owner.²⁵ In addition, in all cases the landowner has a duty to refrain from injuring a trespasser by "wilful or wanton," rather than merely negligent, conduct.²⁶

A licensee differs from a trespasser in that the licensee comes on the land with the permission of the owner, although the licensee enters the premises for the licensee's own purpose rather than for a purpose of the owner.²⁷ Still, the licensee must enter at his or her own risk, and the owner is under no obligation to inspect the premises to discover unknown dangers or to give warning of dangers which should be obvious to the licensee.²⁸ Examples of persons included in this category are: tourists, salespersons, people taking short cuts with the owner's permission, people seeking refuge from the weather, and invited social guests.²⁹ If, however, a dangerous condition is present on the premises, and a licensee who habitually comes on the land would not be aware of this danger, the owner must give notice of the danger.³⁰

An invitee enters an owner's land, with express or implied permission, for the purpose of doing business with the landowner. Examples are customers in restaurants, banks, theaters, beaches, and amusement parks.³¹ The owner is under an obligation to inspect the premises and make them safe from po-

24. *Id.* at 396.

25. *Id.*

26. *Id.* at 397. The term "wilful" in civil proceedings denotes an act that is intentional, knowing, or voluntary, as distinguished from accidental. The term "wanton" means "reckless, heedless, malicious; characterized by extreme recklessness or foolhardiness." BLACK'S LAW DICTIONARY 1582 (6th ed. 1990).

27. KEETON ET AL., *supra* note 13, § 60, at 412.

28. *Id.*

29. *Id.* at 413.

30. *Id.* at 418. Examples of dangers that would require warning are the installation of concealed high tension wires, and a concealed man-made trench. *Id.* at 418 & nn. 83-84 (citations omitted). See also *Haffey v. Lemieux*, 224 A.2d 551, 553 (Conn. 1966) (finding that landowner should have told licensee mail carrier of unsafe porch step, since it was foreseeable that licensee would climb porch steps to deliver mail).

31. KEETON ET AL., *supra* note 13, § 61, at 419.

tential as well as actual danger.³² The theory on which this liability is based, often called the "economic benefit theory,"³³ is the proposition that "the duty of affirmative care to make the premises safe is imposed upon the person in possession as the price he must pay for the economic benefit he derives, or expects to derive from the presence of the visitor."³⁴ But the potential of benefit to the owner is not enough to classify the visitor as an invitee; there must also exist the element of invitation.³⁵ Without the element of invitation, the intruder is a licensee or a trespasser, depending on the circumstances.³⁶

B. *The Development of Public Outdoor Recreation*

The post Civil War era commenced a period of public support for outdoor recreation,³⁷ during which time city,³⁸ state,³⁹ and national parks⁴⁰ were established. Then, in 1916, the National Park Service ("NPS") was created.⁴¹ It was directed by the National Park Service Organic Act of 1916 to:

"promote" the use of the national parks, while declaring the "fundamental purpose" of the parks to be to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁴²

The NPS administers the national parks, national monuments and military parks, including former Civil War battlefields.⁴³ The NPS also acquired the administrative functions of the for-

32. *Morin v. Bell Court Condominium Ass'n, Inc.*, 612 A.2d 1197, 1199 (Conn. 1992).

33. RESTATEMENT (FIRST) OF TORTS §§ 332, 343 cmt. a (1934).

34. *KEETON ET AL.*, *supra* note 13, § 61, at 420.

35. *See id.* at 420-23.

36. *Id.* at 423.

37. *CAMPBELL-MOHN ET AL.*, *supra* note 1, § 5.1(B)(2), at 205.

38. *Id.* (noting that Central Park in New York City was laid out in the 1860s).

39. *Id.* (noting that Niagara Falls and Adirondack State Parks were established in 1885 by New York City residents who had the concern for and interest in outdoor recreation).

40. *Id.* (noting that the first National Park, Yellowstone, was established by Congress in 1872).

41. 16 U.S.C. § 1 (1988).

42. *CAMPBELL-MOHN ET AL.*, *supra* note 1, § 5.1(B)(1), at 203.

43. *Id.* §§ 5.1(B)(2)-(3), at 205-08.

mer Bureau of Outdoor Recreation⁴⁴ which had been established in 1963 to encourage recreation at all levels: federal, state, and local.⁴⁵ Congressional recreation legislation included the national system of trails established in 1968,⁴⁶ and the creation of more urban parks, national historic sites, and national recreation areas in the 1970s through the 1990s.⁴⁷ Recreation legislation "reflects the recognition of the increasing importance of public recreational resources in a post-industrial, populous country."⁴⁸

The federal government acquires land for recreation by purchase and by condemnation.⁴⁹ State and local ownership of recreational land has also been established by gift, purchase or condemnation.⁵⁰ Economic difficulties, however, including rising land prices and sinking state budgets,⁵¹ have slowed down the acquisition of land for recreation at the state and local level. Governmental bodies became more dependent on donations in order to obtain land to use for recreation.⁵² This led to the development of recreational use statutes.

44. *Id.* § 5.1(B)(3), at 210 n.38.

45. 16 U.S.C. § 4601 (1988). Specifically, Congress stated that:

The Congress finds and declares it to be desirable that all American people of present and future generations be assured adequate outdoor recreation resources, and that it is desirable for all levels of government and private interests to take prompt and coordinated action to the extent practicable without diminishing or affecting their respective powers and functions to conserve, develop, and utilize such resources for the benefit and enjoyment of the American people.

Id.

46. CAMPBELL-MOHN ET AL., *supra* note 1, § 5.1(B)(3), at 211 (citing 16 U.S.C. §§ 1241-51 (1988)).

47. *Id.*

48. *Id.*

49. *Id.* § 5.2(A)(1), at 220. The terms of purchase and source of funds are detailed in 16 U.S.C. § 4601-5(a) (1988). *Id.* at 220-21. For Congress' declaration of the purpose of the Act, see *supra* note 45.

50. CAMPBELL-MOHN ET AL., *supra* note 1, § 5.2(A)(2), at 222-31. Under the Recreation and Public Purposes Act of 1926 (*as amended*, 16 U.S.C. §§ 869 to 869-4 (1988)), federal land can be conveyed to a state or locality for "historic-monument purposes or recreational purposes" at no charge. *Id.* § 5.2(A)(2), at 223 (quoting 43 U.S.C. § 869-1 (1988)). Gifts have established state parks (Yosemite was given to the state of California by Congress in 1864) and others have been purchased from private owners. *Id.* § 5.2(A)(3), at 231.

51. *Id.* § 5.2(A)(3), at 232.

52. *Id.*

C. *Origin and Development of Recreational Use Statutes*

The demand for recreational land has continued to outpace the funds available for acquisition.⁵³ Since governmental funds were inadequate to buy sufficient land, alternative approaches to the situation were needed. One such alternative was to encourage private landowners to open up their land for public recreation and use.⁵⁴ This alternative was eventually adopted in 1965 by the Council of State Governments⁵⁵ as a strategy to cope with the existing dilemma.⁵⁶ The Council drafted a document known as its Suggested State Legislation, which recommended that the state legislatures pass "an act to encourage landowners to make land and water areas available to the public by limiting liability in connection therewith."⁵⁷ The Council's document, known as the Model Act of 1965, helped to make the option of opening private land for public recreational use more viable.⁵⁸ The Act was subsequently adopted by several states,

53. Ford, *supra* note 2, at 171. The President's Commission on Americans Outdoors conducted a workshop in 1986 studying "Recreation on Private Lands" and discovered that the projections made in 1962 concerning the public's need for recreational land in 2000 had already been reached in 1980 and the Commission predicted that the need for more lands and waters for recreational activities will increase. *Id.*

54. N. Linda Goldstein et al., *Recreational Use Statutes—Time For Reform*, PROB. & PROP., July-Aug. 1989, at 6, 7-10.

55. NATIONAL ORGANIZATION OF STATE GOVERNMENTS, OFFICIAL DIRECTORY 39-41 (1984).

The membership of the Council of State Governments ("CSG") includes the states of the United States, the District of Columbia, and territories of the United States. Its purpose, *inter alia*, is "to strengthen state government and preserve its role in the American federal system by . . . assisting the states in improving their legislative, administrative and judicial practices . . . [and] . . . defining and coordinating national programs." *Id.* The CSG conducts research on state programs and problems and produces a number of publications including Suggested State Legislation, which is published annually. The governing board of the CSG is composed of: the governor of each state; two legislators from each state, one from each house; and a large executive committee comprised of legislators, governors, a chief justice and others. *Id.*

56. 1965 MODEL ACT, *supra* note 5, at 150-52.

57. *Id.* at 150.

58. John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?*, 24 IND. L. REV. 1587, 1590-91 (1991). Becker explains that:

The stated purpose of the 1965 Model Act was to encourage owners to make land and water areas available to the public for recreational purposes by limiting owner's liability toward persons who enter their property for such purposes. Protection from liability was extended to holders of a fee

including Connecticut.⁵⁹ The current Connecticut Recreational Use Act, passed in 1971,⁶⁰ is in keeping with the purpose and design of the original 1965 Model Act.⁶¹

ownership interest, as well as to tenants, lessees, occupants, and persons in control of premises. The Act benefitted roads, waters, watercourses, private ways and buildings, structures, and machinery or equipment attached to realty.

Recreational activities within the purview of the 1965 Model Act include hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports, and viewing or enjoying historical, archeological, scenic, or scientific sites. In describing the protection afforded owners and occupiers, the Act states that an owner or occupier owes no duty of care to keep premises safe for entry or use by others for recreational purposes, or to give any warning of dangerous conditions, uses, structures, or activities to persons entering the premises for such recreational purposes. If an owner directly or indirectly invites or permits any person to use the property for recreational purposes without charge, the owner does not assure that the premises are safe for any purpose, nor confer the status of licensee or invitee on the person using the property, nor assume responsibility for or incur liability for any injury to persons or property caused by any act or omission of persons on the property.

Id.

59. *Scrapchansky v. Plainfield*, 627 A.2d 1329, 1337-38 (Conn. 1993) (Katz, J., dissenting) ("Parroting a Model Act promulgated in 1965 by the Council of State Governments, the Connecticut Legislature enacted General Statutes §§ 23-27a through 23-27k, entitled 'An Act Limiting the Liability of Property Owners Toward Persons Using Their Land for Recreation,' in 1967.").

60. 1971 Conn. Pub. Acts 249 (codified at CONN. GEN. STAT. ANN. § 52-557g (West 1991)). This section states that:

(a) Except as provided in section 52-557h, an owner of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes *owes no duty of care* to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering for recreational purposes.

Id. (emphasis added). See also 1965 MODEL ACT, *supra* note 5, at 150. Additionally, liability is imposed under certain conditions:

(1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that, in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

CONN. GEN. STAT. ANN. § 52-557h (West 1991). See also 1965 MODEL ACT, *supra* note 5, at 150.

61. 1965 MODEL ACT, *supra* note 5, at 150-52.

While it is true that the recreational use statute gives the landowner a defense against liability barring wilful, reckless or grossly negligent conduct, landowners "cannot simply declare themselves covered by a recreational use statute and automatically expect limited liability for all accidents occurring on their property."⁶² There is no *quid pro quo*. Instead, in order to take advantage of the statutory immunity from liability, landowners must be sued before they can assert recreational use as an affirmative defense. They cannot prevent the bringing of a lawsuit.

In 1979, the National Association of Conservation Districts initiated a study of landowner liability and trespass laws.⁶³ The results of this study illuminated the fact that, despite the protection offered by recreational use statutes, landowners were still concerned with potential liability. The study also noted:

[The] 1979 study of landowner liability and trespass laws noted two deficiencies: (1) Liability law is generally too protective of users, and injured persons have been granted recoveries so often that landowners are discouraged from opening their land for recreational use; and (2) both laws are too complex and confusing to be either predictable or understood. As a result, landowners are reluctant to make their land available, and the public has fewer recreational choices.⁶⁴

The results of the study culminated in the 1979 Model Act.⁶⁵

One essential difference between the 1965 Model Act and the 1979 Model Act is that in the 1965 Act, "owner" is defined as any "possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises,"⁶⁶ whereas in the 1979 Model Act, "owner" is defined as including any "individual, legal entity or governmental agency that has any ownership or security interest whatever or lease or right of possession in land."⁶⁷ The

62. Goldstein et al., *supra* note 54, at 8.

63. Becker, *supra* note 58, at 1590 (citing W.L. CHURCH, PRIVATE LANDS AND PUBLIC RECREATION: A REPORT AND PROPOSED NEW MODEL ACT ON ACCESS, LIABILITY, AND TRESPASS (1979)). Church, associate dean of the University of Wisconsin Law School, led this study.

64. *Id.* at 1591-92.

65. COUNCIL OF STATE GOVERNMENTS, 1979 SUGGESTED STATE LEGISLATION 107-112 (1978) [hereinafter 1979 MODEL ACT].

66. 1965 MODEL ACT, *supra* note 5, at 151; Becker, *supra* note 58, at 1590.

67. 1979 MODEL ACT, *supra* note 65, at 107 (emphasis added); see also Becker, *supra* note 58, at 1592.

Connecticut Recreational Use Statute did not adopt the 1979 Model Act definitions, and did not include governmental agencies in the definition of "owner." A governmental agency, however, may have its own immunity which is derivative of sovereign immunity.

D. *Sovereign Immunity*

1. *The Federal Government*

Sovereign immunity was adopted by American judges from England where the idea was held that "the king can do no wrong,"⁶⁸ and thus became part of the common law of the United States.⁶⁹ It means that the federal or state government is subject to being sued only when it consents. The federal government has waived sovereign immunity in some circumstances and is liable in tort, if at all, only under the Federal Tort Claims Act ("FTCA").⁷⁰ The government's liability under this statute is "in the same manner and to the same extent as a private individual [would be] under [the same] circumstances."⁷¹ Liability for recreational injuries on federal lands is also governed by the FTCA.⁷² Under the FTCA, the government's liability is limited to acts of negligence, and to wrongful acts and omissions.⁷³ Discretionary acts are expressly exempted from tort liability under the FTCA.⁷⁴ Thus, no liability may be based upon the exercise

68. Carolyn Birmingham, *Sovereign Immunity in Connecticut: Survey and Economic Analysis*, 13 CONN. L. REV. 293, 293 (1981) ("A sovereign is a supreme repository of power. Unless it consents to suit, a suit brought against it will be dismissed for want of jurisdiction. This jurisdictional prerogative is the essence of the doctrine immunity.").

69. KEETON ET AL., *supra* note 13, § 131, at 1033.

70. 28 U.S.C. §§ 2671-2680 (1988). *See also* WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 636 (8th ed. 1988). The Federal Tort Claims Act was enacted in 1946, providing the judicial remedy available to anyone who suffered tortious injury which could be attributed to the United States Government. KEETON ET AL., *supra* note 13, § 131, at 1034 & n.13.

71. 28 U.S.C. § 2674 (1988).

72. 28 U.S.C. §§ 1346(b), 2671-2680 (1988).

73. CAMPBELL-MOHN ET AL., *supra* note 1, § 5.2(B)(4), at 251.

74. 28 U.S.C. § 2680(a) (1988). *See also* KEETON ET AL., *supra* note 13, § 131, at 1041-42. Cases that have been adjudicated as within the discretionary exemption include claims of recreational users on federal lands "killed by a grizzly, injured on a rocky path, drowned, injured by a fall along a trail, injured by a fall from an arch, injured at a waterfall, struck by lightning, injured in a motorcycle race, and killed in a rafting accident." CAMPBELL-MOHN ET AL., *supra* note 1, § 5.2(B)(4),

or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal governmental agency or employee.⁷⁵ Discretionary activities encompass judgmental decisions in contrast to the more routine operational acts.⁷⁶

2. State Government

State immunity, as a general rule, is much like that of the federal government.⁷⁷ Unless a state waives some or all of its immunity, it is afforded complete protection against tort liability.⁷⁸ This immunity is both substantive and procedural. When procedural immunity is removed, one has the right to sue a state in tort or otherwise. Procedural immunity can be abolished by statutes enacted by the state's legislature. Even when procedural immunity is waived, however, a state can retain substantive immunity as a defense against liability.⁷⁹ Thus, a statute may give consent for a state to be sued,⁸⁰ but a state court may hold that the statute did not also give the state's consent to liability.⁸¹ Although the state has procedurally waived immunity from liability, therefore, it does not necessarily follow

at 251-52 (footnotes and citations omitted). Cases with fact situations that were not considered discretionary exemptions from liability are

claims by a swimmer attacked by an alligator at a swimming area in a national forest, a swimmer killed by a powerboat at a recreational water project, a diver paralyzed by hitting a submerged tree stump at a Corps of Engineers project leased to a state park system, a diver paralyzed by hitting a submerged rock adjacent to a national park, and beach visitors injured by hot coals on the beach.

Id. at 252 (footnotes and citations omitted).

75. See generally CAMPBELL-MOHN ET AL., *supra* note 1, § 5.2(B)(4), at 251-52. See also *Gordon v. Bridgeport Hous. Auth.*, 544 A.2d 1158, 1188 (Conn. 1988).

76. CAMPBELL-MOHN ET AL., *supra* note 1, § 5.2(B)(4), at 252. Discretionary functions are generally contrasted with operational ones. The planning stage is usually discretionary, whereas the implementation of the plan is usually held to be operational. *Id.*

77. KEETON ET AL., *supra* note 13, § 131, at 1043.

78. *Id.*

79. *Id.* at 1043 & n.16.

80. For example, the state of New York has constitutionally given jurisdiction to the Court of Claims to hear cases against the state. N.Y. CT. CLAIMS ACT § 8 (McKinney 1989) ("The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined . . .").

81. GEORGE F. KUGLER, JR., REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON SOVEREIGN IMMUNITY 134 (1972).

that the state has waived completely all immunity from substantive liability. The nature of the activity implicated in the suit, as well as the particular governmental agency involved, are essential factors in determining whether or not the state or its agents will claim substantive tort immunity.⁸²

The Eleventh Amendment to the United States Constitution,⁸³ however, does provide procedural immunity in that it bars suits against state governments in federal courts.⁸⁴ Any suits against the state based on federal law must be initially brought in state rather than in federal court.⁸⁵

The majority of states have consented to some tort liability, and the extent of liability accepted and the reasons for acceptance differ among the states.⁸⁶ A study of tort liability in the states, concerning state reluctance to give up complete immunity and varying degrees of abrogation of immunity, indicated that three factors contributed to this reluctance:

- (1). . . cumbersome language about sovereignty and the nature of law which is usually contradictory within itself . . . (2) Legislative and judicial inertia . . . and (3) financial fears, that the states and their subdivisions actually cannot afford, in the face of other more ur-

82. *Id.* at 140. See also PETER H. SCHUCK, *SUING GOVERNMENT* 206-07 (1983); HARRY STREET, *GOVERNMENTAL LIABILITY* 143-84 (1975). See also *McCummings v. New York City Transit Auth.*, 81 N.Y.2d 923, 932, 613 N.E.2d 559, 564, 597 N.Y.S.2d 653, 658 (Bellacosa, J., dissenting), *cert. denied*, 114 S. Ct. 548 (1993) ("Nothing in the legislative history of the Court of Claims Act . . . indicates that the waiver provision was designed to override the well-defined and carefully reasoned body of law The city's defense which we here sustain rests not on any anachronistic concept of sovereignty, but rather on a regard for sound principles of government administration and a respect for the expert judgment of agencies authorized by law to exercise such judgment." (quoting *Weiss v. Fote*, 7 N.Y.2d 579, 588, 167 N.E.2d 63, 67, 200 N.Y.S.2d 409, 415 (1960))); *McCabe v. New Jersey Turnpike Auth.*, 170 A.2d 810, 813 (N.J. 1961) ("[T]he majority of courts have been reluctant to construe consent provisions as authorizing liability for ordinary negligence unless the statute clearly so states."); *Maynard v. City of New London*, No. 525277, 1995 WL 55113, at *2 (Conn. Super. Ct. Jan. 30, 1995) (Connecticut General Statutes § 7-465 "expressly denies the governmental immunity defense.").

83. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

84. *KEETON ET AL.*, *supra* note 13, § 131, at 1043.

85. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 2.11, at 47 (4th ed. 1991).

86. For a list of the distinctions between states, see *KEETON ET AL.*, *supra* note 13, § 131, at 1045 n.36.

gent demands upon their treasuries, to pay out what they would be required to pay if tort liability were accepted.⁸⁷

3. *Municipalities*

A municipality is "a legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes."⁸⁸ Municipal corporations are created by and derive their powers from the state's legislature.⁸⁹ They are subdivisions of the state, acting as local governments, and also have the same interests as private corporations.⁹⁰ At common law municipalities enjoyed governmental immunity in tort claims that arose from governmental activities, but not those that arose out of proprietary or ministerial activities of the government.⁹¹ "Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . On the other hand, ministerial acts are performed in a prescribed manner, without the exercise of judgment or discretion" ⁹² Police and fire departments, for example, are considered governmental, having been endowed with power by the government, and are immune from suit for tortious acts.⁹³ On the other hand, municipal corporations performing proprietary functions are not offered immunity.⁹⁴ In addition, other municipal corporations, such as public hospitals and municipally-owned utility companies, which usually charge for their services and are operated like private corporations, are not granted immunity from liability for their tortious acts.⁹⁵ The American Law Institute recognizes as a general rule that municipalities have no general immunity.⁹⁶ Discretionary functions, however, still remain as a shield against municipal

87. Robert A. Leflar & Benjamin E. Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1364 (1954).

88. BLACK'S LAW DICTIONARY 1018 (6th ed. 1990).

89. *See id.* at 1017.

90. PROSSER ET AL., *supra* note 70, at 625.

91. KEETON ET AL., *supra* note 13, § 131, at 1051-53.

92. Kolanizk v. Board of Educ., 610 A.2d 193, 195 (Conn. 1992) (quoting Heighl v. Board of Educ., 587 A.2d 423, 425 (Conn. 1991) (quoting Gauvin v. New Haven, 445 A.2d 1, 3 (Conn. 1982))).

93. KEETON ET AL., *supra* note 13, § 131, at 1053.

94. *Id.* at 1051.

95. *Id.* at 1053.

96. *Id.* at 1052 (citing RESTATEMENT (SECOND) OF TORTS § 895c (1965)).

liability in all states including those that have generally abolished immunity, those that retain immunity subject to exceptions, and those that retain municipal immunity and extend it even to other entities such as school districts and counties.⁹⁷

III. Current State of the Law

A. *Connecticut's State Immunity*

"That a sovereign state is immune from suit, unless it consents to be sued is the settled law of Connecticut."⁹⁸ The state's right not to be sued is not to be diminished by statute unless a clear intention to that effect is expressed by the legislature.⁹⁹ There are exceptions, however, to the general rule that there is no suit without consent.¹⁰⁰ First, the Connecticut Constitution¹⁰¹ has authorized the legislature to provide statutorily for a claims commissioner who hears claims against the state.¹⁰² The commissioner's decision is final on questions of law and fact,¹⁰³ but judicial review is possible under the Administrative Procedure Act, once all administrative remedies have been exhausted.¹⁰⁴ Second, Connecticut has statutorily consented to suit in certain situations such as actions against the state on

97. *Id.* at 1053 (citations omitted).

98. *Murphy v. Ives*, 196 A.2d 596, 598 (Conn. 1963) (citing *State v. Kilburn*, 69 A. 1028, 1029 (Conn. 1908)).

99. *Murphy*, 196 A.2d at 598 (quoting *Kilburn*, 69 A. at 1029).

100. *Birmingham*, *supra* note 68, at 296.

101. *Id.* (citing CONN. CONST. art. XI, § 4 ("Claims against the state shall be resolved in such a manner as may be provided by law.")).

102. CONN. GEN. STAT. ANN. § 4-160(a) (West 1991). This section states that "[w]hen the claims commissioner deems it just and equitable, he may authorize suit against the state on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable." *Id.* CONN. GEN. STAT. ANN. § 4-142 (West 1991) states that:

There shall be a claims commissioner who shall hear and determine all claims against the state except: (1) Claims for disability, pension, retirement, employment benefits; (2) the periodic payment of claims upon which suit otherwise is authorized by law; (3) claims for which an administrative hearing procedure otherwise is established by law; (4) requests by political subdivisions of the state for the payment of grants in lieu of taxes, and (5) claims for the refund of taxes.

Id.

103. *Birmingham*, *supra* note 68, at 297-98. "Although the claims commissioner can grant permission to sue the state or one of its agencies, he rarely does so." *Id.* at 299.

104. *Id.* at 298.

highway and public works contracts,¹⁰⁵ and injuries sustained on state highways or sidewalks.¹⁰⁶

In Connecticut, "a municipality has governmental immunity in the performance of its governmental discretionary functions,"¹⁰⁷ but not its ministerial ones. Thus, there is no immunity for ministerial acts whereby a duty is to be performed in a prescribed manner, but there is immunity when the act requires the exercise of judgment or discretion.¹⁰⁸ Exceptions to discretionary immunity occur where (1) a statute specifically abolishes municipal immunity,¹⁰⁹ (2) a statute imposes derivative liability on municipalities for certain tortious conduct of municipal employees,¹¹⁰ and (3) the statute imposes liability on a municipality for the negligence of its employees acting within the scope of their employment.¹¹¹

105. CONN. GEN. STAT. ANN. § 4-61(a) (West 1991).

106. CONN. GEN. STAT. ANN. § 13a-144 (West 1991).

107. *Letowt v. City of Norwalk*, 579 A.2d 601, 601 (Conn. 1989).

108. *Gordon v. Bridgeport Hous. Auth.*, 544 A.2d 1185, 1189 (Conn. 1988) (reasoning that discretionary acts are an exception to liability, given that such acts are not performed maliciously, wantonly or in an abuse of discretion). The court held that:

"A municipality is immune from liability for the performance of governmental acts as distinguished from ministerial acts. Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . On the other hand, ministerial acts are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action."

Id. (quoting *Gauvin v. New Haven*, 445 A.2d 1, 3 (Conn. 1982) (citing *Tango v. New Haven*, 377 A.2d 284, 285 (Conn. 1977); *Wright v. Brown*, 356 A.2d 176, 180 (Conn. 1975)). See also *Maynard v. New London*, No. 525277, 1995 WL 55113 at *2 (Conn. Super. Ct. Jan. 30, 1995); *Gaylor v. Town of West of Hartford*, No. 39 13 74, 1994 WL 228349 at *2 (Conn. Super. Ct. May 9, 1994); and *Pfeifer v. Holman*, No. 50 30 38, 1990 WL 288660 at *1 (Conn. Super. Ct. April 2, 1990).

109. CONN. GEN. STAT. ANN. § 7-108 (West 1991). This section states that cities or boroughs are liable for damage from mobs. *Id.*

110. CONN. GEN. STAT. ANN. § 7-465 (West 1991). There is an assumption of liability for damage caused by employees or members of local emergency planning districts, and joint liability of municipalities with district departments of health or regional planning agencies.

111. CONN. GEN. STAT. ANN. § 52-557n (West 1991 & Supp. 1994). This statute details the liability of municipal corporations. The only mention of a recreational area is in section (b)(4) in which the access to a recreational area is discussed. The statute in whole states that:

(a)(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee,

officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by the means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

(b) *Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from:* (1) The condition of natural land or unimproved property; (2) the condition of a reservoir, dam, canal, conduit, drain or similar structure when used by a person in a manner which is not reasonably foreseeable; (3) the temporary condition of a road or bridge which results from weather, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe; (4) *the condition of an unpaved road, trail or footpath, the purpose of which is to provide access to a recreational or scenic area*, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe; (5) the initiation of a judicial or administrative proceeding, provided that such action is not determined to have been commenced or prosecuted without probable cause or with a malicious intent to vex or trouble, as provided in section 52-568; (6) the act or omission of someone other than an employee, officer or agent of the political subdivision; (7) the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, when such authority is a discretionary function by law, unless such issuance, denial, suspension or revocation or such failure or refusal constitutes a reckless disregard for health or safety; (8) failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances; (9) failure to detect or prevent pollution of the environment, including groundwater, watercourses and wells, by individuals or entities other than the political subdivision; or (10) conditions on land sold or transferred to the political subdivision by the state when such conditions existed at the time the land was sold or transferred to the political subdivision.

(c) Any person who serves as a member of any board, commission, committee or agency of a municipality and who is not compensated for such membership on a salary or prorated equivalent basis, shall not be personally liable for damage or injury occurring on or after October 1, 1992, resulting

B. *Immunity under the Connecticut Recreational Use Statutes*

1. *Grant of Immunity to Private Landowners*

According to *Genco v. Connecticut Light and Power Co.*,¹¹² "limiting [a] private property owner's liability for injuries sustained on his property to situations in which there has been wilful or malicious failure to warn against dangerous conditions," does not violate the Equal Protection Clause of the U.S. Constitution.¹¹³ Under an equal protection analysis, "[i]f the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge."¹¹⁴ In this situation, the legislative purpose of the statute is to encourage private landowners to open their land to the public for recreational needs.¹¹⁵ The court found this purpose to be legitimate, and the means used—the statutory limitation of liability—to be rationally related to this purpose.¹¹⁶ The court, therefore, found that the recreational use statute withstood constitutional review.¹¹⁷

The Connecticut Recreational statute has likewise been found not to violate the Connecticut Constitution.¹¹⁸ The Con-

from any act, error or omission made in the exercise of such person's policy or decision-making responsibilities on such board, commission, committee or agency if such person was acting in good faith, and within the scope of such person's official functions and duties, and was not acting in violation of any state, municipal or professional code of ethics regulating the conduct of such person, or in violation of subsection (a) of section 9-369b or subsection (b) or (c) of section 1-21i. The provisions of this subsection shall not apply if such damage or injury was caused by the reckless, wilful or wanton misconduct of such person.

Id. (emphasis added).

112. 508 A.2d 58 (Conn. 1986).

113. *Id.* at 63 (citing *Goodson v. Racine*, 312 N.W.2d 16 (Wis. 1973)).

114. *Genco*, 508 A.2d at 62 (quoting *Ryszkiewicz v. New Britain*, 479 A.2d 793, 798 (Conn. 1984)).

115. Michael K. Davis, *Landowner Liability Under the Wyoming Recreational Use Statute*, 25 LAND & WATER L. REV. 649, 651 (1980).

116. *Genco*, 508 A.2d at 62.

117. JOSEPH A. PAGE, *THE LAW OF PREMISES LIABILITY* § 5.23, at 126-27 (2nd ed. 1988).

118. CONN. CONST. art. 1, § 10. This section states that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." *Id.*

necticut Constitution states that every person shall have a remedy by due course of law for injury done to him.¹¹⁹ The court found that "it is within the province of the legislature to redefine or abolish existing definitions of injury since it is within its province to create, abrogate or redefine the 'established law,'"¹²⁰ and that, therefore, Connecticut's Constitution has not been violated by the statute.

2. *Grant of Immunity to Municipalities as Landowners*

In *Manning v. Barenz*,¹²¹ a landmark case, "owner" immunity under the recreational use statute was extended to municipalities.¹²² A two-year old child was injured when a metal box containing toys fell on his hand while he was playing in a municipal park.¹²³ The Supreme Court of Connecticut affirmed a lower court decision that the municipality was the "owner" of land within the meaning of the recreational use statute.¹²⁴ Thus, it concluded, the municipality enjoyed the immunity from liability that the statute conferred.¹²⁵

The court held that "[w]here the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intent of the legislature and there is no need for statutory construction or a review of the legislative history."¹²⁶ The court focused on the definition of the word "owner" in the recreational use statute, interpreting the term unambiguously to mean "the possessor of a fee interest."¹²⁷ Since the statute did not plainly say private landowners, the court concluded that section 52-557g applied to all land own-

119. *Id.*

120. *Gentile v. Altermatt*, 363 A.2d 1, 11 (Conn. 1975); see also *Genco*, 508 A.2d at 63 ("A statute limiting the liability of owners who provide the public with park area for outdoor recreational purposes is a reasonable exercise of legislative power, and it does not violate the constitutional provision that the courts shall be open to every person for redress of any injury.").

121. 603 A.2d 399 (Conn. 1992).

122. *Id.* at 402-03.

123. *Id.* at 400.

124. *Id.* at 399.

125. *Id.*

126. *Id.* at 401 (quoting *All Brand Importers, Inc. v. Department of Liquor Control*, 567 A.2d 1156, 1164 (Conn. 1989)).

127. *Id.* at 401; CONN. GEN. STAT. ANN. § 52-557f (West 1991).

ers—private and public,¹²⁸ and the court did not look to the legislative purpose of the statute. Therefore, in order to fall within the purview of the statute, a municipality needed only to establish that it was the possessor of a fee interest in land available to the public without charge for recreational purposes.¹²⁹ The court reasoned that its decision was in accord with a majority of other jurisdictions that have considered the definition of “owner” within similar recreational use statutes.¹³⁰

Prior to the 1992 decision in *Manning*, the issue of governmental immunity under the recreational use statute had been addressed in the state’s lower courts, but with varying results. At the federal court level, however, Connecticut’s Recreational Use Statute was found to confer immunity from liability upon the United States government. In *Jennett v. United States*,¹³¹ Connecticut law was applied in a suit involving a wrongful death action for a drowning which occurred on a reservoir in Connecticut which was owned by the federal government, and maintained by the Army Corps of Engineers.¹³² The suit against the United States was permitted under the Federal Torts Claims Act.¹³³ The district court held that Connecticut Statutes section 52-557g¹³⁴ applied in this case because the landowner was the U.S. Government, and under the Federal Tort Claims Act, the federal government is treated as a private individual would be treated in the same circumstances.¹³⁵ Under the FTCA, the United States Government is susceptible to liability only if a private citizen would be liable under similar circumstances, regardless of the state law being applied.¹³⁶ Therefore, if a private owner would be immune from liability under the recreational use statute, the federal government and its agencies would also be immune.¹³⁷ In *Jennett*, therefore, applicability of the statute made the government immune to liabil-

128. *Manning*, 603 A.2d at 401.

129. *Id.*

130. *Id.* n.4.

131. 597 F. Supp. 110 (S.D.N.Y. 1984).

132. *Id.* at 110.

133. 28 U.S.C. § 2671-2680 (1988). See *supra* notes 71-76 and accompanying text.

134. CONN. GEN. STAT. ANN. § 52-557g (West 1991).

135. See *supra* notes 70-75 and accompanying text.

136. See *supra* notes 70-75 and accompanying text.

137. See *supra* note 71.

ity.¹³⁸ The district court held that "[t]he principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners."¹³⁹

At the state court level, decisions preceding *Manning*¹⁴⁰ had been divided over whether or not section 52-557g applied to public landowners.¹⁴¹ In July 1993, the Connecticut Supreme Court reaffirmed the *Manning* rule in *Scrapchansky v. Plainfield*.¹⁴² *Scrapchansky* involved a man who was injured while playing in a baseball game on a field owned by the town of Plainfield.¹⁴³ The lower court found that the municipality had tort immunity, based on the court ruling in *Manning*.¹⁴⁴ The Supreme Court of Connecticut, in a three-two decision, affirmed the lower court decision.¹⁴⁵ "Our decision in *Manning v. Barenz* . . . settled the question in Connecticut of whether the [Recreational Use] [A]ct affords immunity from liability for negligence or nuisance to a municipality for an injury suffered on town land developed as a playground."¹⁴⁶ Thus, the court found that the act did confer immunity on municipal landowners.¹⁴⁷

The dissent in *Scrapchansky*, however, persuasively argued against the majority's finding of governmental immunity.¹⁴⁸ The dissent stated that nothing in the legislative history suggested that the legislature intended or even contemplated that the act would provide immunity for governmental entities.¹⁴⁹ "Therefore," the dissent concluded, "to apply the act to municipalities imposes too high a societal cost and serves no useful or intelligible purpose."¹⁵⁰

138. *Jennett*, 597 F. Supp. at 113.

139. *Id.* at 112.

140. *Manning v. Barenz*, 603 A.2d 399 (Conn. 1992).

141. See generally *Gauthier v. Town of Fairfield*, No. CIV 89-0261744-S, 1990 WL 271070 (Conn. Super. Ct. May 2, 1990).

142. 627 A.2d 1329, 1336 (Conn. 1993).

143. *Id.* at 1330.

144. *Id.* at 1330, 1332.

145. *Id.* at 1331.

146. *Id.* at 1336.

147. *Id.*

148. *Id.* (Katz, J., dissenting).

149. *Id.*

150. *Id.*

3. *Municipal Tort Immunity in New York*

As discussed above,¹⁵¹ when the defendant is the United States government, under the Federal Torts Claims Act, the federal government is susceptible to liability only if a private citizen would be liable under similar circumstances, regardless of what state law is being applied.¹⁵² When the defendant is a state or municipal corporation, however, the results have varied.¹⁵³

151. See *supra* notes 131-39 and accompanying text.

152. See *supra* note 71 and accompanying text.

153. See generally Robin C. Miller, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R. 4TH 262 (1986 & Supp. 1994). Several states have interpreted that recreational use statutes give municipalities immunity from liability.

For example, in Louisiana, the state is considered in the same position as a private litigant, and thereby has immunity under its recreational use statute. *Id.* at 275 (citing *Rushing v. State*, 381 So. 2d 1250 (La. Ct. App. 1980); *Pratt v. State*, 408 So. 2d 336 (La. Ct. App. 1981)).

Similarly, in Michigan, the court applied its recreational use statute to municipalities, holding that there was no reason to distinguish between the state and local government. *Id.* at 277 (citing *McNeal v. Department of Natural Resources*, 364 N.W.2d 768 (Mich. Ct. App. 1985)).

Also, in Nevada, the court held that the term "owner" was broad enough to include a public owner and that there was nothing on the face of the statute which indicated that the legislature intended to limit the statute to private owners. *Id.* at 277 (citing *Watson v. Omaha*, 312 N.W.2d 256 (Neb. 1981)).

And, in Oregon, the court held that its recreational use statute applied to public as well as to private landowners. *Id.* at 278 (citing *Hogg v. Clatsop County*, 610 P.2d 1248 (Or. App. 1980)).

On the other hand, a Minnesota court, referring to the legislative purpose of a now repealed statute, held that the term "owner" under its recreational use statute did not extend to municipalities. *Id.* (citing *Hovet v. Bagley*, 325 N.W.2d 813 (Minn. 1982)).

Likewise, a Pennsylvania court held that the state was not an owner under the recreational use statute because when the Pennsylvania statute was enacted the state already possessed sovereign immunity to the type of action to which the statute applied and, therefore, the legislature would not have believed the statute was necessary to protect the state. *Id.* at 280 (citing *Hahn v. Commonwealth*, 18 Pa. D. & C.3d 260 (1980)).

And in Florida, a court held that the recreational use statute should not be interpreted as extending liability protection to governmental entities because government is already charged with making the land available to the public and the statute is directed towards private landowners to motivate and encourage them to open up their private lands to the public. *Id.* at 280 (citing *Pensacola v. Stam*, 448 So. 2d 39, 41 (Fla. Dist. Ct. App. 1984)).

For example, the New York Court of Appeals in *Sega v. State*¹⁵⁴ held that New York's recreational use statute¹⁵⁵ did not limit the scope of the term "owner" to private landowners.¹⁵⁶ In *Sega*, two claimants were injured while on state lands.¹⁵⁷ The Court of Appeals rejected the argument that the legislature intended that the statute apply only to private landowners.¹⁵⁸ In its reasoning, it found that the statutory language in the statute was unambiguous,¹⁵⁹ and that "[i]nasmuch as the legislative intent is apparent from the language of [the statute], there is no occasion to consider the import, if any, of the legislative memorandum."¹⁶⁰

In *Ferres v. New Rochelle*,¹⁶¹ however, the Court of Appeals denied immunity under the statute to a municipality.¹⁶² In contrast to the court in *Sega*, the court examined the legislative history of the statute, stating that its purpose was to encourage landowners to allow their properties to be used by the public.¹⁶³ The court held that

[i]t would be contrary to reason to assume that the Legislature could have intended that the statute apply in circumstances where neither the basic purpose of the statute, nor, indeed, any purpose could be served—as in the case of the supervised park here where the municipality has already held its recreational facility open to the public and needs no encouragement to do so from the prospective immunity offered by the statute.¹⁶⁴

The court then distinguished *Sega*, reasoning that the question of whether section 9-103 applied to this kind of municipal park

154. 60 N.Y.2d 183, 456 N.E.2d 1174, 469 N.Y.S.2d 51 (1983).

155. N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989). Section 9-103 originated as § 370 of the Conservation Law, originally passed in 1956. Act of April 19, 1956, ch. 842, 1956 N.Y. Laws 1113. Thus, the section was not based on either the 1965 or the 1979 Model Acts.

156. *Sega*, 60 N.Y.2d at 190, 456 N.E.2d at 1177, 469 N.Y.S.2d at 54.

157. *Id.* at 188, 189, 456 N.E.2d at 1176, 1177, 469 N.Y.S.2d at 53, 54. *Sega* is a consolidation of two cases: *Sega v. State*, 89 A.D.2d 412, 456 N.Y.S.2d 856 (3d Dep't 1982); and *Cutway v. State*, 89 A.D.2d 406, 456 N.Y.S.2d 539 (3d Dep't 1982).

158. *Id.* at 190-91, 456 N.E.2d at 1177-78, 469 N.Y.S.2d at 54-55.

159. *Id.* at 190, 456 N.E.2d at 1177, 469 N.Y.S.2d at 54.

160. *Id.* at 191, 456 N.E.2d at 1178, 469 N.Y.S.2d at 55.

161. 68 N.Y.2d 446, 502 N.E.2d 972, 510 N.Y.S.2d 57 (1986).

162. *Id.* at 449, 502 N.E.2d at 974, 510 N.Y.S.2d at 58.

163. *Id.* at 452-55, 502 N.E.2d at 975-77, 510 N.Y.S.2d at 61-62.

164. *Id.* at 453, 502 N.E.2d at 976, 510 N.Y.S.2d at 61.

was "not clearly answered by the words of the statute" ¹⁶⁵ The court, after analyzing the legislative history, held that section 9-103 did not apply in this case. ¹⁶⁶

Thus, in *Sega* the New York Court of Appeals has extended the definition of the term "owner" in its recreational use statute to include public or municipal landowners. ¹⁶⁷ But in *Ferres*, the Court of Appeals, in denying municipal liability, demonstrated a willingness to consider the legislative history to determine the proper reach of the statute. ¹⁶⁸

IV. Analysis

A. *Private Landowners Who Allow Public Use of Their Land Fulfill An Important Societal Need*

Most states have enacted recreational use statutes ¹⁶⁹ whose purpose has been to make more land available to the public for recreation. ¹⁷⁰ National emphasis on health and exercise and an ever increasing population have created a need for more recreational land. Increased financial burdens on the states make it difficult for the states themselves to purchase recreational land. Thus, legislatures have encouraged private landowners to allow public use of their land for recreation. ¹⁷¹ The Connecticut Recreational Use Statute sought to encourage private landowners to open their lands to public recreation by granting them immunity from tort liability. ¹⁷² The government alone cannot meet the public's need for recreational and open space. ¹⁷³

"[W]e have long depended and will continue to depend upon the generosity of private owners of land and water to open up their property to the use and enjoyment of their fellow citizens. . . . So

165. *Id.* at 456, 502 N.E.2d at 977, 510 N.Y.S.2d at 63.

166. *Id.* at 453, 502 N.E.2d at 976, 510 N.Y.S.2d at 61.

167. *Sega*, 60 N.Y.2d at 190, 456 N.E.2d at 1177, 469 N.Y.S.2d at 54.

168. *Ferres*, 68 N.Y.2d at 452-55, 502 N.E.2d at 975-77, 510 N.Y.S.2d at 61-62.

169. *See supra* notes 3-4, 10 and accompanying text.

170. *See supra* note 45 and accompanying text.

171. *See supra* note 58 and accompanying text.

172. *See supra* notes 3-9 and accompanying text.

173. *Genco*, 508 A.2d at 61.

this act here is to allow limited liability . . . of Connecticut property owners to open their land for public use without charge."¹⁷⁴

Landowners could not be expected to open their lands and then be liable for injuries that occurred to anyone coming on their land. Unless private landowners are given statutory protection, recreational users of these private lands would be owed a duty of care normally given to licensees who come on the land. That is, landowners would have to use reasonable care to give notice of potential dangers and be responsible for a user's injuries where such notice was lacking. The burden of this obligation on land covering many acres would be monumental. The recreational use statutes, however, by limiting an owner's liability to wilful or wanton conduct, instead imposes upon the landowner a duty of due care as if the user were a trespasser, not a licensee.¹⁷⁵ A landowner is not responsible for injuries to trespassers caused by an unsafe condition of the land. Therefore, the recreational user of private land, like the trespasser, comes on the land at his or her own risk. There is, however, always the exception for wilful or wanton conduct or neglect which would make a private landowner liable for injuries sustained by a trespasser or recreational user. The limitation on liability is in keeping with the purpose of recreational use statutes: to make available more recreational land, and thereby satisfy the demands of society and alleviate the burden on the states of purchasing this recreational land. Landowners, then, should be encouraged to open their lands for public use, and may need even more incentives than afforded to them under the recreational use statutes. Even when the private owner has immunity from liability, he may still be sued and have to go to court to assert an affirmative defense of immunity from liability under the statute, which will cost the owner litigation fees and court costs.¹⁷⁶

Elimination of potential litigation might be accomplished by registration of the offered land with the state, and the posting of notice to the recreational user that the land is to be used

174. *Id.* (quoting 13 CONNECTICUT GENERAL ASSEMBLY PROC., 1971 Sess., Pt. 4, at 1805 (remarks of Rep. David Lavine)).

175. *See supra* notes 16-26 and accompanying text.

176. *See Neri v. Woodbury*, 3 Conn. L. Rptr. 213, 214 (1991) (raising an unsuccessful special defense of immunity from liability under § 52-557g).

at the user's risk. The state might also consider tax incentives, such as a reduction of property taxes to those who register their property with the state, specifying that their land is open to the public for certain recreational uses.¹⁷⁷

B. *Public Landowners Should Not Be Extended Immunity From Liability Under the Connecticut Recreational Use Statute*

The immunity given by a recreational use statute to a private landowner derogates¹⁷⁸ the common law because it reduces the duty of care owed to one who is invited onto private land. The landowner now owes a duty of due care to the recreational user equivalent to that owed to a trespasser. Under the canons of statutory construction, a statute which derogates the common law must be strictly construed in accord with its purpose.¹⁷⁹ The Connecticut Recreational Use Statute does not specifically state whether the term "owner" in the statute includes both private landowners and governmental entities, such as municipalities.¹⁸⁰ The legislative purpose in Connecticut, however, was to encourage private landowners to give free access to their lands in exchange for limited liability, in order to meet the demand for recreational land.¹⁸¹ The legislature never mentioned, and probably never considered, extending limited liability to public landowners, such as municipalities, when it passed the recreational use statute.¹⁸² Since the statute should be strictly construed in accord with its purpose of limiting liability to *private* landowners, it is not correct to extend immunity under the statute to "public owners."¹⁸³

Connecticut's Supreme Court, however, has extended immunity under the recreational use statute to municipalities in

177. Goldstein et al., *supra* note 54, at 10.

178. Derogation is defined as "the partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force." BLACK'S LAW DICTIONARY 444 (6th ed. 1990).

179. *Scrapchansky*, 627 A.2d at 1340 & n.6 (Katz, J., dissenting).

180. *See id.* at 1336-37.

181. *Id.* at 1339.

182. *Id.* at 1340. The 1979 Model Act, in contrast to the 1965 Model Act that the Connecticut Legislature used as a model for its recreational use statute, specifically included governmental entities. *See supra* text accompanying note 67.

183. *Scrapchansky*, 627 A.2d at 1340-41 (Katz, J., dissenting).

its *Manning*¹⁸⁴ decision, and reaffirmed this decision in *Scrapchansky*.¹⁸⁵ In *Scrapchansky*, the court pointed out that the decision to apply immunity to municipalities "is not inconsistent with many state courts that have applied their recreational use acts to public owners."¹⁸⁶ It is not meaningful, however, to compare jurisdictions abstractly, because there are too many factors that vary from one state to the next. First, it must be determined if a particular state's recreational use statute was based on the 1965 Model Act, the 1979 Model Act or neither, because this may affect the purpose of the statute.¹⁸⁷ Connecticut based its recreational use statute on the 1965 Model Act, which did not include governmental entities in the definition of owner. This stands in contrast to other states which based their statutes on the 1979 Model Act, which specifically included governmental entities under its immunity umbrella.¹⁸⁸ States which applied the 1979 Model Act, therefore, were clearly given a legislative mandate to extend immunity to municipalities. No such mandate exists for states such as Connecticut, whose recreational use statutes are based on the 1965 Model Act, and whose statutes have not been subsequently amended to reflect any change from the original purpose of the Act.

The court in *Manning*,¹⁸⁹ however, stated that when the plain meaning of a statute is completely unambiguous, the analysis stops at that point.¹⁹⁰ "Where the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intent of the legislature and there is no need for statutory construction or a review of the legislative his-

184. *Id.* at 1336 (citing *Manning v. Barenz*, 603 A.2d 399 (Conn. 1992)).

185. *Id.*

186. *Id.* n.8 (citing *Manning v. Barenz*, 603 A.2d 399 (Conn. 1992)).

187. New York's recreational use statute, for example, was originally passed in 1956 as part of the state's Conservation Law. See *supra* note 155. However, the purpose behind the statute is similar to the purpose of the 1965 Model Act and the Connecticut recreational use statute: to encourage landowners to allow use of their land for recreational users. See *Ferres*, 68 N.Y.2d at 454, 502 N.E.2d at 977, 510 N.Y.S.2d at 61-62.

188. See *supra* note 67 and accompanying text.

189. *Manning v. Barenz*, 603 A.2d 399 (Conn. 1992).

190. *Id.* at 401.

tory.’”¹⁹¹ The court concluded that since the definition of “owner” includes the “possessor of a fee interest,” a municipality which possesses a fee interest is also an owner, and, therefore, the Connecticut Recreational Land Use Statute¹⁹² “applies to all land owners—municipal and private.”¹⁹³

The term “owner,” although unambiguous, however, must be considered in its context.¹⁹⁴ The Connecticut statute, at its enactment in 1971, was based on the 1965 Model Act, which did not include a governmental entity in the definition of “owner.” The legislature never amended the statute to indicate that it intended to include public landowners in the term “owner.”¹⁹⁵ The legislative purpose to address private landowners was never amended. A statute which derogates the common law must be strictly construed in accord with its purpose, which requires an examination of the relevant legislative history of the statute.¹⁹⁶ Therefore, the term “owner” should not be construed to include public landowners.

191. *Id.* (quoting *All Brand Importers, Inc. v. Department of Liquor Control*, 567 A.2d 1156, 1164 (Conn. 1989)).

192. CONN. GEN. STAT. ANN. § 52-557g (West 1991).

193. *Manning*, 603 A.2d at 401.

194. Steven D. Ecker, *The Recreational Use Statute Takes on a Whole New Meaning: Is There Life After Manning v. Barenz and Scrapchansky v. Plainfield?*, CTLA FORUM/CONN. TRIAL LAW. ASS'N, Nov. 5, 1993, at 33.

195. The court in *Manning* further stated that it would have arrived at the same conclusion even if it consulted the legislative history because the legislative purpose of opening lands for public use was “not thwarted” by extending the immunity to public lands as well. *Manning*, 603 A.2d at 401 n.3. This is not sound reasoning because it puts in a factor that was never mentioned (nor considered) by the legislature. The author submits that there is no justification for a court to give immunity to a municipality under a statute when the thought never entered the mind of the legislators.

196. For example, the New York Court of Appeals in *Ferres*, in determining whether New York’s recreational use statute should apply to a municipal landowner which already operated a recreational area, examined the legislative history. *Ferres*, 68 N.Y.2d at 452-55, 502 N.E.2d at 975-77, 510 N.Y.S.2d at 60-62. The court stated:

[W]e must, of course, carefully examine the language of the statute and its underlying purpose to determine its intended effect. But we may also look beyond the words of the statute, to the history surrounding its original enactment We are mindful that in “the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle.”

Id. at 451, 502 N.E.2d at 975, 510 N.Y.S.2d at 60 (quoting *People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313, 315 (1937) (citations omitted)).

Second, the issue of state sovereignty must be considered. The fact that states do not all exercise the same amount of sovereign immunity, at their own option, makes it meaningless to compare jurisdictions as a basis for statutory interpretation. Connecticut has never totally abrogated¹⁹⁷ its immunity, and has steadfastly held to the doctrine that the sovereign is immune from suit unless it consents.¹⁹⁸ When the recreational use statute was passed in 1971, the state still enjoyed substantial immunity. Although bills were proposed in the Connecticut General Assembly to waive some or all of the immunity of the state,¹⁹⁹ “[o]bjections to waiver of immunity focused on increased cost to the state through increased litigation, potentially large damage awards, and increased administrative burdens.”²⁰⁰ When the Connecticut Legislature passed the Recreational Use Act in 1971, the state retained substantial immunity. The state legislates what liability or immunity is held by municipalities. Municipalities in Connecticut have derivative governmental immunity, with some exceptions.²⁰¹ In Connecticut Statutes section 52-557n,²⁰² the Connecticut Legislature defined the liability of municipalities. The only mention of municipal immunity concerning a recreational use area is in section 52-557n(b)(4)²⁰³ which states that a political subdivision shall not be liable for “the condition of an unpaved road, trail or footpath, the purpose of which is to provide access to a recreational or scenic area, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe.”²⁰⁴ The statute only mentions access to a recreational area and not the area itself. If the legislature had intended to extend immunity for recreational areas to municipalities, it could have done so here, especially since section 52-557n was amended in 1992.

197. Abrogate is defined as to “annul, cancel, revoke, repeal or destroy.” BLACK’S LAW DICTIONARY 8 (6th ed. 1990).

198. See *supra* notes 105-06 and accompanying text.

199. Birmingham, *supra* note 68, at 304.

200. *Id.*

201. See *supra* notes 98-106 and accompanying text.

202. See *supra* note 111.

203. See *supra* note 111.

204. See *supra* note 111.

The legislature rather than the judiciary has made these decisions concerning the doctrine of sovereign immunity.²⁰⁵ In view of Justice Katz's dissent in *Scrapchansky*,²⁰⁶ which articulates several reasons not to interpret the definition of "owner" so as to include municipalities in the Connecticut Recreational Use Statute, the legislature should statutorily clarify that definition.²⁰⁷ The author proposes that the Connecticut Recreational Use Statute should merely apply to private owners in keeping with the original legislative purpose of the act, and any modifications, changes, or additions to municipal immunity should be made in section 52-557n.

C. *The Public Policy Implications of Allowing Municipal Landowners Immunity From Liability*

Given that the issues of municipal immunity and liability should be addressed statutorily outside the recreational use statute, what is the public posture on tort liability that the state should take? The ideal is for "the state [to] maximize community well-being and minimize tort judgments."²⁰⁸ Admittedly, a state feels an underlying tension between economic concerns such as increased tort litigation and their subsequent monetary judgments, and the concern for the well-being, health and safety that the state has for its citizens. Does the state of Connecticut need the shield of public owner immunity in order to open up land for recreational use that it otherwise would not make available? Or is the court allowing municipalities to use the shield of owner immunity when the municipality had long established the area for public use without any thought of im-

205. Birmingham, *supra* note 68, at 304 (quoting *Berger v. State*, 130 A.2d 293, 295 (Conn. 1957) ("The question whether the principles of governmental immunity from suit and liability can best serve this and succeeding generations has become, by force of the long and firm establishment of these principles as precedent, a matter for legislative, not judicial determination.")).

206. *Scrapchansky*, 627 A.2d at 1336 (Katz, J., dissenting).

207. *Id.* at 1336-40 ("Although we look to legislative inaction following a decision by this court to signify its acquiescence in our interpretation of a particular section, the ink on *Manning v. Barenz* has barely dried.") (citation omitted). The *Manning* court held that the term "owner" in the recreational use statute applied to both private and public landowners. Justice Katz further stated that he, "therefore, hesitate[s] to draw any conclusion from the lack of legislative response to this court's interpretation of the act." *Id.*

208. Birmingham, *supra* note 68, at 314.

munity under the statute? In all fairness, the municipality would be better able to bear the burden of damages resulting from injury than an individual. For example, an individual using a playground does so in good faith that it is safe and that no danger exists or harm will result. The public expects that the municipality will take care of its members.

"Whereas the private landowner may have a strong incentive (in the form of injury to herself [or himself] or her [or his] friends and relatives) to keep her [or his] land safe regardless of liability exposure, the municipality may 'depend' on liability as an inducement to responsible conduct."²⁰⁹ When immunity is applied to a municipality, it insulates the municipality from causes of action in tort based on negligence and lack of due care. The practical and economic result is that the municipality has no sword motivating it to keep its recreational areas safe.²¹⁰ The ordinary citizen would have no recourse in the case of lack of due care by a municipality if the injury occurred while using recreational areas such as playgrounds, ball fields, swimming pools, tennis courts, and the like, when the municipality charges no fee to enter that area.²¹¹ On the other hand, when the municipality is liable, any damage remedies resulting from negligence that are paid by the municipality are spread among the taxpayers. This increase in taxes is publicized, and results in a self-correcting situation. Government officials make sure that the situation is corrected, and that it does not happen again. The public's remedy is two-fold: (1) compensation for in-

209. Ecker, *supra* note 194, at 34.

210. The New York Court of Appeals raised similar concerns about extending New York's recreational use statute to *already existing* municipal recreational areas in its disposition of *Ferres*:

[T]he statute remains unchanged in one significant respect: it does not provide immunity to a municipality, which, . . . already operates and maintains a supervised facility . . . for use by the public. Nothing in the wording of [the statute] or its history supports defendant's construction *which results in a drastic reduction in a municipality's responsibility in the operation and maintenance of its supervised parks*

Ferres, 68 N.Y.2d at 453-54, 502 N.E.2d at 977, 510 N.Y.S.2d at 62 (emphasis added).

211. An essential element of immunity under the recreational use statute is that no fee is charged. CONN. GEN. STAT. ANN. § 52-557g(a) (West 1991) (only those landowners who make land available for recreational users "without charge, rent, fee or other commercial service" are subject to limited liability).

jury; and (2) removal of those in office who do not exercise responsibility and care. Exercise of due care is a fundamental basis of our tort system—the incentive of avoiding liability keeps it functional, and the remedy of damages when that duty fails gives fair redress. At the very least, the public must be informed of what position its government has taken on tort liability. A citizen probably will not tolerate the fact that public recreation areas are supported by tax dollars, but the public has no redress for injury on those lands. The situation is particularly egregious when the recreational area is small and encompasses parks, playing fields and swimming pools.²¹²

Because economic realities drive many decisions, municipalities can always cover potential liability with insurance coverage. The cost of municipal liability insurance coverage can be spread among the public, and no one private person would have to bear alone the cost arising from tort injury. When it comes down to either the government or a private party being responsible for injury, it is always easier for government to bear the burden, even though ultimately the compensation is paid by taxpayer dollars. Municipalities are faced with an economic tension to maximize community well-being on the one hand, and to minimize money paid in tort judgments on the other hand. The legislature must face this problem head on and give statutory guidance to the courts.

If the legislature does decide to give municipalities recreational immunity, it should be clearly distinguished from the recreational use statute. For example, an amendment could be made to an existing statute that governs municipal immunity, such as section 52-557n. Or, public landowners could be held liable in tort generally, with exceptions for specific situations enumerated in a statute.

V. Conclusion

The Connecticut Legislature was motivated to encourage private landowners to open their lands to the public in return for limited liability because more recreational land was needed.

212. This assumes that there is no charge for entrance onto the land for recreational use. Otherwise, the recreational statute immunity would not apply. See CONN. GEN. STAT. ANN. § 52-557g(b) (West 1991).

Municipal landowners, however, are not in the same position. If there are municipal financial problems to be faced and balanced against the public's need for safety and redress against tort injury, these public policies must be addressed specifically by the legislature. There was no intention to include government entities in "owner" immunity when the Connecticut Recreational Use Statute was enacted by the legislature in 1971. Now, more than twenty years after the passage of the statute, and in light of the Connecticut Supreme Court's decisions in *Manning* and *Scrapchansky*, it is time to reassess the situation and to evaluate the application of the recreational use statute, clearing up ambiguities that have been manifested as cases have come to court, and redefining terms where necessary.

It is, therefore, the legislature, rather than the judiciary, which must resolve the issue of immunity where land has been put aside for the recreational use of the public. The prudent result would be for the legislature to state that recreational use statutes apply only to "private owners," and to handle any changes in municipal liability under separate codification, or to amend already existing statutes which pertain to liability of municipalities. The *Scrapchansky* dissent challenges the Connecticut Legislature to clarify its legal intent concerning the definition of "owner."

Dissents are important factors in the evolution of the law. Often the dissent of today becomes the law of tomorrow.

The value of separate opinions to the scientific observer of a precedent system is exceptionally great. The judge who writes a separate opinion deals with the same fact situation, based on the same record, same precedents, or statutes, and same attorneys' arguments, and has participated in the same panel deliberations, as the author of the court's opinion. His utterances constitute an equally legitimate historical source. No scholar looking at a case afterward can make the same claim. Indeed, the separate opinion can give a scholar reviewing the case an otherwise unattainable glimpse into the essence of decision making and how it happens, into the nature of judicial thinking. . . .

. . . .

In the very determination of the facts, artful—even artificial—conclusions and deductions have been drawn. But when one sees a second judge at work, when a significant point in his opinion facts emerge that were completely glossed over in the majority's

version, we cannot avoid realizing that everything is not quite as simple as it might first have seemed.²¹³

Hopefully, the *Scrapchansky* dissent will serve as the impetus for the Connecticut Legislature specifically to define the issue of municipal immunity, both under the recreational use statute and in general, taking into careful consideration the safety and protection of the community.

*Joan M. O'Brien**

213. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* § 42, at 52-54 (1989).

* I thank my family and friends for their encouragement, love and support to me during law school, and dedicate this Article to my husband, Michael, and to my children, Chris, Alyssa and Laird, Jean-Paul, and Will.

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