

OREGON TRIAL LAWYERS ASSOCIATION

319 SW Washington Street, #607

Portland, OR 97204

www.oregontriallawyers.org

503-799-1017

**Testimony on Senate Bill 327-A
Before the House Committee on Judiciary
Arthur Towers, Oregon Trial Lawyers Association
May 9, 2017**

Senate Bill 327-A is the product of a workgroup of which we were a part. We appreciated the opportunity to participate in the workgroup led by Senator Prozanski. We were hopeful that there would be broad agreement among stakeholders. Sadly, there was only narrow agreement. SB 327-A accurately reflects the narrow agreement. We support the compromise bill.

By definition, compromises don't completely satisfy all the parties. We do feel that there are unresolved issues that the committee should consider at one time or another.

Current law states that government has immunity from responsibility for injuries and damage on its property if the victim was engaged in recreational activity. There are two exceptions:

- a. The government charges admission or a user fee.
- b. The negligence was caused by an individually identifiable government employee.

Senate Bill 327-A simply eliminates the second exception.

So what is the impact on a family that suffers an injury from improperly maintained playground equipment or an improperly marked swimming hole?

- a. The family is not allowed to make its case in court.
- b. The family must pay the medical bills, starting with the first dollar. Of course, their private insurance or the Oregon Health Plan could pay too.
- c. The family is not eligible for any compensation for economic or non-economic damages.
- d. There is no opportunity for the family to hold the government accountable or gain a sense of closure or vindication via litigation.

What can government do about its responsibility?

In 2012, a family of eight was swimming in Haag Lake, in a County Park. One person stepped off a steep underwater cliff. The drop-off was not visible from the surface, the currents in that spot are strong, and the lake bottom was slippery mud. Several others went in to the rescue the first. Through good fortune another family swimming there included an EMT and two former lifeguards. They were able to save and revive the victims who nearly died.

After that 2012 near-fatal incident, the county took no remedial action to warn people about the dangerous location. A boy scout as a project built a kiosk that held life jackets, but the kiosk was in an out of the way place, and there was no explanation why life jackets would be needed.

The county took no remedial action, and in fact arrested an angry citizen who tried to post homemade warning signs.

After that 2012 incident, the County renamed the \$55 annual user fee and now calls it a "parking fee."

County officials testified under oath that the fee has created a surplus of tens of thousands of dollars. They also testified that putting up warning signs listing the unique danger of the site, building kiosks with life jackets where they can be seen, and stenciling warnings on the sidewalk would cost "hundreds of dollars."

The government also has discretionary immunity. If the government creates a safety policy and follows it, then the survivors are barred from recovery.

What Happened When Four People Drowned in a County Park in 2014?

Jeremy Scholl was three years old when he drowned in August, 2014 at the same spot in Haag Lake. His grandmother, his mother and her brother also drowned. Jova Ixtacua-Castano, 42 Gabriela Garcia-Ixtacua, 25; and Michael Garcia-Ixtacua, 13, also drowned. They were Jeremy's grandmother, mother, and uncle.

The survivors brought a suit of \$4M against the county. The judge threw out the suit because the fee was for parking not for using the park.

Recreational and Discretionary Immunity are not the only protections that Government has in cases like these.

The government also has damage caps under the Oregon Tort Claims Act. The cap for damages for a local government in a single injury or death is \$691,200. For multiple injuries or death the cap is \$1,382,300. If the case had gone to trial, **AND IF THE COUNTY WAS FOUND TO BE NEGLIGENT, AND IF THE NEGLIGENCE HAD BEEN MORE THAN 50% OF THE CAUSE OF THE DROWNING**, the cap could well have come into play.

The Government claims that without recreational immunity, it must close parks. Are there any other alternatives?

The Government claim is based on quotes on insurance premiums. Yet, the government must be insured against other acts of negligence for which there is no cap on damages and no immunity. For instance, if a city police officer violates the civil rights of someone in custody, the federal claim is not capped.

In the recreational immunity cases, there is still discretionary immunity and the tort claims cap.

- The Government could fight back against the insurance industry.
- The Government could raise money to make facilities safer.

Portland Public Schools is pursuing this option with its bond measure. The campaign slogan is “Get the Lead Out.” We assume proponents chose this slogan because voters want schools to be safe. Similar emphasis could be placed on playground safety. Recreational immunity provides a perverse incentive for government to prioritize other expenditures over playground or park maintenance.

- The Government could allocate existing funds to make facilities safer.

Only after Jeremy and his family drowned did the county spend the nominal amount of money needed to put up warning signs listing the unique danger of the site, to build kiosks with life jackets where they can be seen, and to stencil warnings on the sidewalk

Senate Bill 1062 is a similar approach. That bill, which has bipartisan bi-cameral support, allocates \$2.5M for state grants to school districts to detect carbon monoxide and test for lead in water. SB 1062 is a good bill that should pass.

We regret that when it comes to lower profile recreation issues, that government has sought to shield itself from responsibility rather than identifying this as a community problem that taxpayers and their representatives should tackle.

We hope that in the future, the legislature will examine the need for recreational immunity at the very least for public sector entities that encourage and market their facilities as a safe place for families to recreate.

http://www.oregonlive.com/forest-grove/index.ssf/2014/08/hagg_lake_drowning_3_generatio.html

<https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB1062/Introduced>

Oregonian editorial April 29, 2017 in favor of local school bond measure:

“But here's why voters should still come out en masse and say yes to Measure 26-193, which would [upgrade or rebuild three high schools and one middle school](#) and fund \$150 million worth of health-and-safety repairs throughout the district: The need is urgent, the responsibility is ours...”