City Cycling vs. Recreational Use Immunity

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By Bob Anderton

Under common law, landowners owe a different duty of care depending upon the legal status of the person on their land. One can be an invitee, a licensee or a trespasser. Landowners have the fewest duties to a trespasser and the most to an invitee.

Historically, people were considered invitees when they entered land for recreational purposes, whether or not they were actually invited. This meant that landowners had a duty to perform inspections, to discover dangerous conditions and to use "ordinary care" to keep their land "reasonably safe."

Recreational Immunity Legislation

Legislation enacted in 1967, now codified at RCW § 4.24.210, limits landowner liability when persons come onto their property for recreational purposes. It provides:

> [A]ny public or private landowners ... who allow members of the public to use (their lands) for the purposes of outdoor recreation ... without charging a fee ... shall not be liable for unintentional injuries to such users.[1]

The statute eliminates common law negligence claims. However, there is an exception to this immunity:

> Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.[2]

The Washington Supreme Court clarified this exception in *Davis v. State*.[3] The court explained that an injured recreational user must prove all four elements in the injury-causing condition or the landowner is not liable. These elements are: 1) known; 2) dangerous; 3) artificial; and 4) latent. The issue in *Davis* was whether the condition was artificial.

The court ruled that, while tracks leading to a cliff where a motorcyclist crashed were artificial because they were a human-made alteration, this alteration did not transform the natural state of the thing that caused the injury — namely, the cliff. The test for liability is now whether "the artificial external circumstance so changed a natural condition [that] it is unreasonable to distinguish the two when analyzing whether the condition was artificial."

Recreational Use Immunity and Bicycles on the Street

Municipalities occasionally attempt to argue recreational use immunity against bicyclists using public roads. Even the City of Seattle — despite its much-touted bicycle plan — has made this argument.

Bicyclists are entitled to all the relevant rights of a driver of a motor vehicle.[4] If a bicyclist engaged in recreation on a public road was precluded from making a negligence claim, then automobile drivers simply out for a drive also would be precluded. Certainly this was not the Legislature's intent.[5]

Rather, the test for recreational use immunity is not whether a plaintiff was engaged in recreation, but whether the landowner intended the area to be open expressly for recreation.[6] There is no known Washington case on point stating that the statute does not apply to public roadways. However, the leading case law is consistent with this interpretation.

Gaeta v. Seattle City Light

Gaeta concerned a motorcyclist who crashed on a private road to Diablo Dam. The court held that the recreational use statute applied, but the rationale it used in applying it shows that it does not apply to bicyclists on a public street. The court reasoned as follows:

> Gaeta cites *Smith v. Southern Pac. Transp. Co.*, 467 So. 2d 70 (La. Ct. App. 1985) in support of his argument that a roadway which can be put to non-recreational use loses the protection of the recreational use act. …
>
> Smith may be distinguished from the case at bar. Smith was a professional truck driver driving a large truck through downtown New Orleans on a thoroughfare which happens to cut through City Park for a portion of its length. *The roadway was built and maintained primarily for commercial use, as opposed to recreational.* On the other hand, Gaeta was riding his motorcycle on a cross-country tour and turned off the main highway onto the Diablo Dam roadway. The Diablo Dam roadway is not a thoroughfare, but *leads only to the reservoir and abutting lands left open by Seattle City Light to the public for recreational use.*[7]

Chamberlain v. Dep't of Transportation

Chamberlain involved a boy struck by a vehicle on the walkway along the Deception Pass Bridge.[8] His claim was dismissed on summary judgment for recreational use immunity and the appeals court affirmed. The injury occurred on the sidewalk in a scenic recreational area. The sidewalk allowed access to the view; it did not facilitate utilitarian travel. Moreover, dictum in the opinion suggests that defendants must show that the area was "expressly made available for recreational use."[9]

Widman v. Johnson

Widman involved a pickup truck driver who exited a private logging road onto a state highway and collided with an oncoming vehicle.[10] The court noted that "'on virtually all entrances to its logging roads,' Hanson posted signs saying, 'Private Property,' and 'The Forest Land Behind This Sign Is Open For RECREATIONAL USE ONLY.'"[11]

The plaintiff argued that recreational use immunity did not apply, but the court held as follows:

> We disagree. Every reasonable person reading this record would believe that the Main Line itself was, to use Johnson's words, a "recreational spot." Every reasonable person would also believe that Hanson had opened the Main Line for recreational use. Those matters being established, the fact that the Main Line may also have been used for other purposes (e.g., as a shortcut by non-recreating members of the public) lacks legal significance. We hold that the Main Line was land of the kind described in RCW 4.24.210, and that RCW 4.24.210 applies to this case.[12]

This analysis further clarifies that the focus is on whether the landowner opened an area for recreational purposes, rather than whether users believe they are engaged in recreation.

Riksem v. Seattle

Riksem arose out of a crash between a bicyclist and a jogger on the Burke-Gilman Trail.[13] The court held that recreational use immunity applied. However, it explained the purpose of the statute and its explanation makes clear that the statute is inapplicable on a public street:

> In Washington "[a] statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat the manifest object, it should receive the former construction." [citations omitted] *The manifest object of the recreational use statute is to provide free recreational areas to the public on land and in water areas that might not otherwise be open to the public.*[14]

The recreational use immunity statute is a reasonable way to motivate increased access to recreational areas. It does not, however, reduce the rights of bicyclists on public streets. ■

Bob Anderton bikes to work and doesn't consider this recreation (but it sure beats being stuck in traffic). His practice focuses on representing bicyclists. He is a former Bar Bulletin editor. For more information on this area of law, visit www.washingtonbikelaw.com or contact Bob at 206-262-9290.

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1 RCW § 4.24.210(1).

2 RCW § 4.24.210(4). The exception excludes rock-climbing anchors:

> A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor.

3 144 Wn.2d 612, 30 P.3d 460 (2001).

4 *See* RCW § 46.61.755(1), SMC 11.44.020.

5 As stated in RCW § 4,24,200:

> The purpose of RCW 4.24.200 and 4.24.210 is to **encourage** owners or others in lawful possession and control of land and water areas or channels **to make them available** to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

(emphasis added). Public streets already are public and are primarily intended for utilitarian rather than recreational uses. There is no need to "encourage" their availability for public use.

6 *See Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608–09 (1989):

> We find the proper approach in deciding whether or not the recreational use act applies is to view it from the standpoint of the landowner or occupier. If he has brought himself within the terms of the statute, then it is not significant that a person coming onto the property may have some commercial purpose in mind.

7 *Id.* at 608 (emphasis added).

8 *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 214 (1995).

9 *Id.* at 218–19:

> Whether one considers a bridge to be more closely associated with the land areas it links or the water channel it bridges, there is no question that the Legislature intended that bridges such as the Deception Pass Bridge— **as long as they are expressly made available for recreational use and no fee is charged**— be included in the "land and water areas or channels" to which RCW 4.24.200-.210 applies. (emphasis added)

10 *Widman v. Johnson*, 81 Wn. App. 110, 111–13 (1996).

11 *Id.* at 112.

12 *Id.* at 114.

13 *Riksem v. Seattle*, 47 Wn. App. 506 (1987).

14 *Id.* at 511 (emphasis added).