

Wisconsin's Recreational Immunity Statute: How Much Protection Does It Offer?

Claire Silverman, Legal Counsel, League of Wisconsin Municipalities



In response to the COVID-19 pandemic, many municipalities are contemplating how to approach summer/fall sports leagues and recreational opportunities they typically offer. In addition to navigating the public health concern, municipalities are concerned about potential liability if recreational users contract COVID-19 while engaging in recreational activity on municipal property. In most cases, municipalities opening their property for recreational use should be protected by recreational immunity, subject to its existing exceptions. The following legal comment is a summary of Wisconsin's recreational immunity statute.

Many Wisconsin municipalities own property used to provide individuals with recreation opportunities – e.g., municipal parks, playgrounds, pools, beaches, golf courses, tennis courts, skating rinks, sledding hills, skateboard parks, and paths and trails for various activities like biking, running, walking, rollerblading, skiing, and snowmobiling. Municipal officials often inquire whether the municipality or its officials are liable for injuries occurring while people are engaged in such activities on municipal property. Generally speaking, they are not.

Section 895.52, commonly referred to as Wisconsin's "recreational immunity" statute, provides property owners, including municipal governments, with immunity against liability for any injury to a person engaged in recreational activity on the owner's property. The statute provides broad immunity to municipal property owners, but is not absolute. There are statutory exceptions and some significant cases interpreting

the law as it pertains to municipalities and other governmental bodies that municipalities must be aware of. This legal comment attempts to explain recreational immunity's general protections, as well as its limitations.

Statutory Purpose and Coverage

The legislature enacted Wis. Stat. § 895.52 and simultaneously repealed Wisconsin's first recreational use statute because judicial interpretation had created several exceptions rendering the statute ineffective.¹ With the current statute, the legislature expressly stated it intended to overrule any previous Wisconsin supreme court decisions interpreting the predecessor to § 895.52 that were more restrictive than or inconsistent with the new act's provisions.

Section 895.52 was enacted to "limit the liability of property owners toward others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit."² Accordingly, § 895.52 provides that no owner, officer, employee or agent of an owner owes to any person, entering the owner's property³ to engage in recreational activity, a duty to:

1. keep the property safe for recreational activities;
2. inspect the property; or
3. give warning of an unsafe condition, use or activity on the property.

The statute further provides that "no owner and no officer, employee or agent of an owner is liable for the death of, any injury⁴ to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for

any death or injury resulting from an attack by a wild animal."

There are two statutory exceptions. Section 895.52(4) doesn't limit the liability of a municipality or any of its agencies, officers, employees, or agents for either of the following:

1. A death or injury that occurs on property owned by a governmental body during any event for which the owner charges spectators an admission fee; or
2. death or injury caused by a malicious act or by a malicious failure to warn against an unsafe condition a governmental body's officer, employee, or agent knew of, which occurs on property designated by the governmental body for recreational activities.

Conduct is "malicious" when it results from hatred, ill will, or revenge, or is undertaken when insult or injury is intended.⁵

Statutory Definitions and Terms

Section 895.52 defines most of the specific terms used within the statute. "Owner" is defined as "a person, including a governmental body... that owns, leases or occupies property" or that "has a recreational agreement with another owner." The term "governmental body" includes a "municipal governing body, agency, board, commission, committee, council, department" or a formally constituted subunit thereof.

Of all the terms used in § 895.52, "recreational activity" has spawned the most litigation. The statute broadly

defines “recreational activity” as “any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity.” Importantly, the term excludes any organized team sport activity sponsored by the owner of the property where the activity takes place. In enacting the statute, the legislature provided an extensive list of the kinds of activities meant to be included within the term but noted it was impossible to specify every activity that might constitute recreational activity.⁶ Where substantially similar circumstances or activities exist, the legislature intended that § 895.52 be liberally construed in favor of property owners to protect them from liability.⁷

Significant Court Decisions

Litigation over recreational immunity has involved, among other issues, whether the recreational immunity afforded by the statute is affected when municipalities provide services they are not obliged to, like supervision, which are then performed inadequately; whether someone was engaged in recreational activity when the injury or death in question occurred; and the limits of the organized sports exception. Although space constraints prevent a comprehensive discussion of the applicable case law, it’s worth noting a few things.

Generally, courts have been mindful of the statute’s underlying purpose of encouraging property owners to open property to recreational users and, in light of the legislature’s clear attempt to overrule judicially created exceptions to the predecessor statute, have not wavered in situations where applying the statute appears harsh because of alleged municipal negligence. The courts have held that municipalities don’t lose recreational immunity by undertaking an obligation they need not take, such

as providing some sort of supervision of recreational activities on municipal property, and performing in a manner that’s alleged to be negligent.⁸

The courts have had difficulty, however, distinguishing between recreational and non-recreational activities in varied fact situations. The Wisconsin Supreme Court has said it continues to be frustrated in its efforts to state a test that can be applied easily because of the “seeming lack of basic underlying principles in the statute.”⁹ This makes it harder to predict, with certainty, what the outcome will be in a given case. In determining whether someone is engaged in recreational activity, courts have held that the injured person’s subjective assessment of the activity is pertinent, but not controlling. A court must consider the nature of the property, the nature of the owner’s activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the activity’s intrinsic nature, purpose, and consequences. A court should apply a reasonable person standard to determine whether the person entered the property to engage in recreational activity. Finally, a court should consider whether the activity in question was undertaken in circumstances substantially similar “to the circumstances of recreational activities set forth in the statute.”¹⁰

In some cases, the issue has been whether the activity’s intrinsic nature is commercial rather than recreational so that the recreational immunity statute might be held inapplicable. A governmental body earning profit does not, in itself, convert a recreational event into a commercial one for purposes of § 895.52.¹¹

Other significant court decisions involve cases where the courts have interpreted the exclusion from the definition of

“recreational activity” of any organized team sport activity sponsored by the owner of the property on which the activity takes place. In *Hupf v. City of Appleton*,¹² a participant in a recreational softball league sued the city, alleging negligence, after a softball struck him in the eye while he was leaving the city park. The court held that the city was the softball league’s “sponsor” within the meaning of § 895.52, even if the city did not have a profit motive, where the city took team registrations, maintained the grounds, and provided umpires, scoreboards, bases, and softballs. As further evidence of the City’s sponsorship, the court looked to an exculpatory contract participants signed releasing the city from any damage claims and referencing the city Parks and Recreation department or the school district as “sponsoring” the league.

The City argued that because Hupf was injured while leaving the park, versus participating in the organized sport, the exclusion didn’t apply. The court rejected that argument, holding that although a walk in the park for the purpose of exercise, relaxation, or pleasure is an activity for which the owner is immune, “the legislature did not intend to create a corridor of immunity from the ball field to the parking lot when the walk is inextricably connected to a non-immune activity.” The court noted that this same logic applies when someone is engaged in a recreational activity that is covered by the statute; momentary diversions such as going to the bathroom or taking a brief break from a recreational activity don’t remove the protection of § 895.52.

In another case involving the organized sport exclusion, the Wisconsin Supreme Court held that the exception from landowner immunity extends to spectators as well as participants.¹³

Conclusion

Wisconsin’s recreational immunity statute, § 895.52, provides municipalities with broad immunity against liability for injuries to people engaged in recreational activity on municipal property. However, that immunity is not absolute. Municipal officials and municipal attorneys should

be aware of statutory exceptions and case law interpretations that might expose a municipality to potential liability so that the municipality can secure the requisite insurance or implement measures to mitigate such liability.

Liability 390R2

About the Author:

Claire Silverman is Legal Counsel for the League of Wisconsin Municipalities. She joined the League staff in 1992. Contact Claire at cms@lwm-info.org

1. See 1983 Wis. Act 418, repealing sec. 29.68 which was created in 1963.
2. 1983 Wis. Act 418, sec. 1.
3. “Property” means real property and buildings, structures and improvements thereon, and the waters of the state. § 895.52(1)(f).
4. “Injury” means an injury to a person or property. § 895.52(1)(b).
5. *Ervin v. City of Kenosha*, 159 Wis.2d 464, 464 N.W.2d 654 (1991).
6. “Recreational activity” “includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle or utility terrain vehicle, operating a vehicle, as defined in s. 340.01(74) on a road designated under s. 23.115, recreational aviation, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or educational activity.” § 895.52(1)(g).

7. 1983 Wis. Act 418, sec. 1.
8. See *Johnson v. City of Darlington*, 160 Wis.2d 418, 466 N.W.2d 233 (Ct. App. 1991) and *Ervin v. City of Kenosha*, 159 Wis.2d 464, 464 N.W.2d 654 (1991). *But cf. Linville v. City of Janesville*, 184 Wis.2d 705, 516 N.W.2d 427 (1994), where a vehicle was accidentally driven into a municipal pond while the occupants were looking at a fishing spot, and the paramedics allegedly were slow to respond or allegedly negligent in other respects. Wisconsin Supreme Court held that § 895.52 didn’t afford the municipality immunity for injuries sustained by the recreational land users. The court reasoned that the claims were based on allegedly negligent emergency rescue services provided by the municipality which were unrelated to the municipality’s ownership of the recreational land or were based on the allegedly negligent actions of municipal employees whose employment was unrelated to the recreational land.
9. *Auman v. School Dist. of Stanley-Boyd*, 2001 WI 125, 248 Wis.2d 548, 635 N.W.2d 762.
10. *Id.*

11. *Fischer v. Doylestown Fire Dept*, 199 Wis.2d 83, 543 N.W.2d 575 (Ct. App. 1995). *But cf. Silingo v. Village of Mukwonago*, 156 Wis.2d 536, 458 N.W.2d 379 (Ct. App. 1990).
12. *Hupf v. City of Appleton*, 165 Wis.2d 215, 477 N.W.2d 69 (Ct. App. 1991).
13. *Meyer v. School District of Colby*, 226 Wis.2d 704, 595 N.W.2d 339 (1999) (school district not immune from liability when spectator watching a high school sponsored football game was injured when the bleachers broke under her as she descended following the football game. Although watching a high school football game is a recreational activity, and the school district hadn’t charged spectators admission, the organized sport exception extends to spectators who aren’t participants and whose injuries don’t arise out of team sport activity or the actions of participants in that activity).

FULL SERVICE IN-HOUSE
Solutions that
 help **SHAPE OUR**
COMMUNITIES

We now offer Public and Emergency Management Consulting through our new company, RW Management
 - A McMahon Associates Inc. Company -

McMAHON
 ENGINEERS ARCHITECTS

920 751 4200 | MCMGRP.COM

- Architecture
- Wastewater Systems
- Waste-to-Energy
- Water Systems
- Municipal Engineering
- Environment/Ecology
- Water Resources
- Transportation
- Parks & Recreation
- Land Surveying
- Site Development
- Geospatial Solutions
- GIS Development
- BIM
- Structural Engineering
- Industrial Engineering
- Electrical/Controls
- Mechanical HVAC/Plumbing
- Public & Emergency Management
- Funding Strategies, Solutions and Grant Assistance
- Construction Services
- Design-Build Services
- Public/Private Partnerships
- Operations Services

[f](#) [t](#) [in](#) [v](#)