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I. INTRODUCTION

As a result of the recent Pennsylvania Supreme Court decision in *Lory v. City of Philadelphia*,[1] local governments and state agencies in Pennsylvania have greatly expanded immunity from lawsuits brought by people injured on government owned recreational lands. The *Lory* court determined that Pennsylvania's Recreation Use of Land and Water Act (the "Recreation Act"),[2] read together with the state's Political Subdivision Tort Claims Act (the "Tort Claims Act"),[3] immunizes municipal governments from liability for injuries resulting from both negligent maintenance of their recreational lands and their willful failure to guard or warn of hazards on that property.[4] Under the provi-

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1. 674 A.2d 673 (Pa. 1996).
2. PA. STAT. ANN. tit. 68, §§ 477-1-477-8 (West 1994).
3. 42 PA. CONS. STAT. ANN. §§ 8541-8564 (1982 & Supp. 1996).
4. *Lory*, 672 A.2d at 676.

sions of the Sovereign Immunity Act,[5] the *Lory* holding applies equally to state owned recreational lands.[6] Consequently, once an individual's injury is determined to have occurred on land covered by the Recreation Act, political subdivisions and Commonwealth agencies can claim an absolute defense to liability.

As outlined in the *Lory* case, the Recreation Act and Tort Claims Act work together.[7] The Recreation Act shields private and public landowners from negligence liability for injuries suffered by people using their land for recreational purposes without a fee.[8] The landowner remains liable to recreational users only for "wilful or malicious failure to guard or warn" against a dangerous condition.[9] The Tort Claims Act, on the other hand, confers tort immunity upon political subdivisions for acts that constitute "willful misconduct."[10] In *Lory,* the supreme court concluded that the "willful" standard imposing liability under the Recreation Act is the same standard rendering a political subdivision immune from injury liability under the Tort Claims Act.[11] Government agencies thus have a blanket defense to liability for injuries occurring on their recreational lands.

Section I of this note outlines the operation and interpretation of Pennsylvania's Recreation Act. Section II summarizes the immunity provisions of the Tort Claims and Sovereign Immunity Acts. Section III analyzes the *Lory* case, and Section IV looks at legislative responses to the decision. Lastly, this note points out that in the aftermath of the *Lory* decision, questions as to what constitutes recreational land under the Recreation Act and whether governments should be eligible for Recreation Act immunity are being reconsidered.

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5. 42 PA. CONS. STAT. ANN. §§ 8521-8528 (1982 & Supp. 1996).

6. *See infra* note 97 discussing identical effect of Recreation Act immunity on Tort Claims and Sovereign Immunity Acts.

In *Ayala v. Philadelphia Bd. of Pub. Educ.*, 305 A.2d 877 (Pa. 1973), the Pennsylvania Supreme Court abrogated the judicially created doctrine of governmental (i.e., municipal) immunity. *Ayala*, 305 A.2d at 889. Five years later, in *Mayle v. Pennsylvania Dept. of Highways*, 388 A.2d 709 (Pa. 1978), the supreme court abolished sovereign immunity, previously held to be constitutionally grounded. *Mayle*, 388 A.2d at 386. The state legislature responded to these two cases by creating statutory immunities for local and state agencies: the Political Subdivision Tort Claims Act of 1978, 42 PA. CONS. STAT. ANN. §§ 8541-8564 (1982 & Supp. 1996), and the Sovereign Immunity Act of 1980, 42 PA. CONS. STAT. ANN. §§ 8521-8528 (1982 & Supp. 1996).

7. *Lory*, 674 A.2d at 675.

8. PA. STAT. ANN. tit. 68, §§ 477-1-477-8 (West 1994).

9. *Id.*

10. 42 PA. CONS. STAT. ANN. §§ 8541, 8542(a) (1982 & Supp. 1996). The Recreation Act uses the spelling "wilful," whereas the Tort Claims Act uses the spelling "willful." Either spelling is correct. *See* NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1981).

11. *Lory,* 674 A.2d at 676.

II. The Recreation Use of Land and Water Act

America's growing population coupled with citizens' increased leisure time and interest in healthy outdoor activities have resulted in greater demand for recreational land.[12] Government programs to acquire land for public parks and trails are limited, however, both by funding constraints[13] and the public's uneasiness about aggressive government land acquisition policies.[14] Communities have thus turned to a variety of other means for making open space lands available to the public,[15] including

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12. *See, e.g., More people, the same land*, Harrisburg Patriot News, May 12, 1996 at B10; Pennsylvania Department of Environmental Protection, *Pennsylvania Greenway Partnership*, vol. 2, no. 23 Environmental Protection Update 8-9 (June 7, 1996) (survey shows 79% of Pennsylvanians consider outdoor recreation activities an important part of their lifestyles); Pennsylvania Department of Environmental Resources, Pennsylvania's Recreation Plan 1991-1997 at 247 (survey respondents expect their leisure and recreation time to increase over next five years); J. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreation Use Statute Limiting Landowner Liability*, 53 Wash. L. Rev. 1, 4 (1977) (noting: "There is little doubt that overpopulation and increased leisure time have added to the pressures on publicly owned recreation areas in the past two decades.").

13. *See, e.g.,* Pennsylvania Dep't. of Environmental Resources, *supra* note 12 at 270 (funding public recreation by increasing taxes is least popular financing method); Don Hopey, *Congress Mining Public Land Fund,* Pittsburgh Post-Gazette, June 17, 1996 at A6 (Congress voting to appropriate from the federal Land & Water Conservation Fund the smallest amount in twenty-two years to acquire open space lands).

Governments are being forced to become more creative about financing the recreational properties they currently own. *See, e.g.,* Linda Kanamine, *Squeezing Extra Green From Public Spaces,* USA Today, June 11, 1996, at Section Life p.2 (noting that cash-strapped park departments favor pay-to-play activities over free parks and ballfields); Linda Kanamine, *National Parks May Court Sponsors,* USA Today, June 11, 1996, Life at p.7d (noting that National Park Service is considering licensing national parks logos to private industry).

14. *See, e.g.,* Michael Matza, *Hiking Club's 'Huts' Draw Fire,* The Philadelphia Inquirer, July 1, 1996, at A3 (reporting that a property rights group labels Appalachian Mountain Club "a radical environmental group with an anti-people agenda" because it advocates federal acquisition of twenty-six million acres of forest land in Northeast).

15. *See, e.g.,* Land Trust Exchange & the Trust for Public Land, The Conservation Easement Handbook 2 (1988)(explaining how to use conservation easements, a technique halfway between acquisition and government land use regulation); Loring LaB. Schwarz, Greenways: A Guide to Planning, Design, and Development § 6 (1993) (describing techniques for developing greenways); Rails-to-Trails Conservancy, Trails for the Twenty-First Century (Karen-Lee Ryan ed. 1995)(detailing how to develop multi-use trail corridors); New Jersey Dept. of Environmental Protection, Open Lands Management Program Fact Sheet (describing currently unfunded state program that reimburses private landowners for costs incurred in opening their lands for public recreational uses, including the expenses of fencing, trash receptacles and liability insurance); Del. Code Ann. tit. 16, § 6841 (1995) (limiting liability of civic organizations and their sponsors for negligent acts or omissions occurring in connection with the construction or maintenance of parkland); Tenn. Code Ann. § 11-10-105 (1992)(providing that owners of land subject to conservation easement owe no duty of care to keep that land safe for entry).

Creative techniques for making recreational land available are particularly important in areas of the country with few large public landholdings. *See* President's

adopting state recreational use laws that limit the tort liability of landowners who make their lands available to the public for recreational uses free of charge.[16] Many states, including Pennsylvania, have modeled their recreational use acts on the Model Act promulgated by the Council of State Governments.[17]

A. *The Recreation Act: The Duty Of Care*

Pennsylvania's General Assembly recognized the need for additional recreational areas and knew there were large private landholdings in the Commonwealth that could fill this need.[18] The legislature realized, however, that it was not reasonable to expect landowners to open themselves up to liability for injuries suffered by recreational users of their land when they received no

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Commission on Americans Outdoors, Recreation on Private Lands (March 1986) (noting that private lands constitute 60% of the 1.35 billion acres of America's forests and rangelands; most public lands are in less populated areas of the country, unlike private lands that are often located near population centers).

16. Some examples of "hold harmless" recreational use statutes are the following, which exist in forty-eight states in addition to Pennsylvania: ALA. CODE §§ 35-15-1 to 35-15-5, 35-15-20 to 35-15-28 (1991); ARIZ. REV. STAT. ANN. § 33-1551 (1990); ARK. STAT. ANN. §§ 18-11-301 to 18-11-307 (1987); CAL CIV. CODE § 846 (West 1982); CALIF. GOV'T. CODE § 51238.5 (1983); COLO. REV. STAT. §§ 33-41-101 to 33-41-106 (1995), §§ 29-7.5-101 to 29-7.5-106; (1986); CONN GEN. STAT. ANN. §§ 52-557f to 52-557j (West 1991); DEL. CODE ANN. tit. 7, §§ 5901-5907(1995); FLA. STAT. ANN. § 375.251 (West 1974 & Supp. 1987); GA. CODE ANN. §§ 51-3-20 to 51-3-26, 12-3-116 (1990); HAWAII REV. STAT. §§ 520-1 to 520-8 (1985); IDAHO CODE §§ 36-1601 to 36-1604 (1994); ILL. ANN. STAT. ch. 745, §§ 65/1 to 65/7 (Smith-Hurd 1993); IND. CODE ANN. §§ 14-2-6-3 (West 1983); IOWA CODE ANN. §§ 461C.1 to 461C.7 (1984 & Supp. 1996); KAN. STAT. ANN. §§ 58-3201 to 58-3207 (1983); KY. REV. STAT. ANN. §§ 150.645, 411.190 (Baldwin 1993); LA. REV. STAT. ANN. §§ 9:2791, 9:2795 (West 1991); ME. REV. STAT. ANN. tit. 14, § 159-A (Supp. 1995); MD. NAT. RES. CODE ANN. §§ 5-1101 to 5-1108 (1989); MASS. GEN. LAWS ANN. ch.21, § 17C (West 1994); MICH. COMP. LAWS ANN. § 324.73110 (West 1996); MINN. STAT. ANN. §§ 604A.20 to 604A.26 (West 1996); MISS. CODE ANN. §§ 89-2-1 to 89-2-7, 89-2-21 to 89-2-27 (1992); MO. STAT. ANN. §§ 537.345 to 537.349 (Vernon 1988 & Supp. 1996); MONT. REV. CODE ANN. §§ 70-16-301 to 70-16-302, 23-2-321 (1993); NEB. REV. STAT. §§ 37-1001 to 37-1008 (1995); NEV. REV. STAT. ANN. § 41.510 (Michie 1986); N.H. REV. STAT. ANN. § 212.34 (1989), § 508.14 (1983 & Supp. 1995); N.J. STAT. ANN. §§ 2A:42A-1 to 2A:42A-7 (West Supp. 1987); N.M. STAT. ANN. §§ 16-3-9 (Michie 1987), 17-4-7 (Michie 1995); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989); N.C. GEN. STAT. § 113A-95 (1994); N.D. CENT. CODE §§ 53-08-01 to 53-08-06 (Michie 1989 & Supp. 1995); OHIO REV. CODE ANN. §§ 1533.18 to 1533.181 (Page 1995 & Supp. 1995); OKLA. STAT. ANN. tit. 76, §§ 10 to 15 (West 1995); OR. REV. STAT. §§ 105.655 to 105.680 (1993); R.I. GENERAL LAW §§ 32-6-1 to 32-6-7 (Michie 1994); S.C. CODE ANN. §§ 27-3-10 to 27-3-70 (Law. Co-op. 1991); S.D. COMP. LAWS ANN. §§ 20-9-12 to 20-9-18 (1996); TENN. CODE ANN. §§ 11-10-101 to 11-10-104 (1992), 70-7-101 to 70-7-105 (1995); TEX. CIV. PRAC. & REM. CODE §§ 75.001 to 75.004 (Vernon 1986 & Supp. 1996); UTAH CODE ANN. §§ 57-14-1 to 57-14-7 (1994); VT. STAT. ANN. tit. 10, § 5212 (1993); VA. CODE ANN. § 29.1-509 (Michie. 1992); WASH. REV. CODE ANN. §§ 4.24.200, 4.24.210 (1988 & Supp. 1996); W. VA. CODE §§ 19-25-1 to 19-25-7 (1993 & Supp. 1996); WIS. STAT. ANN. § 895.52 (West 1995); WYO. STAT. §§ 34-19-101 to 34-19-106 (1990).

17. *See* Council of State Governments, *Public Recreation on Private Lands: Limitations on Liability*, 24 SUGGESTED STATE LEGIS. 150, 150-52 (1965) (the "Model Act").

18. *See* Rivera v. Philadelphia Theological Seminary, 507 A.2d 1, 7-8 (Pa. 1986).

compensation in return.[19] Consequently, Pennsylvania's Recreation Act, adopted in 1966, was designed expressly "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."[20] The Recreation Act limits the traditional duty of care that landowners owe to entrants upon their land[21] as follows:

> Section 477-3. *Duty to keep premises safe; warning*
> Except as specifically recognized or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.[22]

Section 6 of the Recreation Act reads, in pertinent part:

> Section 477-6. *Liability not limited*
> Nothing in this act limits in any way any liability which otherwise exists:
> (l) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.[23]

Pennsylvania courts have held that the willfulness standard outlined in section 6 of the Recreation Act is the same duty of

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19. *Rivera*, 507 A.2d at 7-8.

20. PA. STAT. ANN. tit. 68, § 477-1 (West 1994).

21. *See generally* 62 Am. Jur. 2d, *Premises Liability* §§ 72-479 (1990 & Supp. 1996).

22. PA. STAT. ANN. tit. 68, § 477-3 (West 1994). Furthermore, section 4 of the Recreation Act provides:

> Section. 477-4. *Assurance of safe premises; duty of care; responsibility, liability*
> Except as specifically recognized by or provided in section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
> (l) Extend any assurance that the premises are safe for any purpose.
> (2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
> (3) Assume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons.

Id. § 477-4.

23. *Id.* § 477-6 (emphasis added). *See generally* Betty Van der Smissen, American Motorcyclist Assoc., Recreational User Statutes: A Review of Landowner Hold-Harmless Laws in the United States, 27-28 & Table 1, col. 6 (1987) (summarizing exceptions to immunity contained in states' recreational use acts).

Some state courts have found the immunity provided by their recreational use statutes broad enough to protect landowners from the attractive nuisance doctrine, whereas other jurisdictions have not. *Compare* Blair v. United States, 433 F. Supp. 217 (D.C. Nev. 1977) (holding Nevada recreational statute negated attractive nuisance doctrine) *with* Smith v. Crown-Zellerbach, Inc., 638 F.2d 883 (5th Cir. 1981) (finding attractive nuisance doctrine not negated by Louisiana recreational use statute). Pennsylvania courts have not directly addressed the tension between the duty of care owed under the Recreation Act and the doctrine of attractive nuisance.

care owed to gratuitous licensees at common law.[24] According to this standard, a possessor of land is liable for physical harm caused to gratuitous licensees under the standard of care set forth in Section 342 of the Restatement (Second) of Torts,[25] which provides:

> Section 342. *Dangerous Condition Known to Possessor*
> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
> (b) he fails to exercise reasonable care to make the condition safe, or warn the licensees of the condition and the risk involved, and
> (c) the licensees do not know or have reason to know of the condition and the risk involved.[26]

Federal courts have analyzed the willfulness standard somewhat differently, concluding that willfulness under section 6 of Pennsylvania's Recreation Act contains two elements: (1) actual knowledge of a danger; (2) that is not obvious to those entering the premises.[27]

B. Public v. Private Landowners

The Model Act makes clear in its preamble that it is designed to "encourage [the] availability of *private* lands by limiting the liability of landowners."[28] The actual language of the model legislation, however, does not differentiate between private and public landowners.[29]

While some states have followed the lead of the Model Act and limited the application of recreational use statutes to private landowners,[30] other states have legislatively[31] or judicially[32] extended their recreational use statutes to cover public landown-

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24. Baran v. Pagnotti, 586 A.2d 978, 980-81 (Pa. Super. Ct. 1991) (finding that a gratuitous licensee is a person who is expressly or impliedly permitted to enter upon another person's land for the licensee's benefit).

25. RESTATEMENT (SECOND) OF TORTS § 342 (1965).

26. *Baron*, 586 A.2d at 981 (citing RESTATEMENT (SECOND) OF TORTS § 342 (1965)).

27. *See* Livingston v. Pennsylvania Power & Light Co., 609 F. Supp. 643, 649 (E.D. Pa. 1985), *aff'd mem.*, 782 F.2d 1029 (3d Cir. 1986)(quoting Kopp v. R.S. Noonan, Inc., 123 A.2d. 429, 43 (Pa. 1956)). *See also* Flohr v. Pennsylvania Power & Light Co., 821 F. Supp. 301 (E.D. Pa. 1993); Capriotti v. Bunnell, 685 F.Supp. 462 (M.D. Pa. 1988); Rosa v. United States, 613 F. Supp. 469 (M.D. Pa. 1985); Davidow v. United States, 583 F. Supp. 1170 (W.D. Pa. 1984).

28. *See* Model Act, *supra* note 17 at 150 (emphasis added).

29. *See id.*

30. *See, e.g.*, HAW. REV. STAT. §§ 520-1 to 520-8 (1985); Chapman v. Pinellas County, 423 So.2d 578, 580 (Fla. App. 1982) (noting that in light of abolition of sovereign immunity, counties are not entitled to protection of recreation act).

ers.[33] These latter jurisdictions tend to reason that because state and governmental immunity statutes provide public entities with any defenses available to private persons, if a private landowner is shielded from negligence liability under a recreation act, then state and local agencies should also be immune.[34]

Pennsylvania's Recreation Act does not specify whether its scope is limited to private property owners.[35] Prior to 1986, Pennsylvania courts ruled that the Commonwealth should not be considered an "owner of land" under the Recreation Act.[36] These cases reasoned that government entities did not need statutory encouragement to open their lands to the public because their recreational lands were by definition available for public use.[37]

In 1986, the Pennsylvania Supreme Court in *Commonwealth v. Auresto*[38] ruled that Recreation Act immunity should be available to the Commonwealth.[39] The court reasoned that since the passage of the Sovereign Immunity Act, with its narrow exceptions to blanket immunity, "the Commonwealth's exposure to liability occurs only in instances where a private party would also be subject to liability."[40] Since *Auresto*, Pennsylvania courts have held that the Recreation Act applies to local governments as well.[41]

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31. *See, e.g.,* ALA. CODE §§ 35-15-21(l) (1991) (finding that owner includes "(a)ny public or private organization . . . any federal, State, or local political subdivision or any agency"); ILL. ANN. STAT. ch. 745, § 65/2(b) (West 1973) (holding that " 'Owner' includes the possessor of any interest in land, whether it be a tenant, lessee, occupant, the State of Illinois and its political subdivisions, or person in control of the premises.").

32. *See, e.g.,* Sega v. State, 456 N.E.2d 1174 (N.Y. 1983).

33. *See generally* Van der Smissen, *supra* note 23, at 11-12 & Table 1, col. 4.

34. *See* Trimblett v. New Jersey, 383 A.2d 1146 (N.J. Super. Ct. 1977). *See also* Sandra M. Renwood, Note, *Beyond "Commonwealth v. Auresto:" Which Property is Protected by the Recreation Use of Land & Water Act?* 49 U. PITT. L. REV. 261 (1987) (discussing applicability of recreational use statutes to public and private landowners).

35. *See* PA. STAT. ANN. tit. 68, §§ 477-1 to 477-8 (West 1994). At the time the Recreation Act was passed in 1966, neither the Commonwealth nor its political subdivisions were subject to suit. *See Brown*, 305 A.2d at 868-70; *Ayala*, 305 A.2d at 877-78. Thus there would have been no need to expressly extend Recreation Act immunity to public entities.

36. Borgen v. Fort Pitt Museum Assoc., 477 A.2d 36 (Pa. Commw. Ct. 1984); Ehehalt v. Nyari O'Dette, Inc., 481 A.2d 365 (Pa. Commw. Ct. 1984).

37. *See Borgen*, 477 A.2d at 39; *Ehehalt*, 481 A.2d at 367.

38. 511 A.2d 815 (Pa. 1986).

39. *Auresto*, 511 A.2d at 817.

40. *Id.*

41. Walsh v. City of Philadelphia, 585 A.2d 445 (Pa. 1991); Jones v. Cheltenham Twp., 543 A.2d 1258 (Pa. Commw. Ct. 1988); Farley v. Twp. of Upper Darby, 514 A.2d 1023 (Pa. Commw. Ct. 1986), *allocatur denied*, 536 A.2d 1334 (Pa. 1987). As discussed in Section IV of this note, the state legislature is considering making governments once again ineligible for Recreation Act immunity.

C. *"Land" Under The Recreation Act*

Aside from the issue of who is an eligible property owner under the Recreation Act, much litigation has centered on whether an injury suffered occurred on "land" within the meaning of the Act.[42] The Recreation Act makes no distinction between improved and unimproved land, large and small parcels, or rural and urban recreational areas.[43] Rather, the Act seems to cloak landowners with immunity from negligence claims as long as property is entered upon for "recreational purposes" free of charge. Although the recreational activities listed in the Act tend to be those enjoyed in a more rural setting, the list is expressly noninclusive and includes activities that can be performed in urbanized settings such as fishing and swimming.[44] Moreover, the Recreation Act's definition of "land" expressly includes improvements to realty such as buildings and other structures.[45]

In the last decade, however, Pennsylvania courts have interpreted the Recreation Act to exclude developed recreational areas.[46] The first appellate court case to consider the issue, *Rivera v. Philadelphia Theological Seminary*,[47] analyzed whether an indoor swimming pool constituted "land" entitled to immunity under the Recreation Act.[48] By a four to three vote, the Pennsylvania Supreme Court held that the Recreation Act was not intended to apply to "enclosed recreational facilities in urban regions."[49] The court noted that with the exception of swimming, all of the other activities listed as "recreational pur-

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42. The Recreation Act provides:

Section. 477-2. *Definitions*

As used in this act:

(1) "Land" means land, roads, water, watercourses, private ways and buildings, structures and machinery or equipment when attached to the realty.

(2) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

(3) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(4) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

PA. STAT. ANN. tit. 68, § 477-2 (West 1994).

43. *Id.* §§ 477-1 to 477-8.

44. *Id.* § 477-2(3).

45. *Id.* § 477-2(1).

46. *See* Mills v. Commonwealth, 633 A.2d 1115 (Pa. 1991); Walsh v. City of Philadelphia, 585 A.2d 445 (Pa. 1991); Rivera v. Philadelphia Theological Seminary, 507 A.2d 1 (Pa. 1986).

47. 507 A.2d 1 (Pa. 1986).

48. *Rivera*, 507 A.2d at 9.

49. *Id.*

poses" in the Act are pursued outdoors.[50] This reading, of course, ignores the phrase "including but not limited to" in the Recreation Act's definition of "recreational purpose."[51] The *Rivera* court also wrote that the legislature's intent "to limit the applicability of the Recreation Act to outdoor recreation on largely unimproved land is evident . . . from the Act's stated purpose. . . ."[52] The Recreation Act's statement of purpose, however, mentions no such limitations.[53]

The state supreme court revisited the Recreation Act in *Walsh v. City of Philadelphia*.[54] Although this time the plaintiff's injuries occurred at an outdoor recreational facility, the *Walsh* court held that Recreation Act immunity was not available to the defendant, City of Philadelphia, because the site was "a completely improved recreational facility."[55] The *Walsh* court reasoned that: "By assuming responsibility of installing the improvements that exist at this facility, the City concomitantly assumed the responsibility for maintaining those improvements."[56]

Subsequent court rulings, most importantly *Mills v. Commonwealth*,[57] have continued to limit the types of recreational land eligible for immunity under the Recreation Act.[58] The plaintiffs in *Mills* fell and sustained injury at Penn's Landing, a waterfront area in Philadelphia containing a marina, grassy areas and a museum.[59] The Pennsylvania Supreme Court ruled that even if the plaintiffs were injured on the "unimproved" grassy areas, Recreation Act immunity could not be invoked to cover recreation

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50. *Id. See* PA. STAT. ANN. tit. 68, §§ 477-2(3), 477-1 (West 1994).

51. PA. STAT. ANN. tit. 68, § 477-2 (West 1994).

52. *Rivera*, 507 A.2d at 8.

53. PA STAT. ANN. tit. 68, § 477-1 (West 1994). To bolster its conclusion that the Recreation Act is available only to private landowners, the *Rivera* court references the Model Act's commentary. *Rivera*, 507 A.2d at 7. The Recreation Act was passed by the Pennsylvania Legislature, however, without commentary. *Id.*

54. 585 A.2d 445 (Pa. 1991).

55. *Walsh*, 585 A.2d at 450.

56. *Id.* Justices Nix and McDermott, among the dissenters in *Rivera*, again filed dissents in *Walsh* stating that they found no basis in the Recreation Act for excluding improved land. *Id.* at 453 (Nix, C.J., & McDermott, J., dissenting).

57. 633 A.2d 1115 (Pa. 1993).

58. *See also* Brown v. Tunkhannock Twp., 665 A.2d 1318 (Pa. Commw. Ct. 1995) *alloc. den.* 675 A.2d 1252 (Pa. 1995)(finding baseball field at which bleachers had been provided "improved land" outside purview of Recreation Act); Seifert v. Downingtown Area Sch. Dist., 604 A.2d 757 (Pa. Commw. Ct. 1992) (holding lacrosse field is "improved land" not eligible for Recreation Act immunity). *But see* Wilkinson v. Conoy Twp., 677 A. 2d 876 (Pa. Commw. Ct. 1996) (holding municipal park containing softball field "land" under Recreation Act).

59. *Mills*, 633 A.2d at 1116.

areas that were highly developed when viewed as a whole.[60] The court opined: "[W]e believe the intended beneficiaries of the [Recreation Act], in addition to the general public, are landowners of large unimproved tracts of land which, without alteration, is [sic] amenable to the enumerated recreational purposes within the act."[61]

The *Mills* decision left open the question of what type of improvements and how many improvements will cause a facility to be viewed as highly developed.[62] Additionally, by stating that the intended beneficiaries of the Recreation Act are owners of "large" tracts of land, the court raised the question of how big a parcel must be to fall within the parameters of the Recreation Act.[63]

III. The Governmental Tort Immunity Statutes

In addition to Recreation Act immunity, government agencies may defend suits brought against them by individuals suffering injuries on their land under both the Tort Claims and Sovereign Immunity Acts.[64]

A. *Political Subdivision Tort Claims Act*

Pennsylvania's local government immunity statute, the Tort Claims Act, grants local agencies blanket immunity from suit except where: (1) the plaintiff's cause of action would otherwise exist at common law or by statute if governmental immunity was not available; (2) the conduct at issue was that of an officer,

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60. *Id.* at 1118-19.

61. *Id.*

62. *Id.* For instance, in *Pomeren v. Commonwealth*, 550 A.2d 852 (Pa. Commw. Ct. 1988), the commonwealth court held that an earthen hiking trail in a state park was not an improvement vitiating Recreation Act immunity. *Id.* at 854. After *Mills*, however, it is arguable that a man-made trail, whether paved or not, constitutes an "alteration" that makes the land ineligible for recreational immunity. *Compare* Brezinski v. County of Allegheny, No. 2442 Civ. 1996 (Pa. Commw. Ct. May 27, 1997) (finding landscaped park containing a picnic shelter "unimproved" land for Recreation Act purposes).

63. *See* Renwood, *supra* note 34, at 276-82 (advocating that population density, size of land and degree of improvement be the factors used to decide if property is "land" under the Recreation Act).

64. 42 Pa. Cons. Stat. Ann. § 8541-8564 (1995); 42 Pa. Cons. Stat. Ann. §§ 8521-8528 (1995). *See generally* 18 McQuillin on Municipal Corporations § 53.24 (1992-93), which provides:

> The reason [for tort immunity of governmental entities] is one of public policy, to protect public funds and public property. Taxes are raised for certain specific governmental purposes; and, if they could be diverted to the payment of the damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed.

Id.

employee or agent of the municipality acting within the scope of his or her employment; and (3) the plaintiff's injury resulted from a negligent act falling into one of eight specified categories.[65] Section 8542(a) of the Tort Claims Act specifically provides that "*'negligent acts' shall not include* acts or conduct which constitutes a crime, actual fraud, actual malice or *willful misconduct*."[66] Under the Tort Claims Act, therefore, where a plaintiff avers willful misconduct on the part of a municipality, the statute bars recovery because liability may only be imposed for the municipality's *negligent* acts.[67]

B. Sovereign Immunity Act

Similar in structure to the Tort Claims Act, the Sovereign Immunity Act provides that a plaintiff seeking to impose liability on a Commonwealth agency must establish that: (1) common law or statutory causes of action would otherwise exist; (2) the injury results from a Commonwealth agency's negligent act; and (3) the negligent act falls within one of the statutory exceptions to immunity.[68]

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65. 42 PA. CONS. STAT. ANN. §§ 8541-8564 (1995); 42 PA. CONS. STAT. ANN. §§ 8521-8528 (1995).

66. 42 PA. CONS. STAT. ANN. § 8542(a)(2) (1995) (emphasis added). *See also* Delate v. Kolle, 667 A.2d 1218 (Pa. Commw. Ct. 1995), *alloc. den.*, 678 A.2d 367 (Pa. 1995) (noting that for purposes of statutory exception to defense of governmental immunity, "willful misconduct" has the same meaning as term "intentional tort").

67. 42 PA. CONS. STAT. § 8542(a)(2) (1995); Petula v. Mellody, 631 A.2d 762 (Pa. Commw. Ct. 1993)(finding that the Tort Claims Act bars recovery from local agency where a plaintiff avers willful misconduct); Marko by Marko v. City of Philadelphia, 576 A.2d 1193 (Pa. Commw. Ct. 1990) (holding City immune from liability to a minor injured in a fall from exercise bars on municipal playground, even if injury resulted from willful or malicious conduct of municipal employees), *appeal granted,* 592 A.2d 46 (Pa. 1990).

Municipal employees, on the other hand, may be held individually liable for injuries resulting from their willful misconduct. 42 PA. CONS. STAT. ANN. §§ 8545-8550 (1995). *See* King v. Breach, 540 A.2d 976 (Pa. Commw. Ct. 1988) (noting that section 8550 of the Tort Claims Act abolishes immunity for willful misconduct on part of municipal employees, but does not abrogate local agency immunity). Governmental immunity is different than official immunity, which protects municipal employees and officers from personal liability if they were acting within the scope of their employment when the injury occurred. *See generally* Michael R. Bucci, Jr., Note, *Judicial Clarification of a Common-Law Doctrine: The Pennsylvania Doctrine of Official Immunity*, 84 DICK. L. REV. 473 (1979-80).

68. 42 PA. CONS. STAT. ANN. §§ 8521, 8522 (1995). The nine categories of liability are: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines. *Id. See, e.g.,* Moser v. Heistand, 649 A.2d 177 (Pa. Commw. Ct. 1994) (holding that plaintiff seeking to overcome defense of sovereign immunity must show: (1) a cause of action; that (2) falls within one of the statutory exceptions to immunity).

Unlike the Tort Claims Act, the Sovereign Immunity Act does not expressly state that "negligent acts" do not include acts of willful misconduct.[69] Case law interpreting the Sovereign Immunity Act, however, distinguishes between acts of negligence and acts of malice or willful misconduct.[70] Thus, where a plaintiff avers willful misconduct on the part of a state agency, the statute effectively bars recovery because liability may only be imposed for the Commonwealth's *negligent* acts.[71]

IV. THE *LORY* DECISION

The interlocking immunities available to public agencies under the Tort Claims Act, Sovereign Immunity Act and Recreation Act[72] were examined by the Pennsylvania Supreme Court in *Lory v. City of Philadelphia*.[73] In that decision, the court granted the City of Philadelphia absolute immunity under the Recreation Act and Tort Claims Act from a lawsuit brought by the family of a boy who drowned while swimming in a City owned pond.[74]

A. *Lory v. City of Philadelphia: The Trial and Commonwealth Court Decisions*

In 1983, teenager David Barr drowned after he consumed alcohol and went swimming in Devil's Pool, a pond located in Philadelphia's Fairmount Park.[75] Although the City had repeatedly posted "no swimming" signs at the pond, the signs were promptly removed by vandals.[76] On the day Barr drowned, the signs were missing.[77] The family's lawsuit against the City alleged that it failed to take adequate measures to guard or warn against swim-

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69. *See* 42 PA. CONS. STAT. ANN. § 8522(a) (1995).

70. *See* Evans v. Philadelphia Transportation Co., 212 A.2d 440, 442-46 (Pa. 1965); Geelen v. Pennsylvania Railroad Co., 161 A.2d 595, 599-600 (Pa. 1960).

71. *See* Frazier v. Southeastern Pa. Transp. Auth., 868 F. Supp. 757 (E.D. Pa. 1994) (holding Commonwealth cannot be liable for damages arising out of intentional torts). State officials and employees, however, remain personally liable for willful misconduct committed outside the scope of their duties. 42 PA. CONS. STAT. ANN. §§ 8524-8525 (1995); La Frankie v. Miklich, 618 A.2d 1145 (Pa. Commw. Ct. 1992) (finding Commonwealth employee not protected by sovereign immunity from liability for intentional tort claims where employee was acting outside scope of her employment).

72. This issue of interlocking immunities appears to be a case of first impression, although the issue could have been explored in earlier cases. *See* Angeli v. Gov't of Middletown Twp., 8 D.&C. 4th 533 (C.P. Bucks Cty. 1990) (finding township not shielded from liability under Recreation Act because its failure to fix hole in park could be viewed as "willful;" Tort Claims Act interface not addressed).

73. 674 A.2d 673, 676 (Pa. 1996).

74. *Lory*, 674 A.2d at 676.

75. *Id.*

76. *Id.*

77. *Id.*

ming in the pond.[78] At trial, a jury found the City liable for negligence and awarded plaintiff's decedent over $660,000 in damages.[79]

The City filed post-verdict motions for judgment n.o.v. and a new trial, arguing that: (1) it was immune from plaintiff's negligence claim under section 6 of the Recreation Act because the Act imposes liability on the City only for its "willful or malicious failure to guard or warn;" and (2) the City could not be held liable for its willful or malicious failure to guard or warn because that was synonymous with the "willful misconduct" for which the City was immune pursuant to the Tort Claims Act.[80]

The Philadelphia Court of Common Pleas denied the City's post-verdict motions and the City appealed to the Pennsylvania Commonwealth Court.[81] On appeal, the commonwealth court majority agreed with the trial court that the City's actions constituted a "willful or malicious failure to guard or warn" and therefore it was not immune from liability under the Recreation Act.[82] The appellate court further wrote that the City could not claim immunity under the Tort Claims Act because "willful misconduct" under the Tort Claims Act and "willful failure to guard or warn" under the Recreation Act constitute two different states of mind:

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78. *Id.*

79. Barr v. City of Philadelphia, No. 2001, slip op. at 1-2 (decided June 8, 1993, Phila. Cty. Ct. of Common Pleas, June Term), *rev'd sub nom.* Barr v. City of Philadelphia, 653 A.2d 1374 (Pa. Commw. Ct. 1995), *rev'd sub nom.* Lory v. City of Philadelphia, 674 A.2d 673 (Pa. 1996). The jury's verdict assessed comparative negligence of 55% against the City and 45% against the plaintiff. *Id.* The jury award of $100,000 in the wrongful death action, and $600,000 in the survival action was molded by the trial court to reflect this comparative negligence and to add delay damages, resulting in a total verdict of $660,915.79. *Id.*

80. Defendant City of Philadelphia's Brief in Support of its Motion for Post-Trial Relief, Barr. v. City of Philadelphia, Phila. Cty. Ct. of Common Pleas, June Term, No. 2001, at 1-9.

81. Barr v. City of Philadelphia, No. 20091, slip. op. at 8. The commonwealth court noted that its scope of review was limited to determining whether the trial court abused its discretion or committed an error of law. Barr v. City of Philadelphia, 653 A.2d 1374, 1378 (Pa. Commw. Ct. 1995) *rev'd sub nom.* Lory v. City of Philadelphia, 674 A.2d 673, 674 (Pa. 1996).

82. *Barr*, 653 A.2d at 1380. The commonwealth court determined that Devil's Pool was located in a "remote and undeveloped portion" of Fairmount Park and thus was "land" within the scope of the Recreation Act. *Id.* at 1378-79. Devil's Pool, however, is located in a densely populated area of Philadelphia and is within one quarter mile of bridges, a concession stand and restaurant, paved bike paths and other park improvements. Fairmount Park Master Plan (1986). Neither the commonwealth court nor the supreme court discussed how these park improvements affected the status of Devil's Pool as "land" under the Recreation Act. *See* section I(c) of this note for discussion of what constitutes land eligible for recreational immunity.

> Willful denotes an act of commission, requiring proof "that the actor [affirmatively] desired to bring about the result that followed, or at least [knew that] it was substantially certain to follow." On the other hand, a willful failure to guard or warn denotes an actor's failure to act or an intentional omission rather than an actor's intentional desire to harm, kill, or maim.[83]

Nevertheless, the court reversed and remanded the case for a new trial on the basis that evidence of unrelated drownings in other City ponds had been erroneously admitted into evidence.[84]

The dissenting commonwealth court judges reached the same conclusion later reached by the state supreme court: willful misconduct encompasses willful failure to guard or warn.[85] The dissent noted that the majority had to conclude that the City:

> (1) [H]ad knowledge of the dangerous condition of Devil's Pool; (2) should have realized that such condition involved an unreasonable risk of harm to the public; and (3) failed to exercise reasonable care to make the condition safe, or to warn the public. These elements are consistent with those in the majority's definition of willful misconduct, that being, "that the actor [affirmatively] desired to bring about the result that followed, or at least [knew that] it was substantially certain to follow."[86]

The commonwealth court dissent disagreed with the majority's conclusion that because the City did not possess the "desire to harm, kill, or maim," there was no willful misconduct:

> [A] desire to harm is not necessarily required for conduct to rise to the level of willful misconduct. The definition of willful misconduct upon which the majority relies states that as long as the actor knows that harm will most likely follow, the conduct is willful misconduct. In the present case, the evidence supports a conclusion that the City knew of the dangerous conditions of Devil's Pool, and knew that someone would most likely be injured as a result of their failure to guard or warn.[87]

Finally, the commonwealth court dissent noted that under section 8542(a) of the Tort Claims Act, the City's willful or malicious failure to guard or warn necessarily constituted either "negligent acts" or "willful misconduct."[88] The dissent stated that the City's

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83. *Barr*, 653 A.2d at 1381. The commonwealth court implicitly concluded that governmental immunity from willful misconduct under the Tort Claims Act does not include immunity from claims of willful failure to guard or warn. *Id.*

84. *Id.* at 1383.

85. *Id.* at 1383 (McGinley, J., dissenting).

86. *Id.* at 1384 (McGinley, J., dissenting). The dissent was applying the three part test outlined in section 342 of THE RESTATEMENT (SECOND) OF TORTS for the duty owed to gratuitous licensees. *See supra* text accompanying note 25 for text of this Restatement section.

87. *Barr*, 653 A.2d at 1382.

88. *Id.* at 1384 (McGinley, J., dissenting)(citing 42 PA. CONS. STAT. ANN. § 8542(a) (1995)).

actions had to be considered willful misconduct, and thus immune under the Tort Claims Act, because the phrase "negligent acts" in the Tort Claims Act had been held not to include willful or malicious failures to act.[89]

B. The State Supreme Court Decision

The City appealed the adverse commonwealth court ruling to the Pennsylvania Supreme Court, claiming that it should prevail without a new trial on the ground that it was completely immune from liability under the joint provisions of the Recreation Act and Tort Claims Act.[90] On appeal, the Pennsylvania Supreme Court read these two Acts together and, in a brief analysis, concluded that the City's willful or malicious failure to maintain warning signs could not be deemed a "negligent act" by the plain language of the Tort Claims Act and parallel case law.[91] The *Lory* court implicitly held, then, that willful misconduct under the Tort Claims Act includes willful failure to guard or warn.[92] The Recreation Act's exception to immunity for certain willful acts is therefore negated by the Tort Claims Act's shield of immunity for those very acts.

Chief Justice Nix and Justice Cappy concurred in the majority *Lory* opinion, finding the result required by the language of the two Acts at issue.[93] Chief Justice Nix, however, objected to reaffirming restrictions on the types of land eligible for immunity under the Recreation Act.[94] Justice Nix's reading of *Lory* would be even broader, extending the decision's blanket immunity to many more types of recreational land including improved lands.[95] In a separate concurring opinion, Justice Cappy rues the *Lory* decision as overly broad.[96] Justice Cappy notes disapprovingly that as a result of the *Lory* decision, political subdivisions

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89. *Id.* at 1384-85 (McGinley, J., dissenting) (citing Jones v. Cheltenham Twp., 543 A.2d 1258 (Pa. Commw. Ct. 1988) (noting "willful" means an act done voluntarily or intentionally or knowingly, as distinguished from accidentally); Zlakowski v. Commonwealth, 624 A.2d 259 (Pa. Commw. Ct. 1993) (finding that complaint alleging negligence in failing to warn recreational users could not be amended to allege willful or malicious failure to warn because this would allege new cause of action after expiration of statute of limitations)). This analysis of the Tort Claims Act's phrase "negligent acts" was the basis upon which the Pennsylvania Supreme Court based its decision in favor of the City. *Lory*, 674 A.2d at 676.

90. *Lory*, 674 A.2d at 674.

91. *Id.* at 676.

92. *See id.* at 676 n.3 (Cappy, J., concurring).

93. *Id.* at 676 (Nix, C.J., & Cappy, J., concurring).

94. *Id.* (Nix, C. J., concurring).

95. *Lory*, 674 A.2d at 676 (Nix, C.J., concurring).

96. *Id.* (Cappy, J., concurring).

and the Commonwealth[97] enjoy *greater* immunity than that of a private citizen, and, "in fact will enjoy absolute immunity from suit with respect to lands subject to the Recreation Act."[98]

V. Legislative Responses

At the time this note was drafted, the state legislature was considering amending the Recreation Act. The competing legislative proposals are: (1) to broaden the types of land covered by Recreation Act immunity; or (2) to totally exclude governmental entities from Recreation Act coverage.[99] Of course, if neither proposal passes, the Recreation Act remains unchanged. In conjunction with the holding in *Lory*, legislative action — or inaction — could result in one of three liability scenarios for governmental entities, each with different policy implications.

A. *Option I: Immunize All Government Owned Recreation Facilities*

The *Lory* holding provides governments with blanket immunity for injuries occurring on their recreational lands.[100] As detailed earlier in this note, recent court rulings limit Recreation

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97. Justice Cappy notes that although the *Lory* case deals with the Tort Claims Act, for purposes of applying *Lory*, the difference between the Tort Claims Act and the Sovereign Immunity Act is "inconsequential." *Lory*, 674 A.2d at 677 n.4. Judge Cappy therefore assumes that the immunity *Lory* grants to political subdivisions extends to state agencies as well. Cf. Farley v. Township of Upper Darby, 514 A.2d 1023 (Pa. Commw. Ct. 1986)(holding Pennsylvania Supreme Court's reasoning in *Auresto* regarding Commonwealth's immunity under Recreation Act and Sovereign Immunity Act equally applicable to municipalities under Tort Claims Act); Walsh v. City of Philadelphia, 585 A.2d 445 (Pa. 1991)(holding Tort Claims Act imposes liability upon municipalities in same circumstances as Sovereign Immunity Act imposes liability upon Commonwealth); DeLuca v. Sch. Dist. of Philadelphia, 654 A.2d 29 (Pa. Commw. Ct. 1994) (concluding sovereign and governmental immunity exceptions are interpreted conjointly and consistently when there is similarity of subject matter).

98. *Lory*, 674 A.2d at 677 (Cappy, J., concurring). However, although the public agency itself is absolutely immune from liability, a plaintiff remains able to recover from government employees in certain circumstances. *See supra* text accompanying notes 68 & 72 for discussion of governmental and sovereign immunity from claims based in willful misconduct. Note that the *Lory* reasoning granting governments blanket immunity could also be construed by analogy to cover government land under the scope of the Pennsylvania Rails to Trails Act, 32 Pa. Purdons Stat. § 5611 (1967 & Supp. 1997). Similar to the Recreation Act, the Rails to Trails Act limits the liability of trail owners to recreational users. *Id.*

99. *See* S. 654, P.N. 1816, 1995 Pa. Sess.

100. *Lory*, 674 A.2d at 676. This "blanket immunity" outcome could also occur in jurisdictions that require plaintiffs alleging "willful failure to guard or warn" to prove intentional conduct on the part of the defendant. In *Klepper v. City of Milford*, 825 F.2d 1440 (10th Cir. 1987), for example, the court found that under Kansas law, "wilful failure to warn is . . . a purposefully designed failure to warn with the intent to do wrong or cause injury." *Klepper*, 825 F.2d. at 1447. The plaintiff in Klepper argued, and the court noted, that this narrow definition of willfulness could "virtually abolish" rather than merely

Act immunity to "land" that is large in size, located in a sparsely populated area and unimproved.[101]

Park and recreation providers have become increasingly concerned that these judicial decisions are contrary to the legislation's intent and that this narrow interpretation of the Act will discourage projects to provide better access to outdoor recreation facilities for persons with disabilities.[102] Consequently, Senate Bill 219,[103] reintroduced in the next legislative session as Senate Bill 219, was introduced to amend the Recreation Act so that it specifically provides for immunity to apply to both urban and rural land and developed and undeveloped parcels of any size.[104] Under the amended Recreation Act, *all* public and private recreation land would receive immunity from suits based on negligence.[105] In conjunction with the Tort Claims and Sovereign Immunity Acts' immunity for willful misconduct, Senate Bill 219

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limit the liability of government landowners to recreational users. *Id.* at 1445 & n.6. *Accord* Bingaman v. Kansas City Power & Light Co., 1 F.3d 976 (10th Cir. 1993).

101. *See* Mills v. Commonwealth, 633 A.2d 1115 (Pa. 1991); Walsh v. City of Philadelphia, 585 A.2d 445 (Pa. 1991); Rivera v. Philadelphia Theological Seminary, 507 A.2d 1 (Pa. 1986).

102. *See* Pennsylvania Fish and Boat Commission, Information Paper on Recreation Use of Land and Water Act, 68 Pa. Stat. Ann. § 477-1 (1994). The Information Paper notes that:

> [T]he uncertain state of the law has discouraged landowners and clubs and organizations from undertaking projects to provide better access for persons with disabilities. Such projects may include installation of parking areas near fishing, boating or hunting opportunities, construction of paths, trails or ramps suitable for wheelchair use . . . and installation of fishing piers and boat docks.

Id.

103. S. 654, P.N. 1816, 1995 Pa. Sess. At the time this note went to press, this Bill had been reintroduced as Senate Bill 219. *See* S. 219, P.N. 211, 1997 Pa. Sess. Therefore, throughout the rest of this article, original Bill 654 will be referred to as Senate Bill 219.

104. *See* Section 2 of Senate Bill 654, P.N. 686, originally introduced by Senator Doyle Corman and others on March 2, 1995, which provides:

> (1) "Land" means land, roads, water, watercourses, private ways and buildings, structures [and], *boating access and launch ramps, fishing piers, boat docks, ramps, paths, trails, shooting ranges, hunting blinds and areas providing access to or parking for lands and waters, including, but not limited to, access ramps, trails or piers for use by persons with disabilities. The term also includes* machinery or equipment when attached to the realty. *The term applies to such areas and physical objects, whether they are in an unimproved condition or a condition improved by manmade effort, whether they are large or small in size and whether they are located in a rural or an urban area.*

S. 654, P.N. 686, § 2, 1995 Pa. Sess. Section 2 of Senate Bill 219 is the same as Senate Bill 654 except that the new Bill adds "horseback riding," "field sports" and "basketball" to the list of covered recreational purposes. S. 219, P.N. 211, 1997 Pa. Sess.

105. *See* S. 219, P.N. 211, § 2, 1997 Pa. Sess. The requirements of "recreational purpose" and entry "without charge" would still have to be met. *Id.*

Pennsylvania would not be alone in extending immunity to all recreational sites. *See, e.g.*, ILL. ANN. STAT. ch. 745 §§ 65/1 to 65/7 (1993)(providing complete Recreation Act immunity to all recreational sites). Illinois municipalities, however, remain liable for willful and wanton actions. *See* James L. DeAno, *Governmental Immunity for Recreational Injuries*, ILL. BAR JOURNAL, Jan. 1994, Vol. 82, at 28-40.

effectively would give governments absolute tort immunity from injuries occurring at their recreation facilities.[106] The Bill would thus greatly broaden the impact of the *Lory* holding.[107]

There are public policy arguments both for and against this outcome. As a result of its blanket limitation of liability, Senate Bill 219 encourages governments to offer recreational facilities to the greatest number of people possible in both urban and rural settings.[108] It promotes the economic benefits that result from recreation-based tourism.[109] The amendment's broad definition

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106. But, as discussed above, this immunity does not extend to entities that charge a fee for use of their recreation areas. *See supra* note 42. Even if the recreational use is free, if it is offered as a benefit of a paid transaction, such as a campground fee, Recreation Act immunity may not exist. *Cf.* French v. Woodloch Pines, 46 D. & C.3d ___ (C.P. Pike County 1986) (noting that toboggan run available to hotel users free of charge was not necessarily immune from liability under Recreation Act).

Before extending Recreation Act immunity to a property, courts will also look to see whether the plaintiff entered upon the property for a "recreational purpose." In Pennsylvania, this threshold may be met even in cases where the property owner did not intend the land to be used recreationally. *See* Friedman v. Grand Central Sanitation, Inc., 571 A.2d 373 (Pa. 1990) (holding owner of landfill entitled to Recreation Act protection where plaintiff hunter was using landfill for hunting and overcome by caustic fumes). Other jurisdictions have required that this recreational purpose requirement be met from a landowner's perspective as well. *See* Glen Rothstein, Note, *Recreational Use Statutes and Private Landowner Liability: A Critical Examination of Ornelas v. Randolph,* 15 WHITTIER LAW REV. 1123 (1994) (analyzing California's "recreational purpose" requirement). *See also* Diamond v. Springfield Metropolitan Exposition Auditorium Auth., 44 F.3d 599 (7th Cir. 1995) (finding plaintiff's negligence claim barred under the state recreation act since although plaintiff's visit to convention center where injury occurred was not related to recreation, multi-purpose convention center was recreational "in character").

107. Other amendments that would strengthen and expand the Recreation Act include: 1) providing tax relief in exchange for allowing public use of private land; 2) allowing user fees to be applied toward maintaining the recreational resource without loss of immunity; 3) offering negligence immunity from suits brought by volunteers working on the land; 4) establishing a state indemnification system or awarding attorneys' fees to recreation providers so that property owners know in advance they will not bear litigation costs; and 5) including lessees, conservation organizations and others who hold an interest in the recreational land within the Recreation Act's definition of "owner." *See* SCHWARZ, *supra* note 15, at 285-86.

108. Unhampered by the fear of costly litigation, governments presumably would be free to make recreation facilities available to a greater number of citizens. *Cf.* Rivera v. Philadelphia Theological Seminary, 507 A.2d 1, 18 (1986) (McDermott, J., dissenting) (finding that in enacting the Recreation Act, "[t]he legislature balanced danger against a benefit to a great number of people; allowing a use of facilities with immunity from liability, great and small, so that many could have, what the possible consequences for an injury to one, would make improvident to give to any").

109. Pennsylvania's parks, forests, greenways and other recreational areas are essential elements of the state's $18 billion tourism industry, which is second only to the state's agricultural industry. *See* Governor Tom Ridge, Governor's Office, Proclamation, Recreation and Parks Month (July 1996). One study estimated that the economic impact of state parks alone was $562 million. Impact of State Parks on Pennsylvania's Economy, 13 (July 1990). One could argue that the more recreational activities are important to a region's or state's economy, the more recreational risks should be allocated to the participant rather than to the recreation provider. *See generally* Cathy Hansen & Steve Duerr,

of "land" also could avoid time consuming and hair splitting litigation over how large and undeveloped a property must be to qualify for Recreation Act immunity.

On the other hand, the conjunction of the *Lory* holding and Senate Bill 219 would leave injured plaintiffs with limited recourse for compensation,[110] which runs counter to recent trends in tort law.[111] This outcome might be perceived as unfair, particularly where a plaintiff was injured at a highly developed recreational facility.[112]

B. Option II: Strip Governments of Recreation Act Immunity

When the original Senate Bill 654 was submitted for review to the Pennsylvania House of Representatives, it underwent a dramatic revision: an amendment to exclude from the Act's coverage all "recreational property owned or operated by the Commonwealth or local government agencies."[113] By stripping government of the negligence immunity offered by the Recreation Act, this version of the Bill overturns *Commonwealth v. Auresto*[114] and effectively negates the *Lory* holding. The amendment puts recreational land on the same footing as other municipally or state owned property, subjecting agencies to liability under the Tort Claims and Sovereign Immunity Acts for negli-

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Note, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act,* 28 UNIV. OF WYO. LAND & WATER L. REV. 149 (1993).

110. This result would occur unless the injury was intentionally caused by a government employee. *See supra* notes 67 & 71.

111. *See* Specter v. Commonwealth, 341 A.2d 481, 483 (Pa. 1975) *limited* 354 A.2d 52 (Pa. Commw. Ct. 1976), (illustrating that the trend in recent years has been "to do away with immunities from suit which are neither constitutionally or statutorily compelled"). But at least one other state provides for absolute sovereign and municipal immunity in its recreational user statute. *See* OHIO REV. CODE Ann. §§ 1533.18, 1533.181 (1995)(providing that landowners owe no duty to recreational users); Phillips v. Ohio Dept. of Natural Resources, 498 N.E. 2d 230 (Ohio App. 1985) (noting that under the recreational immunity statute, a state is not subject to liability even for its willful or intentional misconduct).

112. *See* Renwood, *supra* note 34, at 279-81 (discussing protecting the reasonable expectations of recreation users); *Walsh*, 585 A.2d at 450 (providing: "By assuming responsibility of installing the improvements that exist at this facility, the City concomitantly assumed the responsibility for maintaining those improvements.").

113. S. 654, P.N. 1816, § 2(1), 1995 Pa. Sess. (as amended on third consideration, House of Representatives, March 12, 1996). The House version of the Bill added the following sentence to the definition of "land:" *"The term does not include recreational property or facilities owned or operated by the Commonwealth or local governmental agencies."* *Id.* This highly restrictive amendment was not proposed again when Senate Bill 654 was reintroduced as Senate Bill 219. At the time of this note, however, Senate Bill 219 was tabled until a compromise could be reached.

114. 511 A.2d 815 (Pa. 1986)

gent maintenance of their recreational properties.[115] But, under those Acts, governments would still be immune from suits grounded in willful misconduct.[116]

This approach to negligence immunity also has its pros and cons. Unlike original Senate Bill 654, the House amendment provides a person injured by a public agency's negligent maintenance of its recreational lands with recourse to financial compensation.[117] This threat of tort liability presumably would cause governments to exercise additional caution in the repair and upkeep of public recreation facilities.

These positive results must be balanced, however, against the additional tort liability that local governments and state agencies would certainly incur as a result of the House amendment.[118] The extra governmental liability undoubtedly would be at the expense of the recreating public, reducing the money available for providing parks and recreation areas and making governments more cautious in their delivery of services.[119] For

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115. A claim based in negligence would still have to clear the hurdles presented by the real estate exceptions to immunity in both tort immunity acts. *See, e.g.,* Mascaro v. Youth Study Center, 523 A.2d 1118, 1124 (Pa. 1987) (providing waiver of immunity for injuries caused by real property in the care, custody or control of a local agency, set forth in section 8542(b) of the Tort Claims Act, is applicable only where artificial condition or defect of the land itself causes injury); Preteroti v. Uniservice, Inc., 413 A.2d 787 (Pa. Commw. Ct. 1980) (setting forth that cause of action against Commonwealth under real estate exception to immunity, section 8522(b) of the Sovereign Immunity Act, requires allegation that special characteristics of lake made it dangerous).

116. *See supra* text accompanying notes 67 & 71. Note that even this restrictive amendment does not completely cure the outcome that Supreme Court Justice Cappy complained of in his concurrence in *Lory*. *See supra* text accompanying note 99.

117. S. 654, P.N. 1816, § 2(1), 1995 Pa. Sess. *See* Legislative Pennsylvania Reference Bureau (unofficial), Senate Bill 654, Feese Amendment Debate, at 27-30 (state representative introducing House amendment stated that "Senate Bill 654, without this amendment, would preclude an innocent injured taxpayer of the Commonwealth who is injured by a dangerous condition created by the Commonwealth or local government from having any possibility of seeking compensation.").

118. The position paper on Senate Bill 654 prepared by the Pennsylvania Department of Conservation and Natural Resources ("DCNR") indicates that the House version of the Bill is supported by the state trial lawyers' lobby. DCNR Position Paper on S. 654. Given the fortuitous timing of the House amendment (March 12, 1996), it appears possible its sponsors anticipated and tried to counter the April 17, 1996 *Lory* decision.

119. In addition to the DCNR, other organizations strongly opposing the House amendment include: the Game Commission, Fish and Boat Commission, Pennsylvania Recreation and Park Society, Pennsylvania Land Trust Alliance and Pennsylvania Township Supervisors Association.

The following comment made by a Game Commission official about the proposed House amendment to S. 654 is a good example of the types of concerns these agencies have:

> The immediate concern of the Game Commission is that with this loss of protection we [put a] drain on our budget just because of litigation costs. . . . Under our additional properties [which a municipality opens to public hunting under a cooperative agreement with the Commission] . . . the fear is that if they got into a lot of litiga-

instance, the position paper issued by the DCNR, the agency that oversees Pennsylvania's state park and forest system, provides:

> [The House amendment] would be devastating to public landowners and be tremendously costly to Pennsylvania taxpayers. . . . Government entities, especially small municipalities, do not have the financial resources to pay litigation costs and lawsuits. It is anticipated that the loss of [the Recreation Act's] protection to public landowners would have a chilling effect on government's interest and ability to participate in the development of recreation facilities such as ball fields, trails, boat accesses, and other park facilities. Local governments may choose to close existing facilities.[120]

If restitution for injured plaintiffs was the reason underlying the House amendment to the Recreation Act, perhaps a wiser approach than stripping public entities of negligence immunity is to amend the Tort Claims and Sovereign Immunity Acts to permit liability to be imposed for a governmental agency's willful misconduct in certain instances.

C. Option III: No Action Alternative

If neither Senate Bill 219 nor the previously proposed House amendment to the Recreation Act is passed, the decisions from *Lory v. City of Philadelphia*[121] and *Mills v. Commonwealth*[122] combine to dictate that governments are immune from suits based in negligence or willful misconduct as long as the recreational injury occurs on large, semi-rural and undeveloped parcels of land.[123] Currently, this is the status of the law in Pennsylvania.[124]

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tion involving something like this, the first thing they're going to do is deny public access.

Joe Gorden, *New Legislation Could Impact Public Access To Land,* The Johnstown Tribune-Democrat, Sept. 18, 1996 at D7. *Cf.* Hahn v. United States, 493 F. Supp. 57, 59 (M.D. Pa.), *aff'd without opinion,* 639 F.2d 773 (3d Cir. 1980) (granting Recreation Act immunity to federal government under Federal Tort Claims Act on ground that the United States has no obligation to make its property available to the recreating public); *Contra Mayle*, 388 A.2d at 714-15 (disputing suggestion that making governments liable for their torts would substantially raise costs of government or upset governmental financial stability).

120. DCNR Position Paper on S. 654.

121. 674 A.2d 673 (Pa. 1996).

122. 633 A.2d 1115 (Pa. 1991).

123. *See* section II(c) of this note for discussion of judicial restrictions on scope of the Recreation Act.

124. *See, e.g.*, Wilkinson v. Conoy Twp., 677 A.2d 876 (Pa. Commw. Ct. 1996) (stating: "[W]hether it acts maliciously or negligently, the municipality or other governmental unit is absolutely immune, without exception, for injuries occurring on municipally-owned recreational land.").

Such a "no action" outcome constitutes a framework that other jurisdictions have arrived at legislatively.[125] The New Jersey and California tort immunity acts, for example, completely immunize public entities and employees from liability for injuries caused by unimproved public property.[126]

Although the recreational immunity available to local and state agencies appears broad under the *Lory* decision, it is not absolute because of judicial erosion of the types of "land" encompassed by the Recreation Act. Under current law, a person injured by poorly maintained improvements to a highly developed recreational facility can seek financial compensation.[127] On the other hand, recreational users injured by a natural condition existing on undeveloped public property bear the risk of injury.[128] Leaving the Act untouched does provide a middle ground.[129] Without legislative action, however, the current judicial trend toward narrowing the Recreation Act's scope means that recreation providers will be hesitant to continue opening their lands to recreational users and to make improvements needed for safety, convenience and disabled accommodation purposes.

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125. At least one author suggests that a legislative approach to this issue would be more desirable. *See* Pamela Lajeunesse, Note, *The Political Subdivision Tort Claims Act: Pennsylvania's Response to the Problems of Municipal Tort Liability*, 84 DICK. L. REV. 717, 746 (1979-80) (calling legislature's failure to insert recreational immunity provision into Pennsylvania's Tort Claims Act a "significant oversight").

126. *See* N.J. STAT. ANN. § 59:4-8 (1992), and CAL. GOV'T CODE §§ 831.2, 831.4, 831.6 (West 1983), respectively. The New Jersey Tort Claims Act, for instance, provides public entities and employees with absolute immunity for injuries caused by "natural condition(s) of any lake, stream, bay, river or beach." N.J. STAT. ANN. § 59:4-8 (1992). The legislative comment to the section sets forth that it:

> [R]eflect[s] the policy determination that it is desirable to permit the members of the public to use public property in its natural condition and that the burdens and expenses of putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received. . . .
>
> In addition it is intended under those sections that the term unimproved public property should be liberally construed and determined by comparing the nature and extent of the improvement with the nature and extent of the land. Certain improvements may be desirable and public entities should not be unreasonably deterred from making them by the threat of tort liability.

Id. The California Tort Immunity Act provides absolute governmental immunity for trails and unpaved roads leading to recreational areas and for unimproved public property. CAL. GOV'T CODE §§ 831.2, 831.4, 831.6 (West 1983).

127. *See Walsh*, 585 A.2d at 450-51.

128. *See Lory*, 674 A.2d at 674.

129. An alternative approach is to except out from Recreation Act immunity specifically listed, highly developed recreational facilities such as indoor gymnasiums and swimming pools.

VI. Conclusion

Commonwealth agencies and municipalities are now afforded blanket immunity from claims brought by people injured on government owned recreational lands under *Lory v. City of Philadelphia*. The *Lory* decision held that Pennsylvania's Recreation Use of Land and Water Act immunizes public agencies from negligence claims, while the Political Subdivision Tort Claims Act and Sovereign Immunity Act immunize the agencies from claims of willful misconduct. An injured plaintiff's only hope is to try to abrogate that immunity by arguing that the land where the injury occurred falls outside the definition of "land" in the Recreation Act.

Whether the *Lory* holding will be extended to all public recreation facilities, or, conversely, whether governments will even be able to claim immunity under the Recreation Act are matters currently being considered by the state legislature. Each alternative answer to this issue differs in its financial and policy implications for governments and injured plaintiffs. Removing governments from eligibility for Recreation Act immunity benefits injured plaintiffs, but will undoubtedly reduce the public provision of park and recreation facilities. If the law is left untouched, because of the current judicial trend toward narrowing the scope of Recreation Act immunity, public and private landowners alike will be more cautious in opening their land to recreational users and in making improvements needed for convenience and disabled accommodation purposes. Legislators should consider that passage of Senate Bill 219, which provides Recreation Act immunity to both urban and rural land and developed and undeveloped recreational parcels of any size, is the approach that will encourage the provision of recreational facilities to the greatest number of people in the Commonwealth. To address concerns about restitution for injured plaintiffs, the legislature could consider amending the Tort Claims and Sovereign Immunity Acts to provide a basis for liability for governmental acts of willful misconduct.