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THE GENERAL PERCEPTIONS OF NORTH CAROLINA RECREATION ADMINISTRATORS OF THE LEGAL ASPECTS OF MUNICIPAL LIABILITY

The University of North Carolina at Greensboro ED.D. 1985

THE GENERAL PERCEPTIONS OF NORTH CAROLINA RECREATION ADMINISTRATORS OF THE LEGAL ASPECTS OF MUNICIPAL LIABILITY

by

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A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

Greensboro
1985

Approved by

Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at The University of North Carolina at Greensboro.

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March 26, 1985
Date of Acceptance by Committee

March 26, 1985
Date of Final Oral Examination

GASKILL, PAUL L., Ed.D. The General Perceptions of North Carolina Recreation Administrators of the Legal Aspects of Municipal Liability. (1985) Directed by Dr. Joseph Bryson. 99pp.

Public recreation programs and facilities in the United States have experienced four decades of rapid growth and expansion. As a result of this growth, greater numbers of people are either visiting municipal or county park and recreation facilities or engaging in programs sponsored by these agencies. Recreation administrators in the United States and in North Carolina are charged with the responsibility of providing facilities and programs to this increasing user population in a safe, prudent, and reasonable manner.

The purposes of this investigation were (1) to describe the past and present position of the legislature and the courts in North Carolina with regard to municipal liability of parks and recreation agencies in the state, and (2) to assess the legal judgment of recreation administrators in North Carolina as it relates to municipal liability through an analysis of a legal judgment survey administered to all municipal and county directors of parks and recreation.

The analysis of litigation revealed that the doctrine of governmental immunity has been abrogated by the courts on numerous occasions, and that the most significant parks and recreation litigation involved the assignment of negligence to departmental activities and the assignment by the court of a proprietary function to such activities. In general, the receipt of revenues is used as a major criterion in classifying an activity as proprietary in nature, and proprietary activities generally do not enjoy governmental immunity. The amount of revenue which will render an activity proprietary, however, is still judicially unresolved.

Analysis of the survey data returned by seventy two (72) recreation administrators in the state revealed that there appears to be a discrepancy between services perceived to be most liable and previously litigated recreation services in North Carolina. The statistical analysis of the data revealed that there were no significant differences in response patterns between the total, municipal, and county groups. In general, administrators were uncertain about departmental immunity, governmental vs. proprietary status, the legality of waivers, and Section 1983 Civil Rights liability.

This investigation indicates that the dissemination of legal information to practicing administrators should become a major objective of the professional recreation associations and recreation curricula in North Carolina.

ACKNOWLEDGMENTS

Appreciation is extended to all of the recreation professionals who both aided in the formulation of the survey instrument and provided the data on which this study was based.

Sincere thanks is also extended to the Research and Development Committee of Elon College for its financial support during the completion of this study, and to Dr. Joseph Bryson and the doctoral committee for the guidance and assistance offered throughout this investigation.

In sincere appreciation for their encouragement, support, and sacrifice during the preparation of this study, I affectionately dedicate this dissertation to my wife, Patricia, and my daughters Rebecca and Anne.

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CHAPTER I

INTRODUCTION

The organized recreation and park system of the United States is in an evolutionary state. It has experienced three distinct periods of development, each of which has contributed to the nature of its current programs and services. Youth work, diversionary activities, and conservation concerns best describe the major elements of each of these eras.[1] Each has given form to the public, private, and commercial elements comprising the total system. Some interesting dichotomies and philosophical conflicts have resulted from these stages of development, and their presence continues to affect the definition of recreation services and the role the organized recreation and parks agencies are expected to play in today's society.

The desire to serve the underprivileged child characterizes the earliest phase of the organized recreation service. Voluntary youth-serving organizations such as the Boy and Girl Scouts, the Playground Association of America, and the YM and YWCA dominated the movement that provided basic programs.[2] These broad social concerns gave rise to the development of public parks and playgrounds as a local government function, and by the late 1800's many cities such as Boston, New York,

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[1]Michael Chubb and Holly R. Chubb, One Third of Our Time? (New York: John Wiley and Sons, Inc., 1981), p. 21.

[2]Richard G. Kraus and Joseph E. Curtis, Creative Management in Recreation and Parks (St. Louis: The C.V. Mosby Co., 1982), p. 2.

and Chicago created such facilities to support youth programs. Recreation experiences were seen as a means to an end— the building of better citizens.

The second stage of development emerged during the Depression of the 1930's and reached its zenith in the late 1940's. Work programs of the federal government during the New Deal era of the 1930's were responsible for the construction of hundreds of federal, state, and local park and recreation facilities. The administrative or management responsibilities for these facilities were often given to local government, for activities in the parks were seen as useful in breaking the monotony of poverty and in relieving the tensions of World War II. It was during this period that communities developed park and recreation commissions and charged them with the responsibility of providing diversionary activities.[3] There was an increase in the number of community recreation buildings, athletic fields, and other sports facilities. Organized recreation took on a mass approach, and for many, sports became synonomous with recreation.

Expansion of outdoor recreation interests in the late 1950's gave rise to the third and current period of the movement. Private commercial investments, coupled with expanding federal and state programs, were having a tremendous impact on leisure behaviors. Camping, water and winter sports, and vacation travel enjoyed a significant growth in popularity. The nurturing and developing of our natural resources to accommodate these interests and the need for recreation and park professionals

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[3]Lynn S. Rodney, Administration of Public Recreation (New York : The Ronald Press, Co., 1964),p. 18.

with managerial and planning skills to manage these efforts have characterized this era of development.[4]

These three distinctive periods in the history of organized recreation and park services are reflected in the programs and organizational structures of the many groups providing for leisure time expressions. Programs tend to be one of three types: diversionary, resource management oriented, or instruments of personality development and social change. The first is most often observed in municipal government in North Carolina and in industrial recreation settings; the third is characteristic of hospital and youth serving agencies. The resource management orientation is most frequently found at the state and federal levels.

Public Recreation in North Carolina

The public recreation movement in North Carolina paralleled the trends of the nation in development, but legally began with the discussion of the need to conserve, develop, and manage the lands of the State for recreational purposes in the Constitution of North Carolina. Article XIV, Section 5 of the State Constitution specifically states:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdividions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to perserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historial sites, openlands, and places of beauty.

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[4] Sidney G. Lutzin and Edward A. Storey, Managing Municipal Leisure Services, (Washington, D.C.: The International City Management Association, 1973), p. 19.

In order to further clarify the role of the state in the implementation of this broad policy statement of the constitution, the legislature created the nation's first recreation council in 1946 which was advisory to the Department of Natural and Economic Resources. The Executive Organization Act of 1973 reorganized both the recreation council with the passage of G.S. 143B-311, and the department through the enactment of Article 7, G.S. 143B-279. The general provisions and organization of the newly formed Department of Natural Resources and Community Development and its powers and duties with respect to municipal recreation are described thus:

> 1) To study and apprise the recreation needs of the State and to assemble and disseminate information relative to recreation.
> 2) To cooperate in the promotion and organization of local recreation systems for counties, municipalities, and other political subdivisions of the State, and to aid them in the administration, finance, planning, personnel, coordination and cooperation of recreation organizations and programs.
> 3) To aid in recruiting, training, and placing recreation workers, and to promote recreation institutes and conferences.
> 4) To establish and promote recreation standards.
> 5) To cooperate with appropriate State, federal, and local agencies and private membership groups and commercial recreation interests in the promotion of recreation opportunities.
> 6) To act jointly, when advisable, with any other State, local, or federal agency, institution, private individual or group in order to better carry out the Department's objectives and responsibilities.[5]

Part 13 of Article 7, G.S. 143B-311, describes the duties and powers of the reorganized parks and recreation council, which in part are to "advise the Secretary of Natural Resources and Community Development with respect to the promotion, development and administration of the State's recreation and park system", and to "advise the Secretary ...

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[5]Article 7, G.S. 143B-279, Duties and Responsibilities, General Statutes of North Carolina.

with respect to the quality and quantity of the total recreation services provided to the citizens of the state and out-of-state visitors by governmental units, private agencies, and commercial organizations". Lastly, it is the duty of the council to "educate and inform the citizens of the State with respect to both the needs and the opportunities of the recreation and park systems".[6]

To further encourage the growth and development of municipal and county recreation systems in the State of North Carolina and to further define the relationship of the state and local governments in this regard, the legislature enacted G.S. 160A-209 and G.S. 160A, Article 18. The former statute broadly provides municipal and county governments the power to levy property taxes "to establish, support, and maintain public parks and programs of supervised recreation".[7]

The latter statute is specific to recreation services, and first defines recreation as "opportunities that are diversionary in character and aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural development and leisure time experiences".[8] The statute goes on to authorize both cities and counties in the State to engage in a wide variety to recreation experiences. Specifically, G.S. 160A-353 authorizes local government to:

1) Establish and conduct a system of supervised recreation.

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[6]Article 7, Part 13, G.S. 143B-311, General Statutes of North Carolina.

[7]Section C, Item 24, G.S. 160A-109.

[8]G.S. 160-A-352, Recreation Defined, General Statutes of North Carolina.

2) Set apart lands and buildings for parks, playgrounds, recreational centers, and other recreational programs and facilities.

3) Acquire real property, either within or without the corporate limits of the city or the boundaries of the county, including water and air rights, for parks and recreation programs and facilities by gift, grant, purchase, lease, exercise of the power of eminent domain, or any other lawful method.

4) Provide, acquire, construct, equip, operate, and maintain parks, playgrounds, recreation centers, and recreation facilities, including all buildings, structures, and equipment necessary or useful in connection therewith.

5) Appropriate funds to carry out the provisions of this article.

6) Accept any gift, grant, lease, loan, bequest, or devise of real or personal property for parks and recreation programs. Devises, bequests and gifts may be accepted and held subject to such terms and conditions as may be imposed by the grantor or trustor, except that no county or city may accept or administer any terms that requires it to discriminate among its citizens on the basis of race, sex, or religion.[9]

The State of North Carolina has thus allowed for the creation and continued support of local recreation programs and services through statutory provisions. One hundred and seven (107) North Carolina municipalities and fifty four (54) counties implemented these statutory provisions and currently offer full-time recreation programs. Implied in the State's definition of and provision for recreation services is the acknowledgement that such services, by their very nature, often require active physical exertion of participants and frequently by many people at the same time. The chance of personal injury to participants is therefore greater in recreation services than in most other services of local government, and the potential for litigation involving the municipality or county which chooses to support parks and recreation programs is also viewed to be higher.[10]

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[9] G.S. 160A-353, Powers, General Statutes of North Carolina.

[10] Michael R. Smith, "Civil Liability of the City and City Officials", Municipal Government in North Carolina, ed. David M. Lawrence and Warren J. Wicker (Institute of Government, The University of North Carolina at Chapel Hill, 1982), p.88.

The potential for litigation is dependent, however, on the applicability of the principle of sovereign immunity to parks and recreation functions. Sovereign immunity provides that a governmental entity shall not be subject to legal suit without its consent. This immunity is generally said to rest on several policy bases. These include the view that as a sovereign, the government can do no wrong; that public bodies have limited funds and can expend them only for public purposes; that public agencies cannot be responsible for the torts of their employees; and that public bodies have no authority to commit torts.[11] Under this immunity rule, a municipality or county is not liable for the tortious acts of its employees or agents (acts which cause injury or harm) committed while performing a governmental function if such acts are not negligent.

The liability of a North Carolina municipality or county for the torts of its officers and employees generally depends on whether the employee was engaged in a governmental or proprietary function or activity. In general, a city enjoys sovereign immunity and is not liable for the torts of an employee if that person harms someone while he is carrying out a governmental function. Sovereign immunity does not apply and the city is liable if the employee commits a tort while engaged in a corporate or proprietary function. In North Carolina, the distinction between the two functions of municipal government still is not clear, and these distinctions have been determined by the state judiciary on a case by case

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[11] William L. Prosser, The Handbook of the Law of Torts, (4th ed.; New York: John Wiley and Sons, 1971), p. 28.

basis, not through statutory provision. Judicial decisions concerning whether parks and recreation departments are proprietary or governmental are contradictory, creating uncertainty on the part of many recreation administrators as to their immunity or liability status.

Recognizing that there are circumstances under which municipal and county governments may be held liable for their actions by the courts, the North Carolina General Assembly enacted G.S. 160A-485 which allows local governments to waive their governmental immunity through the purchase of liability insurance. The law states that:

> any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.[12]

Any plaintiff may therefore maintain a tort claim against a city insured under G.S. 160A-485, and the municipality may no longer use governmental immunity as a defense.

In an attempt to further assist municipal and county governments with the tort liability issue, the General Assembly enacted G.S. 143B-424 in 1979. This law created the Public Officers and Employees Liability Commission which assists local governmental agencies in acquiring from a private insurance company "a group plan of professional liability

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[12]G.S. 160A-485, Case Notes, General Statutes of North Carolina. Passed in 1975, G.S. 160A-485 allows the purchase of liability insurance for general protection of a city's employees from tort liability claims. This statute replaces G.S. 160-191.1 (1964) allowing the procurement of liability insurance on motor vehicles only.

insurance covering the law enforcement officers and/or public officers and employees of any county or municipality of the State".[13]

Purpose of the Study

Recreation administrators in North Carolina are charged with the responsibility of providing a variety of programs and facilities to the public within their jurisdictions in a safe, prudent, and reasonable manner. Traditionally, the doctrine of sovereign immunity provided broad protection to the agencies and administrators engaged in public leisure service provision. Due to constant judicial action, the statutory provisions for purchasing liability insurance, and the undefined nature of recreation as a governmental or proprietary function, the immunity doctrine has been abrogated and generally weakened. Recreation administrators have subsequently found themselves and their departments confronted with potential litigation more frequently than ever before, placing an increased significance on the legal competencies and judgment of practicing recreation professionals.

The purposes of this study are twofold:

1) To describe the past and present position of the legislature and the courts in North Carolina with regard to municipal liability of parks and recreation agencies in the state.

2) To assess the legal judgment of recreation administrators in North Carolina as it relates to municipal liability through an analysis of a legal judgment survey administered to all municipal and county directors of recreation and parks.

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[13]G.S. 143B-424, Powers and Duties of Commission, General Statutes of North Carolina.

Questions to be Answered

In recent years the number of law suits brought against cities and their public officers and employees in North Carolina have increased significantly. These suits have sought to collect damages for harm caused by carelessness of city officers and employees in discharging their official duties. Judicial decisions, as well as liability insurance coverage of municipalities and counties, have led to the presently unsettled status of local governments in regard to tort liability.

The questions to be answered in this study have emerged from this legal transition, and are as follows:

1) Based on an analysis of judicial decisions involving or relevant to municipal and county recreation and park agencies in North Carolina, what is the current status of these agencies in regard to the doctrine of governmental immunity?

2) Based on an analysis of judicial decisions involving or relevant to municipal and county recreation and park agencies in North Carolina, what are the major factors influencing current judicial decisions regarding the distinction between governmental and proprietary functions of recreation and park agencies in the State?

3) To what extent are the professional park and recreation administrators in North Carolina aware of the potential tort liability of their departments as measured by questionnaire responses concerning governmental immunity and governmental vs. proprietary functions?

4) Based on a survey of professional park and recreation administrtors in North Carolina, what is the number and specific nature of tort liability law suits settled either out of court or at the trial court level involving their departments?

5) How is the use of participant liability waivers or exculpatory agreements by public recreation agencies viewed by the courts, and how frequently are such agreements employed by the professional park and recreation administrators in the State?

6) What is the position of the courts and what is the legal knowledge of professional recreation and park administrators in the State in regard to Section 1983 Civil Rights Liability?

Scope of the Study

This study will examine the legal liability of municipal and county park and recreation agencies in North Carolina. The statutory foundations of the study were previously discussed subsequent to an analysis of the General Statutes of North Carolina. All cases involving or relevant to municipal or county departments of parks and recreation will be analyzed using the North Carolina Reports, the North Carolina Court of Appeals Reports, the North Carolina Index, and the North Carolina Digest. Each case cited will be described in terms of

1) the major facts surrounding the case;

2) the decision of the court;

3) the effect of the decision on the current status of municipal tort liability in recreation and park agencies in North Carolina.

Related literature which reflects national trends in tort law significant to North Carolina will also be reviewed.

In order to determine the degree to which the one hundred and sixty one (161) directors of parks and recreation are aware of their governmental immunity and proprietary vs. governmental status, a questionnaire will be administered and the data statistically analyzed. This instrument will also attempt to collect statistics on recent law suits heard at the trial court level or settled out of court. A descriptive statistical analysis of the data will include regional group comparisons, county and municipal group comparisons, male and female administrator group comparisons, and overall implications of the survey data.

Significance of the Study

Legal liability has become a major concern for public recreation professionals regardless of the immunity which has sheltered their activities for so many years. The trend of the states is to reduce or eliminate governmental immunity for many or all of the services included under the broad governmental umbrella of activities. The deterioration of the strength of the sovereign immunity doctrine is thus a given when considering tort liability in regard to almost any governmental service. This deterioration has resulted from both statutory and judicial influence, and administrators may therefore be unaware of the status of their departmental liability as affected by statutory provision or judicial interpretation.

In like fashion, it is important for administrators to understand the basic attributes of the municipal corporation as viewed by the state. Municipal corporations have been regarded by the law as having a dual character, which has affected their liability for tortious acts. A municipal corporation is both a subdivision of the state, performing governmental and political functions, and a corporation with special and local interests which are similar to those of a private corporation, and which are not shared by the state itself.[14]

As a consequence of this dual character, the courts have attempted to distinguish between the two respective capacities. The distinction being, at least in theory, simply that a governmental function can be

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[14]Grainger R. Barrett, "Parks and Recreation", Municipal Government in North Carolina, ed. David M. Lawrence and Warren J. Wicker (Institute of Government, The University of North Carolina at Chapel Hill, 1982), p. 441.

defined as one which is necessary to the well-being of the community. Thus it is often concluded that public education, training for self-preservation and good citizenship, and safeguarding the public health are governmental functions, while the provision of mere amusement or entertainment is not. Immunity is generally provided for the acts of the municipal corporation in its governmental or public capacity, but not for those undertaken in its corporate, private, or proprietary capacity.

In most cases, however, it is not so easy to draw the line between the two, and there is no rule of thumb which can be applied with any certainty of result. Although the charging of a fee has often been used as a convenient standard, it has been only one factor influencing judicial decisions.[15] The difficulty in drawing clear distinctions, especially in the field of public recreation, is amply demonstrated by comparing those functions which have been held to be governmental with those which have been held to be proprietary. This study will attempt to clarify the attitude of the courts in North Carolina in relation to the governmental-proprietary distinction, thus allowing administrators to form more accurate assessments of the current legal status of their department's operations.

Finally, information from this study may serve to encourage administrators to take definitive steps to reduce the liability risk factors present in their departments. An understanding of the conditions under which they may be found liable will enable administrators to more competently perform their duties and responsibilities, and may also help to

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[15]Ibid., p. 440.

avoid costly liability litigation.

In an era when society demands more services of municipal government than ever before, so too does it demand a reasonable guarantee of safety from negligent or careless acts of its agents. Public recreation administrators in North Carolina can be proud of their record in this regard, but must also prepare for the legal consequences of providing an increasingly broad range of leisure services.

Organization of the Remainder of the Study

The remainder of the study will be divided into four chapters. Chapter II will examine the court cases involving or relevant to public parks and recreation in North Carolina. Related literature which reflects national trends in tort liability and tort law modification significant to North Carolina will also be reviewed. In addition, the impact of Title 42, Section 1983 of the United States Code (42 U.S.C. Section 1983), or the Civil Rights Act of 1871 which imposes federal liability upon local government agencies and employees, will also be discussed.

Chapter III will describe the action research component of the study and will include a discussion of the research instrument and its development, a description of participant characteristics, and a discussion of the survey administration procedures. An analysis of the percentage of return and a description of the statistical procedures to be employed in the data analysis will conclude this section of the study.

Chapter IV will present the analysis of the background data obtained from respondents on the legal liability questionnaire, followed by a

discussion of reported trial court and out-of-court settlements and their implications. The analysis and interpretation of administrator's legal judgment concerning governmental immunity, governmental vs. proprietary function, waiver validity, and Section 1983 Civil Rights Liability will conclude the chapter.

Chapter V will contain the summary and conclusions suggested by the judgment analysis study as compared to the questions of the study in Chapter I and the case law analysis contained in Chapter II. This chapter will be concluded with recommendations and suggestions for further research.

CHAPTER II

REVIEW OF THE LITERATURE

The concept of municipal responsibility for park and open space aspects of public recreation is not new. Since the creation of the municipal corporation, governmental officials have set aside public squares, plazas, and gardens for the enjoyment of the tax-paying citizens of the municipality. The Boston Commons in the late 1700's and New York City's Central Park project in the mid-1800's reinforced the notion that natural beauty should be preserved within the urban area and provided at public expense. The creation and maintenance of municipal park systems by local governments therefore became a commonly accepted function of government by the twentieth century.[1]

By the 1920's and 1930's, recreation programs were also being established in large cities. Many of these programs utilized existing public park lands for active recreation purposes, and construction began on indoor facilities to support the leisure needs of the public during this period. Many states enacted enabling legislation at this time, and recreation achieved general recognition as a legitimate function of government for which tax dollars could be allocated.

Because recreation programs often required the active and strenuous physical involvement of participants which could potentially lead to

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[1]Betty Van der Smissen, State Laws for Parks and Recreation, Oglebay Park, Wheeling, West Virginia: American Institute of Park Executives, 1956), p. 3.

personal injury, recreation and park operations have received attention from the legal community since their inception. Much of the early literature which discussed the liability of municipal officers as well as the liability of the municipal corporation in regard to park and recreation operations dealt with the governmental versus proprietary distinction. The earliest study of court decisions pertaining to parks and recreation, for example, was published in 1932 and focused on the governmental and proprietary status of such services. The study revealed that of the thirty-six states which authorized public parks and recreation, twenty-one of them considered these services to be governmental, fourteen considered them to be proprietary, and one state was undecided.[2] Later the same year, Charles Reed, then Chairman of the National Recreation Association, noted that:

> Court decisions relating to liability have rested largely on the question of whether the municipality administering the public recreation facilities was performing a governmental (public) or proprietary (private) function.
>
> In general, a city acts in a governmental capacity when it is engaged in the performance of a public service or duty in which it derives no special privilege but which it is bound to see performed in pursuance of a duty proposed by law for the general welfare of its inhabitants. The proprietary function, on the other hand, is one voluntarily undertaken by the city for its particular local advantage or pecuniary profit.[3]

In conclusion, Reed strongly recommended that recreation administrators should strive to maintain as much immunity as possible for their

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[2]National Recreation Association, Is Parks and Recreation a Governmental or Proprietary Function? (New York: NRA, 1932).

[3]Charles E. Reed, Charges and Fees (New York: National Recreation Association, 1932), p. 35.

services through the limited utilization of user fees and charges. Such fees, if received in sufficient amounts, had rendered recreation functions proprietary in nature. As a general rule, proprietary functions did not enjoy sovereign immunity and accordingly were judged to be liable for incidents of harm or injury to participants.

Serious criticism of the doctrine of sovereign immunity and the tort liability of the municipal corporation had certainly preceded these limited discussions of the liability of leisure services in the community. Although critical comment of the doctrine appeared before 1900, widespread interest in the problem among legal commentators seems first to have been stimulated in 1924 by a notable series of articles by Edwin M. Borchard of the Yale University School of Law.[4] Hundreds of articles on municipal tort liability and the sovereign immunity doctrine, many of which commented on pertinent judicial decisions, appeared in law reviews in the next fifteen years. Few of these, however, dealt specifically with parks and recreation liability, and by the late 1930's, interest in the topic of governmental tort liability as evidenced by legal commentary had diminished.

By the 1940's, however, the tort liability of municipal governments was beginning to receive the renewed attention of numerous legal authorities. In a 1941 article, Edgar Fuller and A. James Casner discussed the probability of the demise of the doctrine of governmental immunity throughout the country, citing the increasing range of services provided

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[4] Yale Law Journal, 34 (1924), 129; 229; Yale Law Journal, 36 (1924), 757; 1039; Columbia Law Review, 38 (1925), 577, 734.

by governmental units and the shifting opinion of the courts as major contributing factors.[5]

The following year, the entire Spring 1942 issue of Law and Contemporary Problems was dedicated to the issues surrounding municipal tort liability. In this issue, Blachly and Oatman suggested that the local government needed state legislative support due to the continual judicial abrogation of the immunity doctrine, and that "a scientific and just system of responsibility cannot be established by judicial action ... but can be brought about only by constitutional or legislative action".[6] The authors' support for legislation enabling municipalities to obtain insurance policies to protect their agents is apparent in their conclusion that: "In short, there is no way of assuring a maximum of justice and a minimum of suffering, except the assumption of responsibliity by the unit of government, on the insurance principle".[7]

Articles in the same issue of Law and Contemporary Problems by French,[8] David,[9] and Warp[10] discussed the complexities of the municipal

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[5]Edgar Fuller and A. James Casner, "Municipal Tort Liability in Operation", Harvard Law Review, 54 (1941), 439.

[6]Frederick F. Blachly and Miriam Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey", Law and Contemporary Problems, 9 (1942), 212.

[7]Id. at 213.

[8]Patterson H. French, "Research in Public Tort Liability", Law and Contemporary Problems, 9 (1942), 234.

[9]Leon Thomas David, "Public Tort Liability Administration: Basic Conflicts and Problems", Law and Contemporary Problems, 9(1942), 335.

[10]George A. Warp, "Tort Liability of Small Municipalities", Law and Contemporary Problems, 9 (1942), 363.

tort liability and immunity issues, and generally concluded that in the face of increasing litigation:

> .. it would seem that the method of meeting the situation lies, not in keeping the law in its present unjust state, not in granting immunity to all municipalities, but in devising some form of State or cooperative insurance, perhaps made compulsory by statute.[11]

The last article of this series by John Repko focused on the general attitude of the courts towards several specific activities of local governments. In regard to parks, swimming pools, and recreation centers, Repko noted that most litigation to date had classified these operations as governmental on the ground that they had an intimate relation with the public health, or more broadly, the public good. Concerning the charging of fees, Repko noted "they explain away admission fees as incidental, expense-defraying charges. But it is this element of a charge which is seized upon by the courts of other mind".[12] The article concluded by noting that most contemporary writers on the subject commended the growing tendency of the courts to impose responsibility for the careful operation and maintenance of parks and recreational facilities.

By 1949, George Butler in an early recreation text utilized by a number of college recreation curricula of the day, expressed concern over the increasing interest of the courts, state legislatures, local government attorneys, and others in the liability for personal or property damage due to negligence on the part of local government employees.

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[11] Id. at 367.

[12] John S. Francis Repko, "American Legal Commentary on the Doctrine of Municipal Tort Liability", Law and Contemporary Problems, 9 (1942), 227.

Butler advised administrators to be cautions in future operations in concluding:

> In general, in the states where recreation is a governmental function incidental charges do not affect the nature of the function, that charges which result in operating profits tend to change the function, and that charges imposed for the purpose of making a profit will change the function in practically all states.[13]

The stabilization of the American economy and the suburbanization trends of the late 1940's and 1950's following World War II led to several decades of rapid expansion of municipal leisure services. This increase in program offerings and participation inevitably led to increased litigation across the United States, and to a renewed interest by legal authors concerning the susceptibility of municipal governments to suit. Clouding the issue was the unwillingness of state legislatures to definitively address the municipal tort liability versus sovereign immunity controversy in the face of judicial decisions which tended to weaken the sovereign immunity doctrine.

By 1957, the issue in many states, including North Carolina, was very complex and unsettled. Although many states had adopted Tort Claims Acts (North Carolina adopted its Tort Claims Act in 1951) which served to waive the sovereign immunity of state governments, municipal government sovereign immunity was being abrogated by the judiciary on a case by case basis. In regard to leisure services, Charles Rhyne noted in an important text on municipal law that:

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[13]George Butler, Introduction to Community Recreation (New York: McGraw-Hill Book Co., Inc., 1949), p. 435.

> Judicial opinions manifest a conflict of views respecting municipal tort liability arising from the operation and maintenance of recreational facilities such as parks, swimming pools, bathing beaches, playgrounds, and other recreation areas or play facilities.[14]

In concluding, Rhyne reiterated the previous conclusions of other legal authors, indicating that governmental recreational functions generally enjoyed immunity while proprietary recreational functions generally did not. The criteria on which these distinctions were based, however, were variable from state to state as well as from case to case.

By the 1960's, municipal liability in tort was being researched and discussed by a number of authors. William Prosser authored a well received review of the general principles of tort law in 1964 entitled The Law of Torts,[15] and in the same year Lynn Rodney included tort law as a major competency area of park and recreation administrators in what would become the most widely used recreation text of the decade. In Administration of Recreation,[16] Rodney lamented the fact that many recreation administrators were not familiar with the principles of tort law in regard to their communities, and cautioned that the lack of clear distinctions between governmental and proprietary functions made the common practice of charging user fees a major factor contributing to personal and governmental liability in tort.

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[14]Charles S. Rhyne, Municipal Law (Washington, D.C.: National Institute of Law Officers, 1957), p. 777.

[15]William L. Prosser, The Law of Torts, (3rd ed.; New York: John Wiley and Sons, 1964).

[16]Lynn Rodney, Administration of Recreation (New York: The Ronald Press, Co., 1964).

In 1968, Betty van der Smissen authored a text containing a summary of state statutes and major case law involving physical eudcation activities in schools and municipal recreation services entitled The Legal Liability of Cities and Schools for Injuries in Recreation and Parks.[17] This text, made current in 1975 by a supplement of cases and statutory change summarizations, quickly became a definitive source of case law and statutory provisions for practicing administrators.

After considerable research, van der Smissen concluded that:

> The majority of legal writers have assailed vigorously the doctrine of immunity in crusading for more municipal responsibility for wrongful and negligent acts. Some speak in terms of the changing function of municipalities in today's society, while others feel that the municipalities are in a more favorable position by holding municipal functions to be proprietary because the rules of negligence, contributory negligence, assumption of risk, et cetera, apply and usually a municipality is not negligently operating an activity or facility or maintaining an area.[18]

In regard to North Carolina, van der Smissen concluded that "in consideration of previous dicta on standards of reasonable care, one might say there appears to be a trend toward holding the proprietary view for all (recreation and park) operations."[19]

The publication of the van der Smissen text, increased litigation, and the changing statutory provisions of state governments toward municipal sovereign immunity, especially in the area of insurance coverage,

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[17]Betty van der Smissen, The Legal Liability of Cities and Schools for Injuries in Recreation and Parks (Cincinnati: The W.H. Anderson Co., 1968).

[18]Id. at 36.

[19]Id. at 339.

contributed to the large number of books, articles, and commentaries on recreational activities and tort liability that have appeared in the professional literature up to the present time. Most notably, a series of books by Herb Appenzeller, From the Gym to the Jury,[20] Athletics and the Law,[21] and Sports and the Courts,[22] discussed the complexity of the liability of schools, school personnel, and municipalities in the sponsoring of physical education and interscholastic sports and recreation programs. In 1979, Cym Lowell authored The Law of Sports,[23] a work discussing sports law and the extensive litigation resulting from public participation in sports and active recreational programs. Liability articles appeared regularly in the Journal of Physical Education and Recreation. By 1983, Parks and Recreation Magazine included the National Recreation and Park Association Law Review column by James Kozlowski in its monthly offerings. In general, the recent literature attempts to identify risk factors present in recreation operations, and clarify municipal administrator rights and responsibilities inherent in leisure service delivery systems.

General articles on tort liability in recreation services have thus become abundant. As significant, however, are the articles which

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[20]Herb Appenzeller, From the Gym to the Jury (Charlottesville, Va.: The Michie Co., 1970).

[21]Herb Appenzeller, Athletics and the Law (Charlottesville, Va.: The Michie Co., 1975).

[22]Herb Appenzeller, Sports and the Courts (Charlottesville, Va.: The Michie Co., 1980).

[23]Cym H. Lowell and John C. Weistart, The Law of Sports (Indianapolis: The Bobbs-Merrill Co., 1979).

appear in the legal periodical literature of each state that pertain to liability and sovereign immunity to which many recreation administrators do not have easy access. Recent articles by Elizabeth Moore[24] and Beecher Gray[25] on the doctrine of sovereign immunity in North Carolina are examples, in that these articles comment on the statutory and judicial abrogation of the doctrine in the state. They also discuss the proprietary versus governmental distinction being drawn by the judiciary, and generally call for legislative action to modernize the sovereign immunity doctrine. Recently, Gray has summarized this judicial trend:

> Although the doctrine of sovereign immunity as applied in North Carolina has been criticized, judicial abrogation or modification of the doctrine is unlikely. North Carolina courts have stated that modification or repeal of the doctrine must flow, if at all, from the legislature. The courts have taken the position that even though the sovereign immunity doctrine was judicially created, the legislature has made sovereign immunity the public policy of the state by enacting statutory modifications of the doctrine. Therefore, according to the courts, any further modifications of the doctrine must be made by that branch of government.[26]

After a brief discussion of Section 1983 Civil Rights liability which follows, a review and discussion of litigation in North Carolina will illustrate the unsettled disposition of the courts in regard to governmental immunity and the governmental versus proprietary distinction of concern to these and other legal commentators.

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[24]Elizabeth Moore, "Torts: Governmental Immunity", North Carolina Law Review, 56 (1978), 1147-1150.

[25]Beecher Reynolds Gray, "Local Government Sovereign Immunity: The Need for Reform", Wake Forest Law Review, 18 (1982), 43-57.

[26]Id. at 49-50.

Section 1983 Liability

Recently, public administrators are becoming aware of another source of potential liability that is imposed upon them by federal law. In this instance, damages can be assessed against individual officials and governmental units for violation of rights guaranteed by the United States Constitution or federal statutes. These suits are being brought pursuant to Title 42, Section 1983 of the United States Code (42 U.S.C. Section 1983), the Civil Rights Act of 1871, which in part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[27]

This federal statute thus authorizes a person to sue and recover damages against a city or its officers for the violation of a federal Constitutional or statutory right when the violation is caused by official conduct. The provisions of Section 1983 are designed to deter city officers and employees from engaging in conduct that is likely to violate a citizen's federal rights. Under Section 1983, alleged constitutional violations most frequently yield First Amendment freedom of speech cases, Fourth Amendment wrongful search and seizure cases, and Fourteenth Amendment due process cases.

In North Carolina, no Section 1983 litigation involving parks and recreation functions has been initiated. Nationally, however, the

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[27]United States Codes, Title 42, Section 1983.

number of cases arising from alleged civil rights violations has multiplied. According to Kozlowski:

> In 1961, only 270 civil rights suits were initiated in Federal courts in which the United States was not a party. By 1981, this figure had risen to 29,173. Generally, civil rights suits brought in federal court have increased 66 percent between 1976 and 1981.[28]

Nationally, the most common source of Section 1983 claims that involve leisure service agencies evolve from actions of either the enforcement arms of such agencies (park rangers, wildlife officers), or the actions of municipal law enforcement officers on public recreation areas and facilities. For example, recent cases include that of Catton v. City of New York[29] in which police brutality at a Central Park concert led to alleged Fourth Amendment violations; Prochaska v. Marcoux[30] in which a wildlife conservation officer allegedly violated the Fourth Amendment unreasonable search and seizure rights of a boater; Stroeber v. Veterans Auditorium[31] involving random stop-and-frisk procedures by policemen at a rock concert leading to alleged Fourth Amendment wrongful search and seizure violations; Milwaukee Mobilization for Survival v. Milwaukee County Park Commission[32] in which First Amendment free speech violations attributed to a public assembly fee and permit system were

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[28]James C. Kozlowski, "Section 1983 Civil Rights Liability for Public Park and Recreation Agencies", Parks and Recreation, 17 (1982), 24.

[29]Catton v. City of New York, 523 F. Supp. 598 (1981).

[30]Prochaska v. Marcoux, 632 F2d 848 (1980).

[31]Stroeber v. Veterans Auditorium, 453 F. Supp. 927 (1977).

[32]Milwaukee Mobilizatdon for Survival v. Milwaukee County Park Commission, 477 F. Supp. 1210 (1979).

alleged; and Donovan v. Mobley[33] in which a lifeguard, dismissed after writing a series of articles about a municipal beach operation, maintained that such dismissal constituted a violation of First Amendment rights to freedom of speech.

These cases are illustrative of the type of litigation to which North Carolina administrators may be subjected in the near future, expecially when considering the variety of law enforcement duties performed by local police on parks and recreation facilities and the legal responsibilities of park superintendents, park rangers, park police, or wildlife officers. Although these duties vary according to location, they often are identical to police officers when enforcing rules and regulations on parks and recreation facilities.

Municipal Liability - Under Section 1983, a municipality is generally liable only if a citizen's federal rights are violated in the implementation of an ordinance or regulation officially adopted by the city council. Thus in Milwaukee Mobilization for Survival v. Milwaukee County Park Commission, supra, the city was held liable under Section 1983 because regulations limiting public assembly allegedly caused the First Amendment violations. A municipality is not required to pay damages in a Section 1983 suit if the violation of federal rights was caused by the independent, isolated act of a city officer or employee who had no authority to make final policy for the city,[34] such as in the previously cited

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[33]Donovan v. Mobley, 291 F. Supp. 930 (1968).

[34]Michael R. Smith, "Civil Liability of the City and City Officials", in Municipal Government in North Carolina, ed. David Lawrence and Warren J. Wicker, (Chapel Hill: Institute of Government, The University of North Carolina, 1982), p. 95.

cases of Catton, Prochaska, Stroeber, and Donovan.

Employee Liability - Municipal employees may be held liable for these independent actions, however, even if the governmental entity is not. Generally, the federal courts have determined that municipal officers are entitled to only a qualified good faith defense under Section 1983, and the following requirements must be satisfied to establish a good faith defense:

> First, the defendent must be acting not with the malicious intention to cause a deprivation of Constitutional rights or other injury to the plaintiff, but sincerely with a belief that he is doing right. Second, if he meets the first test, he is liable only if he knew or reasonably should have known that his act would violate the Constitutional or statutory rights of the plaintiff.[35]

In summary, legal commentators have concluded that the scope and extent of governmental and employee immunity from federal Constitutional or statutory violations by local officials is not yet clear. As park and recreation facilities and programs expand in North Carolina, however, an increasing number of public employees serve an increasing user population each year. In addition, as more law enforcement and disciplinary responsibilities are given to facilities supervisors, park rangers, and park police, the potential for litigation arising from Section 1983 civil rights infringements in North Carolina is unquestionably enhanced.

Recreation and Park Litigation in North Carolina

The legal issues surrounding the tort liability of municipal corporations and municipal employees and officers in North Carolina are

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[35]Milwaukee Mobilization for Survival v. Milwaukee County Park Commissoin, 477 F. Supp. (1979), p. 1212.

indeed complex, and most often involve the doctrine of sovereign immunity, the governmental versus proprietary distinction of municipal activities, and the degree to which employee or municipal negligence can be proven in each case.

Although sovereign immunity and the governmental versus proprietary distinction have been addressed earlier in this chapter, the negligence issue merits further discussion because of its presence in most tort case law. Generally, negligence is considered to be the omission by an individual to do something which a reasonable and prudent man would do under similar circumstances. Conversely, the courts may find negligence to be the commission of an act which a reasonable and prudent man would not do.

The successful maintenance of a suit based on negligence, however, requires the consideration of more than just conduct. Most legal authorities concur that four general criteria are necessary to support a negligence suit:

1) A legal duty to conform to a standard of behavior to protect others from unreasonable risks (duty).

2) A breach of that duty by failure to conform to the standard of care required under the circumstances (breach).

3) A sufficiently close causal connection between the conduct of the individual and the resulting injury to another (proximate cause).

4) Actual injury or loss to the interests of another (damages).[36]

In regard to the case analysis which follows, municipal negligence has been a factor in thirteen (13) of the twenty one (21) cases discussed,

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[36]William L. Prosser, The Law of Torts, (3rd ed., New York: John Wiley and Sons, 1964), p. 177.

and in all of the cases the governmental versus proprietary or immunity issues were judicially examined.

As early as 1906, the North Carolina Supreme Court was considering the issue of municipal immunity from suit and the distinction between governmental and proprietary activities in regard to such immunity. In Fisher v. New Bern,[37] suit was brought against the city for negligence in the maintenance of a fallen electrical line which caused the death of a city resident. At issue was whether the city was immune from litigation, or whether the sale of electric power to the public created a corporate interest for the city which would make it susceptable to suit. Judge H.R. Bryan noted in this case that:

> Where powers are granted to cities and towns for public purposes, exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation is to be regarded as a private company.[38]

A proprietary activity which was negligently operated was thus found to exist in Fisher, and the City of New Bern was required to compensate the plaintiff for damages.

Several years later in another utility-related case, that of Metz v. Asheville,[39] the plaintiff claimed that the negligent operation of a municipal sewerage system caused the typhoid fever of a resident which led to his death. Judge J. Brown, citing the Fisher case, concluded

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[37]Fisher v. New Bern, 53 S.E. 342, 140 N.C. 506 (1906).

[38]Id. at 507.

[39]Metz v. City of Asheville, 150 N.C. 748, 64 S.E. 881 (1909).

that the establishment of a public sewer system is an exercise of a governmental function, and the sovereign immunity doctrine made the city free from liability in this instance.

In the 1917 case of Morgan v. Tarboro[40] involving the city park of the Town of Tarboro, an injury to a spectator at a Colored Fireman's Tournament was sustained when a stand of seats collapsed. The legal issue centered on whether the municipality was negligent and whether it was engaged in a proprietary function since ten cents per seat was charged as admission to the tournament. Although the city council had authorized the tournament, only verbal permission was given to a private citizen to erect and charge for such seating. The government neither formally recognized nor received funds from these activities, and was found to be immune. The court ruled that:

> The principle of law is well settled that if the act which the municipality licenses a person to commit within its limits is not unlawful in itself or inherently dangerous, so as to become a public nuisance, and an injury is occasioned merely on consequence of the manner in which the act is performed, then the municipality is not liable.[41]

In contemporary recreation operations, the issuing of permits to private concessionaires for a variety of services has become common practice, but often results in profit for the municipality. The Morgan case thus serves as precedent in regard to such services from which harm to participants may result and from which profits are not received.

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[40]Morgan v. Town of Tarboro, 93 S.E. 470, 174 N.C. 104 (1917).

[41]Id. at 106.

By the 1930's, many public parks and recreation departments in North Carolina were engaged in the expansion of park, playground, and athletic field areas.[42] In 1936, the City of Durham was challenged by an outraged taxpayer in Atkins v. Durham[43] concerning such expansion. The plaintiff desired to restrain the city from issuing a $25,000 bond issue to finance the construction and improvement of Durham parks and playgrounds. The plaintiff maintained that the expenditure was an unnecessary one, and that a general vote of the taxpayers should be initiated in order to approve such an expenditure. In finding for the defendent city, Justice Clarkson stated in no uncertain terms that parks and recreation were necessary and legally legitimate governmental functions, the funding of which did not require public vote. Clarkson noted:

> It has been said that "Health is Wealth." Those parks and playgrounds at all times, and especially in the heat of summer, are a blessing and benediction to industrial workers and to their children, and to all inhabitants of the city. Nothing is more conducive to health and good morals than these recreational places in a thickly settled city. The great weight of authority is to the effect that they are a public necessity.[44]

The following year, two significant cases involving recreation and parks were heard in the North Carolina Supreme Court. Lowe v. Gastonia[45] involved the injury to a golf caddy on a municipal golf course sustained when the caddy fell from a small bridge which crossed a creek. The

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[42]Pursuant to North Carolina codes 2795, 2776 (b), and 2787 which gave municipal corporations that original authority to establish parks and playgrounds necessary to the maintenance of their inhabitants.

[43]Atkins v. Durham, 210 N.C. 295, 186 S.E. 330 (1936).

[44]Id. at 303.

[45]Lowe v. Gastonia, 211 N.C. 564, 191 S.E. 7 (1937).

bridge was judged to be defective, and the city of Gastonia was thus deemed negligent. The court found for the plaintiff, stating that:

> A municipality cannot avoid liability for injuries suffered by a caddy on its municipal golf course, as a result of its negligent failure to exercise reasonable care for his safety, on the ground that it owned and operated the golf course in the exercise of a governmental function.[46]

Although the court did not specifically address the governmental versus proprietary nature of the golf course, it did indicate that the course was proprietary in nature. The court therefore awarded the plaintiff damages based on the findings of negligence in this case, since the negligent failure to maintain the bridge was judged to be the proximate cause of the caddy's injuries.

The second case to be heard in 1937 was White v. Charlotte[47] in which a fifteen-year-old girl died as a result of a fall from a swing located in a city park. The city was deemed to be involved in a governmental function in the operation of the park since no fees were attached to the activity, and the crucial issue was whether the swing was faulty and indeed caused the death. On appeal, the North Carolina Supreme Court ruled that the alleged negligence of the city in maintaining the swing could not be proven. Justice Connor, commenting on the liability of the city, noted that:

> It does not follow as a matter of law that defendants owed no duty to the plaintiff's intestate and others who had the right to use said facilities for purposes of play or recreation, to exercise reasonable care to provide facilities

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[46] Id. at 565.

[47] White v. Charlotte, 211 N.C. 186, 189 S.E. 492 (1937).

> which were reasonably safe, or that defendants would not be liable to plaintiff for a breach of such duty, if such breach was the proximate cause of injuries which resulted in the death of his intestate.[48]

Having determined the potential liability of the city, Conner continued:

> If there was negligence on the part of the defendants with respect to the construction of maintenance of the swing, or its location in the park, as contended by the plaintiff, there was no evidence from which the jury could have found that such negligence was the proximate cause of the death of the child. Whether she fell or was thrown from the swing while she and a companion were standing on the seat, and "pumping", because of a jerk which resulted from the slipping of the links in the chains, or because of some inadvertence on her part or on the part of her companion, is purely a matter of conjecture.[49]

In affirming the decision of the lower court, Justice Connor concluded that:

> In the absence of any evidence tending to show negligence on the part of the defendants which was the proximate cause of the death of plaintiff's intestate, there was no error in the judgement dismissing this action.[50]

It is thus apparent in White v. Charlotte that the court viewed the park operation to be governmental, yet the city had the legal duty to conform to a standard of care that would protect the public from unreasonable risks. In this case, it could not be determined that the failure to conform to a standard of care in the park swing's maintenance was the proximate cause of the childs death, and the case was dismissed.

The following year, the question of whether a municipal auditorium qualified as a necessary governmental expense was deliberated in

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[48] Id. at 186.

[49] Id. at 187.

[50] Id. at 188.

Twining v. Wilmington.[51] Justice Seawell upheld the finding of the trial court that in this case "bonds for the purpose of acquiring lands and erecting suitable buildings thereon for recreation and athletic purposes are not for a necessary municipal expense" without the expressed approval of a majority of the qualified voters of the city.[52] This finding was contrary to the decision in Atkins v. Durham, supra, and expressed judicial doubt concerning the governmental necessity of providing parks and recreation services to the public.

Several years later, the city of Durham was once more involved in litigation, in this instance stemming from the leasing of a public baseball field to an entrepreneur in Cates v. Cincinnati Exhibition Company and the City of Durham.[53] The plaintiff, who was attending a night game at El Toro Park, was struck in the eye by a foul ball during a game between the Durham Baseball Club and a team from the Piedmont league. The plaintiff maintained that the Cincinnati Exhibition Company and the City of Durham were negligent in not placing adequate fencing around the spectator area and in not installing a better lighting system which would enable spectators to follow high fly balls at night.

The major argument of the plaintiff's case, that of negligent construction and operation of the baseball field, could not be proven. Since the plaintiff had a choice between screened and unscreened seating, and since the lights and screening of the spectator areas met with

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[51]Twining v. Wilmington, 214 N.C. 655, 200 S.E. 416 (1938).

[52]Id. at 657.

[53]Cates v. Cincinnati Exhibition Company and The City of Durham, 1 S.E.2d 131, 215 N.C. 64 (1939).

acceptable standards of the day, the case was dismissed. It was noted by the court that a spectator at a baseball game had to assume some of the risk of attending such a sport from which foul balls could potentially cause bodily injury. In addition, although a proprietary function was involved, the court again did not address the governmental and proprietary issue because negligence was not proved on the part of the defendant.

The following year in Latta v. Durham,[54] the defendant city attempted to lease a civic auditorium used for public recreational purposes to a private party. The suit maintained that such a lease would serve to exclude the taxpaying citizens of Durham from the facility, and that such a leasing action by the city council limited their right of equal access to public facilities. The North Carolina Supreme Court ruled that even though the city was involved in a proprietary recreational function, the suit was premature and that the complete exclusion of the public as a result of the lease could not be supported by the facts presented by the plaintiff in the case.

In Brumley v. Baxter and the City of Charlotte,[55] another land use case, the plaintiff brought suit against the defendant city in order to restrain a proposed donation of city land to a private group wanting to develop the Charlotte Veterans Recreation Center. This facility was to be developed by private sources and used exclusively by returning

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[54]Latta v. Durham, 6 S.E.2d 508, 216 N.C. 722 (1940).

[55]Brumley v. Baxter and The City of Charlotte, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945).

veterans of World War II. The North Carolina Supreme Court prohibited the donation of the land to the veterans' association for its proposed recreational purposes, but hinted that leisure services may not be entirely governmental functions in noting: "it is a sound principle of municipal law that a city may exercise only such powers as are expressly granted, necessarily implied, or essential to its purposes."[56]

The following year, the North Carolina Supreme Court ruled in Purser v. Ledbetter[57] that since the use of tax dollars for parks and recreational purposes had not been approved by the voting public, the fiscal expenditures of tax dollars for the support of such activities should be prohibited. More importantly, however, the court discussed at length whether recreational facilities and programs were necessary governmental expenditures. It noted:

> Independently of any question as to the degree of social necessity, we believe that the activities proposed, however qualifying as a public purpose for which the municipality may provide by approval of the people, are too remote from the governmental function to be classed as objects of necessary public expense.[58]

Justice Seawell also stated that in studying Atkins v. Durham, supra, that its authority should not be revived or extended and it therefore would not be followed as a precedent. In regard to the future provision of recreational services by municipalities, however, he stated that:

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[56]Id. at 693.

[57]Purser v. Ledbetter and the Treasurer of the Charlotte Parks and Recreation Commission, 227 N.C. 1, 40 S.E.2d 702 (1946).

[58]Id. at 8.

> This decision closes no gate to the people of Charlotte, or of any other municipality, if they have the will to open it. The Constitution makes them trustees of their own progress. It neither drives them nor stays them, but leaves with them the responsibility for the wisdom of the venture.[59]

Justice Seawell in Purser v. Ledbetter thus clearly stated that recreational programs and facilities should not be considered legitimate governmental functions. In Patterson v. Lexington,[60] however, the issue of whether parks and recreation were necessary areas of governmental expenditure was avoided when Justice Devon ruled that the plaintiff failed to make a case of actionable negligence against the defendant city and affirmed the trial court judgment of nonsuit. The plaintiff in Patterson, while twisting her ankle on an embankment used by the city as overflow seating at a municipal baseball field, could not prove that it was the condition of the embankment that proximately caused her injury, thus leading to the nonsuit verdict. The court did, however, comment on the liability of the municipality, cautioning that the:

> defendant was not an insurer of the safety of those who entered their park but was held to the obligation of exercising due care to prevent injury which reasonably could have been foreseen and to give warning of hidden perils of unsafe conditions ascertainable by reasonable inspection.[61]

Several years later in two companion cases resulting in death, that of Lovin v. Hamlet[62] and Norton v. Hamlet,[63] a seven-year-old and a five-

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[59] Id. at 9.

[60] Patterson v. City of Lexington, 50 S.E.2d 900, 229 N.C. 637 (1949).

[61] Id. at 639.

[62] Lovin v. Hamlet, 243 N.C. 399, 90 S.E.2d 760 (1956).

[63] Nortin v. Hamlet, 243 N.C. 404, 90 S.E.2d 760 (1956).

year-old boy fell into a lake owned and maintained by the Town of Hamlet and were drowned. The parents of the children brought separate suits, alleging negligence on the part of the defendant in operating an artificial lake and playground and failing to provide barriers to restrain the public from entering the deep water adjacent to the dam. The plaintiffs further maintained that the lake was an attractive nuisance which was negligently supervised by the defendant.

In both of these cases, the North Carolina Supreme Court found for the defendant, noting that negligence in the maintenance and operation of the area could not be proven. Of additional significance, Justice Barnhill stated that the attractive nuisance doctrine did not apply to the maintenance and operation of a park, and that the children were visiting the park and playground adjacent to the lake and not to the lake itself. In regard to the attractive nuisance of the lake, Barnhill noted that: "there is no supporting allegation of fact that children were accustomed to wade in the lake or to play along the water's edge in such manner and to such extent as to put the agents and officials of the defendants on notice."[64]

The issue of governmental liability in these companion cases was thus avoided once again, but Justice Barnhill alluded to the present and future uncertainty of the governmental immunity doctrine in his comments:

> It appears, therefore, that we have one case, Atkins v. Durham, supra, in which it is held that the maintenance of a park and playground is a governmental function and another case, Purser v. Ledbetter, supra, in which it is

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[64]Lovin v. Hamlet, supra, at 403.

> held that the maintenance of such playground or park is not a governmental function. We need not now determine which decision will be followed. We are content to rest our decision at this time solely on the deficiency of the allegations contained in the complaint. The question of governmental immunity will be answered when it is squarely presented for decision.[65]

Justice Barnhill's prediction that the issue of governmental immunity would be squarely addressed by the courts was realized only two years later in Glenn v. Raleigh.[66] This case involved a detailed analysis of the doctrine of governmental immunity in North Carolina as affected by the proprietary activities of the parts and recreation department of the defendant city.

As reported in the case, a park maintenance employee operating a rotary lawn mower at Pullen Park in Raleigh struck a visitor (a member of a group having a picnic) in the head with a rock thrown from the mower. The plaintiff suffered severe and permanent injury as a result.

Justice Brown, in first discussing the negligence of the employee and of the city, stated that the court felt the city was indeed negligent and responsible for the actions of its employees. The court also ruled that the negligence was the proximate cause of the plaintiff's injury. The defendant, however, maintained that even if the employee was negligent, the city should be immune from damages because of the governmental nature of the park.

Since negligence was found to exist, the court went on to examine the governmental nature of the recreation facility. Pullen Park, a

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[65]Id. at 405.

[66]Glenn v. Raleigh, 248 N.C. 378, 103 S.E.2d (1958).

forty-two acre natural park, contained picnic areas, walking trails, and a playground. In addition, however, the park also contained a three acre amusement area which charged fees of the public. The income of this area was $18,531 for the year in question, or eleven percent (11%) of the city's $158,243 annual recreation and park budget. It was ruled that the doctrine of governmental immunity did not apply, and that a proprietary function for the entire park was involved. In the words of the court:

> A person injured in the picnic area through the negligence of a municipal employee while acting in the discharge of his duties is not precluded from recovery by the governmental immunity doctrine, it being inferable from the record that the picnicking facilities of the park were substantial factors in drawing patrons for the revenue-producing concessions and that the several areas of the park were merely parts of a composite whole.[67]

The defendant city argued that the revenue from the amusement area was incidental, and that even if the area charging the public was proprietary, the remainder of the parks and recreation operation was supported solely through tax revenues and thus should be considered a governmental function. The court stated that:

> Where a city receives a net income in a substantial amount from the operation of one of its parks maintained as a part of its recreational and amusement program, the fact that its overall budget requirements for its entire recreational programs shows a deficit does not alter the fact that the operation of the park imports a pecuniary advantage to the city so as to exclude the application of a governmental immunity in its operation.[68]

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[67] Id. at 378.

[68] Id. at 379.

Since a proprietary function was found to exist, and negligence was proven on the part of the city which proximately caused the injury to the plaintiff, the court found for the plaintiff and damages were awarded.

The negligence issue was again raised in Aaser v. Charlotte[69] in 1965. In this case, the plaintiff was injured in a corridor of the Charlotte Coliseum when a hockey puck struck her in the ankle. Several boys, playing hockey in the corridor, caused the puck to strike the plaintiff. The plaintiff asserted that the coliseum and the city were negligent in allowing such activities to take place in a public facility.

Although an obvious proprietary function was involved and the city was not immune, the court ruled in favor of the defendant, stating that in order for negligence to exist, the defendant needed to be aware of the conditions which may result in harm or injury and then fail to remedy such conditions. It could not be proven, in this instance, that there was a knowledge on the part of the staff of the coliseum that these hockey-playing activities were taking place, and the case was thus dismissed. According to Justice Lake:

> There is no showing of any knowledge of this condition in the corridor by the city or the authority or that either could have discovered it by the exercise of reasonable care in inspecting the corridors.[70]

In a 1970 case, Toothe v. Wilmington,[71] the negligence and immunity issues were again deliberated. The defendant, who owned a theater used

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[69]Aaser v. The City of Charlotte, The Auditorium-Coliseum Authority, and the Charlotte Hockey Club, 265 N.C. 494, 144 S.E.2d 610 (1965).

[70]Id. at 500.

[71]Toothe v. The City of Wilmington, 174 S.E.2d 286, 8 N.C. App. 171, (1970).

by the public for dramatic productions, was sued for damages suffered by the plaintiff when she fell into the orchestra pit after a choral performance. Since the theater was regularly rented to private groups and profit was received from such rental, a proprietary function was deemed to exist. The court, however, found for the defendant city in concluding that adequate barriers and reasonable care had been exercised in regard to the safety of the theater and the orchestra pit and that no negligence could be proven in this case.

In the 1972 case of Rich v. Goldsboro,[72] the issues of negligence and the governmental or proprietary nature of the recreation system were again crucial in the decision. In this case, a child was injured in a fall from a seesaw in a municipal playground in Herman Park. The plaintiff alleged that the playground equipment was poorly maintained and that the city was negligent, and also that the park contained a train ride for which a fee was charged thus rendering the park a proprietary function.

Although the Glenn v. Raleigh case was cited, the court ruled for the defendant, noting that it could not be determined from the evidence that the alleged negligence of the city was the proximate cause of the child's injury. Also, the court ruled that the small amount of income received from the operation of the train (less than one percent of the city's park and recreation budget) did not establish the parks and recreation operation as a proprietary function. Accordingly, immunity was

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[72]Rich v. Goldsboro, 15 N.C. App. 534, 190 S.E.2d 229, 191 S.E.2d 362, 192 S.E.2d 824 (1972).

applied in this instance and the case was dismissed.

The Rich v. Goldsboro case was the last liability case in North Carolina directly involving public parks and recreation agencies. Several other relevant cases which merit comment, however, include that of Siebold v. Kinston-Lenoir County Public Library[73] in which the operation of a library was deemed to be a governmental function (libraries in some North Carolina municipalities are park and recreation department functions); Steelman v. City of New Bern[74] in which the governmental immunity of an electric utility was upheld; Koontz v. City of Winston-Salem[75] in which the sanitation function was found to be proprietary due to landfill revenues; and Messer v. Town of Chapel Hill[76] in which the power of the municipality to choose the exact parcel of recreational land that is mandatorily donated to the town within sub divisions was upheld. This decision implied that recreation services were legitimate governmental functions.

Table I presents a summary of the cases discussed in this Chapter:

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[73]Siebold v. Kinston-Lenoir County Public Library, 141 S.E.2d 519, 264 N.C. 360 (1965).

[74]Steelman v. City of New Bern, 279 N.C. 589 (1971).

[75]Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E. 897 (1972).

[76]Messer v. Town of Chapel Hill, 59 N.C. App. 692, 297 S.E.2d 632 (1982).

Table I

Summary of Cases

Case/Number	Date	Major Legal Issue(s)	Resolution of Case
Fisher v. New Bern 53 S.E. 342, 140 N.C. 506	1906	Electric utility found to be proprietary.	Judgment for Plaintiff - Damages awarded.
Metz v. City of Asheville 150 N.C. 748, 64 S.E. 881	1909	Sewer system found to be governmental - Immunity implied.	Judgment for Defendant - Suit dismissed.
Morgan v. Town of Tarboro 93 S.E. 470, 174 N.C. 104	1917	Negligence of licensee does not necessarily render town negligent.	Judgment for Defendant - Suit dismissed.
Atkins v. Durham 210 N.C. 295, 186 S.E. 330	1936	Bond issue for Parks upheld; Recreation called a governmental function.	Judgment for Defendant - Suit dismissed.
Lowe v. Gastonia 211 N.C. 564, 191 S.E. 7	1937	Negligence of city found in golf caddy injury; govt. or proprietary function not addressed.	Judgment for Plaintiff - Damages awarded.
White v. Charlotte 211 N.C. 186, 189 S.E. 492	1937	Parks/playground ruled a governmental function; Negligence of city in death of child not proven.	Judgment for Defendant - Suit dismissed.
Twining v. Wilmington 214 N.C. 655, 200 S.E. 416	1938	Bond issued denied. Implied recreation and parks were not a legitimate function.	Judgment for Plaintiff - Bond issue Prohibited.
Cates v. Cinn. Exhibition Co. & the City of Durham 1 S.E.2d 131, 215 N.C. 64	1939	Negligent construction of ballfield not judged to be related to eye injury of spectator.	Judgment for Defendant - Suit dismissed.

Table I (cont.)

Case/Number	Date	Major Legal Issue(s)	Resolution of Case
Latta v. Durham 6 S.E.2d, 508, 216 N.C. 722	1940	Restricted public access to leased facility not proven; lease of facility allowed; proprietary function implied.	Judgment for Defendant - Suit dismissed.
Brumley v. Baxter and the City of Charlotte 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930	1945	Public land donation to private group prohibited; Implied recreation was a non-governmental function.	Judgment for Plaintiff - Land Donantion Prohibited.
Purser v. Ledbetter and the Treasurer of the Charlotte Parks and Recreation Comm. 227 N.C. 1, 40 S.E.2d 702	1946	Prohibited tax expenditure for city recreation program; found recreation and parks to be unnecessary expense.	Judgment for Plaintiff - Tax expenditure Prohibited.
Patterson v. City of Lexington 50 S.E.2d 900, 229 N.C. 637	1949	Negligence of city in spectator injury not proven; Caution in recreation and park operations advised.	Judgment for Defendant - Suit dismissed.
Lovin v. Hamlet 243 N.C. 399, 90 S.E.2d 760	1956	Companion cases- Negligence of city in child's death not proven; Attractive nuisance found not to apply.	Judgment for Defendant - Suit dismissed.
Norton v. Hamlet 243 N.C. 404, S.E.2d 760	1956		
Glenn v. Raleigh 248 N.C. 378, 103 S.E.2d 482	1958	Negligence of city in lawn mower injury proven; Park revenues of 11% of total Park & Rec. budget adequate to render department proprietary.	Judgment for Plaintiff - Damages awarded.

Table I (cont.)

Case/Number	Date	Major Legal Issue(s)	Resolution of Case
Aaser v. The City of Charlotte 265 N.C. 494, 144 S.E.2d 610	1965	Negligence of city and coliseum authority not established; proprietary function found to exist.	Judgment for Defendant - Suit dismissed.
Siebold v. Kinston-Lenoir County Public Library 141 S.E.2d 519, 264 N.C. 360	1965	Negligence of city to patron on library steps not proven; library found to be a necessary governmental expense.	Judgment for Defendant - Suit dismissed.
Toothe v. Wilmington 174 S.E.2d 286, 8 N.C. App. 171	1970	Negligence of city in injury of theatre patron not proven; Proprietary function found to exist.	Judgment for Defendant - Suit dismissed.
Steelman v. City of New Bern 279 N.C. 589	1971	Negligence in electrocution not established; electric utility found to be governmental and immune.	Judgment for Defendant - Suit dismissed.
Rich v. Goldsboro 15 N.C. App. 534; 190 S.E. 2d 229; 191 S.E.2d 362; 192 S.E.2d 824	1972	Negligence of city in playground injury not proven; Park revenues of 1% of total Park and Rec. budget not adequate to render department proprietary.	Judgment for Defendant - Suit dismissed.
Sides v. Cabarrus Memorial Hospital 287 N.C. 14, 213 S.E.2d 297	1975	Negligence of hospital employees proven in patient death; city or county hospitals judged as a proprietary function.	Judgment for Plaintiff - Remanded for retrial.

Table I (cont.)

Case/Number	Date	Major Legal Issue(s)	Resolution of Case
Messer v. Town of Chapel Hill 59 N.C. App. 692, 297 S.E. 2d 632	1982	Town permitted to choose exact parcel of mandatorily donated land in subdivision; Implied recreation was a legitimate governmental function.	Judgment for Defendant - Suit dismissed.

Summary and Implications of the Literature and Cases

As the review of the literature of the tort liability of the municipal corporation has revealed, there has been a constant concern on the part of legal commentators concerning the unsettled judicial opinion of municipal liability in tort. The courts, in lieu of legislative action regarding the doctrine of municipal sovereign immunity, have rendered contradictory decisions in the parks and recreation area. In the absence of legislative action, the majority of authors have advised recreation practitioners to exercise extreme caution in the sponsoring and implementation of recreation and park programs and activities on the assumption that the individual employee and the municipality may be found liable in tort. The majority of articles in the contemporary literature, therefore, describe risk management plans and other administrative mechanisms through which negligence and subsequent liability may be avoided.

The review of the cases as summarized in Table I illustrates the unsettled opinion of the courts in North Carolina in regard to the

immunity of municipal corporations to suit arising from recreation and park operations. Generally, the sovereign immunity doctrine still serves to protect the governmental functions and employees from suit. Proprietary functions, however, do not enjoy immunity and are liable for the tortious acts of their employees. In either case, if municipal negligence is ruled to be the proximate cause of injury to a plaintiff, immunity may be waived and damages awarded (White v. Charlotte, supra).

In determining whether parks and recreation agencies are governmental or proprietary functions, Table I indicates that judicial decisions have been unsettled. In Glenn v. Raleigh, the receipt of eleven percent (11%) of the total parks and recreation budget through fees and charges led the court to conclude that a proprietary function was involved, while in Rich v. Goldsboro a governmental function was judged to exist since less than one percent (1%) of the parks and recreation budget was obtained through revenue collection. The exact point at which a municipal department becomes proprietary and thus looses governmental immunity based upon the receipt of revenue has still not been determined by the courts. The review of North Carolina litigation does tend to support Kozlowski's recent contention that:

> As land is developed beyond passive open space to provide recreational facilities and programs, the function becomes more proprietary in nature. Entry fees in exchange for recreational opportunities are indicative of a proprietary function. The fee suggests that this activity is for the primary benefit of the participant rather than the public at large. A discretionary service for the primary benefit of individuals generally fits the definition of a proprietary function.[77]

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[77] James C. Kozlowski, "Do Entry Fees Increase Liability?", Parks and Recreation, 18 (1983), 21.

It can be concluded from the review of cases that the critical element in assigning the proprietary function label to local government activities is the charging of fees. As the court noted in Sides v. Cabarrus Memorial Hospital, Inc.: "In North Carolina, the requirement of some monetary charge attached to proprietary functions is of pre-eminent importance."[78] As current levels of revenues to support expanded parks and recreation services in many North Carolina municipalities rise, it can be further concluded that an increasing number of recreation departments in the state will be judged to be proprietary in the course of future litigation.

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[78]Sides v. Cabarrus Memorial Hospital, Inc., 287 N.C. 14, S.E.2d 297 (1975).

CHAPTER III

DESIGN OF THE STUDY

The design of this investigation of the legal judgment of recreation administrators in North Carolina as it relates to municipal liability was based on a questionnaire which was administered to all of the one hundred and sixty one (161) directors of municipal and county parks and recreation departments in North Carolina.

The Survey Instrument

Following preliminary research into the major liability issues facing municipal recreation administrators in the State, an initial survey was designed and mailed to fifteen (15) selected administrators for field testing. Suggestions, additions, and recommendations were solicited from this group, and the research questionnaire was modified using this professional administrator input. Further input from the doctoral committee led to several more additions and modifications of the instrument. After receiving the approval of the North Carolina Recreation and Park Society, the coded questionnaire and a personal cover letter (Appendix A) describing the purpose of the investigation were mailed to all of the one hundred and sixty one (161) participants in the study. A summary of the results of the study was offered in return for their participation in the research project. After three weeks, follow-up telephone calls were placed to participants who had not returned the survey.

The legal liability questionnaire sought information concerning length of administrator experience; size of the agency; activities perceived by the administrator as possessing the greatest potential for litigation; perceived sources of administrator legal knowledge; and whether liability insurance had been purchased by the municipality or county to cover recreation services. In addition, participants were asked to list and describe any litigation involving their department of which they were aware, and were asked to estimate the perceived degree of immunity of their department from liability suits. Respondents were also asked to classify their departments as a governmental or proprietary function and to estimate the percentage of the annual budget received from user fees or revenues. Next, the administrators were asked if they possessed and issued liability waiver forms and whether they perceived such forms as legally valid. Lastly, the respondents were asked to estimate the perceived degree of immunity of their departments from Section 1983 Civil Rights liability litigation.

Participant Characteristics

The one hundred and sixty one (161) recipients of the legal liability questionnaire had a wide range of professional backgrounds. The length of time as director of the municipal or county department, a factor which could prove to have a direct bearing on administrator legal knowledge, ranged from eight months to thirty six years. Departmental size, as measured by the number of staff employed, ranged from one (1) to two hundred and ninety seven (297). The male-dominated survey population consisted of one hundred and forty five (145) male administrators

(90% of the sample) and sixteen (16) female administrators (10% of the sample).

One hundred and seven (107) of the participants were directors of municipal recreation and parks departments, while fifty four (54) were directors of county recreation systems. Respondents were geographically located across the entire state of North Carolina in ninety (90) of the one hundred (100) counties in the state.

Percentage of Return

Three weeks after the follow-up telephone calls were completed, percentage of return figures were computed and are presented in Table II.

Table II

Percentage of Return

	Surveys Sent	Surveys Returned	Surveys Returned % of Sample	Surveys Returned % of Total
Municipal Directors	107	50	46.75	31.10
County Directors	54	22	40.80	13.62
Total	161	72	-----	44.72

As illustrated by Table II, municipal directors returned the surveys at a slightly higher rate than county directors, yielding a total rate of return of 44.72 percent.

Analysis Procedures

This research project was undertaken for the purpose of examining the general perceptions of public parks and recreation administrators in North Carolina regarding the tort liability of their respective departments.

The design for this research consisted of a questionnaire described earlier in this chapter. The data derived from the returned questionnaires were coded and submitted to the Elon College academic computer, a Digital Equipment Corporation (DEC) programmed data processor using the standard Statistical Package for the Social Sciences (SPSS) program.

Initially, a number of statistics for all of the variables contained within the research instrument were tabulated, including frequencies, means, medians, modes, standard deviations, variances, ranges (minimum and maximum), and sum of values. These data were computed for the total population (n = 72), for the municipal director sample (n = 50), and for the county director sample (n = 22). Subsequently, the frequencies and means of the total population and municipal and county samples were examined to determine whether similarities and differences existed between questionnaire response patterns.

This examination raised several relevant questions. First, were there significant differences in the mean response patterns of municipal and county administrators, male and female administrators, and Eastern and Western administrators on the questions of governmental immunity, governmental versus proprietary function, the legal validity of waivers, and departmental immunity from Section 1983 litigation? Next, was there a correlation between reported departmental revenues and administrator perception that their departments were a governmental or proprietary function and whether the departments were immune from legal suit for the total population and municipal and county samples? Lastly, was there a correlation between the reported years of experience or departmental size on perceived immunity, governmental versus proprietary

classification, waiver validity perceptions, and reported understanding of recreation department immunity from Section 1983 litigation for the total population and municipal and county samples?

In order to determine whether there was a significant difference between the mean response patterns of the municipal and county samples on the variables in question, a t test was calculated. The t test is used:

> to determine whether the observed difference between two variable means is likely to be a function of chance or not. A ratio is created by dividing the observed differences by the variation of differences that can be expected due to chance factors. This ratio is known as the t-ratio or the t test for the significance of the difference between means.[1]

T statistics were thus computed between the municipal and county groups, between male and female administrators, and between Eastern and Western administrators on the questions of governmental immunity, governmental versus proprietary function, the legal validity of waivers, and departmental immunity from Section 1983 liability litigation.

To determine the strength and direction of the correlations between the total population and the municipal and county samples on these same variables, correlation coefficients were computed. A coefficient of correlation indicates both the direction and strength of the relationship of two variables, expressed as + 1.0 (perfect positive correlation) to - 1.0 (perfect negative correlation).[2] Examining the direction and

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[1]Donald Ary and Lucy Cheser Jacobs, Introduction to Statistics: Purposes and Procedures (New York: Holt, Rinehart, and Winston, 1976), pp. 324-325.

[2]Gene V. Glass and Julian C. Stanley, Statistical Methods in Education and Psychology (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1970), p. 111.

strength of the relationship between actual revenues and perceived governmental or proprietary status, or between administrator experience and legal perception should provide relevant descriptive information about the recreation director population under study.

As discussed in Chapter II, the North Carolina courts have rendered contrasting decisions in public recreation and parks cases over the years. In addition to the above stated analysis and a survey of reported out-of-court settlements, the discussion in Chapter IV will attempt to clarify the overall legal perceptions of public recreation administrators in light of these contradictory judicial findings.

CHAPTER IV

ANALYSIS AND INTERPRETATION OF DATA

Data were collected in this study in order to investigate the general legal perceptions of professional park and recreation administrators in North Carolina. This chapter will analyze, interpret, and present the results of the legal liability questionnaire (Appendix A) which was sent to all North Carolina municipal and county recreation directors, and will focus on the remaining questions to be answered contained in Chapter I:

1) To what extent are the professional park and recreation administrators in North Carolina aware of the tort liability of their departments as measured by governmental immunity and governmental versus proprietary function questionnaire responses?

2) Based on a survey of professoinal park and recreation administrators in North Carolina, what is the number and specific nature of tort liability cases settled either out of court or at the trial court level?

3) How is the use of liability waivers or exculpatory agreements by public recreation agencies viewed by the administrators and the courts in the state, and how frequently are such agreements employed?

4) What are the legal perceptions of professional recreation and park administrators in the state in regard to federally imposed Section 1983 Civil Rights liability?

The initial analysis of recreation administrator legal perceptions was based on the surveys returned by seventy two (72) directors (44.7% rate of return) and raised the following additional questions:

1) Are there significant differences in the mean response patterns of municipal and county administrators, male and female administrators, and Eastern and Western North Carolina administrators on the questions of governmental immunity, governmental versus proprietary function, the legal validity of waivers, and departmental immunity from Section 1983 litigation?

2) Is there a correlation between reported revenues and administrator perception that their departments are a governmental or proprietary function and whether the departments are immune from legal suit for the total population (n = 72) and municipal (n = 50) and county (n = 22) samples?

3) Is there a correlation between the reported revenues, years of experience, or departmental size and perceived immunity, governmental versus proprietary classification, waiver validity perceptions, and reported understanding of recreation department immunity from Section 1983 litigation for the total population (n = 72) and municipal (n = 50) and county (n = 22) samples?

Preliminary Data

Before addressing each of these major questions, however, a discussion of general participant responses to a variety of liability related questions contained within the survey instrument will provide a foundation of administrator legal perception on which to build. For example, respondents were asked if they perceived legal liability to be a primary administrative concern in the parks and recreation field today. Seventy (70) administrators (97.2%) indicated that they perceived legal liability to be a primary administrative concern, while only two (2) administrators (2.8%) indicated that it was not.

Although the majority of respondents indicated that liability was a primary administrative concern, there was a wide variety of responses relating to the amount of time that administrators devoted to liability-related concerns. As Table III illustrates, the majority of administrators (n = 53) indicated that they spent 0-10% of their time per month with liability-related matters. Both municipal and county samples responded with little variation from the total group on this variable, and it is interesting to note that as a total group, only 26.4% indicated that they spent more than 10% of their time with liability concerns.

Table III

Time Devoted to Liability

	Total Population n = 72		Municipal Directors n = 50		County Directors n = 22	
	Freq.	%	Freq.	%	Freq.	%
0-10%	53	73.6	37	74.0	16	72.8
11-20%	13	18.1	9	18.0	4	18.2
21-30%	6	8.3	4	8.0	2	9.0
Total	72	100.0	50	100.0	22	100.0

One explanation for this time allocation statistic relates to the questionnaire item concerning which individuals in the recreation department are responsible for identifying liability-related concerns. As Table IV illustrates, only 62.5% of the total administrative group had personal responsibility for identifying such concerns, followed by the entire staff (19.4%), the county manager/ town attorney (11.1%), the safety commission (5.6%), and the park superintendent (1.4%). The municipal and county samples again had very similar response patterns concerning responsibility for liability identification.

Table IV

Person Most Responsible for Liability Concerns

	Total Population n = 72		Municipal Directors n = 50		County Directors n = 22	
	Freq.	%	Freq.	%	Freq.	%
Director	45	62.5	31	62.0	14	63.7
All Staff	14	19.4	10	20.0	4	18.2
Co. Mgr.	8	11.1	6	12.0	2	9.1
Safety Co.	4	5.6	3	6.0	1	4.5
Pk. Supt.	1	1.4	0	----	1	4.5
Total	72	100.0	50	100.0	22	100.0

Another significant aspect of this questionnaire item focused on the regular inspection of areas and facilities and whether facility inspection was documented. In the previously discussed judicial findings, negligence on the part of the municipal or county government was found to be a critical factor leading to departmental liability in tort. An effective method of avoiding negligent conditions is first to inspect facilities on a regular basis, correct any conditions which are hazardous, and create a record of such inspections which could be produced in court if necessary. Table V indicates that the respondents to the survey do tend to inspect their facilities regularly (88.9%) and to a lesser degree document inspections (66.7%) in their attempt to provide safe and negligent free leisure facilities and environments for the public.

Table V

Facility Inspection and Documentation

	Total Population n = 72		Municipal Directors n = 50		County Directors n = 22	
	Yes	No	Yes	No	Yes	No
Regular Facility Inspection	64 88.9%	8 11.1%	45 90.0%	5 10.0%	19 86.4%	3 13.6%
Inspection Documented	48 66.7%	24 33.3%	33 66.0%	17 34.0%	15 68.2%	7 31.8%

In addition to facility inspection and inspection documentation, the administrators responding to the survey indicated that liability insurance was an important aspect of governmental legal protection. Seventy one (71) or 98.6% of the municipal and county directors responding to the survey indicated that their departments were indemnified by such policies. The amount of coverage ranged from $50,000 to $3,000,000

with $1,000,000 being the most common maximum dollar award allowable for damages in each liability suit.

Most Liable Services

Services provided by the municipal and county recreation and park agencies identified by the respondents as having the greatest potential for liability are presented in Table VI. Athletics were most often named as services in which accidents might occur resulting in liability claims for the total population (n = 24; 33.3%) and for the municipal director group (n = 19; 38.0%). Aquatic activities followed by playgrounds were ranked as the next most liable services by these two groups. County directors, however, ranked both aquatics and playgrounds as the most liable service areas, followed by athletics.

Table VI

Most Liable Services

	Total Population n = 72		Municipal Directors n = 50		County Directors n = 22	
	Freq.	%	Freq.	%	Freq.	%
Athletics	24	33.3	19	38.0	5	22.2
Aquatics	23	31.9	17	34.0	6	27.3
Playground	15	20.8	9	18.0	6	27.3
Parks	5	6.9	3	6.0	2	9.1
Trips	3	4.2	1	2.0	2	9.1
Adventure Programs	1	1.4	0	0.0	1	4.5
Classes	1	1.4	1	2.0	0	0.0
Total	72	100.0	50	100.0	22	100.0

As noted in Chapter II, the most significant litigation involving recreation and park agencies in North Carolina was that of Glenn v.

Raleigh involving a park operation; White v. Charlotte involving a park and playground operation; and Rich v. Goldsboro involving a similar park and playground facility. Since the total group of respondents and the municipal director sample perceived athletics and aquatics as the most liable services, a discrepancy exists between perceived service liability and previously litigated recreation services in North Carolina. These perceptions may be a reflection of national trends which indicate that litigation stemming from athletic and aquatic activities is increasing significantly.[1]

This discrepancy relates directly to the legal liability survey question concerning sources of legal knowledge. In responding to this question, participants were asked to estimate the percentage that several factors contributed to their legal understanding and knowledge (total of 100%). These factors were college or university degree programs, continuing education, professional conferences, professional literature, fellow professionals, experience with litigation, and other.

As Table VII illustrates, the mean response patterns on this question again were very similar for the total, municipal, and county director participants. Indeed, t-tests comparing the means of the total group with municipal and county director samples and the municipal means to county means showed that there were no significant differences between the mean response patterns on this variable. It is interesting to note that the total group perceived fellow professionals to be their primary

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[1]Ronald J. Waicukauski, ed., Law and Amateur Sports (Bloomington: Indiana University Press, 1983), p. 15.

source of legal knowledge, while the municipal and county samples considered professional conferences to be their most salient information source.

Table VII

Sources of Legal Knowledge

	Total Population n = 72 Mean %	Municipal Directors n = 50 Mean %	County Directors n = 22 Mean %
Degree Programs	18.8	11.4	14.5
Continuing Education	11.7	12.4	12.1
Professional Conferences	23.0	22.8	23.2
Professional Literature	15.3	13.0	17.2
Fellow Professionals	28.8	15.2	17.9
Experience with Litigation	10.7	12.0	9.4
Other/ Common Sense	4.0	3.3	5.2

The perceptual information from this variable suggests several things. First, sharing information with fellow professionals and professional conferences are the major sources of legal information for 51.8% of the total administrator group. In sponsoring and encouraging attendance at quarterly and annual regional and statewide conferences, the North Carolina Recreation and Park Society would appear to be a major professional organization contributing to legal knowledge, since informal dialogue and formal legal liability sessions generally characterize such conferences. Secondly, college and university degree programs rank third for the total group, sixth for the municipal group, and fourth for the county sample as legal informational sources. This indicates that

an increased emphasis on legal liability by college and university degree programs may better serve the legal needs of public recreation administrators in North Carolina. Since actual experience with litigation of the total administrator group is limited (10.7%), continuing education efforts of colleges as well as the North Carolina Recreation and Park Society should also be increased to help disseminate current legal information to municipal and county recreation directors in the state.

Experience with Litigation

As previously noted, responses concerning legal knowledge of the total group showed that only 10.7% indicated that experience with litigation contributed to their legal understanding. Accordingly, only ten (10) administrators (13.9%) indicated on the next questionnaire item that they had ever been involved with litigation against the municipal or county department by which they were employed. When asked to list and describe the nature and outcome of legally resolved cases and cases settled out of court, only eight (8) municipal and two (2) county departments responded. Of the sixteen (16) cases reported by these ten (10) respondents, six (6) were settled out of court or retracted and involved the following elements:[2]

- A participant at a Halloween Horror House fell and injured a knee. The insurance company settled out of court and paid the injured party $6,000 in damages.

- Vandals closed a door on an amusement train ride tunnel while the train was in operation. The train, being unable to stop, struck the

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[2]Although often incomplete, the cases presented in this section discuss the facts reported by the ten (10) respondents, and no generalizations beyond the reported facts have been made.

door which fell and injured two children. The insurance company settled out of court for an undisclosed sum.

- A participant at a public pool fell on a diving board, suffering a broken leg as the result of the fall. The injured party decided to retract his claim and no damages were awarded.

- A participant in an instructional gymnastics program submitted a claim for a back injury received during classes, alleging instructor negligence. The claim was voluntarily retracted and no damages were awarded.

- A participant at a tennis facility stepped from a sidewalk into a poorly lighted eroded area, suffering an ankle injury. The insurance company settled out of court and paid the unspecified medical costs of the injured party.

- An individual not hired by a recreation department filed a suit based on alleged discriminatory hiring practices. The claim was voluntarily retracted by the injured party and no damages were awarded.

The remaining ten (10) cases were (are being) litigated in the three major areas of athletics, special facilities, and playgrounds, and involve(d) the following elements:

Athletics

- A participant in a public basketball league was injured (injury not specified) during the course of play. Negligence could not be proven, and the defendant city prevailed.

- A participant in an athletic contest (not specified) received an unspecified injury. Negligence due to inadequate or improper field maintenance was held, and the plaintiff was awarded damages (not specified).

- A participant in a little league baseball game was injured during an All-Star game played outside the city limits of the defendant. The defendant co-sponsored the league but did not maintain the facility. The suit is still pending.

Special Facilities

- A visitor at a public swimming pool was injured as the result of staff horseplay. Negligence was found to be present in this case, and unspecified damages were awarded.

- On a park carousel, a visitor who paid admission for a carousel ride received a broken collar bone and abrasions after a fall which

resulted from his walking on the moving carousel. The next year, a very similar injury was suffered by a participant under the same circumstances. In both of these cases, signs warning participants to remain seated while the carousel was in motion were held to be valid notices. Although a proprietary function was involved, contributory negligence of participants barred recovery.

- At a day camp for handicapped children, a participant received a bruise (other extent of the injury was not specified). The parents are suing the city for $1,000,000 in damages. The suit is still pending.

- At a multi-purpose recreation center, a participant in a senior citizen program fell on a vinyl floor and suffered an unspecified injury. The case is still pending.

Playgrounds

- At a public playground, a child allegedly abusing playground equipment was pulled from a "pony swing" by a park employee, struck once on the buttocks, and instructed not to abuse public property. The parents filed suit against the employee for striking a minor, and brought seperate suit against the city. The employee was found guilty and fined court costs; the defendant city was found negligent and paid $2,500 in damages.

- At a public playground, a child fell from a seesaw and sustained injury. The parents brought suit on the basis of negligent maintenance of public equipment. The courts found for the defendant city, since it could not be proven that the negligent maintenance of the seesaw was the proximate cause of the child's injury.

In summary, the sixteen (16) recent liability cases reported by the ten (10) respondents on the legal liability questionnaire had various outcomes. Three (3) of the claims were retracted, and in the three remaining out-of-court cases, the insurance company paid the medical expenses of the injured parties. Of the ten (10) cases which were litigated, three (3) were found to involve municipal or county negligence and were decided for the plaintiff; four (4) were decided in favor of the governmental unit since no negligence was proven to exist; and three (3) are still pending.

Revenue Production - Fees and Charges

In order to determine the amount of income generated from fees and charges, respondents were asked to estimate the percentage of their annual departmental budgets which were derived from such fees. As previously discussed in Chapter II, the exact amount of revenue from specific facilities and the total percentage these fees contribute to the general recreation department budget are critical elements considered by the judiciary in determining whether a municipality is involved in a governmental or proprietary function. In Glenn v. Raleigh, supra, the receipt of revenues totaling eleven percent (11%) of the total budget led the court to conclude that a proprietary function was involved, while in Rich v. Goldsboro, supra, slightly less than one percent (1%) revenue production was still considered governmental. The specific point at which a municipal department becomes proprietary based on revenue percentage has therefore not been judicially determined.

Table VIII clearly illustrates the degree to which fees and charges contribute to the departmental budgets of the seventy two (72) respondents. Twenty one (21) parks and recreation directors (29.2%) indicated that revenues from fees and charges provided between one (1) and ten (10) percent of their annual departmental budgets. In regard to whether these departments are proprietary or governmental, it can only be concluded that they exist in a fiscal and legal region of uncertainty, and if involved in litigation would be assigned a governmental or proprietary label on a case-by-case basis.

Table VIII

Percentage of Fees and Charges

	Total Population n = 72		Municipal Directors n = 50		County Directors n = 22	
	Freq.	%	Freq.	%	Freq.	%
1 - 10%	21	29.2	12	24.0	9	40.8
11 - 20%	25	34.7	20	40.0	5	22.7
21 - 30%	15	20.8	10	20.0	5	22.7
31 - 40%	5	6.9	3	6.0	2	9.2
41 - 50%	3	4.2	2	4.0	1	4.6
51 - 60%	1	1.4	1	2.0	--	---
61 - 70%	--	---	--	---	--	---
71 - 80%	1	1.4	1	2.0	--	---
81 - 90%	1	1.4	1	2.0	--	---
Total	72	100.0	50	100.0	22	100.0

Of greater significance, however, is the large number of departments which report that revenues contributed between eleven percent (11%) and ninety percent (90%) to their annual budgets. Fifty-one (51) departments (70.8%) indicated that their annual revenues from fees and charges equaled or exceeded eleven percent (11%). With Glenn v. Raleigh, supra, as precedent, it is evident that these fifty-one (51) departments would probably be viewed by the judiciary as proprietary functions if involved in litigation. In consideration of the wide variety of break-even or profit-making activities and facilities of the responding recreation departments contained in Table IX, this proprietary status places an increased burden on administrators to consistently provide safe and negligent free leisure facilities and opportunities.

Table IX

Break-Even or Profit-Making Activities or Facilities[3]

	Total Group)n=72)	Municipal (n=50)	County (n=22)
Athletics	39	28	10
Park Operations	5	4	1
Amusements	4	2	2
Instructional Class	44	33	11
Golf Courses	9	7	2
Youth Centers	4	3	1
Arts Center	2	2	--
Swimming Pools	13	8	5
Special Events	1	--	1
Concessions	2	2	--
Trips and Concerts	3	2	1
Free Gym Usage	1	--	1
Bowling Alley	1	1	--
Stadiums	2	2	--
Campgrounds	2	1	1
Marinas	1	1	--
Racquetball Courts	1	1	--
Tennis Courts	2	1	1

Governmental Immunity

The legal liability questionnaire asked respondents to estimate the position of their respective departments in regard to governmental immunity from liability suits. A Likert-type scale was used to measure this variable, and administrators were asked to assign a value of one (Possess Immunity) through ten (Do Not Possess Immunity) in accordance

[3]Data represent total frequencies of reported break even or profit making facilities or progams.

with individual departmental immunity perceptions. Middle range values from four through six represented respondent uncertainty on the governmental issue.

In addition to the total, municipal, and county populations, the male, female, Eastern, and Western North Carolina administrators were included as comparison groups in order to determine if these factors were related to current administrator legal perception. Initially, mean responses for the governmental immunity question were computed and are presented in Table X.

Table X

Governmental Immunity - Mean Responses

	Total Group n=72	Municipal Directors n=50	County Directors n=22	Male Directors n=65	Female Directors n=7	Eastern Director n=35	Western Directors n=37
Mean Responses	5.07	5.54	4.40	5.21	5.0	5.05	5.32

As the table illustrates, there was a strong similarity of response for the total group, the municipal director group, the county director group, the male administrator group, the female administrator group, and the eastern and western groups. Statistically, the t test for the significance of the difference between means yielded no significant differences between any of the groups. Indeed, the most significant finding was the strong similarity of the patterns of response, and that the total group and comparison groups were clearly uncertain about the governmental immunity status of their departments.

This general administrator uncertainty concerning departmental immunity was again revealed in the subsequent analysis of the data

designed to determine if there was a systematic relationship between immunity perceptions and (1) departmental revenues; (2) administrator experience in years; and (3) departmental size as measured by number of employees. Correlation coefficients were computed between these variables on the assumption that accurate legal knowledge would lead to predictable patterns of response on the governmental immunity variable. For example, an administrator of a department which generates 21-30% of its budget from fees and charges could be expected to have a higher mean score on the immunity variable, since increased revenues generally decrease the probability that a court would assign a governmental function label to this department's activities in the course of litigation. Also, administrator experience in years and recreation department size could be factors that directly affect governmental immunity perceptions. It was therefore hypothesized that a positive correlation would exist between administrator immunity perceptions and these revenue, experience, and size variables.

The statistical result, however, did not support this hypothesis. As Table XI illustrates, the obtained correlation coefficients for the total group indicate the near absence of any linear relationship between the perceived level of governmental immunity and the revenue production, administrator experience, and departmental size variables.[4]

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[4]Correlation coefficients may range from + 1.0 (perfect positive correlation) through 0.0 (no correlation) to - 1.0 (perfect negative correlation).

Table XI

Governmental Immunity - Correlation Coefficients

	Revenue (%)	Administrator Experience (Years)	Departmental Size (Employees)
Total Population	+ 0.25	+ 0.18	+ 0.05
Municipal Directors	+ 0.14	+ 0.11	+ 0.08
County Directors	+ 0.21	+ 0.23	+ 0.04

Although all positive, the correlation coefficients were of sufficient magnitude to conclude only that a nearly random relationship existed between immunity perceptions and the other three variables for the total, municipal, and county groups. This indicates that for the seventy two (72) participants in the study, perceptions of whether the recreation departments were immune from suit were not systematically related to departmental revenues, administrator experience, or departmental size. This finding is indicative of the high level of uncertainty administrators possess in regard to their departmental immunity, and is also further evidence that administrators are uncertain of the role that revenues play in the court's assignment of governmental immunity to municipal recreation services. It also indicates that administrator experience in years and size of the department as measured by the number of full time personnel are not directly related to the perceived level of governmental immunity from suit.

Governmental vs. Proprietary Function

Using the same one-through-ten scale, respondents were asked to indicate the perceived position of their departments in relation to its

governmental or proprietary status. Means for the total group and comparison groups were computed for this variable and are presented in Table XII.

Table XII

Governmental vs. Proprietary Function - Means

	Total Group n=72	Municipal Directors n=50	County Directors n=22	Male Directors n=65	Female Directors n=7	Eastern Director n=35	Western Director n=37
Mean Responses	3.81	3.98	3.72	3.92	4.4	3.65	4.05

As this mean response data indicates, there was a strong homogeneity of perception on this variable. The t test for the significance of the difference between means again yielded no significant differences between any of the total group or comparison group means. The total group mean of 3.8 does indicate, however, that administrators responding to the questionnaire were generally uncertain about the governmental or proprietary status of their departments, but suggests that their services are perceived to be more governmental than proprietary in nature. This finding is significant in light of the previously discussed fees and charges statistics which showed that fifty-one (51) departments (70.8% of the total group) received revenues which equaled or exceeded eleven percent (11%) of their annual budgets, in all probability rendering these departments proprietary functions.

Computed correlation coefficients between the governmental vs. proprietary perception variable and revenues, years of experience, and departmental size presented in Table XIII again confirmed the apparent lack of systematic relationship between these variables.

Table XIII

Governmental vs. Proprietary Function - Correlation Coefficients

	Revenue (%)	Administrator Experience (Years)	Departmental Size (Employees)
Total Population	+ 0.16	+ 0.13	+ 0.09
Municipal Directors	+ 0.08	+ 0.06	- 0.12
County Directors	+ 0.02	+ 0.07	+ 0.04

The number of years of administrator experience and increased departmental size thus do not seem to be related to perceptions of departmental legal status. Most importantly, however, the level of revenues received by the recreation departments is not significantly correlated to this legal status variable. Since the courts in North Carolina have generally based the assignment of this governmental or proprietary status on generated income as noted in Glenn v. Raleigh, Rich v. Goldsboro, and Sides v. Cabarrus Memorial Hospital, supra, it would appear that the administrators participating in this study are either (1) unfamiliar with this judicial practice in the state, or (2) unfamiliar with both recent litigation and the judicially determined revenue percentages which have rendered recreation services proprietary as opposed to governmental functions.

Waivers or Exculpatory Agreements

In public recreation, the use of waivers or exculpatory agreements is widespread, yet is a practice which is receiving increased criticism from the legal community. Exculpatory agreements are generally issued in order to absolve an individual or agency from fault for negligence, and

are designed to relieve the issuing party of their duty to exercise ordinary care and caution. Although the North Carolina Supreme Court or Court of Appeals have not addressed the legality of waivers in regard to leisure services, nationally they are not favored by law as such agreements tend to allow a lack of care on the part of the party insulated from liability. Concerning their use and validity in public recreation, Kozlowski has recently noted that:

> Exculpatory agreements cannot exempt an individual from liability for negligence in the performance of a duty imposed by law, especially an obligation imposed for the benefit of the public. An exculpatory agreement is, therefore, unenforceable if one of the parties is charged with a public service duty, and the purpose of the contract is to avoid liability for negligent performance of this public responsibility. In almost every instance, public parks and recreation agencies are discharging a public duty in conducting their activities and programs.[5]

It is therefore generally considered as against public policy for an agency to attempt to relieve their legal duty to exercise reasonable care and caution through the issuing of an exculpatory agreement. As Kozlowski concludes:

> This point of law is so well settled that very few cases involving exculpatory agreements issued by public recreation and parks agencies ever reach an appeals court. It would be safe to assume that any such agreements would most likely be declared void at the trial court level.[6]

For purposes of liability release, waivers are therefore not generally considered valid for public agency use. In regard to such waivers, the legal liability questionnaire asked North Carolina recreation

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[5]James C. Kozlowski, "Courts Frown on Liability Release Agreements", Parks and Recreation, 17 (June, 1982), 48.

[6]Ibid.

administrators to indicate (1) if they possessed liability waivers in their departments; (2) if they required participants in their various activities to sign waivers prior to participation in these activities; and (3) on a one through ten scale to indicate if they perceived waivers to be legally valid as part of a defense in litigation against their departments.

In response to whether waivers or release forms were possessed by their respective recreation departments, sixty seven (67) or 93.1% of the respondents indicated that they had such forms, while only five (5) or 6.9% indicated that they did not. The same number of administrators (67) indicated that they required participants to sign waivers before participating in various departmental activities. The practice of using waivers by the respondents was therefore firmly established.

In regard to the legal validity of these exculpatory agreements, Table XIV illustrates that the response patterns for the total group and compairson groups were relatively uniform, and no significant differences were statistically found to exist between them. Although the respondents indicated uncertainty concerning the waiver validity issue, the increased magnitude of the means suggests that the administrators did not perceive waivers to be highly valid. This finding is further supported by the statistical information on this variable which revealed that for the total group, the median or middle range value was 7.2, and the mode or most frequent value was 10.0.

Table XIV

Waiver Validity - Means

	Total Group n=72	Municipal Directors n=50	County Directors n=22	Male Directors n=65	Female Directors n=7	Eastern Director n=35	Western Director n=37
Mean Responses	6.20	6.58	6.36	6.37	5.0	5.68	6.75

Correlation coefficients computed between the perceived waiver validity variable and level of revenues, administrator experience, and departmental size variables showed little systematic relationship between these variables with the exception of administrator experience. Table XV illustrates that there is a moderate positive relationship for the total, municipal, and county groups between waiver validity perceptions and administrator experience in years. This indicates that increased administrator experience is accompanied by an increased perception that liability waivers or exculpatory agreements are not legally valid. It can be concluded from previously examined data that fellow professionals and professional conferences were two major sources of administrator legal knowledge contributing to this positive correlation.

Table XV

Waiver Validity - Correlation Coefficients

	Revenue (%)	Administrator Experience (Years)	Departmental Size (Employees)
Total Population	- 0.05	+ 0.61	+ 0.04
Municipal Directors	+ 0.11	+ 0.53	- 0.01
County Directors	+ 0.08	+ 0.66	+ 0.09

Section 1983 Liability

As discussed in Chapter II, federal statute 42 U.S.C. Section 1983 authorizes a person to sue and recover damages against a city or its officers for the violation of a federal statutory or constitutional right when the violation is caused by official conduct. Section 1983 thus provides a remedy under federal law for the violation of rights that are protected by a federal statute or the United States Constitution.

Again using the one-through-ten scale, participants were asked to estimate the perceived degree of immunity of their departments from Section 1983 Civil Rights liability. Administrators responding to the legal liability questionnaire were generally uncertain concerning the status of their departments in regard to such liability. Table XVI indicates that the total group and comparison groups again had very uniform response patterns on this variable, and that the total group mean of 6.1 is an indicator of the lack of understanding concerning Section 1983 liability. Of additional significance with respect to the statistical analysis for this variable was a mode of 5.0, which was reported by thirty three (33) administrators, or 45.8% of the respondents. This clearly indicates that participants were uncertain concerning Section 1983 immunity or liability.

Table XVI

Section 1983 Liability - Means

	Total Group n=72	Municipal Directors n=50	County Directors n=22	Male Directors n=65	Female Directors n=7	Eastern Director n=35	Western Director n=37
Mean Responses	6.15	6.46	5.54	6.18	6.42	6.20	6.16

No significant differences were found to exist between the means on the Section 1983 variable when subjected to t tests for the significance of the difference between means. Correlation coefficients, presented in Table XVII, showed that there was no systematic relationship between the Section 1983 legal liability variable and levels of departmental revenues, administrator experience, or recreation department size for the total, municipal, or county groups. This result is again indicative of the general uncertainty which administrators possess with respect to Section 1983 liability.

Table XVII

Section 1983 Liability - Correlation Coefficients

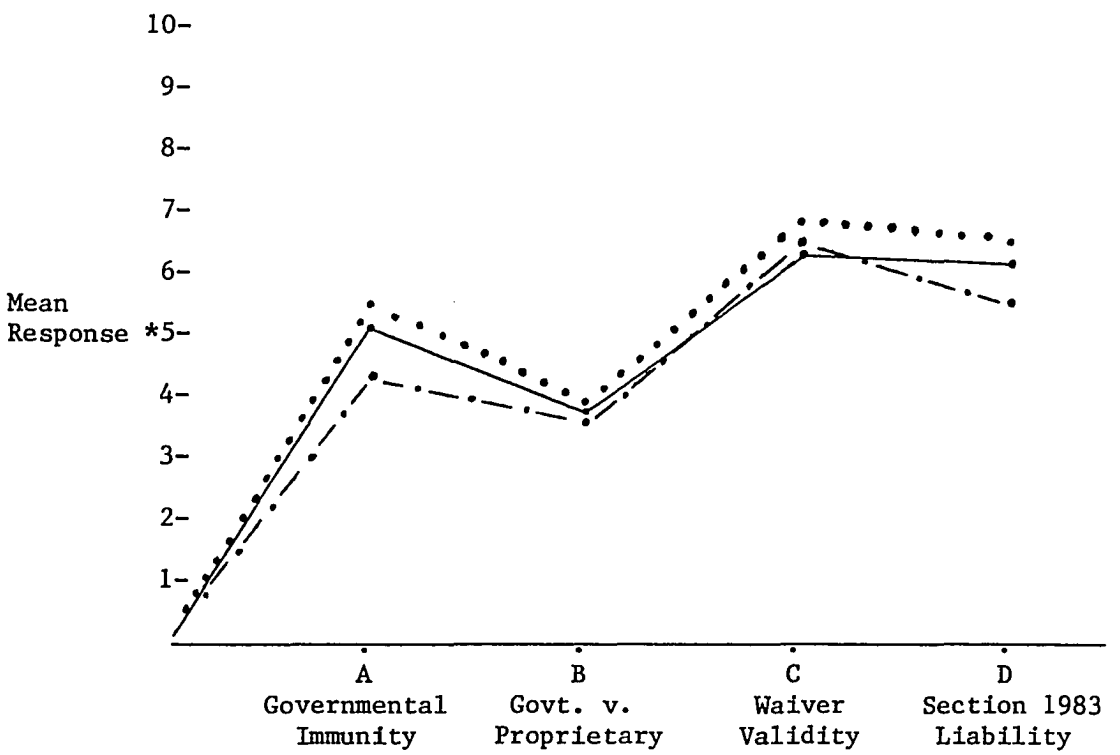
	Revenue (%)	Administrator Experience (Years)	Departmental Size (Employees)
Total Population	+ 0.21	+ 0.32	+ 0.14
Municipal Directors	+ 0.16	+ 0.26	+ 0.19
County Directors	+ 0.11	+ 0.28	+ 0.20

In conclusion, Figure 1 contains a visual representation of mean administrator perceptions concerning the governmental immunity, governmental v. proprietary function, waiver validity, and Section 1983 liability variables. Figure 1 illustrates that the patterns of response for the total group, the municipal director group, and the county group are all very similar. In addition, the general level of uncertainty of the three groups on the four variables is clearly evident. This uniform level of uncertainty resulted in the statistical similarities of the total population and comparison groups, yielding no significant differences between

any of the groups on these variables. This administrator uncertainty also contributed to the apparent lack of correlation between administrator experience, level of departmental revenues, and departmental size and these liability perception variables.

Figure 1

Comparison of Governmental Immunity, Governmental v. Proprietary, Waiver Validity, and Section 1983 Variable Responses



Total Group (n=72) = ——— Municipal Directors (n=50) = ...

County Directors (n=22) = .-.-.-.-

* Scales of 1-10 were used for each variable on the legal liability questionnaire as follows: Governmental Immunity - (1)=Possess Immunity, (5)=Uncertain, (10)=No Immunity; Governmental v. Proprietary Function - (1)=Governmental Function, (5)=Uncertain, (10)=Proprietary Function; Waiver Validity - (1)=Legally Valid, (5)=Uncertain, (10)=Not Valid; Section 1983 Liability - (1)=Possess Immunity, (5)=Uncertain, (10)=No Immunity.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

Public recreation programs and facilities in the United States have experienced four decades of rapid growth and expansion. As a result of this growth, greater numbers of people are either visiting municipal or county park and recreation facilities or engaging in programs sponsored by these agencies. Recreation administrators in the United States and in North Carolina are charged with the responsibility of providing facilities and programs to this increasing user population in a safe, prudent, and reasonable manner.

This investigation of North Carolina municipal liability was divided into two major sections. The first section described the past and present position of the legislature and the courts in North Carolina with regard to the municipal liability of parks and recreation agencies in the state. This discussion, contained in Chapter I, addressed the question concerning the position of the North Carolina legislature with regard to the municipal provision of recreation and park services. Although created by the legislature, municipal corporations and departments have traditionally enjoyed immunity from suit in the event of participant injury due to common law as opposed to legislative law. Common law, derived from the English system of justice, provides sovereign immunity to governmental entities providing public services and is derived from custom and judicial decision, not statutory mandate.

Because judicial decisions determine the strength of governmental immunity, case law in North Carolina involving leisure services was examined to answer the Chapter I questions relating to the status of governmental immunity, and the status of the proprietary vs. governmental function designation in North Carolina. As the review of the literature and previously litigated cases in Chapter II have suggested, the national trend of all the states is to reduce or eliminate governmental immunity for many or all of the activities included under the broad governmental umbrella of services.

The case analysis of North Carolina litigation revealed that the immunity doctrine has been gradually abrogated by the state's courts on a case by case basis. The criteria used by the judiciary in determining whether an activity of local government is liable for incidents of harm to participants has generally rested on negligence and the governmental or proprietary nature of the activity. If a governmental entity is judged to be negligent in offering a service, the court will further scrutinize the agency or department which was involved in the negligent service provision. In many states, including North Carolina, the level of revenues received by such agencies in support of the activity or service is carefully evaluated. If revenues are judged to be of sufficient magnitude, then the court will assign a proprietary label to the activity or service, and the service will lose its governmental status and hence its immunity from suit.

In this regard, the most significant litigation in North Carolina involving recreation and park agencies has included Glenn v. Raleigh, supra, in which the receipt of eleven percent (11%) of the total parks

and recreation budget led the court to conclude that a proprietary function was involved; and Rich v. Goldsboro, supra, in which a governmental function was judged to exist since less than one percent (1%) of the parks and recreation budget was obtained from revenues. The result of this litigation has been the creation of a gray area between one (1) and eleven (11) percent, and to date no judicial action has determined the exact percentage of revenues which will render the governmental activity proprietary in nature.

The second major section of the investigation involved the assessment of the legal judgment of recreation administrators in North Carolina as it relates to municipal liability through an analysis of a legal judgment survey administered to all municipal and county directors of recreation and parks. Initial data from the legal liability questionnaire, although collected from only seventy-two (72) of the one hundred and sixty one (161) recreation departments in the state, provided a foundation for a clear understanding of the legal perceptions and concerns of recreation administrators in North Carolina. Indeed, seventy (70) administrators feel legal liability is a primary concern for the recreation profession today, and fifty-three (53) administrators indicated that they spend up to ten percent of their time per month on liability-related concerns. Only 62.5% of the total administrative group, however, had personal responsibility for identifying such concerns.

In regard to facility inspection, 88.9% of the respondents indicated they regularly inspected their facilities, while 66.7% indicated that such inspections were documented. The most liable services provided were perceived to be athletics, followed by aquatics and playgrounds. Since

the most significant litigation in the state stemmed from park and playground activities, a discrepancy exists between perceived service liability and previously litigated recreation services in North Carolina. These perceptions could be based on observation of national litigation trends, or could be the result of inadequate legal information concerning North Carolina litigation.

The third question contained in Chapter I related to the extent that professional park and recreation administrators in North Carolina are aware of the potential tort liability of their departments as measured by questionnaire responses concerning governmental immunity and governmental versus proprietary functions. With respect to the respondent perceptions concerning the issue of governmental immunity, the total, municipal, county, male, female, Eastern, and Western samples were all generally uncertain concerning their departmental immunity status. No significant differences were found between the groups on this variable, and there does not appear to be a systematic correlation between immunity perceptions and revenue production, administrator experience, or departmental size.

On the governmental versus proprietary function variable, the administrators were again uncertain as to their departmental status, and no significant differences in the response patterns were noted. There again does not appear to be a systematic relationship between revenues, experience, or departmental size and proprietary-governmental status perceptions for either the total population or comparison groups. This uncertainty is significant considering that fifty-one (51) participating departments (70.8%) received levels of revenues which equaled or exceeded

eleven percent (11%) of the annual departmental budget, and based on precedent would probably be judged to be involved in a proprietary activity.

Questionnaire responses concerning the revenue producing activities of the participating departments revealed that twenty-one (21) departments generated between one and ten percent of their budgets with revenues, and fifty-one (51) departments generated over eleven percent of their departmental budgets from such sources. A wide variety of break-even or profit-making activities and facilities contributed to these significant departmental revenues. Using revenue production as a major criteria, it can be concluded that the North Carolina courts would probably assign a proprietary status to the fifty-one (51) departments which derive more than eleven percent (11%) of their budgets from fees and charges.

The fourth question contained in Chapter I related to the number and specific nature of tort liability law suits either settled out of court or at the trial court level involving the departments of surveyed administrators. In the area of reported incidents of harm or litigation, sixteen (16) cases were described by respondents. Six (6) were either retracted or settled out of court, and of the ten (10) cases which were litigated, three (3) were decided for the plaintiff, four (4) were decided in favor of the governmental unit, and three (3) are still pending.

The fifth question contained in Chapter I involved the use of participant liability waivers or exculpatory agreements by public recreation agencies in the state. Liability waivers were used by sixty-seven (67) or 93.1% of the responding administrators, yet the uniform response patterns for the total group on this variable indicated that the respondents were generally uncertain concerning the legal validity of such waivers.

The sixth question contained in Chapter I related to the legal knowledge of professional recreation and park administrators in the state in regard to Section 1983 Civil Rights liability. Respondents to the questionnaire were clearly uncertain with respect to this variable, and there were no significantly different response patterns for the total or comparison groups.

Conclusions

The most significant aspect of the legal liability questionnaire was not the differences between the groups but rather the significant similarities of the patterns of response. There was a strong feeling of uncertainty shared by the responding recreation administrators in relation to all of the major legal variables contained within the survey. Seventy (70) or 97.2% of the respondents feel legal liability is a primary administrative concern, yet all of the administrators are uncertain about their departmental immunity and governmental versus proprietary status. Sixty seven (67) or 93.1% report using liability waivers regularly, yet are uncertain about their legal validity. The entire administrative group is clearly uncertain concerning their rights and responsibilities with respect to Section 1983 Civil Rights liability.

These findings indicate that although concerned about legal liability, the legal knowledge of the responding administrators is incomplete. This legal knowledge also does not seem to be affected by the length of administrator experience, the amount of revenue produced by the department, or the size of the department. In addition, there is a discrepancy between the services that administrators assigned the greatest potential for

creating liability and previously litigated services in the state. All recreation administrators make decisions concerning liability on a routine basis, generally basing these decisions on their perceptions of personal and agency liability. It would appear, as this study has shown, that these perceptions do not reflect an accurate and thorough knowledge of tort law as currently applied to governmental entities in North Carolina.

Recommendations

The results of this study of the legal perceptions of recreation administrators should and will be made available to the participating professionals. In addition, since it has been determined that recreation administrators participating in this study were all generally uncertain concerning the legal liability of their departments, and that fellow professionals, conferences, and degree programs were their major sources of legal knowledge, the following recommendations should be considered:

1) The initiation of a series of legal liability workshops for the administrators and staff of the recreation departments in the state. A legal consultant should be called upon to lead such workshops designed to familiarize the staff with general legal principles, significant North Carolina case law, and risk management procedures which may help administrators make more informed decisions and hence reduce departmental liability.

2) As the major professional organization representing the needs and interests of recreation administrators in the state, the North Carolina Recreation and Park Society should consider the creation of a regular legal column in the quarterly N.C.R.P.S. Review. Such a column could provide current legal information to administrators, perhaps in part utilizing a question and answer format. This column could provide information on risk management programs, current litigation, and information on national liability trends.

3) The sponsorship by N.C.R.P.S. of more frequent educational opportunities using the annual state conference and quarterly regional conferences as sites for such educational programs.

4) The N.C.R.P.S. should encourage the recreation degree programs in the state to increase their continuing education roles with respect to legal liability, and to consider increasing the emphasis on administrative legal responsibilities in the curricular requirements of professional preparation programs.

Suggestions for Additional Research

Research on legal liability involving all of the one hundred and sixty one (161) recreation departments in North Carolina should be continued. A replication of this study or one using similar methodology should be made on an annual basis, and the results of such research should be made available to every recreation administrator in the state. In addition, this type of legal research is appropriate for other states, and could be a valuable addition to the legal understanding of recreation administrators nationwide.

This study has also shown that North Carolina recreation administrators are uncertain concerning the principles of risk management in the public recreation setting. Research which focuses on risk factor identification and the development of implementable risk management plans should be initiated in the state, and this data should be made readily available to practicing recreation professionals.

In addition, the review of the literature in this study revealed a sharp increase in the number of product liability cases involving municipal leisure service agencies as co-defendents. A study which investigates the impacts and significance of product liability litigation in North Carolina could further contribute to the legal knowledge of municipal administrators in the state.

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APPENDIX A

Legal Liability Questionnaire

North Carolina Recreation and Park Survey

Code ___

1. How many years have you been in your present position? _____

2. How many full-time employees work for your agency? _____

3. Who is responsible for identifying liability related concerns for your agency? _____ Are your facilities inspected regularly? Yes___ No___ Is this inspection documented? Yes___ No___.

4. Do you feel that liability is a primary administrative concern in parks and recreation today? Yes___ No___.

5. On an average per month basis, can you estimate how much of your time as an administrator is devoted to liability related concerns? 0-10%; 11-20%; 21-30%; 31-40%; 41-50%. (Please circle one.)

6. Which services provided by your agency do you feel have the greatest potential for liability claims? (Please list five (5); 1=Greatest Potential, 5=Less Potential)
   1)_____ 2)_____ 3)_____ 4)_____ 5_____

7. Does your department or municipality/county cover your services with liability insurance? Yes___ No___. If Yes, what is the maximum dollar award allowable under your insurance plan? _____
   Are individual members of your department insured and to what limit?
   Yes___ to $_____. No___.

8. As an administrator, what percentage do you feel the following factors have contributed to your legal understanding and knowledge?

   _____% College/University Degree Program
   _____% Continuing Education
   _____% Professional Conferences
   _____% Professional Literature
   _____% Fellow Professionals
   _____% Experience with Litigation
   _____% Other _____

   100 %

9. Have you ever been involved with any litigation against the municipal/county recreation department by which you are current employed? Yes___ No___.

10. If yes to the above question, please briefly list and describe on the reverse side of this sheet the nature and outcome of any litigation with which your department has been involved.

11. Please circle the percentage of your annual departmental budget that is derived from user fees or revenues: 0-10%; 11-20%; 21-30%; 31-40%; 41-50%; 51-60%; 61-70%; 71-80%; 81-90%; 91-100%. Are there operations in your department which are run on a break even or profit-making basis? Yes___ No___. If Yes, please circle the type of activity or facility: Athletics; Parks; Amusements; Instructional Classes; Golf Course; Youth Center; Arts Center; Pools; Other: _____

12. Of the following, please circle the primary position of your department in regard to governmental immunity from liability suits:

Possess Immunity				Uncertain		Do Not Possess Immunity			
1	2	3	4	5	6	7	8	9	10

(OVER)

13. Of the following, please circle the number which most accurately describes the position of your department in regard to the question of governmental vs. proprietary function:

Governmental Function				Uncertain				Proprietary Function	
1	2	3	4	5	6	7	8	9	10

14. Do you have liability forms? Yes___ No___. Do you require participants in your various activities to sign waivers prior to participation in those activities? Yes___ No___. Do you perceive waivers to be legally valid as part of a defense in a liability suit against your department? (Please circle the most appropriate number.)

Legally Valid				Uncertain				Not Legally Valid	
1	2	3	4	5	6	7	8	9	10

15. Of the following, please circle the number which most accurately reflects the position of your department in regard to Section 1983 Civil Rights Liability:

Possess Immunity				Uncertain				Do Not Possess Immunity	
1	2	3	4	5	6	7	8	9	10

Response to Question #10, if appropriate:

Box 2196
Present Date

Participant Name
Address

Dear ,

I am in the process of conducting an investigation of tort liability and its implications for public recreation and park agencies in the state of North Carolina. The North Carolina Recreation and Park Society has approved the administration of this survey of all directors of municipal and county recreation departments which will enable me to obtain the benefit of your professional judgment pertaining to several liability issues.

Enclosed is a brief questionnaire which I am asking you to complete and return by June 1, 1984. In return for your time, I will send to you a report of my findings based upon North Carolina statutory law, court cases, and the collective thoughts expressed by you and your colleagues as soon as the study is completed.

I am asking your permission to use the information you submit to me in my doctoral dissertation on tort liability in the recreation and parks field in North Carolina. All responses you provide will of course remain completely anonymous, and I thank you in advance for your assistance and cooperation.

Sincerely,

Paul L. Gaskill
Assistant Professor
Department of Health, Physical
Education, and Recreation
Elon College