

# The new era of recreational path liability

By Harlan Stientjes

In September 2022, the Washington Supreme Court upended a primary defense municipalities had against those who become injured while recreating on municipal owned land. Recreational Immunity or [RCW 4.24.210\(4\)\(a\)](#):

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

A claimant injured on land held out for use without a fee has to prove all four elements above: known, dangerous, artificial, and latent to be able to proceed toward trial.

Historically when someone has become injured on a path, we argued to the courts that the condition was not latent (hidden) and could be readily seen. The court established a standard for this: “if an ordinary recreational user standing near the injury-causing condition could see it by observation, without the need to uncover or manipulate the surrounding area, the condition is obvious (not latent) as a matter of law.”

In the photograph to the right, a tree root creating a rise in a paved pathway surely would not have been latent under this test and we would have received a dismissal from the court because it is clearly there to be seen.

You might ask: So, what changed? In a 5-4 decision, the Supreme Court changed the standard on latency from someone standing next to the condition to be whether a “recreational user” could see the condition while participating in the recreation they are doing.



WCIA claims staff must now evaluate these claims differently. The same tree root issue pictured on the previous page, which can clearly be seen as you stand next to it, is now subjected to a standard of whether someone going 20 to 30 miles-per-hour on their road bike can see it in time to stop given the various weather conditions of whatever day they are riding. They can now produce photographs like the one to the right and argue they can't see the hazard when it's shaded, overcast, sunny, etc. There will be expert



testimony that agrees with this conclusion and judges will be forced by the expert testimony and Supreme Court ruling to agree it is a latent hazard, and send the case through to trial.

WCIA and its members are still not explicitly at fault. WCIA can argue that we were not aware of a condition, that the bike rider acted unreasonably, that the condition is not actually dangerous, etc. However, in an era of increasing jury verdicts, any case that makes it to trial brings with it uncertainty.

Since this Supreme Court decision, WCIA has received quite a few claims regarding tree root pavement hazards on recreation paths that previously never would have been filed. We have also received claims regarding bollards and the absence of bollards (including the one in the photograph to the right which was hit by a motorized skateboarder). In each of these cases, the person has substantial injuries and there is financial risk to WCIA and its members.



This new standard applies to your parks, your paths, and any other areas you hold out for recreational use without charging a fee. Members will be pressured to fix the path and to not remove the hazard causing trees, so what can you do? You certainly can and should continue to mark pavement issues with paint to the best of your ability, but look to the second part of the recreational use immunity standard:

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

While your entity waits for the funds needed to cut the path, remove the root, and repave the path, post signage to warn users of the uneven surface. Simple and clear signage that warns trail users of the uneven surface ahead (from both directions) should be posted. Consult your engineering staff on appropriate pavement markings for bollards and get them marked. This minimal investment will likely save the membership substantial claim costs.