

LANDOWNER DUTY: ASSURE PREMISES NO MORE DANGEROUS  
THAN IT APPEARS TO BE

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As indicated by the following description of general legal principles and case law examples, landowners are usually not liable for negligence when recreational injuries result from conditions on the land which are as obvious to the visitor as to the landowner, or should have been observed by the visitor in exercise of reasonable care. Accordingly, the landowner's most demanding legal duty of care is generally limited to keeping the premises free of dangerous defects or conditions which are not known, or readily observable, to a visitor looking out reasonably for his or her own safety (i.e., hidden traps, dangers or pitfalls).

Moreover, recreational use statutes in most jurisdictions may further limit the landowner's potential liability exposure when the premises are made available public recreational use free of charge. Under these recreational use statutes, there is generally no negligence liability for the landowner's failure to guard, warn, or make the premises reasonably safe. Rather, these statutes limit landowner liability to misconduct which is willful (i.e., intentional) or wanton (i.e., recklessness, utter disregard for the physical well-being of others). The following discussion, however, will limit itself to an overview of negligence liability for the landowner's failure to guard, warn, or make the premises reasonably safe.

### GENERAL PRINCIPLES

Landowners must maintain their property in a reasonably safe condition in view of all the circumstances. Relevant circumstances include: the likelihood of injury to those using the premises (i.e., foreseeability), the seriousness of the injury (i.e., risk), and the landowner's burden of avoiding the risk (reasonable precautions). Foreseeability is the initial measure of a landowner's liability for injuries on the premises. In particular, landowners must take steps to prevent those accidents which might foreseeably occur as result of dangerous terrain.

Within this context, foreseeability is not a mere possibility, but a probability. Based upon one's own knowledge, or the common understanding of reasonable persons in similar circumstances, such injury causing situations have occurred before and are likely to happen again, if reasonable precautions or preventive measures are not undertaken by the landowner. In other words, the test of foreseeability is not whether a particular landowners foresaw a particular risk but, rather, whether a reasonably prudent person should have foreseen the risk, and whether the landowner exercised the care of a reasonably prudent person.

Where the risk of danger is not apparent to those making use of the property, the landowner's burden is greater. This landowner duty of due care is a function of among other things the reasonable

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expectations of those using the premises. In other words, landowners are responsible for assuring that their property is no more dangerous (or safe) than it appears to be. Further, those using the premises must act reasonably using ordinary care to protect themselves and discover obvious dangers.

Accordingly, there is generally no legal duty to provide warnings for those using the premises of conditions which are readily observable to anyone employing the reasonable use of his/her senses. Conversely, a landowner must adequately warn against a danger, if someone would not discover or realize the peril and guard against it. Under such circumstances, landowners must take reasonable steps to warn persons of both the existence of danger and, to the extent required by the circumstances, the nature of the danger being warned against.

### SIGNED AREA MORE DANGEROUS THAN APPARENT IN WARNING?

In the case of *Walter v. State*, 568 N.Y.S.2d 521 (N.Y.Ct.Cl. 1991), the State had erected a sign which prohibited passage beyond a fence adjacent to a parking area in a state park. The sign read: "DANGER, Keep Inside Rail, Watch Your Children; CAUTION, People Walking Below, Do Not Throw Anything Over Cliff." According to the court, nothing in the wording of the sign warned that there was a hidden precipice which was wholly obscured by foliage so that one step could cause a person to plummet downward 60 feet. As a result, the court found that "the warning clearly did not inform the general public that the area beyond the fence was significantly more dangerous than it appeared to be."

By warning of one danger (to persons walking below) and not warning of another (to persons walking in the foliage on top of the cliff), the court concluded that the sign may very well have lulled a casual patron of the park facility into complacency. As a result, the court held that the warning was misleading and insufficient to adequately apprise park users of the type and degree of danger which they faced beyond the fence. Further, the court noted that the construction of the fence did not pose a significant barrier and thus provide an implicit warning that passage was potentially dangerous. In the opinion of the court, "a simple re-wording of the sign to point out that the edge of the cliff was hidden and/or that a fall from the sixty-foot cliff could be life threatening would undoubtedly have sufficed."

In contrast, the court in the case of *Divan v. Village of Hastings-On-Hudson*, 548 N.Y.S.2d (A.D. 2 Dept 1989) found the defendant landowner had no legal duty to erect barriers or fences to enclose natural geographical phenomena. Unlike the *Walter* situation described above, the court found no latent (i.e., hidden) dangerous conditions. On the contrary, the court found that the cliff from which plaintiff fell was "open and obvious," rather than latent.

### SOUND & FURY SIGNIFIES OBVIOUS DANGER

Similarly, the court in the case of *Smith v. North Carolina Department of Natural Resources*, 436 S.E.2d 878 (N.C. App. 1993) found an open and obvious condition on the land had caused the fatal accident. In this particular case, the plaintiff had argued that a warning sign above a state park water falls was an "insufficient, inadequate, and incomplete" attempt by the landowner to warn of the danger of

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the falls. The warning sign read: "Danger, Falls Below." Plaintiff contended that the sign should have been more specific warning of the danger of the slippery rocks at the top of the falls because the landowner was aware of a previous fatality at that location. However, under the circumstances of this case, the court found that the risk of injury associated with a state park water falls and surrounding rocks was "obvious and clearly visible to any onlookers."

In particular, the court noted park ranger testimony which indicated that the sloping nature of the area was "immediately apparent." In addition to the "visibility and sound of the falls," the court found that the warning sign helped make the dangerous nature of the area even more obvious. Because the danger involved was "obvious and apparent," the court found that the warning sign was adequate. In so doing, the court rejected the notion that the presence of other people in the area rendered the warning sign meaningless. On the contrary, the court found that visitors to the area had a legal responsibility to act reasonably, using ordinary care to protect themselves and discover obvious dangers. Since the falls should have been obvious to plaintiff's husband, the court concluded that plaintiff's husband's own negligence was the legal cause of his own death.

### UNIVERSALLY KNOWN, EASILY AVOIDED RISK?

In the case of *Henshaw v. Audubon Park Commission*, 605 So.2d 640, (La.App. 4th Cir. 1992), plaintiff was intoxicated when he climbed a tree in a city zoo. Plaintiff fell 25 to 45 feet when park police ordered him to climb down from the tree. Plaintiff alleged that the city was negligent because it had a rule against climbing trees, but it had not posted any such rule or warning. The court, however, found there was no legal duty to warn or prevent plaintiff because there was no unreasonable risk of injury. On the contrary, the court found the risk of falling from a tree was obvious, universally known, and therefore easily avoided.

Moreover, the court found that the mere existence of a rule did not create a legal duty to post the rule. In this instance, the court found that the rule did not establish the city's recognition of a potential danger to climbers. Rather, the court found the rule was designed to protect the trees, not an intoxicated tree climber. Under the circumstances of this case, the court found the city had no duty to inform plaintiff of what he already knew. To do so, the court found would impose an unreasonable burden on the city to post signs on each and every tree.

### INSUFFICIENT WARNING OF HIDDEN STAIRWAY PERIL

In the case of *Prunier v. Watertown*, 936 F.2d 677 (1991), a visitor to defendant's city park was seriously injured when the bike upon which he was riding apparently crashed down a set of stairs. Plaintiff alleged that the accident was caused by the defendant city's failure to warn of the existence of the flight of stairs. In particular, plaintiff alleged that defendant was negligent because anyone riding a bicycle on the path would be unable to see the stairs in time to stop.

As noted by the court, several witnesses had testified that, as they approached the stairway, they could not see the stairs until they were very close to them. Specifically, one witness testified that an

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overhanging bush obscured the view of the steps from the walkway and that the steps were visible only at a distance of five feet. Another witness testified that the bush and a curve in the walkway made it difficult to see the stairs until immediately before reaching them.

Accordingly, the court concluded that a bike rider traveling faster than these witnesses, who had approached on foot, would have had insufficient warning of the peril posed by the stairs. In particular, the court noted that there was no sign warning cyclists that the paved path was interrupted by stairs. The court, therefore, found these facts indicated the lack of a warning had caused the accident.

### ROPE SWINGS PRESENT OBVIOUS RISK

In the case of *Barrett v. Forest Preserve of Cook County*, 593 N.E.2d 990 (Ill.App. 1992), plaintiff fell from a rope swing located on defendant's land. Plaintiff alleged that the forest preserve was negligent in its maintenance of the area. The court, however, found that plaintiff was not engaged in an intended or permitted use of the forest preserve area at the time of the injury. Further, the court found the forest preserve had no landowner duty to remedy a defective condition on the premises which presented an obvious risk which plaintiff should have been capable of understanding. Specifically, the court concluded that the danger of swinging from a thirty-foot rope over a deep ravine presented an obvious risk to children of similar age and experience as the sixteen-year-old plaintiff.

Similarly, in the case of *Bennett v. City of Lafayette*, 635 So.2d 515 (La.App. 1994), the plaintiff fell from a rope swing located in a wooded, natural area of defendant's city park. Plaintiff entered this area of the park along a trail containing two green signs with white lettering, which originally read, "Trail Closed". Some of the letters on each sign were missing so that one read, "Trail Close" and the other, "Trai Close". In her complaint, plaintiff alleged that "the defendant city had a duty to discover this admittedly dangerous situation through periodic inspection of its 120 acre park, and to remove it before members of the public, thinking this rope was part of the park's recreational equipment, might attempt to swing upon it out over a rugged ravine."

In determining landowner liability, the specific issue before the court was "whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." As described by the court, "a landowner is not liable for an injury resulting from a condition which should have been observed by an individual in the exercise of reasonable care or which was as obvious to a visitor as to the landowner." Applying these principles to the facts of the case, the court found that "the rope hanging from the tree in the defendant's park did not constitute an unreasonable risk of harm."

In this case, the risk was obvious and easily avoidable. Plaintiff did not act with reasonable care for her own safety. The benefit of a park preserved in its natural undisturbed woodland state to society far outweighs the attendant risks that unauthorized persons might hang ropes from the branches of trees. It would be unreasonable to require the city to inspect all trees in the park for such dangers, not only because of the number of trees involved, but also because of the damage such inspections might cause to plant and animal life... The circumstances that this injury took place in a restricted area off a closed trail coupled with the obviousness of the risk require a denial of plaintiff's

claims.

In addition, the trial court found both plaintiff's and the City's experts had testified that "the average adult should have understood that the signs were defaced and actually meant, "Trail Closed." The court, therefore, concluded that "the presence of the ropes hanging from a tree in an area of Acadiana Park closed to the public did not present an unreasonable risk of harm to an adult exercising reasonable care for her own safety."

#### SECOND ACCIDENT MORE LIKELY, EASILY PREVENTED?

In the case of *Mesick v. State*, 504 N.Y.S.2d (A.D. 3 Dept. 1986), plaintiff was injured when he fell from a rope swing in an area used as a swimming hole. The area was posted with signs which limited permissible use to fishing; other activities were declared unlawful. Unknown persons had attached the rope swing to a tree which required the user to swing clear of a rocky bank to reach the water. State employees were aware of swimming in the area and use of the rope swing. State police were aware of an incident two years earlier in which a girl broke her wrist after falling from the rope swing. The defendant, however, took no action to prevent swimming or use of the rope swing following this incident.

As noted by the court, as a general rule in determining negligence liability, the risk reasonably to be perceived defines the duty to be obeyed. In addition, as landowner, the court found the defendant had a legal duty of care to maintain its property in a reasonably safe condition based upon the likelihood of injury and the foreseeability of plaintiff's presence on the premises.

Applying these principles to the facts of the case, the court found the potential for serious injury should have been obvious because the defendant landowner was aware of both the illegal swimming activity and the earlier rope swing accident in an area open to the public. Accordingly, the court found that defendant's posting of signs and occasionally cutting down the rope swing were inadequate precautions under the circumstances of this case. Given defendant's actual knowledge of a rope swing injury involving this particular tree, the court found defendant was negligent in not avoiding a similar incident by simply cutting down a tree which was known to attract rope swings. On the other hand, the court found that plaintiff was equally at fault in failing to look out reasonably for his own safety.