ROPE SWING LANDOWNER LIABILITY AND IMMUNITY

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As illustrated by the court opinions described herein, a rope hanging from a tree in a public park would not normally constitute the type of unreasonable risk of harm necessary to establish landowner liability for negligence. Moreover, applicable statutory or governmental immunity may preclude liability for ordinary negligence.

The mere existence of a rope swing hanging from a tree does not make the land itself unreasonably dangerous, providing a basis for landowner liability. On the contrary, the danger associated with one's choosing to use a rope swing installed on the land by unknown third parties would present an open and obvious risk of serious injury.

While rope swings pose an obvious and easily avoidable risk of harm, under limited circumstances, a public agency may still have a general legal duty to discover and remove known or readily discoverable hazardous debris from the premises within a reasonable time.

NOTICE OF DANGEROUS ROPE SWING

In the case of *Khachadourian v. State of New York,* 2015 N.Y. Misc. LEXIS 4842 (4/9/2015), claimant Nicholas Khachadourian was injured when he fell from a rope swing on a boat launch located on state property. In the state claims court, Khachadourian alleged the State was negligent in "failing to prevent the use of the rope swing or warn of its dangers, failing to monitor or supervise the use of the rope swing and failing to ensure the safety of the rope swing."

On August 5, 2012, claimant Khachadourian, who was 21 years old at the time, went to the Upper Hudson River Boat Launch with his brother and three other friends. The group parked in the boat launch parking lot and used a path through the woods to access a rope swing located in a wooded area near the shoreline.

The rope swing area was located approximately 131 feet from the end of the boat launch's bulkhead and approximately 124 feet from the fence line of the neighboring property. The path from the boat launch parking lot to the rope swing area is approximately 97 feet long.

At the time of the accident, there were several wooden platforms affixed to the trees, and a rope swing hung from one of the tree branches. The rope was about one inch in diameter and about 25 feet long. The bottom of the rope hung over the water, about ten feet from the shore, where the water depth was two to three feet. The rope had knots for people swinging on the rope to grab onto.

About 20 minutes after they arrived, Khachadourian took the rope and climbed onto a platform about 16 feet above the ground. He tugged on the rope to make it taut and jumped off, intending to swing out over the water and let go. However, as soon as he jumped, the rope broke and Khachadourian fell to the ground on the shore, injuring himself. The rope broke at a point about

six to twelve inches down from where it was tied onto the tree limb. There were no signs in the boat launch area or rope swing area warning against or prohibiting rope swinging.

VISIBLE DISCOVERABLE DANGER

As noted by the state claims court, the State, as landowner had a legal duty "to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." On the other hand, the claims court acknowledged the State was "not an insurer against every injury that might occur on its property." Accordingly, negligence liability could not be "presumed from the mere happening of an accident."

Aside from the accident itself, to establish the State's negligence liability for claimant's injuries, there had to be "proof that the State created a dangerous condition or had actual or constructive notice of a dangerous condition." Moreover, there had to proof that the State "failed to properly act to correct the problem or warn of the danger, and that such failure was a proximate cause of the claimant's injuries."

In this case, the claims court noted there was "no dispute that the particular rope swing at issue in this case was a dangerous condition." That being said, the claims court found no evidence that the State had created the dangerous condition or had actual notice of it.

The issue before the claims court was, therefore "whether the State had constructive notice of the dangerous condition." The claims court defined "constructive notice" as follows:

> To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. Additionally, constructive notice may be based on the State's failure to reasonably inspect its property, provided such reasonable inspection would have revealed the dangerous condition.

In this particular instance, the claims court found the State had constructive notice of the rope swing. In the opinion of the claims court, the "credible evidence presented at trial established unequivocally that the rope swing and the platforms had been present at the location for a significant period of time prior to the accident."

Claimant Khachadourian himself had testified that he had visited the rope swing area "about a dozen times" between 2009 and August 5, 2012, the date of the accident. Claimant had also testified that the platforms been there since he started visiting the site in 2009. While claimant could not tell "how long the platforms had been there," he had testified that "the pine tree was growing around the wooden platform affixed to it."

In addition, the owner of the property on the south side of the boat launch had testified that the rope swing and platforms had been there since at least 1990. Similarly, the owner of the property on the north side of the boat launch, testified that he became aware of the rope swing in

2007, after he purchased his house.

All three of the neighboring property owners confirmed that the rope swing and rope swing area was a popular summer recreational spot. One property owner testified that he had observed kids swinging on the rope and jumping into the river "all summer long". Claimant himself had testified at trial that "there was always a good amount of people on the weekends" at the rope swing, located in "a pretty big area in the woods." As described by claimant: "There's a log to sit down on. People were just hanging out, really, enjoying the water."

Other neighboring property owners had similarly observed people accessing the swing from the river and from a path from the parking lot. Moreover, the claims court found the "path from the parking lot through the woods to the rope swing area had been there for a significant period of time and was visible from the parking lot."

INSPECTION RESPONSIBILITY?

Given trial testimony that "the rope swing was visible and apparent," the claims court considered whether "a reasonable inspection of the property would have revealed the dangerous condition" on this particular portion of state land.

Three state employees responsible for managing the boat launch at the time of the accident testified that they had not "inspected the wooded area where the rope swing was located because they believed that the wooded area was not within their responsibilities." One state employee testified that he was "aware of the path leading from the parking lot." Another former state employee testified that "he was aware that there was a path leading from the parking lot into the woods, but he never went down that path because he did not have any reason to, as the woods was not part of the area that he was required to maintain."

In addition, the claims court noted evidence that the State had received a complaint from one of the neighboring property owners "concerning partying and garbage at the boat launch, but no inspection of the wooded area was done in response to this complaint." Following the accident, a state employee had visited the site and "ordered that the platforms and the remains of the rope be removed." This state employee "estimated that a person would have to go only about ten feet down the path to see the structures in the trees."

Based on this evidence, the claims court held "the State should be charged with constructive notice of the dangerous condition." In reaching this conclusion, the claims court acknowledged "the limited resources available to the State to inspect the vast amount of property that it owns." However, under the circumstances of this particular case, the claims court found "the injury-producing activity was visible and apparent and would have been easily discoverable under any reasonably diligent inquiry or minimal inspection."

Having found the greater weight of credible evidence had established Khachadourian's negligence claim, the state claims court concluded the State of New York should be held liable for his injuries.

SHARED RESPONSIBILITY

Based upon the following facts, however, the claims court further found "claimant must also bear some responsibility for the accident":

> Claimant, who was 21 years old at the time of the accident, is a high school graduate with some community college experience. He was very familiar with the rope swing, having used it before "at least a dozen times" in the four years prior to the accident. He was well-aware of the risks involved, which included having to clear 10 feet of shoreline and shallow water depths of 2 to 3 feet before letting go of the rope at about 20 feet from the shoreline where the water depth was 10 to 12 feet.

According to the claims court, in light of these facts, it was "reasonably foreseeable to claimant that his actions could result in an accident like the one that befell him." Moreover, the claims court noted claimant had testified that he knew "there was a clear risk of getting injured on the rope swing." In his testimony, claimant had further admitted that "he did not look at the rope before he started swinging on it that day."

APPORTIONED LIABILITY

Given shared responsibility, the claims court concluded "the liability should be apportioned 60% against the defendant and 40% against the claimant for the injuries allegedly sustained by claimant on August 5, 2012." Accordingly, as determined in further trial proceedings, the State of New York would be responsible for paying 60% of the damages associated with claimant's injuries.

TREE DEBRIS IN PARK RAVINE

Similarly, in the case of *County of San Diego v. Superior Court*, 242 Cal. App. 4th 460, 195 Cal. Rptr. 3d 374, 2015 Cal. App. LEXIS 1033 (11/20/2015) the issue was whether landowner liability should attach for injuries associated with rope swing activity in a county park.

Damon Lane County Park in El Cajon, California (the park) is a 29 acre open space park with trails for hiking, walking and equestrian use. The park is owned and controlled by the County of San Diego (the County). http://www.sdparks.org/content/sdparks/en/park-pages/DamonLane.html

The County has a maintenance crew who services the park daily to collect trash and, as needed, clear the trails and cut weeds. Another crew trims trees and cuts up downed trees. Trees posing a falling hazard to trail users are removed, but trees that have fallen off a trail are often left to support the natural habitat.

Plaintiff Ben Casteen had been rope swinging at the park since he was 12 years old. On a day in 2012, Casteen, a high school student, used a rope swing tied to a tree at the park. The tree was located above a ravine. The rope broke, causing Casteen to fall into the ravine and onto debris

located in the ravine. The debris in the ravine included cut down tree limbs and other brush left by the County's maintenance crews. Casteen suffered injuries to his head and face. Although Casteen did not remember the incident, his custom and practice before using a tree rope swing was to visually check the rope and branch it was hanging from, give the rope a big tug or yank to check for strength and then take a tentative short swing on the rope.

The County had no policy requiring maintenance personnel to remove rope swings in the park. There were no signs posted in the park forbidding tree rope swinging and park personnel doing maintenance never told Casteen to stop tree rope swinging or to remove the rope. A civil engineer who inspected the broken rope opined that the rope had been in the sun for over three months and that the rope broke as a result of ultraviolet-based breakdown of its material.

NO DUTY TO REMOVE ROPE SWINGS

Casteen sued the County, alleging the rope swing constituted a dangerous condition in the park known to the County. In so doing, Casteen claimed the County was negligent in leaving tree debris in the ravine and failing to remove the rope swing. In response, the County claimed the park was not in a dangerous condition. Moreover, the County asserted statutory immunity available to public entities in California for injuries sustained during "hazardous recreational activities."

Since the County did not construct the rope swing, the trial court had concluded "the County had no duty to maintain the swing." Moreover, the trial court found "the County had no duty to police the park and remove rope swings, and leaving wood debris in the ravine did not constitute negligence as a matter of law." The trial court, however, denied the County's motion for summary judgment. In the opinion of the trial court, further trial proceedings were necessary to determine whether the partially hidden wood debris in the ravine constituted "a separate and distinct danger not inherent in the hazardous activity of rope swinging." The County appealed. On appeal, the County claimed statutory immunity for hazardous recreational activities precluded any liability for Casteen's injuries.

REASONABLY SAFE FOR CAREFUL USE

As cited by the appeals court, under the state tort claims act, public entities in California could be held liable for an injury caused by a "dangerous condition" on public property. State law defined a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

Accordingly, as noted by the court, a public entity would "not be held liable for failing to take precautions to protect" when it was "foreseeable that persons may use public property without due care":

> Any property can be dangerous if used in a sufficiently abnormal manner; a public entity is required only to make its property safe for reasonably foreseeable careful use.

HAZARDOUS RECREATON IMMUNITY

Further, the appeals court noted state law precluded "the imposition of liability on a public entity for hazardous recreational activities." In particular, "tree rope swinging" was included within the statutory listing of a "hazardous recreational activity." That being said, the court acknowledged that governmental immunity under the hazardous recreational activity statute would not apply where the "danger" was "not reasonably assumed as inherently a part of the hazardous recreational activity" which caused the injury.

The issue, therefore, was whether the wood debris deposited by the County in the ravine and partially hidden wood debris "constituted a separate and distinct danger not inherent in the hazardous activity of tree rope swinging."

The appeals court noted liability for a public entity's failure to warn of a dangerous condition was based on "the presence of an actual dangerous physical defect or an otherwise dangerous condition which was not apparent to persons using the property with due care." In other words, liability would be based on "the inability of any user to see or appreciate the danger" without regard as to whether the property was "used by careless or careful persons."

Applying these principles to this particular situation, the appeals court found "the debris in the ravine, including partially hidden freshly cut wood left by County personnel, did not create a substantial risk of injury when the park was used with due care." On the contrary, the appeals court determined Casteen had not been "using the park with due care" and his own activity was hazardous as a matter of law, i.e., "swinging from a rope at least 10 feet off the ground."

In reaching this conclusion, the appeals court found Casteen had presented "no evidence showing the debris in the ravine posed a substantial risk of danger to any member of the general public using the park with due care." The appeals court, therefore, rejected Casteen's contention that "the debris posed an additional dangerous condition that the County had a duty to guard against or warn of." According to the court: "Landing on the ground or something located on the ground that could cause injury is reasonably assumed as an inherent risk of tree rope swinging," including landing on tree debris.

> [A]nyone looking into the ravine could see it was cluttered with tree debris. This debris could hide rocks, larger fallen branches or tree cuttings left by the County's maintenance personnel. Should a tree rope swing break, the danger posed to the user of the swing by the ground itself or any type of debris on the ground or in the ravine, natural or manmade, was obvious.

On appeal, Casteen had claimed that he was not engaged in an immune "hazardous recreational activity because he did not consider tree rope swinging to be a dangerous activity that created a substantial risk of injury to himself." The appeals court rejected this argument. In the opinion of the appeals court, Casteen's "subjective belief regarding the risk of injury" was "irrelevant" because "the statute refers to the reasonable assumption of the public generally (i.e., what a reasonable participant would assume to be inherent in the activity)."

> By using a tree rope swing, Casteen reasonably assumed that an inherent part of the activity included the possibility that the rope or branch might break and he could be injured falling to the ground or into the debris filled ravine.

Moreover, according to the court, Casteen's own "custom and practice of testing the rope and branch before using the rope swing" belied his subjective belief and assertion that his activity was neither dangerous nor hazardous.

On appeal, Casteen had further alleged the County had notice of the existence of the tree rope swing and "negligently failed to maintain the rope swing in good repair or remove it." The appeals court rejected this argument.

As characterized by the appeals court, Casteen was "seeking to impose a duty on public entities to bear the cost of continually policing potentially large expanses of public lands for recreational equipment left by third parties." In contrast to the high cost of constantly policing public land to remove rope swings, the court noted "it costs users of public land, such as Casteen, nothing to simply avoid abandoned recreational equipment." In this particular instance, had the County removed the tree rope swing, the court further acknowledged "someone could have easily installed another one."

As a result, the appeals court held public entities "do not have a duty to maintain or remove all items on public lands that could potentially pose hazards to individuals not exercising due care," including rope swings.

> [A]s a matter of law, individuals engaging in hazardous recreational activities utilizing recreational equipment abandoned by unknown third parties on public property [such as rope swings] are not exercising due care.
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> [T]here is a limit as to how far society should go by way of direct governmental regulation... in order to protect individuals from their own stupidity, carelessness, daring or self-destructive impulses."

Having found the County was immune for liability for injuries sustained in a hazardous recreational activity, the appeals court ordered the trial court to enter summary judgment in favor of the County.

See also: "Rope Swing Presents Obvious Risk of Fall," November 1994, *Parks & Recreation* http://cehdclass.gmu.edu/jkozlows/lawarts/11NOV94.pdf

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