PARK SERVICE DEFENDS ROPE SWING INJURY CASE

James C. Kozlowski, J.D., Ph.D.

In a chapter entitled "The Liability Crisis Threatens Outdoor Opportunities", *The Report of the President's Commission on Americans Outdoors* noted that the federal government is oftentimes protected from ordinary negligence liability by state recreational use statutes. "Many courts have found that if the state has a recreational use statute protecting the private landowner, the federal government is protected under that statute." The *Miller* decision described herein is the latest in a growing line of cases which illustrate this principle, i.e. limited landowner immunity for public recreational use of federal lands.

PLATTE RIVER SWINGER HITS BOTTOM

In the case of *Miller v. United States Department of Interior*, 649 F.Supp. 444 (W.D.Mich. 1986), plaintiff Jerry Miller was injured "when he jumped or fell from a rope swing into the Platte River in Sleeping Bear Dunes National Lakeshore Park, a national park located in northwest Michigan." The facts of the case were as follows:

> No fee is charged by the National Park Service for access to the Platte River or any other portion of the park except for a rental fee for camping in designated campgrounds within the park. A few public access points exist along the river bank. One such access point is the mouth of the river at Lake Michigan. At this access point there is a roadway and boat launching ramp maintained by Benzie County, Michigan.
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> The site where Miller's accident occurred is approximately one quarter mile upstream from the access point just discussed. The site is at a bend in the river. The river is considerably wider at this point because of the bend. On one side of the river are privately owned homes. On the other side is a sandy beach where boaters frequently stop to picnic and sunbathe.
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> Miller, age 19 and his female companion, on August 5, 1980, were canoeing on the Platte River and stopped at this sandy area. The river at this point created a small bay or cove. Directly across from the sandy picnic area is a bluff, covered primarily with shrubs and trees including an oak tree close to the bluff's edge.
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> On the branch of this tree which projected out over the cove in the river, hung a long rope with a wooden horizontal handle attached at the end. The origin of this particular rope swing is unknown, although apparently either this swing or similar swings have been at this location off and on for many years. The rope was used by the general public to swing away from the bluff, out over the river and one would drop into the river where the depth was approximately 6 to 7 feet.
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> From where Miller and his friends were picnicking, Miller could look across the cove and see people swinging off the bluff and dropping into the river. He,

> himself, on numerous occasions had used the swing in the same manner. On this particular day after eating some chips and pop, and after one "rum and coke", given to him by a friend, Miller swam across the cove to the bluff in question. At the time, there may have been as many as fifteen people using the swing. A line had formed made up of families, young and old, as well as others.
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> Miller testified he made fifteen to twenty "jumps" before he was injured. He estimated that it was his practice to swing out eight to ten feet, then let go of the swing. He entered the water feet first after an approximate ten foot drop. The water was estimated by Miller to be six to seven feet deep at the point of entry: "Over my head." It was his practice to go straight down into the river until his feet were on the bottom, then push off and return to the surface. On each occasion he experienced no difficulty, nor did any of the other participants. On his last swing/jump something unexpected and unexplainable occurred.
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> When he let go of the rope swing over the river he apparently was off balance. Miller was unable to explain precisely what happened. He conjectured he may have held the bottom of the swing too long or perhaps released one hand earlier than the other. Admittedly the swing did not break. Miller struck the water off balance then hit the bottom of the river, fracturing his neck, resulting in total paralysis of his legs and severe impairment of his arm. The injuries and their consequences are permanent.

A national park service ranger employed at Sleeping Bear Dunes Park during the summer of 1979 testified that he "had observed a rope swing hanging over the Platte River at the location of Jerry Miller's accident." This ranger had made no attempt "to remove the swing or take any other steps to investigate the scene or the surroundings after he was aware of the existence of the rope swing." Further, the ranger did not report his observations to any other park employee or administrator until after he had heard of Miller's accident.

Two other park rangers testified that "this type of swing at this location constituted a safety hazard to park visitors who might use the swing." However, Miller, a good athlete who had lived on the river for many years, "did not consider the rope dangerous nor did he consider it a threat to the safety of the public." One of Miller's neighbors also testified that the cove, known as "rope hole," had had a rope swing for many years. In the opinion of the neighbor, the rope swing looked safe and had been used by his own children.

According to the federal district court, an important issue in this case was whether the Michigan recreational use statute was applicable to Sleeping Bear Dunes National Lake Shore Park. As described by the court, this statute (M.C.L.A. 300.201) read as follows:

> No causes of action shall arise for injuries to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, sightseeing, motorcycling, snowmobiling, or any other outdoor use, with or without permission, against the

> owners, tenant, or lessee of said premises unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant or lessee.

Miller contended that the state recreational use statute did not apply to federal owned properties such as Sleeping Bear Dunes Park. Specifically, Miller argued that "the statute is applicable only to licensees [i.e. those allowed or tolerated on the premises without any expressed or implied invitation], not public invitees such as invited park visitors." Further, Miller maintained that the state recreational use statute was "intended to make property otherwise closed to the public available for recreational purposes." In addition, Miller argued that "the recreational use statute must be read in *pari materia* [i.e. these laws must be construed with reference to each other] with the Michigan Public Health Code." When the state recreational use statute is viewed in this manner, Miller contended it was "apparent the Recreational Use Statute should not apply to parks offering camping and swimming areas to public invitees encouraged to use these areas.

The National Park Service responded that the standards of the state recreational use statute were applicable to Sleeping Bear Dunes National Lakeshore because the Federal Tort Claims Act "requires that the United States be treated the same as a private individual." Further, the park service maintained that "governmental entities, including the United States, should also be encouraged to hold their lands open to the public for the use and enjoyment of the public without exposure to liability under simple negligence."

The federal district court acknowledged that a number of cases in Michigan had applied the state recreational use statute to recreational land operated by governmental bodies. In one instance, a state appellate court had found "no valid reason to distinguish state owned land from land owned by local government." The federal district court further noted that "similar landowner liability statutes or recreational use statutes have been applied to the National Park Service or National Forest lands in other [federal court] districts." As a result, the court found that Miller was "in error when he claims that the recreational use statute does not apply to apply government land."

> Applying the statute to government lands is consistent with the language of the [Federal] Tort Claims Act which specifically requires that the United States be held to the same standard as a private citizen. Clearly, if these 70,000 acres of vacant, large, undeveloped land had been owned by a private person, the Michigan recreational use statute would hold that person liable for injuries to others lawfully on his property, only if the owner was guilty of gross negligence and/or willful and wanton misconduct.

The federal district court judge further rejected Miller's contention that the state recreational use statute was inapplicable under the circumstances because "he was a 'public invitee' and as a result afforded the same degree of care as a 'business invitee'"

> The purpose of the statute is to encourage private owners as well as governmental entities, including the United States, to hold their lands open to the public for the use and enjoyment of the public without exposure of liability for ordinary negligence. I am satisfied the recreational use statute is available to the

> government in this case and bars Miller's recovery in the absence of proof of gross negligence or willful and wanton misconduct.

Having found the state recreational use statute was applicable under the circumstances of this case, the issue before the federal district court was, therefore, whether Miller had "proved by a preponderance [greater weight] of the evidence facts to support the claim of gross negligence or willful and wanton misconduct." According to the federal district court, "the concept of gross negligence and willful and wanton misconduct" by Michigan courts "has been confused and disparate." As noted by the court, a majority of state supreme court judges would find willful and wanton misconduct "only if the conduct shows an intent to harm or at least such indifference as to whether harm will result as to be the equivalent of a willingness that it does."

On the other hand, a minority on the Michigan state supreme court viewed willful and wanton misconduct as merely a higher form of negligence. Rather than intent or willingness, reckless behavior would distinguish willful and wanton misconduct from negligence. Under the minority view, willful and wanton misconduct required "the recognition that failure to exercise ordinary care would have dire consequences."

Under either Michigan definition (i.e. intent/willingness or higher form of negligence), the federal district court found Miller had not proven any willful or wanton misconduct by park officials in this case.

> It is undisputed that a rope swing had been in existence on this particular tree for a long period of time. There is also evidence the swing had been observed by a least one of the rangers and he had taken no action to remove it. One of the rangers stated in his deposition that the existence of the swing, at least in his judgment constituted a safety hazard and should have been removed...
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> The existence of the swing was obvious to all. Miller himself, an active, athletic young man, who had lived on the river, and was an accomplished swimmer had used the swing on many occasions during the preceding year; he knew the depth of the water; he knew how from he had to fall before striking the water and how far he could go down into the water before striking the bottom. All the physical conditions surrounding this particular rope swing were known to him. There were no hidden defects, either known or that should have been known by the park officials, not known to the general public. By his own testimony, Miller stated that on the day of accident there was a line up of people waiting to use the swing, (men, women and children) and that he, himself, jumped from the swing fifteen to twenty times without incident.
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> This swing obviously did not appear dangerous or present any threat to the many ordinary people who came to the park for recreational purposes and who in fact were using the swing. The ranger who testified that in general rope swings constitute a hazard did not state how or in what manner they are hazardous, or to whom. The obvious hazard, it seems to me, is for a young child who can't swim to swing out over the water, lose his grip, and then fall. That is a far different

> situation than what happened to Mr. Miller. There is no way in my judgment that a careful, prudent, safety conscious ranger coming upon a scene where twenty people more or less, are standing in line waiting a turn to swing out and drop into approximately six or seven feet of water would or should conclude that what they were doing, "would likely prove disastrous." I do not believe that the failure to remove the swing was equivalent to an indifference to harm or injury that might occur to these people. At most, the ranger may have been guilty of ordinary negligence in failing to anticipate a potential injury to someone using the swing and then failing to remove it. But as pointed out earlier, the government is not liable for ordinary negligence of its park employees [under the state recreational use statute].

The federal district court also considered Miller's argument that state public health code precluded the applicability of the state recreational use statute under the circumstances of this case. The licensing requirements of this code required the state health department to conduct safety inspections of all bathing beaches. Although this code did not apply to the federal government, Miller argued that the "liable like a private individual" standard of the Federal Tort Claims Act should make "the government's failure to have the beach inspected... a violation of the Health Code." For the following reasons, the federal district court found that "the Michigan Public Health Code does not apply to this case":

> First, the sandy area along the Platte River was not a bathing beach. As defined in the Michigan Administrative Code a bathing beach is "a beach and bathing area offered to the public for bathing and swimming." Although swimming was permitted in this area, the government did not hold it out as a designated beach. As the pictures which were offered as exhibits demonstrate this accident occurred near a bluff covered with shrubs and trees was clearly not a designated beach for swimming. In addition, there was no easy access to this particular area by land. Also as pointed out, the accident did occur at the sandy area where canoes and picnickers pulled up, but rather further downstream.
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> Consequently, even if the sandy area had been inspected and all hazards removed at that location, Miller's accident still would have occurred. Finally, the Health Code applies only to bathing beaches at campgrounds. Since the park's campground and the sandy area were two miles apart, the Health Code is inapplicable.

Finally, the federal district court rejected Miller's contention that the rope swing constituted an intentional nuisance. As defined by the court, an intentional nuisance was "the natural tendency of the act... to create danger and inflict injury on person or property."

> To establish the necessary intent, a plaintiff must show that the defendant, who created or continued the nuisance, knew or must have known that the harm to the plaintiff was substantially certain to follow as a result of defendant's actions...

> In the present case, there was no evidence defendants knew or should have known that harm was substantially certain to follow by not removing the rope swing. No evidence was offered that at any time defendant knew or should have known that anyone else had ever been injured on this particular rope swing or on any other rope swing in any of the national parks. There was a total lack of proof to bring this case within the classification of an intentional nuisance in fact.

The federal district court, therefore, dismissed Miller's case and entered judgment for the defendant United States.