

PARK POT HOLE BIKE FATALITY

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In the case of *Phelan v. State*, 2005 NY Slip Op 25506 (NY 6/29/2005), Nancy Phelan died following an accident in Thompson Lake State Park. Phelan lost her balance and fell from her bicycle after riding over a depression in the road. At the time of the accident, Phelan was not wearing a helmet; she struck her head on the road and was dead within five minutes.

In a wrongful death claim, Phelan's former spouse, claimant Kevin Phelan, alleged that "the death occurred as a result of defendant's negligence in the design, construction, maintenance, and repair of the road where the accident happened."

FACTS OF THE CASE

At trial, decedent's 11-year-old son, William, recounted that his family was on a week-long camping trip at Thompson Lake State Park when his mother died on August 2, 2001. That sunny day, decedent Nancy Phelan, William, Allison (decedent's 9-year-old daughter) and their dog, Kelly, were enjoying a day at the beach. During the mid-afternoon, William and his mother rode their bikes to escort Allison to the Nature Center within the park. They had intended to ride their bicycles back to the beach. Although they had worn their helmets on other occasions during this camping trip, neither was wearing a helmet at this time.

It was during the course of the return trip that the accident occurred. They were heading down a hill on Loop A near campsite 23 on a paved road. William was three to four bike lengths directly behind his mother, who had never ridden on this road prior to the accident. Decedent was riding on the right side of the road approximately one to two feet from the edge of the road. William testified that his mother rode her bicycle over the center of a "pot hole" in the road, and then he saw her handlebars suddenly turn to the right. Her hands remained on the handlebars. After the turn, the bicycle kept moving to the right. It remained on the roadway for a while but eventually one tire went off the road, and his mother fell. He could not estimate how far beyond the depression her bicycle traveled before she fell.

After the fall, William stopped his bike two bike lengths in front of her, and he saw her lying on the ground. He became nervous and he rode his bicycle to the main park entrance to inform an employee of the accident. He then rode to the Nature Center to pick up his sister. They returned to the accident scene where the ambulance already had arrived.

Another eyewitness to the accident, Joanne Sheldon, testified she was seated atop a picnic table at campsite 23 and facing Loop A at the time of the accident. Sheldon observed decedent riding her bicycle along the roadway for approximately 20 to 30 feet before she eventually fell. She observed that decedent was wearing a bathing suit, shorts and sandals. Sheldon approximated that decedent was riding at a speed of 5 to 10 mph down an incline with a curvature in the roadway, and that she rode over a depression in the road. Her handlebars jerked and turned. She lost her balance. Decedent tried to regain control of the bicycle as she continued to move. She fell over to her left side and struck the left side of her skull on the road. Her left leg was

underneath the bicycle and her right leg was on top of the bicycle. Earlier that day, Sheldon had observed children on scooters fall at the same location. Sheldon could not remember where decedent fell, but she did remember the location of the "groove" on the pavement that caused decedent's fall.

Sheldon immediately went over to decedent, who was bleeding profusely and gurgling on her own blood. Decedent tried to lift her head and her back leg was moving slightly. Sheldon told her not to move because help was on the way. Within five minutes, decedent developed a gaze and then a blank stare on her face. At that point, she stopped moving. Sheldon checked for a pulse, but could not locate one. Lifeguards from the park beach arrived six to seven minutes later. Eventually, an ambulance removed decedent from the park and brought her to a hospital where she was pronounced dead upon arrival.

Decedent's former husband, claimant Kevin Phelan testified that he was informed of the accident by the Park Police. He picked up his children at the campground and was escorted to the hospital by the Park Police. When they arrived, they were informed that decedent had died. At approximately 7:00 p.m. that evening, Phelan returned to the park to break down the campsite. At the accident site, he observed that a 12-inch corrugated pipe passed under the roadway.

In Phelan's opinion, the stone material that packed the pipe had collapsed. He observed that the roadway had sunk several inches in places on the road. The next morning he returned to the site and found that crushed stone had been placed in the depression. After the accident, Phelan had several discussions with State Police Senior Investigator James Dolan, who opined that the hole in the road was the cause of the accident. Dolan inspected decedent's bicycle and found nothing wrong with it. Neither the State Police Report nor the Park Police Report, however, make a determination as to the cause of the accident.

The manager of Thatcher State Park, Christopher Fallon, testified at his deposition that he had not observed the depression at any time before the accident, but he was aware of the culvert since he would tour the campground daily. He later testified in the same deposition, however, that although he was aware of the depression before the accident, he did not request that repairs or modifications be made.

Fallon testified that his responsibilities included the oversight of Thompson Lake State Park. Although maintenance was conducted on an observed, as needed basis, there was no scheduled maintenance for this depression. Fallon also admitted that he had observed the culvert several times before the accident, possibly even the morning of the accident. Fallon further testified that there was no rule at the park that bicyclists over the age of 14 wear a helmet.

Upon cross-examination, Fallon testified that he searched park records and found no documents regarding prior accidents at this location. Further, he had not received any complaints about this location while he was park manager.

Alan Gonseth, a civil engineer and bicycle accident reconstructionist, testified on behalf of claimant and inspected the accident scene the morning after it occurred. Gonseth described the road as a 24-foot-wide asphalt pavement without any markings. It slopes downward at a grade of

approximately 8.1 percent . He observed the road located across from campsite 23 as having three depressions with the largest located along the right edge of the pavement. The remaining two depressions were located in the middle and left side of the road. He also observed that there had been major repair work to the depression on the right side where a triangular piece of road had been cut out and patched. It was located at the edge of the pavement where a culvert ran underneath it.

He opined that the packing around the culvert was not done properly, so that when it settled, it left a void underneath the road. Weight on the road eventually caused the road to fall into that void. Gonseth believed that the triangular piece was cut to fix that area, but it was not packed properly, causing the roadway to sink.

Gonseth measured the depth of the depression as 3.5 to 4 inches in the center, on top of the fill that had been placed in it after the accident. He opined that it would be difficult to see the patched area on any approach from the north or south. He further opined that a cyclist going down the grade of this hill at a reasonable rate of speed, who encountered a depression like this one, could easily lose his or her balance and fall.

#### NEGLIGENT REPAIR

Claimant alleged that “defendant's negligent repair of the roadway caused the depression that led to decedent's accident and death.” In response, the State contended that “the depression did not cause decedent's fall and even if it did, decedent assumed the risk of injury.” According to the state claims court, claimant “must establish by a preponderance of the credible evidence that defendant's negligence caused decedent's death.”

Under the circumstances of this particular case, the court noted that the State, as a landowner, had a legal “duty to use reasonable care under the circumstances in maintaining its property in a safe condition”:

The duty to exercise reasonable care requires that the State, as the owner and operator of a recreational area, protect the public from foreseeable risks of harm. Like any other landowner, however, the State is not an insurer of the safety of those using the property for recreational purposes, and the mere happening of an accident does not render the State liable...

[L]atent hazards give rise to a duty to warn entrants and protect them from that danger. Even where the condition is open and obvious, a landowner's duty to maintain property in a reasonably safe condition is not obviated; it merely negates the requirement to warn of such a condition. In either case, however, a claimant must still demonstrate that the risk of harm was foreseeable because the State had actual or constructive notice of the condition and failed to act reasonably to remedy it. Where the landowner creates the dangerous condition that causes the accident, the landowner is deemed to have actual notice of such condition.

In this particular instance, the state claims court took note that “a major repair had been undertaken at the depression located on the right side of the park roadway located near campsite 23.” In so doing, the court found Gonseth’s expert testimony “persuasive” that “the repair was negligently undertaken in that it was not properly packed, thereby causing a sinking of the road, creating a depression.” Further, the court noted “the testimony of William and Sheldon that decedent's bike tire hit this depression and caused her to lose her balance and fall.”

While noting “the triangular depression in the roadway,” as evidence that the roadway “had been repaired,” the court found the State had produced “no proof regarding how many times it was repaired, by whom or with what materials.” In no doing, the court found the State had failed “to rebut the testimony of claimant's engineer that the path was not constructed in accordance with good practice”

Moreover, the court found the State had “knowledge of the depression” based upon the testimony of park manager Fallon. In his deposition, Fallon had testified that “he was aware of the depression before the accident, [but] he did not request that repairs or modifications be made.” Based upon such testimony, the court found the State had “actual notice of this condition” because the State had “created it” and “failed to remedy it.” Further the court found that the testimony of Sheldon and Gonseth indicated the depression was a “latent hazard,” i.e., “it was on an incline with a curve, thereby making the depression difficult to see.” As a result, the court found sufficient evidence had been produced to support a claim for negligence liability:

[C]laimant has established a prima facie claim by demonstrating that the depression was a latent dangerous condition created by defendant, that not only defendant failed to warn decedent of this condition but also failed to remedy it, and that this condition caused decedent's fall and subsequent death.

Having found that “claimant carried his burden and established that defendant was negligent in the maintenance and repair of the road where the accident occurred,” the court then considered the assumption of risk defense raised by the State.

#### ASSUMPTION OF RISK

The State had argued that assumption of risk was “a complete bar to recovery” because the decedent was “participating in a sport.” As described by the court, under certain circumstances, assumption of risk may preclude liability “when a claimant's injury results from the voluntary participation in a recreational activity”:

It is well settled that a voluntary participant in a sport or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. A participant will not be deemed to assume the risk, however, if the risks were unique and resulted in a dangerous condition over and above the usual dangers inherent in the activity.

Factors to consider in the determination of whether a claimant assumed the risk are: the openness and obviousness of the risk, claimant's background, skill and experience, claimant's own conduct under the circumstances, and the nature of defendant's conduct. The most important factor is whether the risk is inherent in the activity.

Applying these factors to the testimony presented, the court found “the depression was not open and obvious.” As a result, the court concluded that the decedent, “a recreational bicyclist, who had not traveled on the roadway previously, did not assume the risk of encountering this type of unwarned hazard.”

Here, defendant presents no evidence that decedent saw the depression. Moreover, after reviewing all the photographs of the accident scene, the Court determines that the depression caused by the negligent repair was not discernable due to the decline and curve in the road.

In making this determination, the court noted that this case involved “a depression caused by a sinking repair” which was “not an ordinary rut or bump in the roadway,” nor was it “ordinarily caused by travel upon the road.” In so doing, the court distinguished this depression from an inherent risk assumed by the cyclist, specifically “the risk of encountering ruts and bumps while riding a bike over a rough roadway without a helmet [which] should be obvious to the experienced cyclist.”

Accordingly, the court rejected “defendant's argument that decedent consented to this risk inasmuch as the risk was hard to see and was unknown to decedent since she had not previously bicycled on that road.” The court, therefore, held that “claimant's recovery is not barred by assumption of risk.”

## DAMAGES

Having found that “claimant has established his claim by a preponderance of credible evidence,” the court then considered “the issue of damages.” In assessing damages, the court refused to “mitigate any damage award for decedent's failure to wear a helmet at the time of the accident.” Specifically, the court found that “[d]ecedent was not required to wear a helmet (*see* Vehicle and Traffic Law § 1238 [5] [b]), and, furthermore, no persuasive testimony, medical or otherwise, was proffered to establish that her injuries would have been either avoided or reduced had she worn a helmet.” Accordingly, the state claims court found decedent’s son and daughter, William and Allison Phelan, were “entitled to a collective award for damages for the wrongful death of their mother in the amount of \$2,437,112,” which included \$2,200,000 “for the loss of parental nurturing.”