

MISLEADING SIGNAGE AND DENSE FOLIAGE
MASK SIXTY FOOT CLIFF NEAR PICNIC AREA

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An adequate warning sign should provide sufficient risk information to take a hidden hazard on the premises and make it open and obvious to the recreational user. In so doing, an adequate warning sign communicates and educates the user to unreasonable dangers already known or discoverable to the landowner. On the other hand, there is generally no legal duty to warn individuals of natural hazards whose physical characteristics already present open and obvious risk information to any reasonable person through the ordinary use of his or her senses.

Once a warning sign has provided an individual with a reasonable opportunity to apprise himself or herself of the general scope of dangers not otherwise apparent on the premises, the recreational user then has a legal duty to utilize such risk information and act reasonably looking out for his or her own safety. Conversely, an inadequate warning sign would be one which fails to apprise the individual of hidden defects on the premises, or leaves too much to the imagination (e.g., "Danger Ahead"). The language in an inadequate warning sign oftentimes fails to identify the true nature and/or magnitude of the risks to be encountered by those authorized to use the premises.

The Walter decision described herein provides an apt illustration of signage which failed to inform park users in clear and unequivocal language that a particular area was actually more dangerous than it appeared to be. The message of the signage at issue in this case proved to be both insufficient and misleading to warn the public of a life threatening situation near a state park picnic area. As noted in the state court's opinion, a simple re-wording of the signs which communicated the true character of the dangerous terrain in the area would have been sufficient to preclude any landowner liability.

Deep Relief

In the case of *Walter v. State*, 568 N.Y.S.2d 521 (N.Y.Ct.Cl. 1991), plaintiff Danielle Walter sued the State of New York following a fall "at John Boyd Thacher State Park, in the county of Albany, on April 17, 1985 between 5:30 and 5:45 P.M." The facts of the case were as follows:

At the time of the incident, Walter was a 19-year old student at Memorial Hospital School of Nursing in the City of Albany. She and her classmates were attending a picnic which had been organized by the School of Nursing. Walter and two of her friends drove to the park, arriving sometime between noon and 12:30 P.M. She parked in the Mine Lot Picnic Area where she and her friends met a group of young men who had come in a van. Walter testified that they stayed inside the van and talked and drank all afternoon. Walter stated she took one sip of Seagrams and soda and then switched to beer which had been brought by the young men. She testified that she consumed a total of four cans of beer that afternoon.

Walter stated that there was a lavatory in the area immediately adjacent to the Mine Lot

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Picnic Area, but that it was closed at the time. Because there were no open lavatory facilities available in the immediate vicinity, she "went to the bathroom outdoors twice." The second time Walter left her group to relieve herself was between 5:30 and 5:45 P.M, when it was dusk. She testified that she walked toward a split rail fence which bordered the north side of the picnic area and separated it from a dense wooded area. The fence consisted of 42-inch high vertical posts placed in the ground approximately every 10 feet apart, with two continuous horizontal narrow rails completing the fence. One rail was attached at the top of the vertical posts and the other at the middle.

Looking toward the wooded area side of the fence from the picnic area side, all that was apparent to the naked eye were dense trees and heavy foliage and a dirt path which ran perpendicularly from the fence into the wooded area. The State did not dispute or rebut evidence, including photographs, that it is impossible to see through the trees and foliage sufficiently to realize that the wooded area is actually the top of an approximately sixty-foot high cliff or escarpment. The distance along the dirt path from the fence to the abrupt, and undetectable, edge of the precipice is approximately 30 feet.

There were two small signs -- a Danger sign and a Caution sign -- one on top of the other, just above the top rail of the fence facing the picnic area. The signs read as follows:

DANGER
Keep Inside Rail
Watch Your Children

CAUTION
People Walking Below
Do Not Throw
Anything Over Cliff

Walter climbed over or through the fence and followed the path into the woods. She stopped behind a bush adjacent to the path, proceeded to urinate, and as she did so, slid down the side of the 60-foot high cliff. She lay there unconscious for several hours, before being found by members of the Saratoga-Capital District Search and Rescue Squad of the Department of Parks and Recreation. Walter's shoe was found at the end of the path, right at the edge of the top of the cliff, and she, herself, was located near the base of the cliff.

In her claim against the State, Walter alleged that the "State failed to give adequate warning of a dangerous latent condition, which was known to defendant but which was completely hidden from Walter, and that the failure to give such adequate warning was the sole proximate cause of her subsequent fall."

As described by the state court of claims, landowners have the following legal duty "to prevent the

occurrence of foreseeable injuries to persons who make use of their land."

A landowner must act as a reasonable man in maintaining his 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.

Foreseeability is the initial measure of a landowner's liability for injuries on the premises.

Thus, a landowner must adequately warn against a danger if someone would not discover or realize the peril and guard against it and must take steps to prevent those accidents which might foreseeably occur as the result of dangerous terrain. The test is not whether a particular defendant foresaw a particular risk but, rather, whether a reasonably prudent person should have foreseen the risk and whether defendants exercised the care of a reasonably prudent person.

When natural geological phenomena pose dangers that are open and obvious, in contrast to latent, property owners are not required to enclose them or take other extensive steps to prevent harm from occurring. This does not mean that a landowner will always escape liability because a naturally-occurring danger is easily visible and its danger understood... Resolution of the issue of breach of duty requires a factual weighing of the severity of potential injuries against the burden on the landowner to avoid the risk...

Where, the risk of danger is not apparent to those making use of the property, the landowner's burden is greater; he 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.

Applying these principles to the facts of this case, the court found "the natural geographical phenomena which posed the risk of Walter's injury was a latent danger which was known to the landowner."

The edge of the cliff could not be seen from the fence and the presence of a path indicated that, despite the easily-scaled fence and the warning sign, the area beyond the fence was routinely travelled. It is true that the State had erected a sign with prohibited passage beyond the fence and, in addition, warned of the existence of a cliff. The danger alluded to in the sign, however, was that to be faced by persons walking below the cliff. 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.

In addition, 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."

[B]y warning of one danger (to persons walking below) and not of another (to persons walking in the foliage on top of the cliff), the sign may very well have lulled a casual patron into complacency... While Walter must be charged with knowing the content of

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the unobscured warning sign we hold that the warning provided was misleading and insufficient to adequately apprise park users of the type and degree of danger which they faced if they went beyond the fence. Nor was the fence of such a construction as to form a significant barrier to passage and thus provide additional implicit warning... [T]he duty of due care is a function of, among other things, Walter's reasonable expectations... [T]he landowner is responsible for assuring that his property is no more dangerous than it appears to be.

Under the circumstances of this case, the court found further that "it was foreseeable that visitors would seek out areas of heavy foliage, even if they had to scale or go through the rudimentary fence to do so."

The State did not offer any evidence to establish that Walter was in the park without authority or after hours, nor did it rebut Walter's testimony that the only nearby toilet facility was closed. The existence of the dirt path also indicates that other persons had left the picnic area and gone into the trees at that location.

Given the foreseeable risk of injury to Walter, the court held that "it would not have been unduly burdensome or impossible for the State to have adequately safeguarded visitors from going over the edge of the cliff without warning."

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. If the sign had given warning that the edge of a sixty-foot cliff was located approximately thirty feet from the fence and was not visible to someone walking in that direction, the court believes that neither Walter nor any reasonable person would have ventured further.

On the other hand, the court acknowledged that Walter was "not totally free from negligence herself."

She ignored a sign which warned of danger and indicated at least the existence of a cliff; she climbed over or through the fence on which the sign was located; and she walked into the heavily-vegetated area beyond the fence when it was dusk and when her judgement was undoubtedly affected by the consumption of four cans of beer and a small quantity of whiskey. Although Walter testified that she did not see the sign, this is of no moment for, as previously noted, she was bound to see what by the proper use of her senses was there to be seen and there was no proof that the sign was not in place or in any manner obscured.

Walter's negligence does not rise to the level that it was a superseding force absolving the negligent defendant from its liability -- that is, to "replace the defendant's negligence as the legal cause of the accident" -- nor does her behavior constitute an express assumption of any risk "with full understanding of the possible harm". Her conduct does, however, require an apportioning of the responsibility for her injuries.

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Consequently, the state court of claims found that "both Walter's and the State's negligence were proximate causes of the accident and that both were equally culpable." Having resolved the issue of liability, the court entered judgment accordingly and ordered the clerk of the court "to schedule the damages phase of the trial as soon as possible." Having found Walter and the State "equally culpable," the State would be liable for 50% of the amount assessed in the damages phase of the trial.