# ROPE SWING IN PARK PRESENTS OBVIOUS RISK OF FALL

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A number of years ago, I was involved in a case involving a fall from a rope swing in a public park. In that case, the plaintiff's expert tried to characterize rope swings as something which park users might reasonably believe were part of the park's recreational equipment! Specifically, this "expert" (whose background was in physical education, rather than park management) testified that the city was negligent in failing to ensure the safety of rope swings which inevitably spring up in large public parks. In so doing, this expert would require public park agencies to inspect and maintain rope swings in a manner more appropriate to a rope climbing activity in a high school gymnasium.

In my testimony on behalf of the city, I stated that rope swings in public parks are to be controlled like any other potentially dangerous park debris generated by unknown third parties. As a result, in the absence of statutory or governmental immunity, a public park agency may have a legal duty to discover and remove hazardous conditions in a public park within a reasonable time. On the other hand, as illustrated by the *Bennett* decision described herein, a city would not be required to inspect all trees for rope swings, particularly in natural undisturbed woodland areas of a large public park.

In addition, a public or private landowner is generally not liable for a potentially dangerous condition which should have been obvious to an individual using the premises for recreational purposes. Accordingly, a rope hanging from a tree in a public park would not normally constitute the type of unreasonable risk of harm necessary for negligence liability because the risk of falling from a rope swing is obvious and easily avoidable by the park visitor. Specifically, the state appeals court in *Bennett* decision described herein found that "the presence of the ropes hanging from a tree in an area of a public park closed to the public did not present an unreasonable risk of harm to an adult exercising reasonable care for her own safety."

## TWINE TIME

In the case of *Bennett v. City of Lafayette*, 635 So.2d 515 (La.App. 1994) plaintiff Beatrice Bennett was injured while visiting Acadiana Park in the City of Lafayette. The incident occurred on July 26, 1990. The facts of the case were as follows:

> Bennett was the owner of Winnette's Early Childhood Development, a day care center for young children. On the day of the accident, Bennett took six of the children, all under age ten, to visit the park for playtime. Acadiana Park, owned and maintained by the City of Lafayette, is much larger than the typical city park. It contains nearly 120 acres of land, about half of which is undisturbed natural woodland. There is traditional

> playground equipment in one area, and there are tennis courts, a soccer field and a basketball court in another.
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> The remainder of the park is woodland, some of which is developed as a campground and nature station with designated trails maintained through a naturally preserved and moderately rugged flood plain adjacent to the Vermilion River. Visitors may take advantage of guided tours along these "nature trails", or they may walk along them without supervision. The trails are marked by signs, and visitors may obtain a map of the area at the nature station. Visitors are encouraged to remain on the trails so as not to disturb the natural woodland environment. The management approach of the City of Lafayette is to leave this area of the park, which contains literally thousands of trees, in its natural, undisturbed state...
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> In order to reach the tree from which the ropes hung, Bennett left the open playground area and entered a heavily wooded section of the park thick with trees and brush. There was an opening or trail through the brush, which she followed until it formed a fork. Near this fork in the trail were 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"...
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> Bennett remembers only going to the park on the day of the accident, and has no clear memory of any of the events leading to her injuries. One of the children, who is now thirteen years old, testified at trial that the group started out playing on the swing sets in the traditional playground area of the park. Some of the children knew about some ropes hanging in a tree where they could swing higher, and they led Bennett to that place. All of the children, save one who was afraid, began swinging on one of two ropes hanging over a gully from a large oak tree. Bennett attempted to swing on the other rope, presumably to test it, though she does not recall the reason, and fell. Since the rope did not break, it can only be assumed that Bennett was unable to hold on to it.

In her complaint, Bennett 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 response, the City of Lafayette claimed to have had "no actual knowledge of the existence of these ropes." Further, the City contended as follows that "[t]he tree to which the ropes were attached was in a restricted area, not subject to periodic inspection."

> The curator of natural sciences for the city, William Fontenot, who manages the nature trail system, testified that the tree was on a closed trail, which he avoided so as not to disturb the natural environment. He had no knowledge of these ropes, which hung from a branch about 40 feet up in the tree down to about 4 feet from the ground. He had

> come upon this site accidentally at the beginning of his employment in 1987 and saw a short length of rope, about 6 feet, tied to the same branch. But since the piece of rope, which looked very old, was 30 to 35 feet above anyone's reach, and since there was no indication that anyone had been around that tree in a very long time, he saw no reason to keep an eye on it or conduct inspections of it. His regular duties never took him to that site, since it was on a closed trail, and it would have been impossible to inspect all of the trees in the park for unauthorized ropes.

The City, however, admitted that "it had knowledge that visitors to the park sometimes went into restricted areas despite prohibitions, but it had no reason to inspect these areas unless something was brought to their attention."

In determining landowner liability, the specific issue before the trial 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."

> In order to determine if a risk is unreasonable the court is to use a balancing test similar to that used in negligence cases where the magnitude of the risk and the likelihood of harm is weighed against the cost or burden of preventing the risk and the social utility of the thing which caused the injury. A potentially dangerous condition that should be obvious to all comers is not, in all instances, unreasonably dangerous.

Accordingly, under the circumstances of this case, the trial court found Bennett had to prove that "the municipal owner of the tree from which the rope was hanging had actual or constructive knowledge of the fact that it presented an unreasonable risk of injury to others." Further, the trial court required Bennett to show that "the public entity had a reasonable opportunity to remedy the defect and failed to do so and that her damages actually resulted from this risk." Applying the negligence "balancing test" to the facts of the case, the trial 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. Bennett 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 at her cost.

In addition, the trial court found both Bennett'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."

> Both experts agreed that the tree was on the closed trail, and that the footing near the tree was uneven and slippery. The ropes tied to the tree branch hung over a steep twelve foot incline or drop in the terrain, like a gully or ravine filled with mud and protruding tree roots. The conditions and total environment around the ropes created an obvious and clear danger.
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> Both experts agree further that Bennett must bear at least some responsibility for her injuries given the obviousness of the risk to which she subjected herself. If her purpose in swinging on this rope was to conduct a safety check for the children, it would have been much more reasonable to do so from the bottom of the incline. Pulling on the rope from the bottom and without swinging on it would have safely tested both the strength of the rope and ability of Bennett to hold on.

The trial court, therefore, dismissed Bennett's claims against the City. Bennett appealed. On appeal, Bennett argued that the City of Lafayette was responsible for her injuries because "the City knew about the rope swings in Acadiana Park before Winnette Bennett's accident, believed them to be hazardous, and took no reasonable measures to prevent the injury which occurred."

As described by the appeals court, a public entity was responsible under state law (La.R.S. 9:2800) "for damages caused by the condition of buildings within its care and custody":

> [N]o person shall have a cause of action...against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.
> Constructive notice shall mean the existence of facts which infer actual knowledge.

Accordingly, the appeals court found Bennett had the burden of proving the following to sustain her claim against the City:

> (1) the property which caused the damage was in the custody of the defendant; (2) the property was defective because it had a condition that created an unreasonable risk of harm to persons on the premises; and, (3) the defect in the property was a cause-in-fact of the resulting injury.

Further, the appeals court stated that "the reasonableness of the risk is determined by balancing the probability and magnitude of the risk against the utility of the thing."

> An owner is not liable for injury which results from a condition which should have been observed by Bennett in the exercise of reasonable care or which was obvious... In determining whether a given condition is unreasonably dangerous, the degree to which the danger may be observed by a potential victim who may then provide self-protection is a major factor.

Applying these principles to the facts of the case, the appeals court found 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."

> In the case at bar, a 31 year old woman was confronted by two ropes of questionable origin and strength hanging from the limb of a tree over a 12 to 15 foot deep ravine in a rugged area of Acadiana Park closed to the general public. It was established that no City or Park employee knew of the ropes... Testimony also established that it would have been possible for her to test the strength of the ropes by standing on safe ground and tugging on them. Yet, she chose to climb upon the roots of the tree from which the ropes hung and attempt to swing out over a potentially dangerous drop-off to perform her safety test... The trial judge found that, under those circumstances, Bennett, an adult confronted by a clearly visible and obviously potentially dangerous condition who failed to exercise reasonable care, could not recover.

Having found "no error in the trial court's findings of fact and its conclusions of law," the appeals court affirmed the judgment of the trial court dismissing Bennett's claims against the City.