GOVERNMENTAL LIABILITY FOR MAINTENANCE OF PARKS

In the early twentieth century, the State of New York had almost complete sovereign immunity from negligence claims. Only those claims specifically allowed by statute could plaintiffs recover against the State. In *Smith v. State*, 227 NY 405 (1920), the Court held that a plaintiff injured because of the negligence of State employees in placing a wire across a walkway in a state park was barred from recovering because the State had not made an express waiver of the state's immunity from liability for the tortious acts of its officers and agents.

The State effectively waived this immunity through Section 8 of the Court of Claims Act in 1929. After, government entities that owned land encompassing state, county, and town parks were subject to the same laws of negligence that applied to ordinary landowners.

Municipalities owe a duty of reasonable care to maintain parks in a safe condition and to take adequate steps to protect park patrons from reasonably foreseeable dangers. They can do so by posting warning signs or otherwise neutralizing dangerous conditions. Though strict immediate supervision is not required, the municipality may be obligated to provide an adequate degree of general supervision, which requires the regulating and preventing activities or conditions that endanger those utilizing the park. *Caldwell v. Island Park,* 304 N.Y. 268 (1952).

This duty does not extend to "open and obvious conditions that are natural geographic phenomena which can readily be observed by those employing the reasonable use of their senses". *Cohen v. State of New Yor*k, 50 A.D.3d 1234 (3rd Dept. 2008); *Tarricone v. State*, 175 A.D.2d 308 (3rd Dept. 1991). The State is not liable for injuries caused by open and obvious conditions.

Though sovereign immunity has weakened, courts have generally dismissed personal injury claims against government entities based on negligent maintenance of parks on the basis that there was no duty owed to the park patron.

In *Doyle v. State*, 271 A.D.2d 394 (2d Dept. 2000), the plaintiff met with a group of people on a plateau in a state park after the park was closed. He was injured after he ran toward the edge of the plateau after observing the headlights of an oncoming motorcycle. He tripped over a surrounding eighteen to twenty-inch stone wall and fell sixteen feet to the ground on the other side of the plateau.

The Court of Claims dismissed the claim. The Second Department affirmed, stating the sign indicating that the park closed at dusk was readily apparent to visitors who entered the park and proceeded on the path up to the plateau, as was the danger of falling over the cliff at the edge of the plateau. Significantly, the plaintiff was familiar with the area and knew that he was on an elevated plateau when he ran toward the edge. There was no latent danger and the State had no duty to warn of a dangerous condition.

In *Cramer v. County of Erie*, 23 A.D.3d 1145 (4th Dept. 2005), the plaintiff fell into a ravine in a county owned park. The Supreme Court dismissed the claim. The Fourth Department affirmed and stated that the ravine was a natural geographical phenomenon, the danger of which is open

and obvious rather than latent. The county did not owe a duty to hang signs or erect a fence around the ravine.

In *Cohen v. State of New York*, supra, four camp counselors went to a whirlpool area downstream a popular swimming hole at the Adirondack State Park. While the main swimming hole was located near a main highway, the whirlpool area was not a high use area, nor was it easily accessible from the main swimming hole. The water in the whirlpool area was turbulent and fifteen feet higher than normal due to recent heavy rains. All of the counselors drowned after divers were unable to enter the water to undertake rescue efforts due to the dangerous condition presented by the raging water.

The Court of Claims denied the State's motions for summary judgment. The Third Department reversed, stating that the whirlpool area was an open and obvious hazard that comprised a part of the natural environment, the danger of which was readily apparent to a person reasonably using his or her senses. This, combined with the fact that the area was not easily accessible from the more commonly used main swimming hole, lead the court to conclude that defendant did not owe a duty to neutralize the danger presented.

In *Melendez v. City of New York*, 76 A.D.3d 442 (1st Dept. 2010), the thirteen-year-old plaintiff fell off the ledge at the top of a waterfall in the Bronx River Park in New York City. The waterfall was not open to the public so there was a four-foot high pipe rail fence blocking access to it. The plaintiff went beyond the pipe rail fence and walked out onto the ledge of the waterfall, which he observed to be wet due to the splashing water. Plaintiff knelt down to watch the people in the waterfall, and when he tried to get up, he slipped and fell into the water.

The Supreme Court dismissed the claim. The First Department affirmed, reasoning that the waterfall was an open and obvious, rather than latent, natural feature of the landscape, and the wet, slippery condition of the ledge was also open and obvious. The danger of climbing out on the wet ledge of the waterfall was apparent and plaintiff could reasonably have anticipated it. The City had no duty to protect park visitors from the waterfall.

In *Panebianco v. State of New York*, 967 N.Y.S.2d 868 (Ct. Cl. 2012), the fourteen-year-old plaintiff was severely injured when she fell down a rocky gorge while on a class field trip in Chittenango Falls State Park. She allegedly veered off of the designated hiking trails and passed a ten to twelve-foot-high sign warning of undeveloped land and forbidding trespassing beyond the sign.

The Court of Claims dismissed the claim, finding that the steepness of the gorge in the accident location was an open and obvious condition and the park was safely and reasonably maintained. The ledges in the dry and steep gorge which the plaintiff fell down was an open and obvious phenomena that she came to only upon veering off the designated hiking trails and consciously choosing to descend the rocky ledges of the gorge by jumping over ledges three separate times.

In *Arsenault v. State of New York*, 96 A.D.3d 97 (3rd Dept. 2012), a family passed several large warning signs at Taughannock Falls State Park as they headed down an unmarked path toward water. While standing directly at the base of the falls underneath the rocky overhang,

approximately 400 feet beyond a designated observation area, the decedent was struck in the head by a large, sharp-edged rock that had apparently dislodged from the cliff.
The Court of Claims denied the State's motion for summary judgment. The Third Department reversed and stated that while the defect was not open and obvious, the State could not be held liable for the death because it provided specific warning signs and otherwise maintained the park in a reasonably prudent manner.
In the past five years, the trend of dismissing these claims seems to be shifting. Two cases within the last five years have denied summary judgments for government park owners in personal injury cases.

In *Agness v. State of New York*, 159 A.D.3d 1395 (4th Dept. 2018), the claimant was bitten by a rabid fox while camping at Sampson State Park. Despite being notified of a potentially rabid animal on the park premises hours before the incident, state police failed to take any steps to minimize this danger to park patrons.

The Fourth Department denied the State's motion for summary judgment, stating that the claim implicated the State's proprietary duties and it was thus required to take adequate steps to protect park patrons from reasonably foreseeable danger since it had actual notice of a potentially rabid animal on the park premises hours before the incident.

In *Calverley v. State*, 134 N.Y.S.3d 554 (3rd Dept. 2020), the decedent went swimming with his two children in waterfall basin in the Adirondack State Park. The water in the basin was smooth and calm with no visible current. After swimming for approximately 20 minutes, the decedent, an experienced swimmer and former ocean lifeguard, swam towards the base of the waterfall. Onlookers observed him go under the water, resurfacing face down and motionless. Following an on scene investigation by the State Police, decedent's death was recorded as an accidental drowning due to the failure to escape an underwater current.

The Third Department denied the State's motion for summary judgment, declining to address the merits of the claims regarding whether the State actually had a duty to warn park patrons of the dangerous condition underneath the base of the waterfall. It stated that the record was sufficient to demonstrate an appearance of merit, which was enough to defeat the State's motion. This decision appears to be in direct contradiction of its own precedent in *Cohen*.

Recent cases have shown that the courts may be eroding the strict interpretation of governmental liability in government owned parks. In years past, most cases alleging personal injuries as a result of negligent maintenance of government owned parks were dismissed in favor of the municipal defendant. There may be a trend away from nonliability in these claims. It is possible that this protection is weakening and government entities will face a higher risk of liability for injuries sustained in municipal parks.

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