

HOLE IN PARK DISTRICT FENCE PROMPTS \$5 MILLION JUDGMENT

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This month's column describes the most recent in a series of cases which have considered governmental liability for injuries sustained by children on railroad tracks adjacent to public parks and playgrounds. To date, most courts have applied the "control" test in determining landowner liability in these cases. As a general rule, there is no liability where there is no control over physical defects or human beings on the land. As a result, under the control test, a landowner owes no duty of care to individuals to protect them from dangerous conditions which are off the premises. On the other hand, a minority of decisions have imposed governmental liability for dangerous conditions off the premises where the risk of serious injury to children was clearly foreseeable under the circumstances.

The case of *Lynch v. National Railroad Passenger Corp.*, 540 A.2d 635 (Pa.Cmwlth. 1988) involved a situation which was very similar to the *Engel* case described herein (*Lynch* was presented in the *Recreation and Parks Law Reporter* # 88-16, Vol. V., no. 2 pp. 57-59, 1988). In each instance, a youth was injured by a train on railroad tracks which ran adjacent to a public play area. In both cases, holes in the play area's fence facilitated access to the railroad. While the *Lynch* court applied the control test in determining governmental liability, the *Engel* court analyzed the railroad hazard on adjacent land in terms of foreseeability.

According to the *Lynch* court, "one who has suffered injuries as a result of encountering a hazardous condition on another's land cannot recover damages from the owner of the land over which he passed to reach the land on which the allegedly dangerous condition existed." In applying this rule, the *Lynch* court rejected the argument that the hole in the fence was a dangerous condition because the injury did not occur on the playground:

No case has been brought to our attention wherein there has been imposed upon a possessor of land a duty to erect fencing or other protective devices or warnings to deter trespassing children from entering a third person's property on which there exists a dangerous condition not created or maintained by the landowner and over which he has no control.

The *Engel* decision described below presents just such a case wherein public landowner liability was imposed for a dangerous condition (trains) over which the governmental entity had no control. In so doing, the *Engel* court, unlike *Lynch*, seemed to impose a duty to erect and maintain protective fencing around such areas where there is a foreseeable risk of injury to children.

DANGER ON THE PREMISES?

In the case of *Engel v. Chicago & North Western Transportation Company*, 542 N.E.2d 729 (Ill.App. 1 Dist. 1989), plaintiff John Engel "was severely injured when he jumped from a moving train" traveling adjacent to a city park owned by defendant Chicago Park District. The facts of the case were as follows:

John Engel was 12-years-old on September 27, 1981. On that date he went to Hermosa Park in Chicago to play with his friends. The park is operated by the Chicago Park District. There are tennis courts, a playground, a playing field, and other recreational facilities. The entire park is fenced. Along the west side of the park are railroad tracks.

For at least two years prior to Engel's injury the fence along the west side had a large opening that extended from the bottom to the top of the fence. Children and adults used this large hole in the fence as a short cut. Through this opening, children had direct access to the railroad tracks from the park. There was an embankment leading to the tracks, and the railroad ties set in the embankment created a stairway up to the tracks...

On the day that Engel was injured he had met some friends at the park. They had decided to go to a nearby store for candy. From inside the park, the shortest route to the store was through the opening in the fence and over the railroad tracks. Engel noticed a train coming at a very slow speed. The train came to a stop and Engel waved to the conductor, who waved back. When the train started up again, Engel got on a ladder on the side of the train. At the time the speed of the train was four or five miles an hour. The speed limit in that area was ten miles an hour.

Engel rode the train for approximately 30 feet and then alighted to join his friends. He had seen others getting on and off the moving trains, including the railroad employees. He attempted to mimic the way in which the men had jumped off the train. Instead, he got spun around and fell, his left leg going under the train. The first wheel crushed his leg and caused it to stick to the track. Twenty-five cars then ran over his leg while he was helpless to move it.

After Engel's leg was surgically amputated in the hospital, the stump beat against the bed in uncontrollable spasms. He underwent repeated and painful skin grafts. He also underwent a lengthy and painful struggle to regain even limited use of his leg. The medical evidence indicates that he is in chronic pain and can walk only short distances on an artificial leg.

According to Chicago Park District, "the risk of danger in climbing on and off a moving train is obvious." Chicago Park District, therefore, maintained that it owed Engel "no duty to protect him from the obvious danger of climbing on the moving train." The jury awarded Engel \$5 million. Defendant Chicago Park District appealed.

As described by the appeals court, the following general legal principles would govern liability in this case.

[A] duty which would not be imposed in ordinary negligence will be imposed on the owner or occupier of land only if such person knows or should know that children frequent the premises and if the cause of the child's injury was a *dangerous* condition *on the premises*. A *dangerous* condition was defined as one likely to cause injury to children because of their inability to appreciate the attendant risks, due to age and immaturity. The existence of such dangerous condition, plus the defendant's knowledge of it, constitutes foreseeability...

[T]his rule does not impose a per se [i.e., in and of itself] duty upon landowners to remedy all conditions on the land and if the condition complained of presents obvious risks which children would be expected to appreciate and avoid, there is no duty to remedy that condition... [S]ince children are expected to avoid obvious dangers there is no reasonably foreseeable risk of harm. Therefore, if a danger is "obvious" it is not considered "foreseeable."

Applying these principles to the facts of the case, the appeals court found that Chicago Park District was aware of a dangerous condition. Specifically, the appeals court found evidence indicating that the Chicago Park District had "failed to repair this large opening in the fence, despite its admitted knowledge of its existence and dangerous condition." (It is interesting to note, however, that the court failed to recognize that the dangerous condition was not on the premises. The broken fence did not cause the injury; it simply facilitated access to a dangerous condition - the railroad - which was off the premises.)

Internal memoranda produced at trial established that the Park District considered the unrepaired fence as a safety hazard and that its personnel knew that children used the opening to gain access to the tracks. Work orders to repair the fence were produced but for unexplained reasons the opening was not repaired. At trial, one of the Park District's witnesses claimed that the repairs had been made, but no substantiation of that claim was produced, and, in fact, the opposite conclusion was proved by other testimony and evidence...

The Park District's repair department had received work orders on eight occasions to fix the fence but these orders had never been approved and the work was never done. The orders started in March of 1980 and the last one was dated in August 1981, just six weeks before Engel's leg was crushed beneath a train...

The engineer for the Park District testified that the open fence separating the park from the tracks created a "very dangerous" condition, one that would undoubtedly allow a child to get hurt if the condition existed for a long enough period of time. The District's safety director also agreed that the condition presented a very dangerous situation.

As noted by the appeals court, trial testimony "also established that the practice of going to the tracks through the opening in the fence was so prevalent at Hermosa Park that the Park District employees frequently engaged in this conduct in plain view of the children in the park."

In addition, park employees were aware that children took rides on passing trains. The practice of grabbing a short ride on slow-moving freight trains is called "flipping" the trains... One of the Park District's employees testified that he had heard of children flipping the trains at Hermosa Park and may have actually seen this happen, but did not recall warning the children not to do this. Another witness, a child who frequently went to the park, testified that for years prior to the accident he had gone through the opening in the fence and boarded moving trains, as had others. A railroad employee testified that he had seen children trying to jump on and off almost every train that passed Hermosa Park.

Railroad employees also jumped on and off moving trains, as part of their job, and the children in the park observed this practice. The railroad would at times run brake tests at the park by stopping the trains and then restarting them while some employees were off the train. Once the railroad crew members who were off the train were satisfied that the trains were running properly, they would mount the moving train by jumping on either the side ladder or stairs of the moving railroad trains. Engel testified that he had observed the railroad crew do this without incident on seven or eight times prior to this accident.

As defined above, the appeals court found that there was indeed a dangerous condition. "In the pending case there is no doubt from its admissions that the Park District knew that children frequented the area around the tracks and that the unfenced access from the park to the tracks presented a dangerous condition in the mind of safety engineers and inspectors for the district." Having found a dangerous condition, the issue before the appeals court was, therefore, "whether the risks of flipping trains were 'obvious' to the 12-year-old Engel." In this particular instance, the appeals court found that this issue was properly submitted to the jury. Further, the appeals court found that there was sufficient evidence for a jury to find that the risk of injury was not obvious to Engel.

[C]hildren are presumed to know the risks of falling from heights, drowning, or being burned... In contrast, other risks of injury should not be presumed to be in the knowledge or life experiences of all children, and should be individually assessed as questions of fact [by the jury]. In the pending case, Engel could not be presumed to have realized the dangers of flipping the train because he had seen others, including employees of the railroad, successfully mount and dismount the slow-moving train. Therefore, it was for the jury to determine whether his injuries were proximately caused by the Park District's breach of duty to him...

The policy determination that most children are presumed to know the risks of injury inherent in certain types of activities, such as playing with fire or playing in bodies of water does not *per se* [i.e. in and of itself] extend to the train flipping cases... The duty in this case was repairing the fence to prevent access to the trains from the park. The Park District admitted its awareness of the children's use of the hole in the fence to go up to the tracks and its belief that the situation was dangerous. We find that the evidence amply supports the jury's conclusion that the Park District breached its duty to repair the fence and that Engel's injuries were proximately caused by that breach... Moreover, we find that the jury was the proper entity to assess all the evidence, including Engel's age, intelligence, and experience. Since in his experience many children and adults had hopped the trains without injury, the jury could have concluded that he had no true appreciation of the risks involved. We will not reweigh the evidence or substitute our judgment for that of the jurors.

The appeals court, therefore, affirmed the judgment of the trial court in accordance with the jury's verdict awarding Engel \$5 million in damages.