

ROUGH SLEDDING ON PARK DISTRICT HILL

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When recreational injury liability is viewed in the proper perspective, it is not the picture of doom and gloom portrayed in the newspapers and other popular media. Reports of huge damage awards to plaintiffs over seemingly trivial incidents may make good news copy, but it is an unfortunate distortion of reality. In my opinion, this type of reporting is, in part, responsible for the perceived "liability crisis." One purpose of this column and the *Recreation and Parks Law Reporter* (RPLR) is to provide a more accurate picture of factors which influence potential liability for recreational injuries.

As indicated by the cases reviewed in (RPLR), not all recreational injuries are compensable. On the contrary, liability will only be imposed when the defendant has created an unreasonable risk of injury. In most instances, the question of reasonableness is decided by a jury. In resolving this issue, the jury will consider the reasonableness of both the defendant's and the plaintiff's conduct in determining liability for a recreational injury.

Given the opportunity, a jury may very well deny an injured plaintiff recovery, even though the defendant failed to take every conceivable precaution to prevent the injury. Further, an appellate court will not disturb a jury's determination when the verdict is reasonably based upon the evidence in a case. The Friedman case described herein provides a detailed account of the evidence considered by the jury and reviewed by the appellate court. See if you agree with the decision. Ask yourself, would the injury or the filing of the lawsuit grab headlines in the local newspaper? Which would be more likely to receive media coverage, a judgment for the plaintiff awarding substantial damages, or a judgment for defendant denying recovery?

PADDED SNOW FENCE ON SLED HILL?

In the case of *Friedman v. Park District of Highland Park*, 502 N.E.2d 826 (Ill.App. 2 Dist. 1986), plaintiff Jordana Friedman was injured on a sledding hill owned and maintained by the defendant park district. The facts of the case were as follows:

The incident in question occurred in February 1980 when Friedman was 8 years old... Friedman was at the top of the Manor Park sledding hill, preparing to sled down the hill. She was seated on the front of the sled with her feet placed in front of her on the sled's frame. Friedman's sister, Fraeda, 10 years old at the time the incident occurred, positioned herself in a seated posture on the sled behind Friedman with her legs on either side of Friedman. Fraeda's feet were placed forward on the wooden steering mechanism of the sled.

It is not clear how they began their descent, but the sled angled across the hill in approximately a 45 degree deviation from a straight descent, heading toward the snow fence on the right side of the hill (south side) as one looks down the hill from the crest. The sled proceeded into the snow fence at the precise point where

one of a series of metal fence support poles, securely driven into the ground, was placed. Friedman's position on the sled in relation to this pole was such that upon the sled impacting with the pole, Friedman was thrown forward with her legs on either side of the pole. As a result of the impact, Friedman suffered serious injury.

Friedman's brother Arie had witnessed the accident and provided the following testimony regarding the condition of the sledding hill and the circumstances surrounding the incident.

Arie confirmed there were snow fences on both sides of the hill, only the north side of which was lined with hay bales. He estimated that 10 or 15 other children were also sledding at the time of the accident. He did not specifically remember if it had been he or his brother that had pushed Friedman's sled to start it down the hill but he recalled that the sled immediately started down the hill at a 45 degree angle toward the south snow fence, striking the fence 20 to 30 feet down the hill. It was Arie's understanding that the sled could be steered to a minor degree.

Friedman's sister Fraeda also witnessed the accident and provided the following testimony.

Fraeda, who accompanied Friedman on the ride that resulted in Friedman's injury, stated that although her feet were on the steering mechanism, she did not know how to steer. In fact, she said she had never been down a hill before and had no idea how to control the sled. She continued that she was aware of the location of the fence and that nothing obscured her view of it. To begin their run down the hill, Fraeda felt she and Friedman had shoved off themselves or had been pushed. She wasn't certain if there had been a sign posted indicating the hill was unsupervised.

Friedman admitted that "she did not know how to steer the sled." In addition, Friedman testified to the following:

Friedman admitted she had used the sled many times prior to her injury and had been on Manor Park hill sledding once or twice previously. Friedman stated the fence was plainly visible prior to her injury. She did not think that the hill itself caused her to veer toward the fence, nor did the sled strike any object or bump that caused a change in direction. Friedman recalls no park district personnel supervising the hill. She realized her sister did not know how to steer a sled.

The jury in this case returned a verdict for the defendant park district, finding Highland Park was not liable for Friedman's injuries. The trial court rejected Friedman's request for a new trial and entered judgment for Highland Park park district. Friedman appealed.

In reviewing the record from the trial court, the appeals court noted the following testimony from Marco Santi, the maintenance foreman, "regarding the maintenance of this hill as a sledding facility."

The procedure Santi implemented was to erect a snow fence on both sides of the hill and secure it to a series of six-foot metal posts each driven two feet into the ground. Santi stated that he placed bales of hay along the inside of the snow fence and inspected the condition of the bales each week, replacing damaged bales. Santi testified that the fence was put up for directional purposes; the hay bales were to prevent children from going into the woods for Santi did not consider the fence strong enough to stop a sled... [A bale of hay cost \$2.50. It was not clear how many were used.] Santi related that prior to the first and only year (1979) that he maintained the hill, he was not aware of any fences or hay bales being placed on Manor Park hill. Further, there was no written policy on how to prepare the slope. [In the year of the accident (1980), another maintenance crew from the golf course maintained the sledding hill.]

Friedman's expert witness had noted many problems on the sledding hill. However, in the opinion of the appeals court, "only a few" of these "numerous criticisms" were relevant to the injury incurred by Friedman.

[This expert witness] felt the topography of the hill, i.e. undulations in the surface, and the lack of a distinct trough to channel sleds straight down the hill, could cause sleds and saucers to travel in various directions on the hill. Such a problem would increase the possibility of a sled or saucer impacting the fence on the south side of the hill. He stated that the type of sled used by Friedman could be turned only in a wide arc and that Friedman, as an 8-year-old, would have difficulty effecting a turn on the sled. He hypothesized that the cause of Friedman's injury was the lack of a protective cushion between sledders and the fence and, additionally, the topography of the hill. It was his opinion that a reasonably well qualified park recreational supervisor would have the knowledge and skill to foresee the hazards extant on the hill when the injury occurred...

[This expert witness testified further that] there are no national standards for the design of sledding hills nor the erection of protective barriers on the sides of such hills. [According to this expert witness,] "you try to remove the hazard completely; if, because of the design you cannot remove the hazard and you have to barricade it or pad it, you make sure the pad is sufficient."

Friedman's expert witness based his opinion upon pretrial evidence and a 30 to 45 minute visual inspection of the sledding hill. However, this inspection, one week before the trial, took place at a time when the hill was not snow covered or being used by sledders.

The superintendent of recreation for Highland Park park district, Constance Skibbe, also testified regarding the maintenance of the sledding hill.

Skibbe stated that she didn't know if the Manor Park sledding hill was specifically designed for sledding purposes or whether it was simply a natural part of the park's terrain. She testified that for the 12 years she had worked at the park, this particular hill was used for sledding with snow fences and hay bales installed along the sides supplied as a regular practice. However, when reminded of Santi's testimony [i.e. not being aware of fences or hay bales prior to 1979], she confessed she was not certain that such fences and hay were utilized on the hill prior to 1978. Skibbe explained that no written policy regarding maintenance of sledding hills had been produced. She added that it was her belief that bales of hay were placed on both sides of this hill each year.

When asked on cross-examination whether if given the opportunity, she would have ordered hay bales placed on the right side (south side) of the hill, she answered that she may not have for two reasons. First, the south side of the hill is sloped in an uphill curve, is slightly higher than the north side, and gravity would serve to slow the progress of any sled proceeding to the south side of the hill. Further, Skibbe declared that the hay bales had a tendency to freeze after absorbing a certain amount of moisture and in themselves become a source of injury when sledders ran into them.

Skibbe acknowledged that children sit on sleds in various ways with varying degrees of control over the direction of their sled. She stated that she knew steel posts were used to secure the snow fences but that the fence was clearly visible to all those who used the hill for sledding, and that a sign was posted clearly indicating that sledding on that hill was unsupervised.

Although never having designed a sledding hill herself, she said she was familiar with nearly 50 sledding hills in the Chicago metropolitan area maintained by municipal park bodies. Skibbe noted that she had never seen a hill designed with a "funneling" effect to naturally direct sleds straight down the hill. She added there was no established practice in the park management field governing the use of fencing alongside sledding hills; some municipalities employed them, others did not. She was not familiar with any other park district that lined the fences with hay bales.

Given such testimony in the case, Friedman argued on appeal that "the jury's verdict was contrary to the manifest weight of the evidence." To support this contention, Friedman cited the evidence that the park district "placed the metal post in the ground, was fully aware of the use of snow bales to keep sledders from going into the woods, and the park district believed that hay bales were on the south side of the hill on the date of her injury." According to Friedman, "defendant's only refutation of its alleged breach of duty owed the plaintiff was testimony that the hay bales did not constitute a buffer, but rather, when frozen, they were a dangerous condition."

As noted by the appeals court, however, Highland Park had relied upon other evidence to deny any liability under the circumstances of this case. Specifically, Highland Park maintained that the following evidence established Friedman's lack of due care.

Friedman was familiar with the hill, having sledded on it on previous occasions and several times on the day of the injury prior to striking the post. Friedman testified she knew of the fence, that it was clearly visible, and she made no attempt to avoid it. Several witnesses stated that it was clear there were no bales of hay lining the snow fence on the hill's south side.

These witnesses also stated that the sled was pushed off the top of the hill at a 45 degree angle, heading toward the fence. Friedman admitted that nothing in the slope or surface of the hill caused her to angle toward the fence and that neither she nor her sister knew how to steer the sled. Friedman's expert testified that even with a properly constructed hill without excessive undulations, a sled pushed at a 45 degree angle would possibly proceed into the fence.

Based upon this evidence, Highland Park contended that Friedman's lack of due care was the sole proximate (i.e. legal) cause of her injury.

According to the appeals court, "questions of a person's due care, another party's alleged negligence and proximate cause are 'preeminently' questions for the jury." In the opinion of the appeals court, defendant Highland Park park district had "introduced evidence from which the jury could infer that it was clear to sledders that the hill was unsupervised by park district personnel." Further, the appeals court acknowledged that "jury determinations can be set aside on review only when the reviewing court is clearly satisfied that the verdict was occasioned by passion or prejudice or found to be wholly unwarranted from the manifest weight of the evidence."

As described by the appeals court, "the standard for determining liability" for children injured on the premises of another "is foreseeability of harm to children."

A dangerous condition will be said to exist where is it one likely to cause injury to a general class of children who, by reason of their immaturity, might be incapable of appreciating the risk. However, this rule does not impose a per se [i.e. automatic] duty upon all owners or parties in possession to correct all conditions on their land for it is well settled that if the potentially dangerous condition presents obvious risks which children would be expected to appreciate and avoid, no duty arises to remedy the condition. This rule obtains even if an owner knows, as the park district did here, that children frequent the premises. The duty that is owed is to keep the premises reasonably safe and to warn of dangerous, non-obvious conditions... If a hazard is obvious, children are expected to avoid it and therefore no reasonably foreseeable risk of harm accrues to the defendant.

Applying these principles to the facts of the case, the appeals court found that "there was substantial support in the record for the jury to find for defendant park district given the facts surrounding Friedman's prior knowledge of her equipment, the hill, the patent [i.e. obvious] nature of the fence, the angle of descent and the lack of supervision." The appeals court, therefore, rejected Friedman's argument that the jury's verdict for Highland Park was "contrary to the manifest weight of the evidence."

In addition, the appeals court found that there was no duty to warn of an open and obvious danger.

Further, we find that the risk that children will drastically deviate from the path properly provided for sledding in not an "unreasonable risk" so as to produce a duty requiring the defendant park district to guard or supervise the hill or to warn Friedman against its use. Where defendant park district here established that Friedman and users of the hill in general could clearly see and were aware of the fence and the absence of hay bales, no duty to warn of a danger not known nor readily apparent to the users of the hill, could be said to exist.

Friedman had also argued that the trial court erred in failing to instruct the jury that a child under 14 years of age is presumed incapable of negligence. The appeals court rejected this argument.

The determination of whether a jury should be instructed as to the existence of a presumption must be made by the trial court in the context of the facts and circumstances of each case. However, the presumption ceases to operate when evidence is introduced against it. Only where there is no evidence that the plaintiff failed to exercise that degree of care which a reasonably careful minor of the same age, mental capacity and experience would exercise under the circumstances is the presumption operable... The trial court acted well within its discretion in determining which instruction regarding a minor's duty of care...

The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Highland Park park district.