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LAW & ORDER

IN DEFENSE OF TERRAIN PARKS

In a landmark case, terrain parks were recognized as a risk management tool, not a menace to jumpers.

By Mark B. Seiger and Charles F. Gfeller,
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The ski industry recently enjoyed a landmark courtroom victory in the case of *Malaguit v. Ski Sundown, Inc.*, a terrain-park injury case that ended with a unanimous jury verdict in favor of Ski Sundown, Conn. This trial provides great insight into how other areas can protect themselves from similar suits involving terrain park incidents.

The *Malaguit* case arose from a 2006 ski accident at Ski Sundown, which involved then-15-year-old James Malaguit. Malaguit was an intermediate skier who chose to ski over what has been described as a “modified roller” jump in Ski Sundown’s terrain park. After becoming airborne, as he intended, Malaguit somehow reverse-rotated and landed on the back of his head and neck. Malaguit was rendered a quadriplegic as a result of this fall.

Following the accident, Malaguit and his mother filed a lawsuit against Ski Sundown, alleging, among other things, that Ski Sundown was negligent in its operation of the terrain park. The lawsuit included a \$36 million life care plan. The claims amounted to an attempted assault on the ski industry as a whole, and in particular, on terrain parks, which the plaintiff’s attorneys painted as “the most dangerous place” on the mountain.

The defense countered by arguing that terrain parks have made “getting air” less dangerous, and pointed out that this was one of the main reasons the ski industry first introduced terrain parks. The defense also showed that terrain parks are now a significant risk management tool utilized by ski areas through-

out the United States, and beyond, to make the sport of skiing safer.

Dangerous Place?

From the very start of the *Malaguit* trial, the plaintiffs attempted to paint a picture that made terrain parks “the most dangerous place” on a mountain. Plaintiff’s counsel adopted a theme for his case in his opening statement—“too young to drive, old enough to fly”—taken from the title of a 2003 ski industry seminar. The plaintiff’s lawyer attempted to say that terrain parks are places where ski areas allow young children, who are not even old enough to legally drive a car, to launch themselves into the air and attempt ridiculous airborne maneuvers at great risk of injury.

The plaintiffs introduced “expert” testimony and references to various medical articles stating that catastrophic terrain park injuries were occurring in alarming numbers. Plaintiffs’ counsel repeatedly noted that terrain parks are not natural to the sport of skiing, but rather are man-made “amenities” that were unnecessary and only served to enhance the risks associated with skiing. As such, plaintiffs argued that the ski industry must be held accountable for having created a dangerous environment that encourages young skiers to engage in “reckless” conduct without appropriate education.

At first blush, plaintiff’s argument that terrain parks encourage unprecedented amounts and types of jumping may seem compelling to an outsider looking in. But in truth, terrain parks have their roots in risk management. And that was the basis of the defense.

A Reasoned Response To Jumping

As part of its defense, Ski Sundown relied on the testimony of noted ski historian and editor John Fry, long-time editor-in-chief of *Ski Magazine* and author of *The Story of Modern Skiing*. Fry impressed the jury with his lifelong devotion to the sport of skiing and his extensive experience, which includes friendships with the likes of Jean-Claude Killy and Steve and Phil Mahre, as well as being the creator of NASTAR ski racing.

The highlight of Fry’s testimony came when he recalled his start in skiing

at the age of six, while living outside of Montreal. In looking back at his youth, Fry told the jury that jumping and taking air were always part of the thrill and excitement of skiing. He testified that young skiers were constantly looking for opportunities to jump, and he described how young skiers would create their own jumps so that they could get air. In his opinion, this “ad hoc” jumping was not safe. Young skiers were building jumps without proper thought regarding their design, location, or visibility.

Fry testified that while the introduction of snowboarding in the late 1980s brought new life to the ski industry, it also exacerbated the problem of ad hoc jumping.

He told the jury that around 1990, the ski industry did something that, in his opinion, made the sport of skiing safer: it took control of jumping by creating terrain parks, where jumping could be done in a reasonably managed, contained, monitored, and relatively safe environment. These parks offered an environment where thought and planning could go into the creation of the various features, which could be built, tested, and maintained by ski area operators, all in an effort to create and control a reasonably safe environment for an activity that would otherwise be done through the creation of ad hoc jumps by untrained skiers.

Statistical Support

To further support Fry’s historical and anecdotal testimony, Ski Sundown called on Jasper Shealy, PhD, one of the world’s leading researchers on ski and snowboarding injuries. Dr. Shealy, a professor emeritus at Rochester Institute of Technology, noted for the jury that the overall rate of injury in skiing has been on the decline since 1970. Some of this decline may be attributed to the efforts of Dr. Shealy and others to make ski equipment safer. But, according to Dr. Shealy, the effects of improved ski equipment reached their high point around 1990. Any material decrease in the injury rate since that time must be attributable to other factors, he stated.

Dr. Shealy posed an interesting rhetorical question: if terrain parks are as dangerous as the plaintiffs believe,

why has the overall rate of injury continued to decline since the introduction of terrain parks around 1990? Dr. Shealy testified that the natural conclusion is that through proper design, construction, and maintenance of terrain parks, the ski industry has created a reasonably safe environment for jumping activities. By taking control of jumping activities through the creation of terrain parks, the ski industry has effectively used risk management techniques to make the sport of skiing safer. In other words, Dr. Shealy opined that terrain parks have actually made the sport of skiing safer!

Through the use of the graph below, showing injury rates per 1,000 skier visits on the left vertical axis, the number of ski resorts in the United States with terrain parks on the right vertical axis, and the years 1970 through 2010 on the horizontal axis, Dr. Shealy showed how injury rates continued to decline after the introduction of terrain parks in 1990.

As the graph shows, the injury rate in 1970 was 8 injuries per 1,000 skier visits. In 1990, the year that terrain parks came into existence, the injury rate was 3.5 injuries per 1,000 skier visits. According

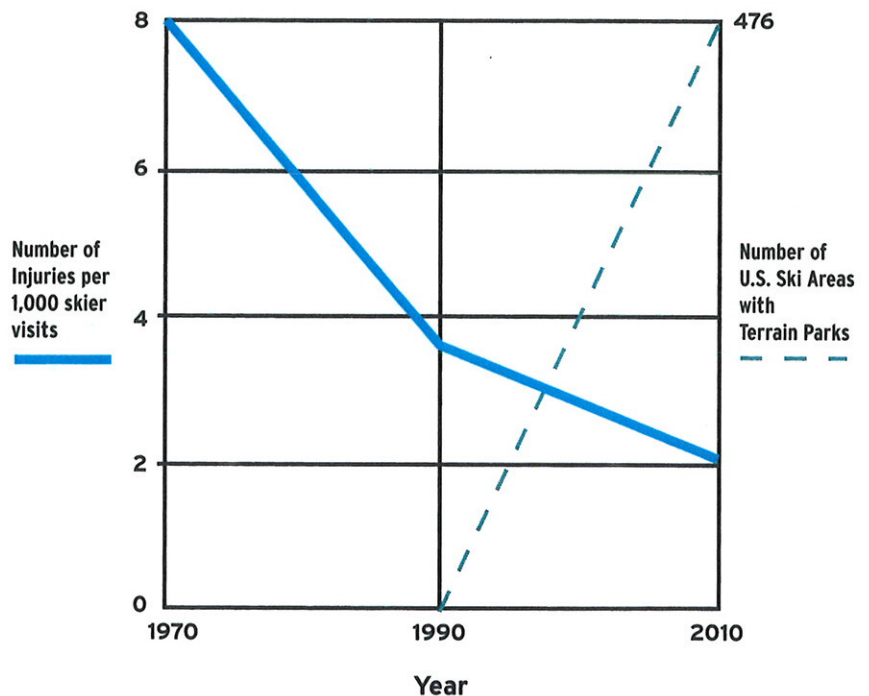
to Dr. Shealy’s testimony, the significant reduction in the injury rate from 1970 to 1990 was the result of the equipment standards that had been developed starting in the early 1970s. As mentioned above, Dr. Shealy testified that from 1990 to the present, he would not have expected the injury rate to continue to decrease as a result of equipment standards. Nevertheless, the injury rate continued to decrease from 1990 to 2010, where the rate of injury is now 2 injuries per 1,000 skier visits. This continued reduction in the injury rate occurred at a time when terrain parks were first introduced in 1990 to where virtually 100 percent of all ski areas in the United States now have terrain parks.

An Industry Perspective

In addition to Fry and Dr. Shealy, Ski Sundown relied on the testimony of Mark Petrozzi, vice president-risk management for Booth Creek Ski Holdings, and the chair of the National Ski Areas Association (NSAA) education committee for approximately 10 years.

Petrozzi provided the industry perspective on terrain parks, emphasizing *continued*

INJURY RATES

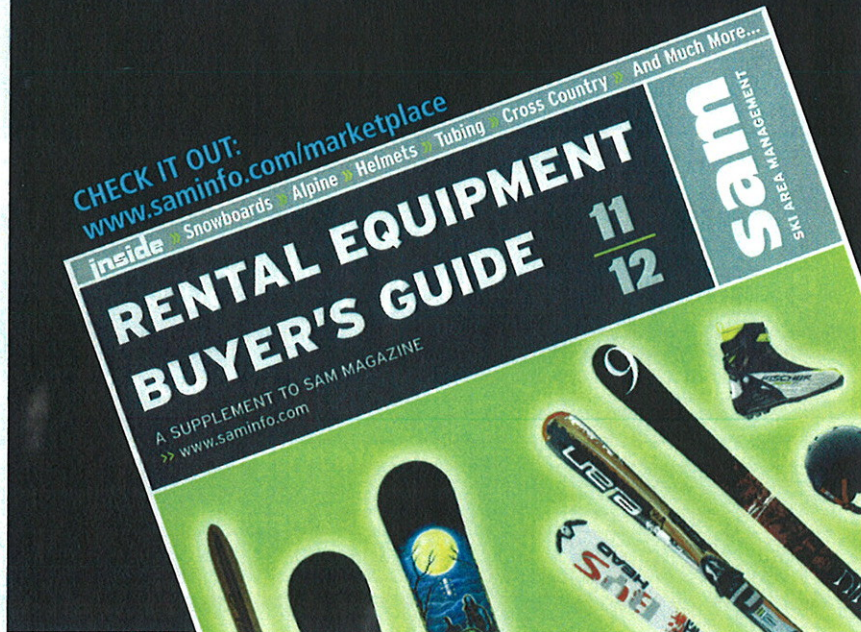


This chart, prepared by injury researcher Jasper Shealy, shows a declining injury rate (solid line, left scale) even as terrain parks grew in number (dotted line, right scale) over the past 20 years.

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the importance of proper design, construction, and maintenance. He testified that since jumping could not be eliminated from skiing, a risk management solution was necessary. In this regard, the terrain park was developed around 1990 as a means by which ski area operators could take control of the ad hoc jumping that was otherwise happening all over the mountain.

Petrozzi testified that the ski industry has long appreciated the need for collaborative efforts to share experiences among resorts so that they can continue to refine their terrain parks. To this end, the NSAA established within its education committee a working group to develop terrain park guidelines and introduce an element of uniformity. Further, Petrozzi noted that Cutter's Camp was established by SAM Magazine to enable terrain park personnel from across the country to gather on an annual basis to share their experiences and learn from one another. He also testified regarding the role of education and the importance of making terrain parks available to all skiers. His testimony concluded with his opinion that ultimately it is the skier's personal choice whether to use a terrain park, a choice for which the skier must assume responsibility.

Conclusion

In today's ski environment, nearly all jumping occurs within the confines of terrain parks. As a result, it is only natural that the vast majority of jumping injuries will occur in terrain parks. However, that does not mean that terrain parks are dangerous, and it certainly does not make terrain parks "the most dangerous place" on a mountain. Instead, through the use of history and injury statistics, Ski Sundown was able to prove, in the *Malaguit* case, that terrain parks have actually made skiing a safer sport. ■

Mark B. Seiger and Charles F. Gfeller are partners with the law firm of Seiger Gfeller Laurie LLP. They focus on civil litigation and the representation of sports and recreational facilities and product manufacturers, particularly ski areas and ski product manufacturers. They handled the Malaguit v. Ski Sundown, Inc. trial on Ski Sundown's behalf. For more information, visit www.sgllawgroup.com.