Playground Liability

While current legal issues such as bullying and cell phones tend to attract attention, liability for playground injuries has been a continuing subject of litigation in K-8 schools. The frequency of these cases has not abated despite periodic reminders in the professional literature for principals. The following case and accompanying question-and-answer discussion illustrate the varying factual circumstances and legal outcomes of recent court decisions. Most of these court decisions illustrate negligence, which is the primary avenue of liability: legal duty, breach of duty, proximate cause, injury, and any applicable defenses. Others show the alternate claims for playground liability.

The Case

David M. was a first grader at a public elementary school in New York. During recess, he broke his elbow when he fell from the monkey bars on the school’s playground. At the time of the incident, an after-school employee was supervising the playground, with David and six other children present. The employee immediately came over to David while he was getting up from the fall and arranged for medical treatment.

Later the same day, David’s father visited the scene with a yardstick. First he measured the height of the monkey bars, finding them to be 6.5 feet from the ground. Next, he measured the depth of the loose wood chips on the ground under the monkey bars, finding them to be a 6-inch layer above a layer of packed down chips that he did not measure. Subsequently, David’s parents filed a negligence suit against the district.

The district submitted deposition testimony as nonmandatory and outweighed by specific other relevant evidence. In a pair of other New York playground cases, one involving a slide and the other involving a horizontal ladder, the appellate court expressly regarded the CPSC standards as nonmandatory and outweighed by specific other relevant evidence.

In one case, the parents advanced secondary tort claims of failure to warn of the alleged latent danger of the surfacing material, and the condition of the monkey bars constituting a public nuisance, but the court summarily rejected both claims as being without evidentiary support. In the other case, the parents alternatively claimed inadequate supervision, but the court concluded that they had not provided evidentiary foundation that the single employee or her location was unreasonable under the circumstances (i.e., a breach of legal duty) and the proximate cause of David’s injuries.

If the CPSC guidelines favored the parents’ side, would they have necessarily prevailed?

No. Although these guidelines are entitled to weight, they are not necessarily controlling, depending on the other evidence. In a pair of other New York playground cases, one involving a slide and the other involving a horizontal ladder, the appellate court expressly regarded the CPSC standards as nonmandatory and outweighed by specific other relevant evidence.

What alternate claims of negligence, beyond insufficient ground cover, were available to the parents in this pair of monkey bar cases?

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The trial court granted the motion for summary judgment, and the state appellate court affirmed this ruling in favor of the district defendants. Both courts concluded that the defendants’ evidence was sufficient to entitle them to judgment as a matter of law on the ground-cover claim and the plaintiffs’ evidence was insufficient to raise a triable issue for two reasons: First, neither expert had inspected the playground, Second, their opinions were based on the father’s measurements, which did not reveal the depth of the lower layer of wood chips. Where expert’s opinions are speculative or without evidentiary foundation, they are not entitled to probative force.

What do you think was the eventual judicial outcome in this case?

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“Playgrounds … merit special attention in terms of risk management to avoid liability.”
Have other court decisions concerning playground liability instead focused on negligent supervision?

Yes. In such cases, the predominant factors have been the number of employees on the playground, their location, and their attention in relation to the injurious incident in question. In most of the cases, the court concluded that either the district met reasonable standards for these factors or, even if not, that the inadequacy was not the proximate cause of the child’s injuries.

For the several cases where proximate cause was the fatal missing element, time span was the key. For example, in one of these cases, the appellate court affirmed the jury’s finding that although the district had breached its duty for sufficient supervision, the accident occurred so quickly that greater supervision would not have prevented it.

In one of the rare exceptions among these New York cases concerning allegedly negligent supervision, the appellate court reversed the summary judgment for the district, thus preserving the issue for trial because 1) the plaintiff-parents based their claim on the quality of the attention, rather than the numerical sufficiency, of the assigned employees; and—although the mishap was sudden—2) the children had been playing tag on the playground equipment, contrary to school rules not to do so, for at least 20 minutes leading up to the incident. In the other exception, the appellate court restored the jury’s verdict, which the trial judge had overridden for lack of proximate cause, concluding instead that once the jury had found that the supervision was inadequate, it was logically impossible—given the sufficient span of time to intervene with corrective measure—not to also find proximate cause.

Has defective playground equipment been another avenue of alleged playground negligence?

Yes. However, an overlapping series of New York cases revealed the need for specificity in the nature of the alleged defect and sufficiency of the evidentiary foundation for such a claim. For example, in one case, the parents alleged that the equipment did not comply with the guidelines of the American Society for Testing and Materials, but the court rejected this claim as not relevant to the specific issue of negligent design or installation. In another case, the appellate court summarily rejected such a claim based on lack of evidence that the district personnel knew or had reason to know of the defect and that it was a proximate cause of the child’s injuries.

Why has so much of this litigation arisen in New York?

Part of the explanation for the preponderance of such litigation in New York is simply the propensity of litigiousness in this state. For example, it leads the other states in the number of due process hearings in special education and in the number of court decisions in civil law generally. However, another significant factor that is oft-neglected in principals’ legal knowledge and that is a potent defense in many states is governmental immunity to negligence liability. In “Governmental and Official Immunity for School Districts and their Employees: Alive and Well?” Peter Maher, Kelly Price, and I found that this common-law immunity was, with complicated variations, alive and well in the vast majority of states but that, with a limited exception where the plaintiff has a “special relationship” with the school district, school districts in New York do not enjoy this protection.

What other sources of playground liability arise beyond such physical injury accidents?

The primary alternative sources of playground liability are student assault or peer harassment in this relatively unstructured venue. For student assaults, two contrasting examples suffice. First, in a New York case, the appellate court upheld the district’s motion for summary judgment based on precedents in that state precluding liability for injuries resulting from a fight between two students predicated on negligent supervision where the plaintiff was a voluntary participant in the fight. In contrast, in a Louisiana case, the appellate court reversed a summary judgment for the school district where the injured student’s mother had repeatedly requested the assistance of the elementary school’s personnel based on the daily threats and attacks on her child. The court concluded that the allegations were sufficient for a trial, where the jury would have to determine whether the culminating assault was reasonably foreseeable to and preventable by the school officials.

Conclusion

Playgrounds, like physical education classes, field trips, and science and industrial arts activities, merit special attention in terms of risk management to avoid liability. Nevertheless, also like these other important aspects of K-8 schooling, the prevailing case law does not at all support eliminating or curtailing such activities. Rather, as a matter of professional concern with student safety without paralyzing fear of legal liability, public school leaders should exercise due diligence with regard to playgrounds. Specifically, the playground safety plan should include establishing reasonable rules and monitoring their enforcement in terms of:

- Maintaining and repairing playground equipment;
- Providing adequate ground materials devoid of visible hazards;
- Ensuring adequate supervision, including numbers, location, and attentiveness;
- Responsive alertness to not only dangerous games but also bullying generally and gender, disability, and racial/ethnic harassment especially; and
- Playground use before and after school hours in addition to recess and other school-time activities.

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