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TRIAL

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When playtime goes wrong

Thousands of kids are injured on playgrounds every year despite readily available safety standards. Those responsible can be held liable.

Edward Steinbrecher

Parents think of a playground as a safe haven for their children, but more than 200,000 children are seen in emergency rooms each year as a result of playground injuries. Seventy-five percent of these injuries occur on public playgrounds, and 75 percent are caused by falls. Thirty-six percent are classified as severe. At least 15 children die each year due to playground injuries, mostly caused by falls to hard surfaces, strangulation by entanglement, and head entrapment.[1]

These injuries are not confined to a few aging playgrounds. Safety problems are remarkably widespread. In a nationwide survey of 760 playgrounds, 87 percent lacked adequate protective surfaces, 42 percent had equipment with head-entrapment hazards, and 40 percent had equipment with protruding parts that could cause clothing to become entangled. Overall, 43 percent of the playgrounds surveyed had at least one piece of hazardous equipment.[2]

Most playground injuries and deaths can be prevented with safe equipment design and playground operation. Although it was common in the past for playground operators to attempt to place blame for an injury on the child who fell or on another boy or girl who pushed the injured child, these excuses are no longer valid. The duty to provide safe play areas should be placed on those responsible for marketing playground equipment and for operating playgrounds.

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The duty of care owed by a playground operator is the degree of care that a person of ordinary prudence charged with similar duties would exercise in the same circumstances.[3] A public or private landowner has a duty to provide adequate supervision and to maintain the premises and playground surfaces in a reasonably safe condition.

The most authoritative playground safety standards are published by the U.S. Consumer Product Safety Commission in its *Handbook for Public Playground Safety*.[4] This publication is the cornerstone of litigation involving dangerous conditions of playgrounds and related equipment. Another important resource is the *Report and Model Law on Public Play Equipment and Areas*, published by the Consumer Federation of America.[5]

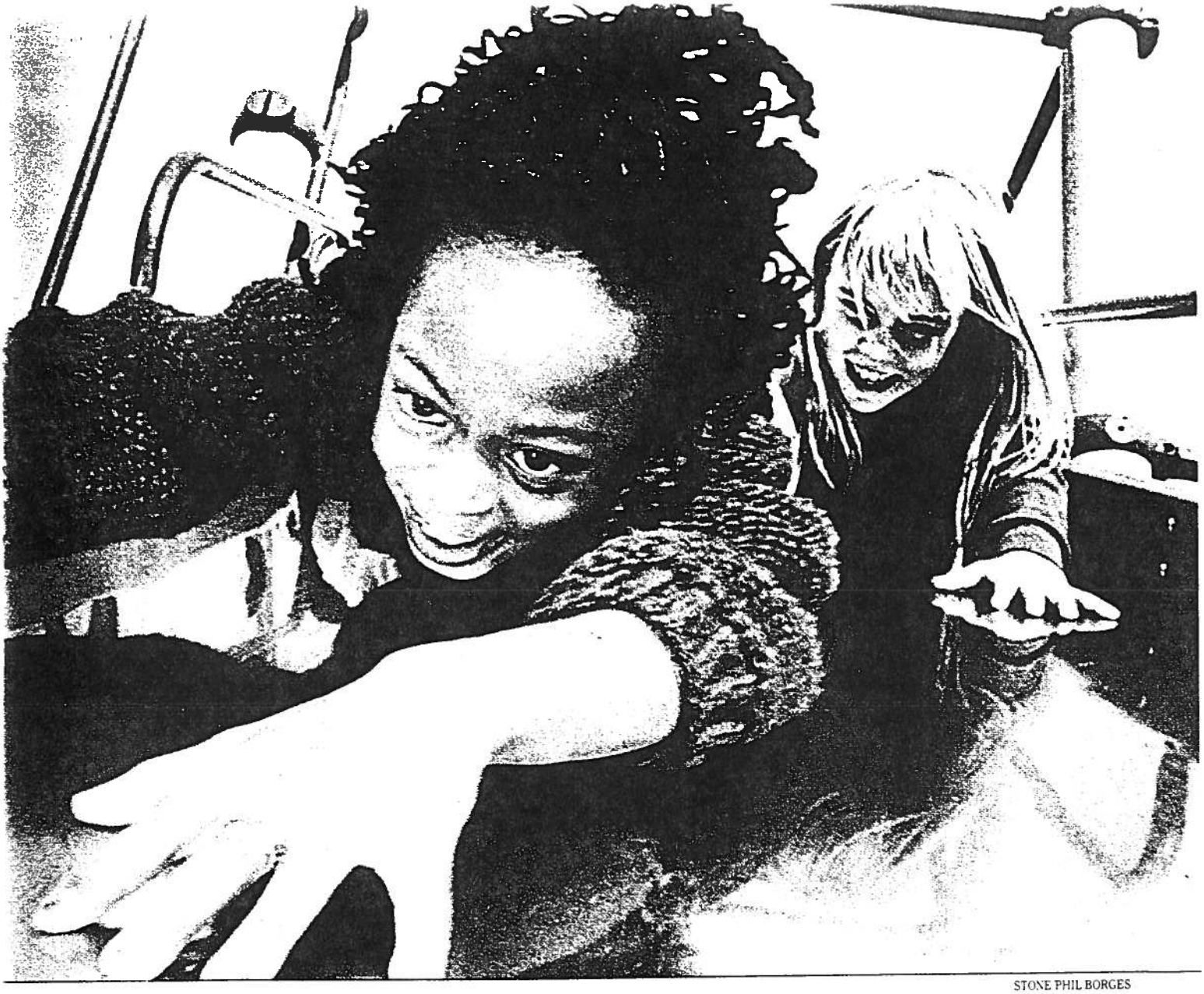
The *Handbook* and the *Report*, which list nearly identical standards, contain a wealth of information regarding playground-surface and equipment hazards. Any manufacturer of playground equipment or any public entity operating playgrounds is expected to be familiar with these standards.

Recently, the *Handbook* was adopted by statute in California, which now requires that all public playgrounds conform to these safety standards.[6] Connecticut, Michigan, New Jersey, North Carolina, and Texas have either adopted the *Handbook* or are close to doing so.[7]

The *Handbook* contains numerous requirements for appropriate inspection and maintenance of equipment and surfaces. Section 7.2 states that "all equipment should be inspected frequently for any potential hazards," and "any damage or hazards detected during inspection should be repaired immediately." This section requires that records of all maintenance, inspections, and repairs, as well as records of any accidents, be retained.

At trial, a playground safety expert or consultant familiar with these standards should present them to a jury.[8] The expert should refer to the standards as tools of good design, operation, and maintenance.

In the past, most playground cases were



STONE PHIL BORGES

Children's joy on playgrounds can turn to tears. Over 200,000 childen suffer playground injuries each year.

based on negligent supervision, and these claims should still be pursued. The defense usually seeks to blame the injured child, claiming assumption of the risk or contributory negligence.[9] Defendants also claim the injury would not have been prevented by the mere presence of supervision. Because a school district or public entity has only a general duty to supervise, defendants often argue, it is difficult to conceive of a plan that would require a supervisor to be near every child on a playground. Generally, liability is easier to establish when there was no supervision or when supervision was abandoned.[10]

However, despite defendants' typical arguments, it is well known that the presence of supervisors provides authority and discipline to protect against serious injuries.[11] Pupils who were present on a playground near the time of an accident have been allowed to testify that if a teacher or supervisor had been present, the children would have behaved differently.[12] If the accident involves a second student's misconduct, evidence of the student's prior misconduct will show that the supervisor should have foreseen the possibility of injury.[13]

Hazardous surfaces

The presence of a hard playground surface is another possible basis for operator liability, but the case law shows conflicting results in these claims.[14] Some states have found liability where playgrounds had hard surfaces that contributed to injuries,[15] while other jurisdictions have reached the opposite result and placed the blame for a fall on the child.[16]

Falls inevitably occur on playgrounds, but the severity of injury is directly related to the surface on which a child falls. According to the CPSC's *Handbook*,

> The surface under and around playground equipment can be a major factor in determining the injury-causing potential of a fall. A fall onto a shock-absorbing surface is less likely to cause a serious injury than a fall onto a hard surface. Because head-impact injuries from a fall have the potential for being life-threatening, the more shock-absorbing a surface can be made, the greater is the likelihood of reducing severe injuries.[17]

It is well documented that serious injury can occur from a fall of less than six inches on asphalt. Fatal injury can occur from a

fall from as little as one foot on asphalt and from as little as three inches on concrete.[18] Safer playground surfacing materials are available in two types: unitary, such as rubber mats; and loose-fill, such as sand, gravel, or shredded wood products. Falls on these surfaces are not life-threatening unless the child has fallen from a height of several feet.

The *Handbook* contains a table listing the "critical heights" of various types of surfacing material.[19] The critical height is the height below which a fall would not be expected to cause a life-threatening injury. An expert can measure the fall height (the height of the highest play surface) of a piece of equipment, and use the table to determine whether the ground surface is safe for that fall height. The critical height of the surface must be equal to or greater than the fall height of the equipment.

A safe surface of loose-filled materials needs frequent inspection to maintain adequate depth and to make sure the materials remain loose. Without maintenance, the surface can easily deteriorate and lose some of its shock-absorbing properties.

In a playground surface case, the jury needs to know that the type of surface determines the injury-causing potential of a fall and that careful design of the surface minimizes the risk of serious injury. The defendant should have taken this principle into account in designing and maintaining the playground. Industry standards can be used as proof of negligence or, at a minimum, to present a question of fact.[20]

A medical or biomechanical expert can explain to the jury the mechanism of injury and how much force is necessary to fracture certain bones or cause head trauma. If the fall onto a hard surface would have had a different outcome on a safe surface, causation may be established. The expert should explain why the surface was defective and what the outcome would have been if the surface had been safe.

Proving notice

In cases against playground operators, the plaintiff must offer proof that the defendant had actual or constructive notice of a dangerous condition—that the defendant either knew or should have known of the danger or defect.[21] The more obvious the dangerous condition, the more likely it is that the operator had constructive notice of it.

In a nationwide survey of 760 playgrounds, 43 percent had at least one piece of hazardous equipment.

Good sources for proving notice are other children who used the playground and people who conducted inspections, such as government inspectors or employees of the playground operator. Notice can also be proved by showing other incidents where children sustained injury in a similar fashion. The longer the dangerous condition existed, the more opportunity the defendant had to discover and remedy it.

Proof of the dangerous condition must be documented by timely photographs and videotape.[22] Measurements need to be made of the fall height, the protruding object, the entanglement or entrapment hazard, and the overall dimensions of the equipment.

Products liability

Like other products, playground equipment is considered defective if it is not as safe as an ordinary consumer would expect or if the benefits of the design are outweighed by the risks.[23] Equipment design is often implicated in causing serious injuries to children.

For example, Marlene Escalera broke her leg at a McDonald's playground while playing on a Tug-N-Turn, a self-propelled merry-go-round.[24] The shoelace from her sneaker got caught in a protruding bolt at the bottom of the stationary base that she twirled around, causing a spiral fracture of her leg. More than 40 other young children sustained the same injury on the Tug-N-Turn, yet nothing was done to eliminate the protrusion hazard.

McDonald's Corp. and JBI, the manufacturer, were aware that the protruding bolt was causing injuries and designed a cover to fit over the bolt, but they failed to retrofit about 1,000 Tug-N-Turns already in use at the restaurants. A jury found McDonald's Corp. liable on a products liability theory since it had actively participated in the product design.

A common theme of products liability cases involving playground equipment is the adequacy of warnings. A manufacturer must take into account reasonably foreseeable misuses of its product.[25] Liability extends to unintended uses if they were foreseeable. The manufacturer should provide warnings in light of all the foreseeable uses of the product and instructions regarding regular maintenance and replacement of parts.

Warnings help those responsible for the equipment practice reasonable accident prevention in light of potential hazards. Warnings can be placed in manuals, but they are better placed on the equipment because the manual is not always available to those charged with maintenance, inspection, and supervision.

While the duty to install safe surfacing belongs to the playground operator, a manufacturer must warn of the need for safe surfacing under its equipment. The company should provide a label warning of the danger of installing its equipment on hard surfaces and should warn that the fall height should not exceed the critical height of the surface. The manufacturer should give information about the critical heights of various types of surfacing.

A manufacturer should not be able to claim that the danger of installing climbing equipment on asphalt is obvious to a person of ordinary prudence.[26] The company has superior knowledge regarding safe installation and surfacing around its product.

The absence or inadequacy of warnings needs to be causally linked to the conduct that would have been different had proper warnings been provided. Warnings are meant to guide the behavior of the adults in charge of the playground who may not understand the hazards and what they

could have done to make the equipment and play area safer. In some jurisdictions, there is a presumption that a warning would have been heeded had it been given.[27]

In investigating the warnings, it is important to obtain the manufacturer's literature, such as advertising, catalogs, and instructions for assembly and maintenance. The playground operator should provide the purchase documents; the inspection and maintenance documents; and any rules or guidelines for inspection, maintenance, and operation of the playground.

Once the hazards are understood, the warnings given by the manufacturer must be reviewed to determine whether better warnings would have made a difference in the outcome of the accident.

Like crashworthiness cases

In some ways, playground cases are similar to crashworthiness cases. Car manufacturers are required to protect against the foreseeable consequences of an automobile collision. It does not matter who is at fault in causing the accident. Rather, the issue is whether the injuries could have been prevented or minimized through safe design.[28] These same principles apply to playground accidents.

Under a negligence or products liability theory, the negligence or defect does not have to be the only factor in causing the injury, but it must be a substantial factor.[29] For example, a slide may be equipped with inadequate handrails, but an injury might occur when one child pushes another child in such a way that the handrails would make no difference. Under these circumstances, the manufacturer would probably not be liable. However, the jury should be allowed to decide whether inadvertent falls or typical child's behavior that could be construed as negligence was foreseeable to the manufacturer or playground operator.

Playground safety has improved over the years, but much more needs to be done. Most of the 200,000 injuries a year that send children to emergency rooms—as well as the 15 deaths each year—can be prevented if playground operators follow widely available safety standards and if manufacturers design equipment careful-

ly and warn users adequately. Safe design, proper warnings, and adherence to safe standards of operation are not too much to ask for the safety of our children. □

Notes

1. CONSUMER PROD. SAFETY COMM'N, PUB. NO. 325, HANDBOOK FOR PUBLIC PLAYGROUND SAFETY (1997) (available at http://www.cpsc.gov) [hereafter CPSC HANDBOOK]; M.G. Mack et al., *Playground Injuries in the 90's*, 33 PARKS & RECREATION 88 (1998); National Program for Playground Safety, *Statistics* (visited Apr. 23, 2000) http://www.uni.edu/playground/.

2. U.S. Public Interest Research Group, *Playing It Safe: A Fourth Nationwide Safety Survey of Public Playgrounds* (visited Apr. 23, 2000) http://www.pirg.org/consumer/playground/98/.

3. *See, e.g.*, District of Columbia v. Shannon, 696 A.2d 1359, 1363 (D.C. 1997).

4. First published in 1981, revised in 1991, 1994, and 1997. Download a free copy at http://www.cpsc.gov.

5. First published in 1992, revised in 1996 and 1998.

6. CAL. HEALTH & SAFETY CODE §115730 (West 2000).

7. *See* National Program for Playground Safety, *In the News* (visited Apr. 23, 2000) http://www.uni.edu/playground/.

8. Dash v. City of New York, 654 N.Y.S.2d 33, 34 (App. Div. 1997).

9. At common law and in most states, a minor under the age of four is not capable of negligence. Untalan v. Glass, 12 Cal. Rptr. 1, 2 (1961).

10. *See* Lopez v. City of New York, 163 N.Y.S.2d 562, 565 (App. Div. 1957), *aff'd*, 178 N.Y.S.2d 860 (1958).

11. Titus v. Lindberg, 228 A.2d 65, 70 (N.J. 1967).

12. *See* Cirillo v. Milwaukee, 150 N.W.2d 460, 465 (Wis. 1967).

13. Silverman v. Board of Educ., 225 N.Y.S.2d 77 (App. Div. 1962).

14. *See, e.g.*, James L. Isham, Annotation, *Liability of Local Government Entity for Injury Resulting from Use of Outdoor Playground Equipment at Municipally Owned Park or Recreation Area*, 73 A.L.R. 4th 496 (1989).

15. *See, e.g.*, City of Miami v. Ameller, 472 So. 2d 728, 729 (Fla. 1985); Prosser v. County of Erie, 665 N.Y.S.2d 216 (App. Div. 1997).

16. Scarano v. Town of Ela, 520 N.E.2d 62, 65 (Ill. App. Ct. 1988); Stewart v. New York City Hous. Auth., 307 N.Y.S.2d 674 (App. Div. 1970).

17. CPSC HANDBOOK, *supra* note 1, at §4.

18. CONSUMER PROD. SAFETY COMM'N, PROPOSED STANDARD FOR PUBLIC PLAYGROUND EQUIPMENT 29 (1976).

19. CPSC HANDBOOK, *supra* note 1, §4.5, Table 1.

20. Hinckley v. Krantz, 658 N.E.2d 797 (Ohio Ct. App. 1995).

21. *See, e.g.*, Miller v. District of Columbia, 343 A.2d 278, 280 (D.C. 1975) (stating that constructive notice is inferred from duty to inspect); Felt v. City of Toledo, 192 N.E. 11 (Ohio Ct. App. 1933).

22. *See, e.g.*, Ortego v. Jefferson Davis Parish Sch. Bd., 657 So. 2d 378, 381 (La. Ct. App. 1995) (holding photos taken four months after the accident inadmissible).

23. *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978).

24. Escalera v. McDonald's Corp., No. 208390 (Cal., Kern County Super. Ct. Dec. 3, 1991). A $5 million fine was later imposed by the CPSC based on McDonald's failure to report playground accidents.

25. *See, e.g.*, Ringstad v. I. Magnin & Co., 239 P.2d 848 (Wash. 1952).

26. Hart v. Western Inv. & Dev. Co., 417 F.2d 1296, 1301 (10th Cir. 1969).

27. *See, e.g.*, Coffman v. Keene Corp., 628 A.2d 710 (N.J. 1993).

28. *See, e.g.*, Kudlacek v. Fiat S.p.A., 509 N.W.2d 603, 606 (Neb. 1994).

29. *See, e.g.*, Mitchell v. Gonzales, 819 P.2d 872, 876 (Cal. 1991).