Several years ago, during the so-called liability crisis of the late '80s, *Time* magazine did a feature article on the unavailability of insurance supposedly caused by the threat of liability. This article was accompanied by a photo of Chicago Park District personnel removing playground equipment from a park district facility. As described by the article, the removal of playground equipment was prompted by a multi-million dollar lawsuit involving a fall from a park district slide. In this case, a toddler sustained severe brain damage when he fell from a slide onto a hard surface. The child's mother had helped him gain access to the slide. To the best of my recollection, this particular case was settled for a sizable amount, rather than litigated.

The *Salinas* case described herein involved a similar set of facts, a fall from playground equipment onto asphalt causing catastrophic injury. However, in *Salinas*, the Chicago Park District litigated, rather than settled the lawsuit. Unlike the lawsuit described in *Time*, *Salinas* was not reported in the national media. Claims which are successfully defended rarely make headlines. A review of existing case law, including the *Salinas* decision, would indicate that courts can be very hard-nosed in denying recovery to a very sympathetic plaintiff.

The popular media, however, tends to distort the truth regarding the incidence of recreational injury liability. Based upon newspaper accounts, one might believe that liability is a foregone conclusion when the a sympathetic plaintiff has sustained serious injury. This distorted perception of liability may prompt park and recreation administrators to needlessly curtail public recreational opportunities.

For example, the implied message in the *Time* article was that the slide accident had caused the Chicago Park District to remove all playground equipment. Such a response would constitute an unfortunate over-reaction to the perceived threat of liability. Such drastic measures would not be based upon existing legal principles as illustrated by the *Salinas* decision described herein. The more reasonable approach would be to remove all hard surfaces underneath existing playground equipment. We, in the parks and recreation field, have known about such precautions, at least, since 1979. In 1979, the *Public Playground Safety Guidelines* published by the Consumer Product Safety Commission (CPSC) recommended the removal of hard surfaces under playground equipment. In general, the customs, practices, and usages of the parks and recreation field have adopted this CPSC recommendation wherein asphalt, concrete, and other non-resilient surfaces beneath playground equipment would be considered unreasonably dangerous.

Documents like the CPSC Guidelines and generally accepted practices in the field of parks and recreation are certainly evidence indicative of the applicable legal standard of care in a given instance.
On the other hand, such written standards or prevailing norms are not necessarily proof positive of the applicable legal standard of care, unless such standards have been given the effect of law by a legislative body. e.g., laws, ordinances, regulations. As a result, prevailing safety norms in a field or practices recommended by risk managers and safety experts are not necessarily the same legal standards which would be imposed by a court. In fact, the legal standard may very well be lower than that advocated by safety experts in a given field.

For example, the legal standard for a reasonably safe automobile is usually defined by the requirements of the state motor vehicle code. Although reasonably safe as defined by the law, a vehicle which barely meets the minimal requirements of the motor vehicle code would generally be considered less than desirable by automobile safety experts. Similarly, the legal standard for recreation facilities, like playgrounds, is oftentimes lower than that generally considered acceptable by safety experts in parks and recreation.

Despite possible discrepancies between the recommended standards of safety experts and the generally lower legal standard of care, it would behoove the prudent park and recreation administrator to perform in a manner consistent with the more demanding safety standards. In so doing, the agency will have a margin of error between its practices and the applicable legal standard of care. More importantly, however, safety practices which are more demanding than the applicable legal standard are more likely to prevent injury-causing situations which give rise to lawsuits. Given the costs associated with defending a lawsuit and the political/public relations fallout associated with injuries, the litigation process is a losing proposition whether your agency ultimately wins or loses in court. The message is, therefore, to operate your facilities and programs on the generally higher plane espoused by safety experts and risk managers, knowing that the legal standard may be less demanding.

Recent reported decisions from Illinois illustrate this point. As described above, the CPSC Guidelines would find asphalt beneath playground equipment to be unreasonably dangerous. These Guidelines, however, have not been adopted as the legal standard through laws, ordinances, or regulations in Illinois. As a result, Illinois courts are not bound by the Guidelines.

In Illinois, negligence liability will be imposed on a landowner for unreasonably dangerous conditions which cause injury. However, the legal definition of unreasonably dangerous is quite different from that contained in the CPSC playground safety guidelines. Under Illinois law, an unreasonably dangerous condition is one which would not be obvious to the injured party. At least two Illinois decisions have found asphalt beneath playground equipment is not unreasonably dangerous because it poses an obvious risk of injury to even small children.

The December 1987 "NRPA Law Review" column described the case of *Alop by Alop v. Edgewood Valley Community Association*, 507 N.E.2d 19 (Ill.App. 1 Dist. 1987) in which an Illinois appeals court had found that asphalt under a slide was an open and obvious hazard which children are expected to know, appreciate and avoid. Having found that the risk of injury posed by the hard surface under the slide was obvious, the appeals court concluded that the defendant landowner owed no legal duty of
care to protect children from such hazards. The appeals court, therefore, affirmed the judgment of the lower court dismissing plaintiff's case.

In describing the Alop decision, I expressed my belief that "the Alop decision presents a minority view which would not be followed in other jurisdictions." Although the Alop decision was not appealed to the Illinois supreme court, I expressed the opinion that the Illinois supreme court may very well find asphalt beneath playground equipment to constitute an unreasonably dangerous condition when it receives and chooses to review subsequent decisions on point.

The Salinas decision described below similarly found the risks posed by asphalt surfacing to be obvious. As in Alop, the Salinas decision was not appealed to the Illinois supreme court. The Salinas decision is, therefore, final. (This information was obtained from the clerk's office at both the appeals court and the state supreme court.)

Accompanying Parent Must Supervise

In the case of Salinas v. Chicago Park District, 545 N.E.2d 184 (Ill.App. 1 Dist. 1989), plaintiffs Rogello and Socorro Salinas brought this wrongful death action against the defendant Chicago Park District following the death of their daughter, Evelia, caused by a fall from a slide in a city park. The facts of the case were as follows:

According to the deposition [i.e. out of court sworn testimony] of her mother, Evelia, eight years old at the time of her fall, was a "mongoloid" child, which she understood to mean that Evelia would develop very slowly. Between the ages of four and five, Evelia attended Morris Inter-American Magnet School, described by her mother as a "special" school; she then attended three years of kindergarten at Louis J. Agassiz School. Evelia suffered from poor speech, which only her mother could understand. Evelia did not receive any special education schooling or services during the summer.

On July 28, 1982, her mother took Evelia to a Chicago Park District park located at Racine and Draper, where the two of them were in the habit of going at least once or twice a week. In the park there was a slide, approximately five feet high with eight steps leading to a large circular platform on the top which was one step above the eighth, or top step.

Evelia walked over to the slide and began climbing the stairs. Her mother was watching as Evelia started to climb and last saw her when she was on the fourth step climbing to the fifth. Her mother turned to speak to a friend and then turned back when she heard Evelia strike the ground. Evelia was taken to Children's Memorial Hospital, where she died on August 12, 1982, as a result of head injuries sustained in the fall.
Chicago Park District argued that "it owed no duty to protect Evelia from the fall" and, further, Salinas "had offered no evidence that any defect in the slide proximately caused the accident." The trial court agreed and granted Chicago Park District's motion for summary judgment. Salinas appealed.

According to the appeals court, "a landowner may be liable for injuries incurred if a slide is defective and the defect causes a fall." The issue before the appeals court was, therefore, whether the allegedly "unsafe and defective condition of the slide proximately caused Evelia to fall." Salinas' expert witness, a playground safety consultant, had testified that "the platform of the slide was defectively installed because there was a bar across the very top of the stairs which made it difficult for children to gain access to the platform." However, in the opinion of the appeals court, the evidence in this case was insufficient to establish that the allegedly defective platform on the slide had caused the fall.

[Proximate [i.e. legal] cause can be established only where there is reasonable certainty that defendant's acts caused the injury. Where, from the proven facts, the non-existence of the fact to be inferred appears to be just as probable as its existence, then the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a trier of fact cannot be allowed to draw it.

In this case, as the circuit [trial] court noted, it cannot be determined from the evidence presented whether Evelia fell from the stairs, while trying to enter the platform, or from the platform itself. There is no evidence as to where Evelia was at the time of her fall or as to what caused her fall. Because there was no evidence that Evelia climbed all of the stairs and attempted to climb from the last stair to the platform, a finding that she fell as a result of any defect in the platform would be based upon conjecture and speculation.

Salinas' playground safety expert had also maintained that "the asphalt surface beneath the slide was an unsuitable surface and created a dangerous condition which children could not appreciate." The appeals court rejected this argument. "[O]ur courts have held that an asphalt surface beneath a slide is, in itself, an inadequate basis for liability."

Salinas had also argued that "Evelia must be treated as a child of tender years... because of her alleged physical and mental handicaps." Specifically, Salinas maintained that "the risk of suffering a fatal head injury was an unreasonable risk of harm which could not be appreciated by Evelia..." The appeals court rejected this argument. In the opinion of the appeal court, the slide was not a dangerous condition. According to the appeals court, a landowner generally "owes no duty to a child for the obvious risk of falling off a slide."

A landowner has a duty to protect children on its premises from harm only if the landowner has reason to know that children are likely to come upon the land where a dangerous condition exists and that the dangerous condition is likely to harm children who, because of their immaturity, might be incapable of appreciating the risk involved...
A landowner owes no duty to a child if children of similar age and experience would be able to appreciate the dangers on the premises. There is no duty on the part of a landowner to remedy obvious risks which children know or should know are presented, because they are expected to avoid dangers which are obvious and therefore no reasonably foreseeable risk of harm exists... Moreover, if a child is too young chronologically or mentally to be "at large," the duty to supervise that child as to obvious risks lies primarily with the accompanying parent.

Salinas contended that Evelia "should be exempt from the general rule" because she "was mentally handicapped." In the opinion of the court, mental incapacity does not change this no duty rule regarding obvious risks. "[W]hen ascertaining a child's appreciation of danger, our courts do not consider the subjective understandings and limitations of the child when a risk is deemed obvious to children generally."

Evelia was eight years old at the time of her injury. She had attended school for several years, was in kindergarten, visited the park regularly with her mother, and had played on the very slide from which she fell. Under these circumstances, Evelia should have been able to appreciate the dangers involved in falling from the slide... Here, Evelia was accompanied by her mother, who allowed her to climb the slide without any physical help or visual observation. Application of a subjective standard in cases such as this, would expose landowners to new risks, relieve an accompanying parent of a duty to supervise, and be contrary to the standards stated in other decisions.

The appeals court, therefore, concluded that the trial court had properly granted summary judgment to defendant Chicago Park District.