PLAYGROUND SUPERVISION QUESTIONED IN EYE INJURY CASES

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This month's column presents two court decisions which examine various aspects of playground supervision liability. The Cassidy and Jenkins opinions described herein have frequently appeared in my presentations and university courses on the topic of recreational injury liability, including references in the videotape series of the "National Workshop on Recreational Injury Liability" produced by NRPA and the George Mason University Center for Recreation Resources Policy.

As a general rule, individuals are not liable for the criminal or negligent acts of third parties. However, when such misconduct by others is foreseeable, the provider of recreational facilities and programs may have a duty to provide adequate supervision to protect those at risk. Within this context, third party misconduct is foreseeable if the reasonable person under the circumstances would know, or should know, that injury is likely to result from the negligent or intentional acts of others.

Once foreseeability is established (i.e. a supervisor is aware, or should be aware, of a dangerous situation), the supervisor must take the appropriate burden of precaution to address the hazard within a reasonable time. Liability will be imposed where inadequate supervision "causes" the resulting injury, i.e. make it more likely than not. Conversely, if injury would have resulted with or without adequate supervision, causation is lacking and liability will not be imposed. In the Cassidy case described herein, the court found these two key ingredients for liability (foreseeability and causation) to be lacking. Although the Cassidy decision involves a school setting, the legal principles involved are readily applicable to recreation and playground supervision in other situations.

It is not necessary to foresee the exact nature of the accident to establish foreseeability for negligence liability. It is sufficient if the reasonable person would be aware of the injury causing propensity of a given situation. On the other hand, the injury must be of the general kind usually associated with a given set of circumstances. The Jenkins case described below addressed this particular aspect of foreseeability. More importantly, however, the Jenkins decision provides a good example of qualified governmental immunity for a failure to supervise a playground.

As indicated by the Jenkins decision, public entities oftentimes have discretionary immunity to decide when, or if, to provide playground supervision. As long as the arguably negligent decision not to supervise is pursuant to a policy/planning/judgmental process, the courts will not second-guess such decisions by imposing liability on a public entity. However, once this "planning" discretion is exercised and the government decides to provide a facility or supervision, there is an "operational" duty to perform in a non-negligent fashion.

UNEXPECTED, NO TIME TO PREVENT?
In the case of District of Columbia v. Cassidy, 465 A.2d 395 (D.C.App. 1983), plaintiff Robert DeShawn Cassidy was injured when he was struck in the left eye by a stick thrown by another student in a kindergarten class under the control of defendant District of Columbia. The facts of the case were as follows:

On December 2, 1977, Cassidy was a student in a kindergarten class at Keene elementary school taught by Mrs. Elaine Williams... There was one other kindergarten class at the school... There were approximately 48 children in the two combined classes... Williams was responsible for watching the children during the lunch period and Mrs. Annie Gales, a substitute teacher, was to supervise the children during the playground recess. However, Williams decided to accompany her class to the playground that day at approximately 1:00 p.m., shortly followed by Gales' class. There were no other classes on the playground.

The school's playground, covering the length of the school and beyond, was a large blacktop area... On December 2, the children were playing in this area and the teachers positioned themselves between the school building and the play equipment about 18 - 20 feet from the children. According to Williams, all of the children were in front of her; Gales testified that there were a few children behind her. At about 1:30 p.m., Williams excused herself from the playground to go to the restroom, and Gales agreed to continue to watch the two classes. At this time, Gales was approximately eight feet from the play equipment and was "revolving and turning all around."

It was during the time of Williams' absence that the accident occurred. Several children brought Cassidy, whose eye was bleeding, to Gales who had neither heard an outcry nor seen what had happened. When Williams returned from the ladies room, about five to seven minutes after she left, she was met by Gales and Cassidy who were walking toward the school. Williams took Cassidy to the school office and Gales remained with the children on the playground.

Cassidy testified that he and his friend, Frank Washington, were playing a game called "Marine Boy." Marine Boy was not an organized school-sponsored game, but was a fictional game created by the children. According to Cassidy, Marine Boy "lives underwater, and he has an underwater boomerang" that he throws. This stick, or "underwater boomerang" was an integral part of the game of "Marine Boy." Cassidy testified that they were playing this game near the steps leading to the auditorium, which would have been directly across the playground from the slides and monkey bars. Cassidy saw Washington with a stick in his hand, which he approximated at trial to be 11 inches long. Cassidy then turned away "for about five seconds," and then turned back round toward Frank, when he was immediately hit in the eye. Washington testified that he had held the stick for six seconds before he accidently threw it at Cassidy. This accident resulted in the loss of Cassidy's eye.
Cassidy argued that the District of Columbia was negligent in its "failure to exercise reasonable supervision of two kindergarten classes which were playing on the school's playground at the time." A jury returned a verdict totalling $150,000.00 against the District of Columbia. The trial court entered judgment accordingly. The District of Columbia appealed.

As described by the appeals court, "the crucial question here is whether Cassidy demonstrated that the District of Columbia, through the negligence of one of its teachers, breached the duty of care owed to Cassidy and that such breach was the proximate [i.e. legal] cause of Cassidy's injury." The appeals court defined the applicable legal duty of care under the circumstances of this case as follows:

Under the law of negligence, the standard of care is defined as "reasonable care under the circumstances." Within the context of a school playground situation this duty has been interpreted to mean the exercise of such care "as a parent of ordinary prudence would observe in comparable circumstances." This duty, however, is restricted by the common law tort principle that limits liability to those injuries which are reasonably foreseeable results of one's action or inaction. The tortfeasor [i.e. wrongdoer], generally not liable if the injury was proximately caused by intervening act of a third party, is not relieved from liability, however, when the intervening acts were foreseeable.

It is generally agreed that a school district is not the insurer of the complete safety of school children, nor is it strictly liable for any injuries which may occur to them. Usually, whether one teacher overseeing a particular number of children in a playground is adequate supervision is a question of fact for the jury, as is the issue of proximate cause. Where, however, it is clear that reasonable persons could draw but one conclusion from the facts alleged, negligence and proximate cause become questions of law [to be decided by the trial judge, rather than the jury].

Applying these principles to the facts of the case, the appeals court found that Cassidy had not "demonstrated a breach of duty on the part of the District."

Here it has been shown that although the school approved plan required only one teacher to supervise the playground area, both Williams and Gales accompanied their respective classes during the recess period. While Williams briefly absented herself to visit the restroom, Gales remained on the playground watching the children. In order to effectively watch over her charges, Gales turned around monitoring the front and rear portions of the play area. Washington and Cassidy were not playing in an area off limits to them. Thus the operative supervisory plan was being followed.

Further, the appeals court found that Cassidy had "failed to show that a violation of the reasonable standard of care was the proximate cause of the injury sustained." Specifically, the appeals court found that Cassidy had failed to sustain his burden of establishing that, through the exercise of reasonable care under the circumstances, the act which caused the injury might have been anticipated or prevented.
A teacher cannot anticipate the varied and unexpected acts which occur daily in and about the school premises. Where the time between an act of a student and injury to a fellow student is so short that the teacher has no opportunity to prevent injury, it cannot be said that negligence of the teacher is the proximate cause of the injury...

How could any teacher anticipate a situation where one child... would be struck in the eye with a stick... Even if such action could be anticipated, there is no showing of any likelihood whatsoever that such action could have been prevented by a teacher or supervisor even if he or she was standing right there. As is often the case, accidents such as this, involving school children at play, happen so quickly that unless there was direct supervision of every child (which we recognize as being impossible), the accident can be said to be almost impossible to prevent...

The evidence adduced at trial showed merely that, due to the quickly occurring, unexpected conduct of a child, Cassidy was struck in the eye by a stick thrown by another student during a supervised play period; thus, the injury was the consequence of an unforeseeable, intervening act of a third party which could be neither anticipated nor prevented and for which the District cannot be held liable under the common law tort principles of negligence and proximate cause.

Given the evidence in this case, the appeals court, therefore, concluded that "no reasonable juror could find a proximate cause connection between the teachers' conduct and the injury." As a result, the appeals court found that the trial court had erred in not granting the District's motion for judgment notwithstanding the verdict of the jury. Consequently, the appeals court reversed the judgment of the trial court for Cassidy and entered judgment for the District of Columbia.

IMMUNITY, SCOPE OF DANGER?

In the case of Jenkins v. City of Miami Beach, Fla.App., 389 So.2d 1195 (1980), plaintiff Tammy Jenkins "was injured late at night in Stillwater Park." Jenkins was injured "when a young boy threw a piece of copper coil which he had pulled free from a park water fountain." Jenkins was struck in the eye by the coil. Jenkins argued that the defendant City's "failure to supervise the park at night despite its knowledge that it was frequented by minors was the proximate (i.e. legal) cause of Jenkins' injury." In addition, Jenkins alleged that "the City's failure to properly maintain the water fountain (allowing the copper coil to become loose enough to be pulled free) was the proximate cause of Jenkins' injury." Specifically, Jenkins contended that the "the young boy's intervening act was arguably foreseeable given the City's admitted knowledge of previous acts of vandalism and 'unruly and undisciplined conduct' engaged in by minors in the park at night."

The trial court entered summary judgment in favor of the defendant City of Miami Beach. Jenkins appealed.

Applying the following four-part test, the appeals court found that "the City's decision to provide no
supervision in Stillwater Park at night is a planning or discretionary governmental decision for which the City cannot be held liable in tort."

As applied to the present case, the inquiry is (1) does the decision to provide no supervision in the park at night involve a basic governmental policy? (2) is the decision essential to accomplish that policy? (3) does the decision require the exercise of basic policy evaluation or judgment? (4) does the City have the lawful authority to make the decision? We answer all four questions affirmatively and thus classify the decision as a planning one which, regardless of its wisdom, cannot give rise to a tort claim.

On the other hand, the appeals court found that this same four-part test dictated that "the City's alleged negligent maintenance of a water fountain in the park is operational level activity for which it can be held liable." The appeals court, however, acknowledged that "liability for the alleged negligent maintenance of the water fountain can only attach if the intervening criminal act of the young boy was foreseeable." In the opinion of the appeals court, the alleged negligent maintenance of the water fountain did not make it foreseeable that a boy would use the protruding coil as a fortuitous missile to hurl at Jenkins. On the contrary, the foreseeable risk of injury associated with this type of defect is that someone would be lacerated by the protruding coil when using the water fountain.

The City's knowledge of previous acts of vandalism committed in the park makes it foreseeable that willful and malicious destruction of property may occur. The City's knowledge that minors engaged in "unruly and undisciplined conduct" makes it foreseeable that minors will engage in conduct difficult to govern or control. But such foreseeability is, without more, unrelated to the alleged negligence of the City.

The question whether the boy's act, clearly an intervening cause of Jenkins' injury, was foreseeable so as to render the City liable can only be answered in affirmatively if the harm that occurred was within the scope of danger attributable to the defendant's negligent conduct. The record before us does not reflect that the City had knowledge that its failure to properly maintain the water fountain had in the past led to this type of injury, or that in the field of human experience, allowing a loose copper coil on the water fountain had so frequently resulted in its being torn free and used to assault others that the City should have expected such a thing to occur in its park.

The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant City of Miami Beach.

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