PLAYGROUND LIABILITY FOR EXPOSED CONCRETE FOOTING UNDER MONKEY BARS IN STATE PARK

James C. Kozlowski, J.D., Ph.D.

Documents like the Consumer Product Safety Commission's Handbook for Public Playground Safety are not conclusive be evidence 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 as illustrated by the case of McCarthy v. State of New York, 562 N.Y.S.2d 190 (A.D. 1990). In this instance, plaintiff was injured in a playground when she fell to the ground from a horizontal ladder. Plaintiff's playground safety expert offered the CPSC guidelines as evidence that "the surface upon which she fell constituted an unsafe and dangerous condition for which the State should be liable."

The appeals court, however, found that this CPSC evidence of the applicable standard of care "was clearly inadequate in that guidelines promulgated by the United States Consumer Product Safety Commission, upon which he relied, were not mandatory or meant to be the exclusive standards for playground safety." Similarly, the CPSC handbook itself presents itself "in the form of guidelines" providing safety information on playground equipment, rather than mandatory rules defining the applicable legal standard of care.

> Because many factors may affect playground safety, the U.S. Consumer Product Safety Commission (CPSC) believes that guidelines, rather than a mandatory rule, are appropriate... These guidelines are not a CPSC standard and are not mandatory requirements. Therefore, the Commission is not endorsing them as the sole method to minimize injuries associated with playground equipment. The Commission believes, however, that the safety features in many of the recommendations in this handbook will contribute to greater equipment safety.

In fact, the applicable legal standard may very well be lower than that advocated by safety experts in a given field. Specifically, the legal standard for recreation facilities, like playgrounds, is oftentimes much lower than that generally considered acceptable by safety experts in parks and recreation as illustrated by the case of *Salinas v. Chicago Park District*, 545 N.E.2d 184 (Ill.App. 1 Dist. 1989). In this case, plaintiff's daughter died following a fall from a city park slide onto an asphalt surface in a city park. Plaintiff's playground safety expert had 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, however, held that "an asphalt surface beneath a slide is, in itself, an inadequate basis for liability." Further, the court noted that a landowner generally "owes no duty to a child for the obvious risk of falling off a slide."

> 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.

In Rosario v. City of New York, 549 N.Y.S.2d 661 (A.D. 1 Dept. 1990), plaintiff was injured in a fall from a playground slide onto a hard surface. The issue, therefore, was "whether the City breached a standard of care to protect children from injury due to falls by installing a cushioned surface around playground equipment." The court found Rosario had presented "no authority in this jurisdiction which has premised liability on the existence of a hard, artificial surface beneath playground equipment." On the contrary, the court found that "the traditional rule in this State has been that a properly constructed and maintained asphalt surface does not constitute an unsafe and dangerous condition so as to subject the owner of a playground to liability." The appeals court, however, found a municipality or public agency may be labile for the negligent operation of playground equipment when it fails to meets its own agency standards regarding surfacing and maintenance.

Similarly, the court in the Sanders decision described below found that exposed concrete footings beneath equipment constituted negligent operation and maintenance of a public playground. In so doing, the court found a dangerous or defective condition on public land pursuant to the applicable legal standard for negligence liability. Specifically, the court found that the State was negligent in its maintenance of the playground because "the state employee who replaced the wood chips on the bare ground saw or should have seen the exposed concrete." While not relying upon the CPSC Handbook, the court's reasoning is consistent with the CPSC recommendation that reasonable maintenance would require personnel to "check for trip hazards, such as exposed footings on anchoring devices."

> All anchoring devices for playground equipment, such as concrete footings or horizontal bars at the bottom of flexible climbers, should be installed below the playing surface to eliminate the hazard of tripping. This will also prevent children who may fail from sustaining additional injuries due to exposed footings.

<u>Footing Skullduggery</u>

In the case of *Sanders v. State of Tennessee*, 783 S.W.2d (Tenn.App. 1990), Andrew Sanders was injured in a state park playground owed by defendant State of Tennessee. The facts of the case were as follows:

> On May 25, 1987, Andrew Sanders, the nine year old son of Lawrence and Pamela Sanders, was climbing on some wooden monkey bars at a playground area in the Cumberland Mountain State Park near Crossville. He apparently lost his hold on the bar while climbing, fell to the ground and struck his head on an exposed concrete footing which held one of the monkey bar supports in the ground. The concrete footing had a protruding nub and Andrew's head struck this nub causing a depressed fracture of his skull.

> Andrew was treated initially at Crossville Hospital, and was later taken by ambulance to Vanderbilt Hospital in Nashville. Subsequently, Andrew underwent surgery in which some bone fragments were removed from his head resulting in a small area left unprotected by the skull.

The state claims commission rendered a judgment for Sanders and his parents totalling $45,000. The State appealed.

As noted by the appeals court, the state claims commission had jurisdiction over monetary claims against the state for "negligently created or maintained dangerous conditions on state controlled real property." Further, the appeals court acknowledged that claimants, such as Sanders, "must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures." In this instance, the appeals court found that the evidence "established and the state virtually conceded that the exposed concrete footing was a dangerous condition and injury therefrom was foreseeable." As a result, the appeals court found the "sole issue on appeal is whether the Commissioner erred in concluding that the proper state officials had notice of a dangerous condition."

As cited by the appeals court, the state claims commissioner had concluded that "requisite notice had been given to the proper state officials" based upon the following findings of fact on the record:

> The crucial question in this set of facts revolves around whether proper State officials had adequate notice of the dangerous condition in sufficient time to have taken some action. The simplest analysis of the contested facts is as follows: There was a one and one-half to one and three-quarter protrusion of the concrete footing above the surface of the ground with a nub on it. This condition came into existence one of two ways. Either it was created at the time the footing was first poured, or the ground was worn away around it leaving it exposed. If the exposed footing came into existence when it was first poured, the State had actual notice of this condition when they completed the pouring thereby creating a dangerous condition. There has been sufficient time for the State officials to have acted.
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> In the alternative, this condition came into existence over a period of time when the soil wore away from around the footing (which is assumed to have initially been even with or below the surface of the ground). In considering this, the Commission observes from commonsense observation of soil erosion that soil erodes when it is bare and is exposed to wind, water, or scuffing feet (for playground). If the soil is covered with a mulch such as wood chips which were used on this playground, then the wood chips may wear away, but so long as an adequate layer of wood chips is maintained, the soil remains. Since the soil wore away there was negligent maintenance and since wood chips were on site, the State employee who first put down wood chips saw the footing and thus the State had actual notice.
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> The concrete protruded at least one and one-half inches above the level of the ground. This had to occur either when the concrete was first poured, or else it occurred over a long period of time when the ground was worn away from the concrete footing. If it

> jutted upward at the time the concrete footing was poured, the State had actual notice of a dangerous condition. In order for the ground to wear away from a concrete footing, the ground must be exposed to the scuffing of feet and the wearing from weather. The scuffing and wearing cannot occur if there is a layer of wood chips, sand, mulch, etc., upon the ground. Therefore, for wearing to have produced the raised concrete, the bare ground had to have been visible over a rather extended period of time.
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> The Commission concludes that somewhere in the course of time, some employee observed the exposed concrete footing and brought the wood chips, and at the point the State had notice. Both of these notices are actual notices. They are not presumed. Each is a reasonably inference from facts.
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> Obviously, in the second inference, the concrete footing was not immediately dealt with. It is possible the employee did not think to make note of it. It is possible the employee waited to report it at a safety meeting, but forgot it when the safety meeting occurred, or perhaps the employee felt that padding the jutting concrete footing with wood chips would be sufficient. There may be other reasons why the notice of the exposed footing failed to reach park records.

On appeal, the state asserted that "it produced as witnesses persons who would qualify as proper state officials to which notice of an unsafe condition should be given, and that they all testified that they had no knowledge of the protruding concrete footing prior to the accident, although frequent inspections were made in an effort to discover any unsafe conditions." As a result, the state maintained that "it had no notice of the unsafe condition" as required by state law.

According to the appeals court, "the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care."

> The state will be liable for actual damages only. No award shall be made unless the facts found by the commission would entitle the claimant to a judgment in an action at law if the state had been a private individual...
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> Owners and occupiers of land have an obligation to exercise ordinary care and diligence in maintaining their premises in a safe condition for visitors upon the premises, and are under an affirmative duty to protect these persons against dangers of which they know or which, with reasonable care, they might discover.
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> Before an owner or operator of premises can be held liable for negligence in allowing a dangerous or defective condition to exist on its premises, it must have (1) been created by the owner or operator or his agent or, (2) if the condition was created by someone other than the owner or operator or his agent, there must be actual or constructive notice on the part of the owner or operator that the condition existed prior to the accident.

Applying these principles to the facts of the case, the appeals court found that "the state constructed the offending instrumentality and obviously must be charged with notice of its condition as constructed."

> There was evidence in the record that the exposed footing appeared to be of long standing. If, in fact, it was covered by dirt at the time of the initial construction, the evidence established that the state officials were well aware of erosion and soil washing problems occasioned by heavy rains and usual playground activity. Wood chips were placed beneath the bars and replaced periodically as they were washed away or displaced. There was evidence that the height of the concrete footing above the soil indicated that if it was not constructed in that manner, it reached that condition over a protracted period of time.
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> The Commissioner found that it could be inferred that the state employee who replaced the wood chips on the bare ground saw or should have seen the exposed concrete. We believe that this is a reasonable conclusion from the evidence. Even though evidence may be susceptible to different inferences, the appellate court will not disturb findings of the trial court where such findings are supported by inferences which may be reasonably drawn from the evidence. Considering the record as a whole, the evidence does not preponderate against the finding of the Commissioner that the proper state officials had notice of the unsafe condition for a sufficient length of time prior to the accident within which to correct the deficiency.

The appeals court, therefore, affirmed the judgment of the state claims commission for $45,000 for the Sanders.