

Defense Themes in Playground Equipment Design Defect Cases

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This article is part of an ongoing series of regular features about product liability law as it affects playground equipment manufacturers. Product liability cases involve claims that the product was defective and unreasonably dangerous for its intended use.² Such claims are often articulated under a theory of strict liability (the product was defective and unreasonably dangerous) and a theory of negligence (the manufacturer failed to exercise reasonable care). Some claims will seek punitive damages, which typically requires a showing of willful and reckless disregard for the rights and safety of others.

These claims are particularly attractive to personal injury attorneys because they involve injuries to children, with whom juries are inclined to sympathize. A child's pain and suffering may have more verdict potential than that of adults, and the prospect for future health complications can be particularly lucrative. This article will identify useful strategies for developing defense themes for defending the design of playground equipment.

Due Care story. Plaintiff's case will focus on the one particular hazard scenario and specific design feature plaintiff alleged to be at issue in your case and will want the jury to view that design feature in isolation. Yet, the manufacturer did not design its product specifically for this particular plaintiff and his accident scenario. The design process considered numerous potential hazards around which the manufacturer designed accordingly and there are numerous other aspects that are reasonably safe and make it an enjoyable and useful product. Develop the due care story, including the history of the product and how much time and effort the manufacturer put into designing, testing and evaluating the product. Identify the process for design development and safety review, including how long it takes and how many people participate. Develop your extensive participation in industry groups and other activities which promote safety. If it was based on a previous product, develop the success of that product, including the number of years that product has been offered, how many units have been sold and other information to confirm that the product and any predecessors products are "tried and true."

Articulate the various potential safety hazards considered in the design process and the precautions taken to promote

safety, even if they do not relate to this accident. These may include recessed bolts, the spacing of certain equipment from others and the soft surface to cushion falls. This may be relevant in strict liability, and certainly will be for negligence and punitive damages claims. Some jurisdictions allow a jury instruction to consider the product as a whole.

The Utility and Usefulness of The Product. Plaintiff will criticize the product as defective and unreasonably dangerous and you must obviously respond with evidence showing that the design is reasonable. In addition, stress the usefulness and utility of the product. Assemble the research showing that playground equipment is invaluable to children's development. Most jurisdictions permit evidence of the usefulness and utility of the product, so identify the specific physical and social skills the equipment helps kids develop. Show that the design choices were intended to develop these skills, to appeal to children, and to encourage them to return to the playground again. Those skills presumably played some role in the design, and you should be prepared to articulate the consideration of them, secure admissions in cross-examination of plaintiff's experts and have your experts discuss them.

Many jurisdictions require a balancing of the risk and utility of the product to determine whether it is defective. With playground equipment, the risk and utility are intertwined. Some level of risk is inherent in the use and utility of playground equipment. An arch climber or a ladder with bar rungs may not be the least risky means of reaching a platform, but its purpose is not merely to help someone ascend the platform. Its purpose is to provide a challenging means of reaching the platform which will develop the child's climbing skills, large muscle strength and hand-eye coordination, amongst others. Develop the purpose of the product so its utility is defined on your terms, not the plaintiff's terms.

Show the extent to which the design process balanced these considerations by designing the equipment to provide challenge in a reasonably safe manner. Find examples of ways in which the manufacturer deliberately designed to allow challenge while still protecting against failure. For example, perhaps the manufacturer placed a balance beam low to the ground to provide challenge while minimizing the height of a fall. Use the CPSC guidelines

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to develop the theme that the play system includes equipment of different risk/challenge and just as the design provides multiple means of reaching each part of the system with varying levels of challenge, kids and supervising parents need to use common sense about taking on an appropriate level of risk.

Comparative Risk. The plaintiff will play to the inclination of parent-jurors to protect kids from harm and risk. The jury will determine not whether the product was dangerous, but whether it was *unreasonably* dangerous. Developing evidence of other risks children routinely face will help put in context whether the dangers associated with using the product were unreasonable. If plaintiff is allowed to cite CPSC statistics concerning injuries on playground equipment, put them in context by comparing them with risks of activities kids might do when they are not playing on playground equipment. Develop evidence concerning the risk of injury to kids playing sports, several of which have higher injury rates than playing on playground equipment. Develop evidence concerning the risk of other activities, such as riding a bike, riding an all-terrain vehicle and swimming. Since plaintiff wants to focus on a specific hazard, this is an area where you can, as well. If the CPSC data is admissible, it should at least be limited to data relating to the product and injury mode.

Industry Standards and Custom. Evidence that the design complied with applicable ASTM standards and CPSC requirements is generally admissible in products liability cases. These standards were developed through years of research, engineering research and statistics in the field. If the product conforms to these requirements, you have credible authority to point to in support of the design. Use the IPEMA certification of compliance with ASTM and CPSC standards and the standards themselves. Compliance with standards does not guarantee a defense verdict, but it will help show the product is reasonably safe and plaintiff's expert's opinions are outside the mainstream.

Industry custom is similar to industry standards and evidence that the product is similar to competitor products in the industry is generally admissible on at least some causes of action. Develop the book on the competition to show that everyone uses the same allegedly defective design. Assemble product brochures and photograph similar competitor products in the field – especially in the

jurisdiction so the jury knows its widespread use in their community. Maybe the jury has even supervised their kids on a similar product. There is safety in numbers and the more products of more manufacturers that fit within the plaintiff's expert's definition of product defect, the more those expert opinions appear to be litigation expedience rather than generally accepted design science. Isolate your adversary as outside the mainstream by showing that the product is mainstream.

Safety History. One topic of discovery will undoubtedly be the presence or absence of other claims of injury involving the equipment. Plaintiff will want to put in as much evidence of other incidents as possible, including accidents involving your products and general accident data. To be admissible at trial, other incidents must be substantially similar to the accident involved in your case, including substantial similarity of product, accident circumstances and alleged claim of defect or failure. You may be able to keep out CPSC accident data (assuming it is unfavorable to you), as the CPSC data may not give sufficient information for plaintiff to show substantial similarity. (The CPSC data also suffers from other infirmities, such as the method of reporting and the fact that it is multiple hearsay). Plaintiff will draw the lines broadly to get as large a number as possible, so draw those lines as narrowly as necessary to report the fewest number of substantially similar claims and, ideally, none. The absence of other substantially similar claims is also generally admissible.

Whether to underscore the significance of no prior claims or to put in context any other claims which do exist, you should develop the number of products which are being defined as "substantially similar" for purposes of this analysis, and more is better. This derives from the simple statistical fact that three claims involving 1,000 products has more jury appeal than three prior claims involving a 100,000 similar products. Develop also information about how many years that group of products has been in the field and ideally attempt to identify how many hours of use and/or how many children (i.e., consumers) have used the product. Prior incidents seem more understandable if you can show how many years those products have been in the field and how extensively they are used by how many children. For example, if you can put in evidence that the product has seen a million kid-days of use, three accidents will not seem very compelling.

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Alternative Designs. Most jurisdictions require that the plaintiff offer a reasonable alternative design that would have allegedly prevented the plaintiff from being injured. Plaintiff will need to show that the claimed alternative design was both feasible and that it would have prevented the accident (i.e., the lack of plaintiff's proposed design caused the injury) and you should attack on both grounds.

In addition, you should also examine the effect of the alternative design on the utility and purpose of the product and the possible creation of new hazards. Emphasize the extent to which the proposed alternative design would actually impede the purpose of the product. For example, a staircase is not a reasonable alternative design to a climbing wall, a ladder is not an alternative design to an arch climber and a zip line is not an alternative to overhead climbing bars because they are different products with different purposes and the selection of those alleged alternative design would impair the purpose of the product at issue and the skills you intend it to build.

Plaintiff's Fault. The fault of plaintiff is always admissible to rebut a negligence cause of action, but might be admissible on a strict liability cause of action only to support a causation defense (i.e., whether the product defect was the cause of the injury). Some jurisdictions do not allow a defendant to claim negligence by a child plaintiff, while some jurisdictions do. Even if a child plaintiff can be found negligent, a child plaintiff is more difficult to blame because children are seen as more sympathetic, naive and in greater need of protection from their own mistakes than adults. These reasons for sympathy suggest the themes to develop with the child-plaintiff. Develop her knowledge, experience and sophistication. Find out her experience playing on playground experience, as she will have likely played on the equipment or variations of it many times before. Find out how she typically used the equipment, how she saw others using it, and what she understood to be the proper way to use it. Develop her knowledge of risk and the obviousness of it, including previous falls by her and which she witnessed. Develop her knowledge of how to properly play on the equipment and her failure to do so. Stress the extent to which these matters and risks are within the common sense comprehension of children.

The Fault of Others. The product is likely to have been owned by some other entity, such as a school or

governmental entity, which was likely responsible for maintaining the equipment and for supervising its use, including developing rules concerning its safe and proper use. Identify the maintenance practices of the owner, including whether they followed the recommendations with respect to proper maintenance of the product. Find out whether they installed the product properly (if they did so at all) and whether they altered the product. Find out what instructions they provided with respect to supervision of children and whether they followed their procedures and enforced their rules. If they did not, develop the case of fault against them. Beware that government entities have sometimes limited and sometimes absolute immunity for certain kinds of claims under certain conditions, so blaming the property owner may not always accomplish as much as you hope.³

Developing these themes will help you defend your product against design defect claims.

(Footnotes)

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²Restatement (Third) of Torts, ¶2. Product liability law varies from state to state, but many states' law is consistent with the Restatement. For questions about specific states, contact your counsel or the authors.

³One of the authors of this article, David Lutz, published an article on the IPEMA website a couple years ago about claims of immunity by governmental entities. If you would like a copy, please email him at david.lutz@bowmanandbrooke.com

Has your company been involved in your local community and would you like to gain additional media coverage? Contact IPEMA's Public Relations firm to assist you in writing a newsworthy article about your company, its relationship with IPEMA, and your community involvement. Contact Lesley Sillaman at Euro RSCG Magnet by emailing lesley.sillaman@eurorscg.com or by calling (412) 456-7839.