Child's play

The court's reaction against the 'cotton wool' culture in *Orchard* will make it difficult for schools to argue that children can be held negligent when playing in a designated play area, says Kris Lines

WHEN DO TEACHERS have a duty to prohibit or regulate horseplay among children? That was the question facing the Court of Appeal in *Orchard v Lee* [2009] EWCA Civ 295. The reasoning in that judgment and the implications the decision has for schools and play providers is worthy of examination.

The case itself concerned a collision between Mrs Orchard (who had recently been appointed as an assistant lunch break supervisor at Corfe Hills School in Dorset) and 13-year-old Sebastian Lee who was playing tag in the playground with one of his friends, Luke. The collision occurred when Sebastian was running backwards taunting Luke and he accidentally crashed into the claimant as she was patrolling the area with a colleague. Although the facts were not in dispute, at issue in the Court of Appeal was whether the county court was right to dismiss her claim against Sebastian.

Lord Justice Waller – giving the leading judgment for the Court of Appeal – held that while it was well-established law that children should be judged by "whether the ordinary prudent and reasonable child of the same age would have foreseen the risk" (*Mullin v Richards* [1998] 1 WLR 1304), focusing purely on whether a risk was foreseeable was in fact too broad a test. Indeed Waller LJ suggested that while children may appreciate that playing games might lead to minor bumps and scrapes, this did not automatically lead to liability. Instead, he suggested that the key test involved assessing the relative culpability of the conduct being performed (*McHale v Watson* 115 CLR 199 (Australia)). In short, if the game was being played in an appropriate play area and in accordance with the rules or accepted norms of the activity (*Blake v Galloway* [2004] EWCA Civ 814) then negligence will not attach.

Implications for schools?

Using this logic, while the claimant's injuries deserve the utmost sympathy, ultimately the most serious blow to her case was struck not by Sebastian, but rather by the school rules that tacitly allowed running in the playground area. By not having any express prohibition or signs in that area of the playground banning running, the schoolboys could argue that they were not doing anything wrong; rather they were just playing like any boisterous 13-year-old boy would do in an appropriate and designated play area. Similar arguments succeeded for the defence in both *Etheridge v K* (A Minor) [1999] Ed. CR 550 (no prohibition against carrying basketballs around school) and *Kearn-Price v Kent CC* [2002] EWCA Civ 1539 (prohibition against leather footballs not enforced).

Children playing in a school playground are unlikely to be found liable if they cause an injury

Whether this defence will succeed in each case is largely a question of fact; however, if schools or play providers want to reduce the risk of similar accidents happening, they should take steps to implement either a disciplinary rule which prevents the activity (such as running or ball games) from taking place, or to physically alter the layout of the area – for example by marking out specific zones or through the careful placement of obstacles to discourage speed. It is however important to add that neither of these solutions is a panacea, as any new rule will need to be enforced and this may necessitate extra supervision and the provision of a physical obstacle may lead to maintenance issues or increase the risks of collisions/inappropriate use by pupils.

Contributory negligence and the 'cotton wool' culture

The case of *Orchard* is also important for the Court of Appeal's clarifications on whether children could be contributory negligent. In particular, Iain Hughes QC, sitting as judge in the county court in *Orchard v Lee* [2008] 13 May, drew a distinction between children playing at school (in what they are entitled to assume is a safe environment) and playing in public or in adult settings (where their actions merit special care). Using this distinction, it will therefore be very difficult for schools to argue that children failed to look after their own safety and therefore contributed to their own injury in designated playground areas, playing appropriate games. Instead the onus will be firmly on the school to prevent or prohibit either the activity or the use of a particular environment before playtime begins.

In a sense the law has come full circle as it reacts against the so-called 'cotton-wool culture' surrounding many activities. Whereas once schools were facing the fear of liability for applying plasters to children, or for allowing boisterous games such as British Bulldogs to be played, now the focus seems to be on reducing childhood obesity and in actually encouraging physical activity. With this judgment in *Orchard*, the courts are saying it is ok for young boys to be boisterous and to scratch, scrape and bruise themselves (and others); the difficult part will be in drawing the line as to the severity of the injury that is acceptable.

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SJ takeaway

- Accidents will happen and minor injuries will occur
- There is a difference between play on school property and outside
- The standard of care test is based on the reasonable child of that age
- No liability will occur if the activity was in a designated play area, and the child was not breaking any rules, or was not acting to any significant degree beyond the norms of that game
- If any prohibition or rules are laid down, they must be regularly enforced