

The Challenges of Bringing Suit Against a Day Care

by Domhnall Ó’Catháin, Esq.

Young practicing lawyers who are the parents of young children are always faced with the challenge of balancing career demands with child care needs during the workday. It is a difficult balance, often leading to such questions as: If I reduce my working hours to care for my children, how will it impact my career? If I leave the children with their grandparents, will they keep their promise to lock the cleaning supplies under the sink? Can I trust the nanny, who until she arrived in the United States drove on the left side of the road, to safely transport the children?

As a result of these concerns, many of us have decided to put our trust in day care centers. We have met the teachers, seen the curriculum of activities, and spoken to other parents. And the children were happy from the first day they started.

Everything is fine until you receive the dreaded phone call that the fingers of your little girl’s left hand got caught in the door and she has been rushed to hospital. You do not want to sue the day care center, but you have co-pays, you had to take time off from work, and you are concerned about how the facility handled the situation. After the last follow up visit to the orthopedist, you make an appointment with a personal injury lawyer.

Being a lawyer yourself, you probably consider doing some research before talking to a personal injury lawyer about your legal options. If so, you will learn that the New Jersey Department of Children and Families has a manual that contains the state’s licensing requirements for child care centers.¹ The requirements are extensive, with a particular focus on health, safety and educational programming.

The Department of Children and Family inspects every licensed child care center annually to assess compliance with the requirements set out in its manual. The inspection records are public documents, thus as a parent and/or an attorney, you have access to them. However, state annual inspections do not guarantee that the day care facility enforces the requirements consistently.

At a recent deposition in one of my client cases, which involved an injury at a day care center, the day care teacher had no knowledge of ever seeing the state manual of requirements when it was produced as an exhibit. The director of the center stated that the manual was available to the teacher even though the teacher was never made aware of it, and that it was stored in a back office.

Of course, even if the day care teacher had knowledge of the requirements and complied with those requirements, is that sufficient? In other words, is compliance with the state’s requirement the minimum or maximum of care to be provided to our children?

Further challenges in determining whether or not a day care facility was negligent in causing the injury of a child are that the only individuals in control of the narrative, or the ‘story’ that is disseminated, are often the defendant day care employees. Consider the following facts from a case where a child was injured during a trip to a local park with his day care class:

The defendant day care center stated that the child was running when he tripped, fell and fractured his elbow. The child insisted that he was permitted to climb unsupervised to a dangerous height, and fell on his arm, causing the fracture. When deposed, the child was confused and inconsistent. Nevertheless, the treating doctor stated that the child was telling the truth and could not have tripped, as alleged by the defendants, because he had no grazes on his knees or other parts of his body, which would have occurred if he tripped while running.

Who do You Believe?

You know when your child is telling the truth because you know the questions to ask and how to ask them. When taking a deposition of a five-year-old boy, whom you do not know, it can be different. Consider the following testimony:

Question: So, Johnny, do you know what it means to tell the truth?

Answer: (Indicating.)

Question: What does it mean?

Answer: You have to tell the truth

Question: So if I said that this table is red, am I telling the truth or am I telling a lie?

Answer: Lie.

Question: Lie.

Answer: Because you're telling it, it's really blue, but it's not – it's really blue, but it's not red.

Question: And is it good or bad to tell the truth?

Answer: Bad.

Question: Bad?

Answer: (Indicating)

Perhaps the biggest challenge in prosecuting a claim for day care negligence is that even if the injured child can establish a case of negligence against the day care center, it cannot overcome N.J.S.A. 2A:53A-7 (1959), New Jersey's Charitable Immunity Act. Generally, the act will provide immunity to a day care facility and its employees if: 1) the day care facility is a nonprofit that is organized exclusively for educational purposes, and 2) the child is a beneficiary of that education.

The courts have been very charitable to nonprofits. In *Bloom v. Seton Hall University*,² a student slipped and fell in a pub operated on the Seton Hall campus. The Appellate Division concluded that operating a pub was consistent with the education purpose of Seton Hall because "a campus experience ought to include opportunities to mature in an environment enriched... by diverse forms of social interchange."³ Interestingly, by the time the case reached the Appellate Division, Seton Hall University replaced the pub with a coffeehouse.

In the end, the decision of whether or not to file a lawsuit for a child injured by the negligence of a day care center will often turn on whether or not the facility is a for-profit or nonprofit institution. If the defendant day care center can establish its nonprofit status and the injured child is a student, it will be challenging for the lawsuit to succeed. Nevertheless, be sure to refer the matter to a personal injury attorney with experience in the handling cases against day care centers. ■

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Endnotes

1. N.J.A.C. 10:122.
2. *Bloom v. Seton Hall University*, 307 N.J. Super. 487, 704 A.2d 1334 (App. Div.1998).
3. *Id.* at 492.

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