

AGE APPROPRIATE PLAYGROUND SAFETY GUIDELINES

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Unless expressly enacted into legislation through a local ordinance or state statute or regulation, the Public Playground Safety Guidelines issued by the Consumer Product Safety Commission (CPSC) do not necessarily establish the applicable legal standard of care in determining negligence liability for a playground injury. Rather, in the absence of a legislated standard, the CPSC Guidelines may provide evidence of the applicable legal standard of care to the extent that these Guidelines reflect the general customs of the community, i.e. so well known in a given locality that the reasonable person under the circumstances would be expected to follow them.

As noted by the state court in the *Ossip* decision described herein “the New York State Departments of Education, Health, Parks and Environmental Conservation have formally adopted the playground safety guidelines promulgated by the CPSC and the American Society of Testing Materials as guidelines by which playground design and safety should be judged.” As a result, state regulations incorporating such playground safety guidelines would constitute the applicable legal standard of care in this particular jurisdiction.

The CPSC *Handbook for Public Playground Safety* differentiates between “preschool-age” children (two through 5 years) and “school-age” children (5 through 12 years). According to the *Handbook*, playgrounds should present a series of graduated challenges which are “appropriate for age related abilities and should be ones that children can perceive and choose to undertake.”

Preschool and school-age children, differ dramatically, not only in physical size and ability, but also in their cognitive and social skills. Therefore, age appropriate playground designs should accommodate these differences with regard to the type, scale, and the layout of the equipment.

Recommendations throughout this Handbook address the different needs of preschool and school-age children, ‘preschool-age’ refers to children two through 5 years and “school-age” refers to children 5 through 12 years. The overlap between these groups is realistic in terms of playground equipment use, and provides for a margin of safety.

Accordingly, as illustrated by the *Ossip* opinion described herein, the applicable legal standard of care in determining whether playground equipment is reasonably safe or unreasonably dangerous in a given situation may depend on the age appropriate nature of the type, scale, and the layout of the equipment under the circumstances.

CPSC playground safety publications are available at the following web address:
<http://www.cpsc.gov/CPSCPUB/PUBS/playpubs.html>

The CPSC *Handbook for Public Playground Safety* is available at the following web address:
<http://www.cpsc.gov/cpscpub/pubs/325.pdf>

PLAYGROUND FALL

In the case of *Ossip v. Village Bd. of Hastings-On-Hudson*, 2006 NY Slip Op 52005 (N.Y. Sup. Ct., 2006), Muriel Ossip was under her mother's supervision when she fell from a set of monkey rings in a playground operated and maintained by defendant Village of Hastings-On-Hudson ("Village"). At the time of her fall on August 8, 2004, Muriel was one month short of her sixth birthday. The facts of the case were as follows:

Mrs. Ossip, Muriel's mother, had visited the playground approximately 50 times previous to the date of her accident and her daughter previously had used the subject monkey rings without incident approximately 8 times before. On the accident date, Mrs. Ossip had been seated on a bench less than 10 feet away from the monkey ring apparatus, "constantly" viewing her. She had observed her daughter successfully reach for the first monkey ring from the platform area where she had been standing, then successfully reach to the second ring. It was at the time that her daughter reached from the second ring to the third ring that she had lost her grip and fell to the sand below, sustaining injury.

In her complaint, Ossip alleged that "the climbing apparatus from which the infant fell was situated too high off of the ground and had rings that were too far apart to be safely used by a child of the infant's age. In response, the Village claimed that it had "maintained the playground in reasonably safe condition." Ossip, however, claimed the Village had failed to demonstrate that the playground equipment "was safe when used by the infant plaintiff or that it was designed, installed and maintained in compliance with operative guidelines." In this particular instance, both sides agreed the Consumer Protection Safety Commission Guidelines were applicable pursuant to state regulations which "formally adopted the playground safety guidelines promulgated by the CPSC and the American Society of Testing Materials as guidelines by which playground design and safety should be judged."

HEIGHT OF EQUIPMENT

Based upon his review of the applicable CPSC Guidelines and the American Society of Testing and Materials guidelines, Ossip's playground safety consultant found the monkey rings were unreasonably dangerous for a five year old. Ossip's "certified safety professional" based his opinion upon an examination of the monkey rings, as well as a review of playground photographs and deposition testimony. As described by the playground consultant, "the rings measured a distance of 15 inches apart and the rings were approximately six and one-half feet off the ground, both of which far exceeded the acceptable ring spacing of 12 inches and the height requirement of the equipment being no more than five feet above ground." Accordingly, Ossip claimed the monkey rings were unsafe because the rungs were "spaced too far apart" and too high, measuring "79 inches from the ground below," far in excess of "the maximum allowable height of four feet to five feet" specified in the CPSC playground safety guidelines:

[T]he CPSC Guidelines state that with respect to horizontal climbers, such as the monkey rings here in issue, an apparatus situated above compacted coarse sand should be no higher than four feet from the ground... [F]or pre-school age

children like Muriel, the maximum height of the climbing rings should be no more than five feet off the ground, with the space between the rings being no more than 12 inches... [The Village not only] failed to establish the distance between the rings, but the submitted deposition testimony of Mr. Gomes [the Village's superintendent's of parks and recreation] establishes a material departure from the Guidelines in that the rings were approximately 6.6 feet from the ground.

In response, the Village claimed Ossip's safety consultant had misapplied the CPSC guidelines to the facts of this case. Specifically, the Village argued that the safety consultant had limited his opinion to criteria which applied to "playgrounds that are suitable for children 2 to 5 years of age." In so doing, the Village argued that Ossip's playground consultant had erroneously "failed to address the standards provided by CPSC Guidelines for playgrounds suitable for 5 to 12 years old."

AGE APPROPRIATE STANDARD

In this particular instance, the Village asserted that this particular playground was age appropriate for children 5 to 12 years of age. According to the Village, "[a]t the time it had purchased the play equipment, Raymond Gomes, the Village's Superintendent's of Parks and Recreation, specifically had requested from the play equipment company that he be provided with equipment suitable for children 5 to 12 years of age." Further, the Village noted that "the sign welcoming children to play at the subject playground specifically states that the playground is designed for children 5 to 12 years of age."

The court agreed with the Village. In so doing, the court found Ossip and her playground consultant had "failed to explain why application of the standards for a playground suitable for pre-school children 2 to 5 years old, rather than the standards for a playground suitable for children 5 to 12 years old, applies." Given the fact that "Muriel was five years old at the time of this accident, one month short of her sixth birthday and just several weeks short of the start of kindergarten," the court found the monkey rings met the appropriate standard for children 5 to 12 years old:

CPSC Guidelines clearly provide at page 21, Section 12.1.5 that 15 inches is the maximum ring distance for a playground suitable for 5 to 12 years old. Thus, no negligence is established with respect to the subject rings measuring 15 inches apart.

CPSC Guidelines clearly provide at page 22, Section 12.1.5 that the maximum height of overhead rings for school age children 5 to 12 is 84 inches. The subject monkey rings measured 79 inches in height and thus do not establish that the monkey rings were dangerous.

SAFE GROUND COVER

In her complaint, Ossip had also alleged that the Village playground "lacked appropriate safeguards to prevent injury," specifically "minimally safe ground cover." At the time of the

injury, Ossip claimed the ground surface beneath the monkey rings was “comprised of compacted, coarse sand which provided virtually no shock absorption.” Moreover, Ossip contended that the Village had failed to adequately inspect, loosen and turn the sand ground cover beneath the monkey rings to eliminate compaction of the sand.

Similarly, following his site inspection of the playground sand, Ossip’s playground consultant found the surfacing material to be “densely compacted such that it provided virtually no adequate absorbency and shock resistance for a falling object.” Having “chosen to use coarse sand as a ground cover,” Ossip’s playground safety consultant stated that it was incumbent upon the Village to “properly maintain the sand by replacing it, loosening it and cleaning it,” but the Village had negligently failed to do so.

According to the Village, on the day following Muriel’s accident, the Village superintendent of buildings and grounds examined the depth of the sand beneath the monkey rings and found the depth to be approximately 16 inches. As a result, the Village claimed the sand under the monkey rings exceeded “the United States Consumer Product Safety Commission’s recommendation that 12 inches of sand be placed under the play equipment for school and community playgrounds.”

The court agreed with the Village, rejecting the opinion of Ossip’s playground consultant that “the compacted coarse sand was insufficient ground cover given the height of the rings.” In so doing, the court agreed with the Village that “the Guidelines do not offer any minimum safety height where sand is packed, as here, 16 inches deep.”

[T]his Court’s perusal of the Guidelines does not reveal any prohibition in the CPSC Guideline with respect to the use of compact sand... Appendix C to the Guidelines, while noting “compacting” as a disadvantage of Organic Loose Material, such as wood chips, bark and mulch, does not state that compacting is a disadvantage of the use of Inorganic Loose Material, such as sand.

Since Ossip’s playground safety expert had relied solely upon the CPSC Guidelines and misapplied the Guidelines in reaching his opinion, the court rejected his conclusion that “the subject monkey ring apparatus was unsafe.” In the opinion of the state court, despite Ossip’s “protestations to the contrary,” the Village had presented sufficient evidence that “the playground had been maintained in a reasonably safe condition and that it and the monkey rings were free of defects and suitable for this five year old infant.”

As characterized by the Village, Muriel’s fall and subsequent injury was “a result of the infant missing the third ring, not any defect in the equipment that had caused her to fall.” As a result, the Village maintained that “Muriel’s injuries were caused by the inherent dangers of engaging in play on the monkey rings and her fall was the normal and commonly appreciated risk of such an activity.” The state court agreed with the Village.

In general, the state court acknowledged that “children who play on jungle gym type equipment have consented to all of the risks which were inherent in and flowed from their playing on the equipment.” Moreover, in this particular instance, the court found that “Muriel’s mother, who actually was supervising her daughter, would have appreciated the inherent safety risks posed by

the monkey rings even if a five year old arguably could not.” Further, the court found that Ossip’s allegation of negligence against the Village for lack of supervision was entirely without merit on the facts presented since the infant’s own mother was supervising her at the time of her injury.

Given that Mrs. Ossip was not standing alongside of Muriel, spotting her, leads ineluctably to the conclusion that Muriel did not require any closer supervision and that any additional supervision by defendants could not have prevented Muriel’s spontaneous misgripping of the monkey ring.

As a result, having found no evidence of any negligence or an unreasonably dangerous condition on the playground at the time of Muriel’s injury, the state court dismissed Ossip’s negligence claims against the Village.