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PLAYGROUND SUPERVISION QUESTIONED IN RESTAURANT INJURY

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This month's column presents a recent appellate court decision addressing the issue of playground safety. In this instance, the injury occurred following a birthday party at a fast-food restaurant. Plaintiff's child was injured when he fell from a merry-go-round located on the restaurant playground. The issue before the court was whether the defendant had created an unreasonable risk of injury in its supervision of the playground.

CONSTANT SUPERVISION NOT REQUIRED

In the case of *Gayden v. George*, 513 So.2d 515 (La.App. 2 Cir. 1987), plaintiff Fred Gayden's son, Frederick Ballard, was injured while attending a birthday party at McDonald's Restaurant in Monroe, Louisiana. The facts of the case were as follows:

In the early afternoon on April 21, 1984, a birthday party was held at McDonald's Restaurant in Monroe in honor of Antoine Smith who was seven years old. Frederick Ballard, who was almost two years old, attended the party accompanied by his aunt, Joyce Harris. The party was coordinated and supervised by Lisa Martin, a McDonald's employee.

At the beginning of the party, Martin accompanied the children, about twenty in number, outside the restaurant to the McDonald's playground. She supervised the children as they played for fifteen to twenty minutes. Martin and the children then returned to the restaurant where they ate hamburgers, ice cream and cake, opened gifts and played a game. Some of the children subsequently returned to the playground where Frederick fell off the merry-go-round and sustained a head injury. He was hospitalized for six days following the accident, but suffered no residual effects as a result of his injury.

Martin testified that after the children finished eating cake and ice cream, she announced the party was over. She stated the children inquired if they could return to the playground and she informed them to ask their parents because she could not supervise them on the playground a second time. Martin testified she also informed the parents they had to supervise the children if they returned to the playground after the party.

Martin stated she did not return to the playground with the children a second time and while Ms. Smith was paying her for the party, a young girl brought Frederick to her stating he had fallen off the merry-go-round. She carried Frederick to his aunt who

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stated Frederick appeared to be okay. Martin testified she was trained to hostess birthday parties and she always followed the same routine. She stated the children were taken to the playground under supervision for about fifteen minutes at the beginning of the party. The children then return to the restaurant where they eat, open gifts, and play a game. Martin then announces the end of the party. She testified the children usually ask to return to the playground and she tells them to ask their parents because she does not supervise them on the playground after the party.

Ms. Harris, Frederick's aunt, and Ethel Outley, the mother of the child for whom the party was given, testified that Martin was supervising the children on the playground when Frederick was injured. However, neither Harris nor Outley could testify they actually saw Martin enter the restaurant from the playground with Frederick after his accident nor did they specifically testify they saw Martin return to the playground a second time.

Gayden sued McDonald's Corporation and the franchise owner, Alex George. The jury found that Gayden had "failed to prove by a preponderance of the evidence that defendants were guilty of any negligence which caused Frederick's injuries." Gayden appealed.

As described by the appeals court, the "sole issue on appeal is whether the Jury's finding is clearly wrong." On appeal, Gayden argued that "Martin was negligent in failing to properly supervise the children when she took them to the playground the second time." In addition, Gayden maintained that Martin was negligent "in failing to request help from the parents in supervising the children while on the playground." In response to these allegations, McDonald's and George argued that "an operator of a restaurant is not the insurer of his patron's safety and is not liable for accidents occurring on the premises through no fault of his own." Also, McDonald's and George maintained that Martin had "announced the end of the party and told the children and their parents she would not supervise the children on the playground a second time."

As described by the appeals court, the following general legal principles would determine negligence liability in this particular instance.

An owner of a business who permits the public to enter his establishment has a duty to exercise reasonable care to protect those who do enter. This duty extends to keeping the premises safe from unreasonable risks of harm or warning persons of known dangers. When the presence of small children is expected, the duty increases... A person who undertakes the control and supervision of a child has the duty to use reasonable care to protect the child from injury. Such a person is not the insurer of the safety of the child, but is required to use reasonable care commensurate with the reasonably foreseeable risk of harm.

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In addition, the appeals court noted that "the trial judge or jury is in a better position to evaluate the credibility of witnesses and the weight of evidence than an appellate court which does not see or hear the witnesses." As a result, the appeals court acknowledged that "a reviewing [i.e. appeals] court should adopt the findings of the trier of fact [i.e. jury or trial judge in a non-jury trial] as its own in the absence of clear error, even if other conclusions from the same evidence are equally reasonable." Applying these principles to the facts of the case, the appeals court found that Gayden had "failed to prove by a preponderance of the evidence that McDonald's and George breached their duty of keeping the premises safe from unreasonable risks of harm."

The absence of constant supervision of the playground by a McDonald employee does not create an unusual risk of harm. Gayden has cited no authority, and we have found none, requiring the operator a playground to maintain constant supervision of children using the playground in order to comply with the duty to maintain the premises safe from unreasonable risk of harm. The McDonald playground consists of a small sliding board, a small merry-go-round and an enclosed short climbing tower. These are not devices on which children are very likely to be injured at play. The playground equipment does not create an unreasonable risk of injury...

Martin testified she informed the parents they would be responsible to provide supervision of the children on the playground after the party. She further testified that the restaurant had a sign posted in the playground area which required all children under the age of twelve to be accompanied by their parents. This warning coupled with McDonald's and George's policy of providing supervision only during birthday parties and their maintenance of safe playground equipment, was sufficient to render the premises safe from unreasonable risks of harm, even to small children.

There is no evidence in this record to establish in what manner the child was injured by the merry-go-round. Any duty Martin had to supervise the child's use of the merry-go-round terminated when she returned the child from the restaurant to the interior of the restaurant.

As a result, the appeals court concluded that "the jury's findings of no negligence on the part of McDonald's and George is not clearly wrong."

Gayden made no contention that the merry-go-round on the playground was defective. He argues Martin was negligent in failing to properly supervise the children when she escorted them to the playground a second time. Martin's testimony provided substantial evidence to support a jury finding that Martin did not escort the children to the playground a second time and had announced the end of the party before the children

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returned to the playground when Frederick was injured. The factual finding was inherent in the jury's conclusion that Gayden had failed to establish by a preponderance of the evidence that there was any negligence established on the part of McDonald's Restaurant that was the cause of the injuries to the child.

Having found that the jury verdict in favor of defendants was not clearly wrong, the appeals court affirmed the judgment of the trial court in favor of McDonald's and George.