

ENTRAPMENT DANGER IN PLAYGROUND REPORTED BUT NOT CORRECTED

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Unless expressly enacted into legislation through a local ordinance or state statute, the Public Playground Safety Guidelines issued by the Consumer Product Safety Commission (CPSC) do not establish the applicable legal standard of care in determining negligence liability for a playground injury. However, in the absence of a legislated standard, the CPSC Guidelines may still 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. CPSC playground safety publications are available at the following web address: <http://www.cpsc.gov/CPSCPUB/PUBS/playpubs.html>

As noted by the appeals court in the *Clark* decision described herein, in 1995, the California Legislature “required the state to adopt regulations for public playgrounds that ‘shall meet the standard of care imposed by courts of law on playground operators, and shall, at a minimum, impose guidelines and criteria that shall be at least as protective as the guidelines in the [CPSC] Handbook for Public Playground Safety.’” Further under state law (Health and Safety Code section 115730) public entities were required “to upgrade their playgrounds to satisfy the new regulations, so far as state funding was available for this purpose.” As a result, the California appeals court in *Clark* referenced the CPSC Guidelines in determining whether a particular piece of equipment in a public playground constituted a “dangerous condition of public property.”

Under California state law (Government Code section 835), a public entity could be held liable for “a dangerous condition of public property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury.” In addition, plaintiff had to show that “the injury was proximately caused by the dangerous condition” and “the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.” Moreover, this statute requires the public entity to have had “actual or constructive notice of the dangerous condition... a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” As described below, the Park District personnel in *Clark* knew that a particular piece of playground equipment was dangerous, but failed to repair or remove the apparatus over a four month period prior to plaintiff’s injury.

FACTS OF THE CASE

In the case of *Clark v. Fair Oaks Recreation and Park District*, 106 Cal.App.4th 336, 130 Cal.Rptr.2d 633 (Cal.App. Dist.3 02/14/2003), plaintiff Burgin Clark, aged 10, broke his leg in an accident on playground equipment owned by defendant Fair Oaks Recreation and Park District (the District). Clark sued the District, alleging a “dangerous condition of public property.”

The District owns and maintains eight parks with playgrounds, including Village Park. In 1988, Village Park acquired a piece of playground equipment manufactured by Columbia Cascade; the District installed it according to the manufacturer's instructions and did not subsequently modify it in any way. The equipment consisted of several different types of apparatus joined together, including platforms, swings, a tire swing, a slide, and an arch climber leading up to one of the platforms.

An arch climber is an apparatus made up of convex side supports, rungs, and open spaces between the rungs; it curves as it ascends. Children are expected to use all four limbs to go up and down it, as it has no handrails. Before February 23, 1999, there had not been an accident on the arch climber in Village Park, so far as the District's employees knew.

In 1981, the CPSC issued guidelines on playground equipment, published under the title "Handbook for Public Playground Safety." They prescribed that the spaces between the top surfaces of adjacent rungs of an arch climber should be at least seven inches and not more than 11 inches apart. This rule was meant to avoid the danger of entrapment, particularly the entrapment of a child's head between rungs. However, if a "head probe" could not penetrate between rungs to a depth of at least four inches, the danger of head entrapment was minimal. Because the head probe test showed that the spaces between the rungs of the Village Park arch climber could not be penetrated to that depth, it complied with the 1981 guidelines.

In 1991, the CPSC issued a revised "Handbook for Public Playground Safety" with new guidelines, reissued without relevant change in 1997. The 1991 guidelines provide that to prevent entrapment, defined as "[a]ny condition that impedes withdrawal of a body or body part that has penetrated an opening," rung spacing on arch climbers should follow the recommendations for rung ladders. These state that spaces between rungs should not be between three and one-half inches and nine inches (i.e., they should be less than three and one-half inches apart or more than nine inches apart). The rungs on the Village Park arch climber measured four and one-half inches apart. Thus they did not comply with the 1991 guidelines.

On October 12, 1998, District Park Supervisor Rodney Melton, a certified playground inspector, performed a safety audit of Village Park's equipment. He immediately reported to his superior, Superintendent Bill Hinson (also a certified playground inspector), both orally and in writing, that he had found many violations of the 1991 CPSC guidelines that could cause life-threatening or permanently disabling accidents ("priority one" hazards), including the risk of entrapment from the improper spacing between the rungs of the arch climber.

(Throughout the country, the National Recreation and Park Association sponsors a National Playground Safety Inspector Certification Course through the National Playground Safety Institute. This course provides a comprehensive training program on playground hazard identification and risk management methods. This course prepares students to sit for the Certified Playground Safety Inspector examination offered at the culmination of the course.)

Melton recommended the equipment be removed as soon as possible. Hinson concurred. However, although he had the authority to remove a portion of a structure, such as an arch climber, on his own initiative, he did not; all he did was to recommend to District headquarters that the entire structure be replaced within the next year under the District's 10-year master plan for all city parks. In the meantime, the equipment was left untouched and children were allowed to play on it as usual, without any warning of its hazards.

On February 23, 1999, the 10-year-old plaintiff played on the arch climber. According to his undisputed testimony, as he descended the apparatus facing toward it and using all four limbs (a normal and reasonably foreseeable manner of playing on it), his left foot missed a rung and his leg fell into the space between two rungs. When he tried to extract it, his femur snapped. Sean Shimada, an expert on biomechanics called by the District, admitted that getting the leg caught in the space between the rungs caused plaintiff's femur to break; if the spacing had complied with the 1991 guidelines this scenario could not have occurred or, if it could, would have been less likely to produce a fracture.

Plaintiff spent three days in the hospital, where he underwent surgery on the leg to insert screws, followed by eight weeks recuperating at home, including four weeks in a wheelchair wearing a cast; later he had a second surgery to remove the screws. He was in significant pain throughout that period, required home nursing care at a cost of \$1,400, and could not attend school.

Following a trial to determine how plaintiff's injury occurred and how to interpret the legal safety standards for playground equipment, the trial court found for plaintiff against the District and awarded damages of \$87,264.70. The District appealed.

#### FORESEEABLE RISK

On appeal, the District argued that "the trial court erred in concluding that the spacing of the rungs on the arch climber created a reasonably foreseeable risk of the kind of injury that occurred." Specifically, the District argued that "the 1991 guidelines did not shift the focus from head entrapment to entrapment per se; rather, both sets of guidelines, correctly understood, spoke only to head entrapment." Accordingly, the District contended that "plaintiff's injury was not the kind of injury that the guidelines were designed to prevent" because "the risk of injury from the space between the rungs was a risk of head entrapment, not of limb entrapment."

As noted by the appeals court, "[t]o establish that the injury-causing risk created by the dangerous condition was reasonably foreseeable, the plaintiff need show only that the general character of the event or harm was foreseeable, not that the precise nature of the accident was so." Accordingly, the appeals court found that Clark did not have to show that the precise manner of entrapment was foreseeable. Rather, Clark only had to show that the general nature of the harm associated with entrapment was foreseeable. Under the circumstances of this case, the appeals court concurred with the trial court's finding that "the arch climber presented a life-threatening hazard of 'entrapment'; thus, an accident in which entrapment caused serious injury was reasonably foreseeable."

It is true that the 1981 provision on which plaintiff relies is addressed to the risk of head entrapment. However, the 1991 guidelines' definition of the word entrapment includes "any condition that impedes withdrawal of a body or bodily part that has penetrated an opening." The guideline for arch climbers is designed to prevent entrapment as defined in the guidelines.

Also, witnesses Melton and Hinson testified in videotaped depositions that, in the case of an arch ladder, the risk of injury would most likely be to a leg. This evidence is sufficient to establish that the type of injury that occurred as a result of the dangerous condition was reasonably foreseeable. "... [B]oth employees were certified playground inspectors, which meant that they had passed a course on how to apply the CPSC guidelines to inspect playground equipment. Their training qualified them to testify on what the guidelines had to say about specific hazards, including the possibility of any particular injury arising from them.

As a result, the appeals court, found substantial evidence supported the trial court's finding that "the injury which occurred was a reasonably foreseeable risk produced by the dangerous condition of the arch climber." In so doing, the appeals court took particular note of "Melton's and Hinson's testimony about the likelihood of leg injury on the arch climber."

#### ASSUMPTION OF RISK

On appeal, the District also argued that plaintiff had assumed the risk of his injury because of the inherent risks associated with a child slipping and falling on playground equipment. In so doing, the District contended that "any piece of equipment into which a body part can be inserted poses the inherent risk that the body part will be caught if the child slips and falls." Further, under the circumstances of this particular case, the District argued that the risk of a child slipping and catching a limb between the rungs of an arch climber was an inherent and unavoidable risk in the use of arch climbers, "no matter how the rungs of an arch climber are spaced."

Under the assumption of risk doctrine, the appeals court noted that "[p]articipants in athletic activities assume the risks inherent in the sport," but they "do not assume risks created or increased by defendant." However, assuming for the sake of argument that plaintiff's use of the playground equipment qualified as a "sport," the appeals court nevertheless rejected the District's assumption of risk defense. In the opinion of the appeals court, the District could not "hide behind the defense of assumption of the risk" because the District has increased the risk of injury.

Even assuming that there is an inherent risk of injury from climbing on static playground equipment and that the 10-year-old plaintiff assumed that risk, he did not assume the increased risk of the serious injury that occurred as a result of the dangerous condition of the property...

[A]ssumption of risk does not apply where the defendant's conduct increased the risk inherent in the activity. The court correctly found that the District did so. Even the District's biomechanics expert, Sean Shimada, conceded that the arch climber's noncompliance with the 1991 guidelines made it more likely that if a child slipped and fell, he would suffer the sort of injury plaintiff did. The District knew of this hazardous violation four months before plaintiff's accident, yet did nothing to correct it or warn against it.

Having found that the District's conduct had "increased the risk in using an arch climber," the appeals court affirmed the judgment of the trial court in favor of plaintiff Clark.