THE HIGH COURT

PERSONAL INJURY

[2024] IEHC 10

[Record No. 2017 99 P]

BETWEEN

DAIRE SEAN HICKEY

PLAINTIFF

AND

LIMERICK CITY COUNCIL, CLANCOURT MANAGEMENT, HAGS ANEBY AB AND SPRAOI LINN LIMITED

DEFENDANTS

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 11th day of January 2024

1. This is a claim for damages arising from personal injuries that were sustained by the plaintiff when he fell off the bars of a climbing frame, known as 'monkey bars' in a playground located on the second defendant's premises. The first defendant had installed the playground equipment in 2014 and the second defendant monitored it since that time by weekly inspections. The third defendant was the manufacturer of the climbing frame, which was designed with arched, zigzag monkey bars with higher bars in the middle of the arch which required the child to reach upwards and outwards when moving from bar to bar.

2. For the reasons set out below I am dismissing the plaintiff's claim.

The law

3. The Court of Appeal in *O'Mahoney v. Tipperary County Council* [2022] IECA 265 set out (at para. 43) the established legal principles applicable to playground users; that ordinary negligence principles and statutory duties under s. 4 of the Occupiers' Liability Act 1995 apply, meaning that users of a playground are owed a duty to maintain the playground in a safe condition. In that case, an issue arose about the manner in which the Council's engineer had interpreted the relevant safety standards applicable to the swing on which the

plaintiff had suffered an injury. The Court of Appeal criticised the engineer's suggestion that the standard was ambiguous. Noonan J. stated, at para. 33:-

> *"The standard stipulates that ground clearance is the distance between the lowest part of the seat and the ground. There can be no ambiguity about this."*

Inherent in the Court of Appeal's criticism of the approach taken by the engineer is a clear endorsement of applicable safety standards and the need for playground equipment to comply with them.

4. In considering the duties owed to children playing on playground equipment, regard must also be had to the need and desirability of enabling and encouraging children to play, with all of the positive benefits of physical challenge, creativity and development that such play entails. The jurisprudence recognises that those benefits may have to be balanced against the inevitable risk of accidents in such play, for example, in the decision of Cross J. in *Byrne (a minor) v. Bell t/a Bumblebees* [2013] IEHC 73 where the infant plaintiff was injured when he jumped off a foam brick wall in a toddler's indoor play area. At para. 19, Cross J. concluded:-

> *"I do not see or believe there was any danger in the premises relevant to the accident that occurred. I believe that the premises were well run and generally safe. You cannot ensure against all mishaps or accidents to young children. Accidents, injuries do happen from time to time and do so without any fault. Play areas such as Bumblebees are an important part of the development of children who are, as in this case, generally far safer there than in some regimes where prudent parents will allow their children to play entirely unsupervised, for example, gardens with trees."*

The evidence

5. On 30 August 2014 when the plaintiff was nine years old, he attended at the playground accompanied by his older brother and younger sister. They were supervised by their mother from her car which she had parked outside the playground railing. The defendants, wisely, did not pursue a claim of contributory negligence against the plaintiff or any lack of supervision by his mother. The plaintiff jumped up to the monkey bars on the climbing frame and proceeded to move from bar to bar. When he was halfway through the bars, approximately at the fourth bar and around the highest point of the arched design, he fell down hitting the ground and he fractured his left arm which caused him severe pain and necessitated surgery. He described the monkey bars as *"all over the place"* and said he fell

"because of the bad monkey bars". The plaintiff's mother said in her evidence she could see that he was struggling on the monkey bars just before he fell and, whilst she did not have any concern about them before the accident, she subsequently formed the view that the bars were dangerous because of their zigzag design.

6. The second defendant's service manager gave evidence of carrying out weekly inspections of the playground equipment including the monkey bars. He had carried out one of those inspections two days before the accident and had found nothing of concern. He confirmed that the first defendant, the City Council, had put a barrier around the entire climbing frame a few months after the plaintiff's accident because of it and a subsequent accident, but that the barrier was taken down a few weeks later and the climbing frame was not modified in any way. That evidence was corroborated by the second defendant's general manager.

7. The more controversial evidence was that of the plaintiff's and defendants' engineers who had different views on the monkey bars' safety, along with the third defendant's witness who gave evidence about the design and manufacture of the climbing frame. The plaintiff's engineer, Mr. Tennyson, was of the view that the European Safety Statement for Play Equipment (BS EN 1176) did not provide for the arched zigzag design of these monkey bars. He criticised the design as unusual and dangerous with an increased risk of falling because the child had to reach upwards and outwards in moving from bar to bar. He contrasted this with the more conventional design where monkey bars are all at the same level and which he said were covered by the European Safety S00tandards, unlike this arched zigzag design. He was also critical of what he said was the lack of room on each bar for the child to hold the bar with both hands which meant they had to overreach with one hand to move to the next bar, which Mr. Tennyson considered to be dangerous.

8. Mr. Tennyson had researched safety standards for this type of arched monkey bar and had located the National Safety Council, a US non-profit body, which apparently stated in a report that the number of injuries caused by monkey bars is so significant that many experts recommend their removal from all playgrounds. Mr. Tennyson did not produce the report from which he had obtained that extract. He was unable to confirm the role or status of the National Safety Council, other than he said it is described in its website as a non-profit organisation. He was unable to tell the court whether it is a public or a private body or whether it is funded by or related to any relevant industry body. He did not identify the

experts who had apparently recommended that monkey bars should be removed from all playgrounds or the basis for any such recommendation or whether the National Safety Council itself had the same view as those experts.

9. Mr. Tennyson did accept that the height fall (*i.e.* the distance from the highest point on the monkey bars to the ground) here was within that required by the European standards, although he disputed that those standards governed their design. He also acknowledged that the surface on which the plaintiff fell was sufficiently thick and adequate.

10. The Council's engineer, Mr. Campbell, confirmed that the height of fall for these monkey bars came well within the three meters required by the European safety standards and that the required handgrip distance of 16 to 45 millimetres was complied with here by a grip distance of 35 millimetres. He said each of the bars did allow a child to grip it with both hands and, whilst the child did have to reach upwards and outwards to move from bar to bar, Mr. Campbell said this was easily done and was designed to ensure a physical benefit and a challenge but one that was an acceptable risk for playground equipment. He disputed that the design was unusual and said he had seen similar monkey bars elsewhere in the country. He also explained how the monkey bars had been certified by an external inspection body after installation in the playground and they had confirmed that the design and installation was in compliance with the European safety standards.

11. Mr. Duggan, engineer for the fourth defendant, also confirmed that these monkey bars complied with the European safety standards which he said does cover this arched zigzag design. He has seen similar designs in other playgrounds in the country. He said children particularly enjoy the challenge and adventure of this type of equipment, which allow them to learn about risk in a controlled environment. The design enables a child to swing from bar to bar but with room for them to hold a bar with both hands if necessary and, if they do fall, the distance is within what is permitted by the European safety standards and they fall onto a safe ground surface that is appropriately designed to minimise the risk of head injuries.

12. The third defendant's engineer, Mr. Foy, gave similar evidence relating to the width and height distances which he said come within the applicable safety standards applicable to this type of monkey bars and that the distance the child had to reach was not excessive.

13. The third defendant's technical director, Mr. Yeats, explained how the monkey bars had been designed to balance risk and challenge but at all times to comply with the European

safety standards. Mr. Yeats was also the Chair of the European Committee that published the technical standards that lead to the European Safety Statement for Play Equipment. He described how anthropometric data about body dimensions had been used to assess the appropriate reach distances in designing the climbing frame. Following its manufacture, the third defendant chose to submit the entire climbing frame for external certification which it passed. Like the witnesses for the other defendants, Mr. Yeats disputed Mr. Tennyson's claim that a child could not fit both hands on a single bar.

Discussion

14. The plaintiff's counsel fairly conceded that their criticism was not of the height fall distance of the monkey bars which, in this case, clearly come within the distance required by the European safety standards. Rather, they argued that the design of the monkey bars was inherently dangerous. Mr. Tennyson said the design was dangerous in requiring a child to reach upwards and outwards in moving from bar to bar and that the European safety standards did not cover this type of equipment. Mr. Tennyson is correct that the design of these bars does require an upward and outward movement of the child, but I do not find his basis for his condemnation of the design to be convincing. Having heard the evidence, I am satisfied that the European safety standards are not limited to straight horizontal monkey bars, as Mr. Tennyson suggests. The standards require specified height fall and grip distances for all monkey bars, whether horizontal or arched. I accept and prefer the defendants' engineering evidence that the standards do cover the type of monkey bar design at issue here and that they comply with the required standards. I found the basis for Mr. Tennyson's contrary views lacked substance, particularly in his reliance on an unclear criticism made by a US organisation with unspecified credentials, by reference to unidentified experts on an unidentified basis.

15. Mr. Tennyson also claims that the bar on this equipment did not allow a child to grip it with both hands, a view that was directly challenged by the defendants' witnesses. Surprisingly, Mr. Tennyson could not supply a measurement to substantiate his claim, unlike the defendants' witnesses who gave their view that the bar could fit both hands by reference to the dimensions of the bar which they had measured. It was also clear from Mr. Tennyson's own photographs included in his report that a child was using the monkey bars when Mr. Tennyson took his photographs and was holding the first of the bars with both hands. Mr. Tennyson sought to distinguish that by reference to the fact that the child was climbing up

to the first of the bars. I do not see any basis for his suggestion that, because the child was gripping the bar while climbing up to it with both hands, somehow the child was not going to be able to use both of his hands on the other bars all of which had the same width as the first bar which the child was clearly holding with both hands. I, therefore, find that the defendants' witnesses were correct in saying that the bars do allow a child to grip it with both of their hands.

16. The design of these monkey bars is both covered by and consistent with the European safety standards for playground equipment. The monkey bars have been carefully designed to ensure an adventurous and challenging play experience for a child of the plaintiff's age at the time of his accident in a controlled and safe environment. The risk of a fall from these bars cannot be entirely removed but can be reasonably provided for by the provision of a safe, thick ground surface aimed at minimising head injury but not necessarily avoiding every risk of bruising or even an occasional broken limb.

17. The design of the monkey bars was reasonable, sufficiently safe and well within the requirements of the European safety standards. In addition, the third defendant manufacturer arranged for independent certification of the equipment post manufacture and pre-installation. The first defendant Council arranged for an independent post-installation inspection. Neither examination raised any concern about the design of the monkey bars, which is not surprising given their clear compliance with the European safety standards for playground equipment. The second defendant, on whose lands the playground is situated, arranged for weekly monitoring of the equipment which I find to have been careful and considered.

18. It emerged from the evidence that shortly after the plaintiff's accident, there was a second incident alleged to have taken place on the same climbing frame. The first defendant Council prudently decided to erect a barrier around the entire unit to prevent its use pending further inspection. Some weeks later the Council decided that no modifications were required, again, unsurprisingly, given that the equipment does comply with the relevant European safety standards. The Council's actions in that regard evidenced the responsible discharge of their duty to the users of the playground equipment rather than demonstrating any evidence of an inherent danger or risk.

Conclusion

19. The plaintiff in using the playground equipment designed for his age, was owed a duty by the defendants as owners and/or occupiers and/or manufacturers of the equipment, to take reasonable care to prevent him sustaining a foreseeable injury. In assessing that standard of reasonable care, compliance with the relevant European safety standards is highly relevant alongside appropriate monitoring of the equipment to ensure it has not fallen into dangerous disrepair. Here, the defendants complied with their obligations in the design, manufacture, installation and inspection of this equipment. Even in a safe controlled environment such as a playground, accidents can and will happen. However, liability for such accidents will only rest with a defendant where the plaintiff establishes, on the balance of probabilities, that the defendants fell below a reasonable standard of care. The plaintiff has not established that. I therefore find against the plaintiff and dismiss his claim.

Indicative view on costs

20. My indicative view on costs is, in accordance with s. 169 of the Legal Services Regulatory Act 2015, that the defendant is entitled to their costs. I will put the matter in for mention before me on 23 January 2024 at 10:30am for the purpose of hearing such further submissions which the parties may wish to make both in relation to costs and the scope and application of the final orders to be made. Any written submissions should be filed with the court at least 48 hours before the matter is back to me.

Counsel for the plaintiff: Padraig McCartan SC, Andrew Walker SC and Sheila Finn BL

Counsel for the first, second and fourth named defendants: Henry Downing SC and Ciara Daly BL

Counsel for the third named defendant: Murray Johnson SC and Elaine Power BL