



IS THE LAW TAKING PLAY OUT OF THE PLAYGROUND?

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“One can supervise as much as one likes, but one will not stop a boy being mischievous when ones back is turned. That, of course, is the moment he chooses for being mischievous.”

(Rich v London County Council (1953) 1WLR 895: Hodson LJ at 903)



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A. INTRODUCTION

Prior to tort law reform in Australia in 2002, and in the midst of what was referred to as the “liability insurance crisis”, journalists, politicians and local authorities were warning of playgrounds shutting down, seats being taken off the swings and cricket being a prohibited activity in our parks. The impression one gained was that the law was not only taking play out of the playgrounds, but that it may effectively shut some down entirely by the pressure that it was said to be placing on liability insurance premiums. More than six years down the track, the playgrounds are still open, the swings are still in place and kids are still playing cricket. But the controversy and the headlines have not disappeared.

Only last month playgrounds and schoolyards were back on the front pages in Queensland. This followed a decision by the Belgian Gardens State School in Townsville to ban unsupervised cart wheels, handstands and somersaults¹. In my opinion this fear of an increased exposure to litigation is more a response to a perceived risk and less a response to any observed litigation trend. That view is supported by a recent Education Queensland press release which said that there was no evidence of a spike in students or parents suing for injuries sustained in the school ground². It is my view, following an analysis of recently decided cases and tort law reform legislation, that the law has been dealt with rather harshly by those who accuse it of taking the play out of playgrounds.

Behavioural experts have for a while now warned against making playgrounds too safe, as to do so they say will impede a child’s mental and physical development. Jay Beckwith, behavioural and play environment expert, in a series of papers on the topic “Safer Playgrounds”, makes the following observation:-

*“An important part of play is risk-taking. It has been known for some time that learning takes place fastest when there is a high degree of failure. Kids naturally push themselves to their limits in order to develop fully. Play makes risk-taking fun. Consequently a ‘safe’ play structure with little or no risk is an absurdity when considered developmentally”.*³

In a country where too many of our children are obese, and many spend all of their time involved in purely sedentary activities, we must not shift kids from the playground to a virtual reality. It is quite simply a matter of national significance to continue to create stimulating playgrounds where children can take risks and develop, but which do not pose an unreasonable risk of injury to those using them. That is the balance which must be struck, and in my view the common law is well equipped to do so.

¹ Courier Mail, August 27, 2008.

² Ibid.

³ Safer Playgrounds – Part 1 “How to design them”: Jay Beckwith, February 19, 2001

In this paper I consider the liability exposure of schools, childcare centres, kindergartens, local authorities and those involved in the manufacture and supply of playground equipment to children injured in the playground.

B. THE COMMON LAW

The common law is one of England's most successful exports, probably running third behind the English language and the Beatles. The common law is essentially judge made law. It is the law which has developed over hundreds of years through the decisions of courts and similar tribunals. The courts make law by the creation of precedents, and this body of precedent comprises the common law. This is to be contrasted with laws enacted by governments through Acts of Parliament. The common law is by and large always subservient to the executive lawmakers.

Tort law, or the law of civil wrongs, is probably the most widely recognised body of law within the common law system. Tort law includes negligence. To establish negligence a person needs to show that:-

1. A duty of care was owed to him or her by another person.
2. The duty of care was breached.
3. The breach caused, or materially contributed to a loss.
4. He or she is able to be compensated by a sum of money (common law damages).

A duty of care is a duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your "neighbour"⁴. Who in law is your neighbour? Anyone so closely and directly affected by your act that you ought reasonably have them in contemplation as being so affected when directing your mind to the particular act or omission in question.

Let us look at the law of negligence as it applies from the schoolyard to the local playground.

⁴ *Donoghue v Stevenson [1932] AC 532*

1. Schools, Childcare Centres and Kindergartens

1.1 Duty of Care

Schools owe a “non-delegable” duty to ensure that all reasonable care is taken for a child’s safety. The non delegable aspect arises out of the special relationship between the school and the child⁵. A non-delegable duty of care is also owed by kindergartens and childcare centres to children in their care. Were it not for the existence of this special relationship, a duty of care could then be delegated to another person.

So for example if a school engages a playground equipment manufacturer to provide certain equipment which turns out to be defective and a student is injured, then notwithstanding that the school has engaged a competent and qualified manufacturer, and has no knowledge (or reason to know) of the defect, it will still be held liable to the student. The absence of any direct fault on the part of the school is irrelevant. The school may then have a separate claim against the equipment manufacturer for all or part of its legal liability exposure to the child.

1.2 Vicarious Liability

The principle underlying vicarious liability is essentially that any negligent act or omission of an employee will become the negligence of the employer if the employee is acting within the scope of his or her employment. If the employee acts outside the scope of his or her employment then he or she may be personally sued. In the field of education, this latter case tends to occur in cases of assault, for example sexual assault or other physical harm⁶.

The High Court in *Ramsay v Larsen*⁷ rejected an argument that a teacher who had breached his duty of care towards a 12 year old student, ought to have been held personally liable. The student in question had climbed a tree against the teacher’s instructions. While the student was in the tree, that same teacher asked him to pull a rope over a higher branch, and in doing this the student fell out of the tree and was injured. The High Court held that the New South Wales government, as the operator of the school, was vicariously liable for the teacher’s negligence. The teacher was not held personally liable.

In *Commonwealth of Australia v Introvigne*⁸ the High Court considered the case of a 15 year old school boy who was injured skylarking in the Woden Valley High School playground on 19 February 1971. The school boy and his friends were playing in the school quadrangle before school and were taking turns

⁵ *The Commonwealth v Introvigne* (1982) 150 CLR 258

⁶ *Stevens v Brodribb* (1986) 160 CLR

⁷ (1964) 111 CLR 16

⁸ (1982) 150 CLR 258

swinging from a rope attached to a flagpole. At a time when the plaintiff was not swinging on the rope, and without warning, the truck (a disc weighing 7kgs) fastened to the top of the flagpole fell approximately 11m and struck the plaintiff on the head, severely injuring him. On the morning in question the school principal had died and staff were called to a room to be informed of that fact at 8.20am, with the meeting lasting around 5 minutes. The accident happened during that period. One member of staff had been posted on yard duty for that 5 minute period. The usual number of teachers supervising at this time was anywhere between 5 and 20. The school was run by the Commonwealth.

The plaintiff sued the Commonwealth, a firm of architects, and the company which built and erected the flagpole. The plaintiff was unsuccessful at first instance, but successfully appealed to the Full Court of the Federal Court who held the Commonwealth negligent for:-

- Failing to properly supervise the pupils in the school grounds in the half hour period before classes started.
- Failing to ensure that the rope was secured by a padlock to the flagpole.
- Failing to make it a rule that the flagpole was not to be used without the express authority of a teacher.

The Commonwealth appealed. It argued that the teachers ought be held liable. It was unsuccessful. The High Court held that it was the Commonwealth which ran the school, and as such the Commonwealth was liable for the breach. The teachers were negligent for failing to provide adequate supervision, and for failing to ensure that the rope was secured to the flagpole by a padlock, but they weren't brought to account for this personally.

1.3 Standard of Care

Having established that a duty of care is owed by one person to another, the next task is to ascertain the degree or standard of care that is required to fulfil that duty. In some cases the standard of care may be high, in others relatively low.

Not surprisingly, the standard of care owed by a school to its students is very high, as is the case with childcare centres and kindergartens. Parents would not want it any other way. The systems and safeguards put in place must contemplate and be sufficient to deal with the mischievous propensities of children. The common law makes no allowance for any relaxation in a school's standards. The departure from the usual system by the teachers at the Woden Valley High School on the day that young Introvigne was injured under the flag pole is a good example of the very high standard owed by a school to a pupil.

1.4 Supervision

The duty to supervise students in the playground does not extend beyond school hours provided that the school policy is not to allow students in the grounds after hours, and the policy is communicated and enforced.

In *Strath (by his tutor, The Protective Commissioner) v New South Wales*⁹ the plaintiff, aged 8, was injured at the Cabramatta Public School on 12 March 1984 when he returned to the school grounds with his brother after hours. The plaintiff entered the playground by climbing over a brick fence and suffered severe head injuries when he fell from a fort in the playground. The one witness to the accident says that he saw the plaintiff immediately prior to the accident attempting to exit the fort by sliding down a pole in such a way which resulted in him falling head first. The witness described the ground surface as compacted sand. This was contrary to the evidence of the deputy principal who said that a surface of soft sand was maintained under the fort.

The New South Wales Court of Appeal accepted that the school required students found in the grounds after hours to leave, and that children and parents were told of the schools policy at school assembly and in newsletters sent home to parents. That was held by the court to be sufficient in circumstances where the policy was enforced. The court accepted that nothing more needed to be done to prevent access to the school. There was no need to construct a prison-like fence around the perimeter of the school. The court also found that the plaintiff had not proved that the fort (including its surrounds) was a dangerous structure. It was mentioned that a finding of liability may have been made against the school if the equipment was inherently dangerous, but no finding on this point was made.

In *The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba (by her next friend Hadba)*¹⁰, the High Court considered the claim of a grade 3 student who was injured on 25 February 1999 when she fell from a flying fox in St Anthony's grounds during morning recess. The plaintiff was 8 years old and was one of 540 students at the school. Teachers were rostered on for supervision during morning and lunchtime recesses, and the school had implemented a "hands off rule" ie children were not to touch each other during school hours in the playground. Children were reminded of this rule in class, in assembly and through posters positioned throughout the school. A specific warning was given to students not to touch children using the flying fox. The flying fox had been at the school for a little less than six years and there was no evidence of any prior serious accidents. On this occasion, the plaintiff had taken hold of the flying fox when two fellow year 3 students each grabbed one leg each causing the plaintiff to fall from the flying fox and suffer facial

⁹ [2000] NSWCA 288

¹⁰ [2005] HCA 31

and other injuries. The accident was not observed by the teacher on duty who was disciplining other children a short distance away. The evidence was that the accident happened in the 20 or 30 seconds which elapsed from the time when the teacher left a point in the playground where she could see the flying fox to a point where it was obscured.

The plaintiff argued that the supervising teacher should have only been given the task of supervising the play equipment area, rather than a larger area of the playground and its surrounds. The school was successful at trial, lost in the ACT Court of Appeal, before ultimately succeeding before the High Court. The High Court held that the plaintiff had not shown that it was reasonable for two teachers to supervise this particular area and its surrounds. There had been no serious incidents on the flying fox in the past. There was a well publicised and enforced school policy directing children not to physically interfere with each other whilst on the equipment. The High Court went on to hold that it was not necessary to have a system where children are observed continuously, and made the comment that continuous supervision would be damaging to teacher/pupil relationships by removing even the slightest element of trust, and be likely to retard the development of responsibility in children, not to mention the prohibitive cost involved in providing such supervision. It also held that even if there was constant supervision, the accident may not have been prevented. In response to an argument from the plaintiff's counsel that children will only behave mischievously if they think that no adult is watching, the court made the comment that the "scope for juvenile mischief is greater than that".

2 Local Authorities

2.1 Duty of Care

The duty of care owed by a local authority to a child using a playground or playground equipment differs to that owed by a school or kindergarten. A local authority can delegate its duty of care eg. if it contracts with a reasonable and competent playground manufacturer to supply equipment, which is supplied but with a defect (which is not obvious) then the local authority may not be held liable to a child injured using this equipment. There has been no fault on its part. The manufacturer would have the exposure. The standard of care required of local authorities in this situation is however high, so in this example the local authority would have to do more than refer to the Yellow Pages when selecting a supplier of the playground equipment.

In *Shire of Wakool v Walters (by his litigation guardian Stead)*¹¹ the plaintiff, who was 2 years and 5 months, fractured his leg playing on an adventure playground in the local park under the supervision of his mother. The plaintiff's mother said that she followed him closely as he moved through the adventure

¹¹ [2005] VSCA 216

playground. The plaintiff crossed a bridge, which formed part of the structure, and then moved onto a steel platform at the end of the bridge which had to one side an arched climbing frame connecting the steel platform to the ground. The arched climbing frame had steel bars across it for climbing with the spaces between the bars large enough for a child the size of the plaintiff to crawl through. The plaintiff walked too close to the edge of the steel platform where the climbing frame was attached, and fell through the space between the first cross-bar on the frame and the steel platform and broke his left leg.

The plaintiff through his litigation guardian sued the council alleging that it had a duty of care to warn users of the adventure playground that the equipment was unsuitable for children aged between one and three. The court found that no such warning was required. Justice Nettle observed that it was commonplace for playgrounds to be fitted with a range of equipment of differing sizes and styles for children of different ages, and commonsense suggested that small children be confined to smaller items of equipment. His Honour thought that this ought to be obvious to adults in charge of small children in the playground, and the council should not be expected to have to warn of that fact. Justice Nettle recognised the ongoing role of parents or carers of children, and in this case he said that no-one was better placed than the respondent's mother to assess whether that part of the equipment was too difficult for her son to negotiate. A more general duty of care was owed by the council to users of the park to maintain the equipment and its surrounds so as to ensure a reasonable level of safety for children using the equipment.

The case didn't finish there. The court heard evidence that the council had put in place a system which was intended to maintain the depth of the soft-fall surface at 250mm, but found that the system had not been maintained with reasonable care. The court accepted the trial judge's findings that the area where the child fell and injured himself was hard and bare. The local authority argued that the Australian Standard regulating the depth of the soft fall surface existed to protect against head injuries. It argued that there was no evidence that 250mm or any other amount of soft-fall would have significantly reduced the risk of a long bone injury (which the plaintiff suffered). The plaintiff relied on evidence provided by medical specialists to the effect that the probability of such an injury happening is higher on a harder surface. The court was satisfied that it was more likely than not that the child would not have broken his leg if there was appropriate soft-fall. The local authority was held liable to the plaintiff in damages.

2.2 Standard of Care

Local authorities owe a very high standard of care to children using local parks and amenities. That is well illustrated by the following case.

On 15 July 2008, the ACT Supreme Court decided the case of *Todd Scott Lemmon v Australian Capital Territory*¹². The plaintiff was 14 when he injured himself using a giraffe swing at the local park. The giraffe swing had a base with six steps. A chain with a circular rubber seat was attached to a metal structure rising high above the platform. There was plastic piping around the chain where the user placed their hands to steady themselves. At the top of the platform, with their hands placed on the piping over the chain and the plastic seat between their legs, the user would leap out jumping clear of the steps with the idea being to swing forward and back and ultimately stop at ground level. The piping around the chain had been vandalised and was cut in four places. When the claimant jumped, the fingers of his left hand became pinched between the sections of the vandalised piping which caused him to let go and throw himself off course. He collided with a metal safety fence to his right hand side and suffered serious facial injuries. The park was the responsibility of the ACT Department of Urban Services. It had retained a contractor to maintain the playground equipment. This contractor undertook regular routine visual inspections to identify, amongst other things, hazards resulting from the vandalism and use of playground equipment. The plaintiff alleged, amongst other things, a failure to comply with Australian Standard 4486 which deals with playground inspection and maintenance. The Australian Standard required three levels of inspection, the first being routine visual inspection every day or two to check for obvious hazards and damage from vandalism; the second being operational inspection every one to three months to check for wear and tear; and the third being a comprehensive inspection at least every twelve months in the form of a detailed safety assessment.

The maintenance contractor gave evidence that there were 125 parks in the area for which he was responsible. His job was to inspect these parks once a week. He inspected 25 parks a day in the same order each week. This particular park was the only one with adventure equipment including the giraffe swing. The others on his list were more conventional parks. He gave evidence that it was common to find the plastic piping around the chain on the giraffe swing cut by vandals. He would generally repair it on the spot. If he couldn't do so he would make the equipment unusable. He had to replace the piping at least twice a month. In addition there may have been one emergency call each month to repair the piping. He carried spare pieces of piping around with him.

¹² (2008) ACTSC 70

The plaintiff sued the ACT as occupier of the park. The court was asked to consider whether there was in place a proper system of inspection. The court held that there wasn't. It found that it was reasonable to expect that the ACT ought to have had the inspector visit the giraffe swing more frequently than once a week given the repetitive vandalism of the piping around the chain. In particular the court referred to the Australian Standard 4486 and the requirement for a visual inspection every day or two for obvious hazards and damage from vandalism. It was held that if this had been complied with, then arguably the accident would not have happened as the piping would have been replaced or the chain taken out of use.

A review of decided cases and literature in the area reveals a few common failings when it comes to local authorities and playgrounds. Most, if not all, are easily remedied. It will for a start be difficult to establish a breach of duty on the part of a local authority if the playground equipment and surrounds comply with the relevant Australian Standards. They are discussed in more detail in the following pages. A local authority ought to maintain a safety management system which includes:-

- Inspecting the equipment and raking the surrounding material every few days.
- Carrying out regular formal inspections of the equipment and reporting defects every few months.
- Attending to remedial works immediately when a defect is revealed.
- Maintaining the requisite minimum depth of soft fall material, and replenishing the supply of soft fall material as required.
- Aerating the soft fall material to ensure that it does not become too compacted.
- Carrying out safety audits of playground equipment at least annually.

2.3 Is a higher duty owed to adults?

What of adults who use playground equipment. What standard of care are they owed by a local authority? In *City of Stirling v Tremeer*¹³, a Western Australian Supreme Court decision handed down on 10 May 2006, an adult plaintiff who ended up a quadriplegic as a result of falling from a track ride in a children's playground sued the City of Stirling. The plaintiff was aged 23. He succeeded in the District Court, where the judge held that the fall was caused by the city's negligence in failing to have sufficient soft sand underneath the playground equipment. The City of Stirling appealed, arguing that:-

- It could not be shown that the city's failure to have 300mm of sand under this particular piece of equipment materially contributed to the respondent's injuries.

- The plaintiff's injuries were caused solely by his own negligence in positioning himself upside down prior to the fall.
- If the city's negligence did materially contribute to the plaintiff's injuries, then the plaintiff was guilty of contributory negligence himself by positioning himself upside down prior to the fall.

The central question for the Court of Appeal was whether the plaintiff proved on the balance of probabilities that the injuries would not have occurred if the City of Stirling had complied with its duty to provide soft sand under the track ride. Ultimately having considered all of the evidence, the Court of Appeal overturned the trial judge's decision and found for the City of Stirling. It held that the clear weight of expert evidence established that the plaintiff would have suffered injuries resulting in quadriplegia even if he had fallen onto soft sand.

The trial judge did not consider, nor did the parties lead evidence on whether the depth of sand required to minimise the risk of harm to an adult is greater than what is required to achieve equivalent protection for a child, and if so whether reasonableness required the city to provide sufficient sand to protect adults. Logic suggests that because adults would hit the ground with greater velocity and force, more sand would be required to cushion their fall. The Court of Appeal commented (it had no reason to go further) that this does not necessarily mean that such an allowance needs to be made by those in control of city parks. The case was run on the basis that the City had no duty to provide additional soft fall to accommodate an adult falling from children's playground equipment. Judge McLure in the Court of Appeal mentioned in the course of his judgement that:-

"I would have great difficulty with the proposition that reasonableness required a local government authority to adopt safety standards and measures to protect adults who may use children's playground equipment."

3. Contributory Negligence

Contributory negligence is where the plaintiff, through his or her own negligence, has been partly responsible for the cause of the event. In such a case the damages awarded to the plaintiff will be reduced in proportion to the extent of his or her contributory negligence.

A child's inability to identify and avoid many risks often weighs against findings of contributory negligence in a playground injury claim. A court is going to take some convincing before it visits liability on a child and reduces damages on account of a child's contributory negligence.

¹³ [2006] WASCA 73

In *Todd Scott Lemmon v ACT*¹⁴ (the giraffe swing case) the defendant pleaded contributory negligence. The court said that as a matter of law a 14 year old boy is capable of being guilty of contributory negligence. Master Harper, who heard the case, held that whilst he would expect a 14 year old boy to realise that he might hurt his hand on the piece of broken piping, he might not realise that it rendered the chain itself dangerous, or that there was a foreseeable likelihood that he might as a consequence be thrown to the ground. Master Harper held that the plaintiff should not have foreseen that by using the swing in the way that he did, he was exposing himself to the kind of injury which he suffered. No reduction in the damages award was made.

4. Playground Equipment Designers, Manufacture's and Suppliers

Playground equipment designers, manufacturers and suppliers owe a duty of care to persons using or affected by the supply or use of the playground equipment. The standard of care owed is high. It is that to be expected of a reasonable and competent person or entity undertaking the tasks involved. Persons injured using the equipment may have a claim in negligence, or under the *Trade Practices Act 1974* (Cth) if the equipment is defective.

I could find no claims made directly against playground equipment manufacturers, designers or suppliers by children injured on or in connection with playground equipment. Schools and local authorities tend to be the targets in this type of litigation, and whether separate claims are made behind the scenes against manufacturers, suppliers or other parties more closely associated with the equipment is not apparent from the written judgements.

Probably the best guide as to what is required of playground equipment suppliers, manufacturers and designers is to be found in the relevant Australian Standards. The content of these Standards is quite specific. Compliance with them will generally leave little room for a finding of negligence, or other breach down the track.

Generally speaking, Australian Standards have been developed to assist those involved in the design, manufacture and supply of equipment and consumer goods to meet minimum safety and reliability requirements. To do this the Standards set out in detail criteria and tests to facilitate safety in a variety of conditions. The Australian Standards are not legally binding. They are not Acts of parliament nor subordinate legislation, the breach of which exposes a person to a legal sanction. They are often used by the courts as an important threshold to meet in defending a breach of duty of care. Failure to comply with the Standard does not automatically mean that there has been a breach of a duty of care, however, in many cases a breach of the Standard will be compelling evidence of negligence. Given that the Standards

¹⁴ (2008) ACTSC 70

are specifically designed to protect children, it is difficult to see that the courts will require anything other than strict compliance with them.

For the playground equipment industry there are three important Australian Standards. They are:-

1. Australian Standard AS/NZS4422- 1996: Playground Surfacing.
2. Australian Standard AS4685-2004: Playground Equipment.
3. Australian Standard AS4486-1-1997: Playground Inspection and Maintenance.

Australian Standard AS/NZS4422 sets out the general requirements for surfacing to be used in childrens playgrounds, and specific requirements for areas where “impact energy attenuation”¹⁵ is necessary. It sets out things which should be considered when selecting a playground surface, and gives a method of testing by which the impact energy attenuation can be determined.

The objective of this Standard is to minimise the severity of a head injury resulting from a fall from play equipment by providing owners of playground equipment, as well as those responsible for the installation and maintenance of the equipment and play areas, with details of the surfacing to be used underneath and around the playground equipment.

Australian Standard AS4685 is comprised of six parts.

Part 1: General safety requirements and test methods.

This Standard sets out the general safety requirements for playground equipment. Additional and more specific safety requirements for specific pieces of playground equipment are set out in the remaining parts referred to below. The stated objective of this Standard is to minimise the risk of injury to children using playgrounds by providing internationally aligned general safety requirements for playground equipment. The Standard is specifically intended for use by designers, consultants, manufacturers and installers of playground equipment as well as operators, inspectors and maintenance professionals. Parts 2 to 6 are all said to apply in addition to the general requirements set out in this Part.

Part 2: Particular safety requirements and test methods for swings.

This Standard specifies particular safety requirements for swings intended for permanent installation for use by children.

¹⁵ “Impact attenuation” is defined as “properties of playground surfacing, transforming the kinetic energy from falls into controlled deceleration/time behaviour during impact.”

Part 3: Particular safety requirements and test methods for slides.

This Standard specifies particular safety requirements for slides intended for permanent installation for use by children. The Standard is not applicable to water slides, bob sleds, rollerways or slide installations where auxiliary equipment such as mats or sleds are used.

Part 4: Particular safety requirements and test methods for runways.

This Standard specifies particular safety requirements for runways (including flying foxes) intended for permanent installation for use by children. This Standard applies to runways where children travel on or along a cable by the use of gravity.

Part 5: Particular safety requirements and test methods for carousels.

This Standard specifies particular safety requirements for carousels of a diameter greater than 0.5m that are intended for permanent installation for use by children. It is applicable to carousels that are used as playground equipment for children with one or more user stations that rotate around a vertical axis or are inclined up to 5 degrees. The Standard is not applicable to motor driven carousels, fairground carousels or log rolls.

Part 6: Particular safety requirements and test methods for rocking equipment.

This Standard specifies particular safety requirements for seesaws and rocking equipment intended for permanent installation for use by children.

Australian Standard AS/NZ 4486:1997 sets out the requirements for the development, installation, inspection and maintenance of playgrounds and playground equipment “to ensure a continuing level of function and safety”. It also contains requirements for information to be supplied by the manufacturer. The standard is expressed to apply to all playgrounds and playground equipment. The objective of the standard is to minimise the risk of injury to children using playgrounds by providing guidelines for placing and developing playgrounds, product information requirements, instructions and operating procedures intended to support sound playground design, the selection of appropriate equipment and to minimise operational hazards. The standard is intended for designers, manufacturers and installers of playground equipment as well as the operators of playgrounds.

C TORT LAW REFORM LEGISLATION

At the beginning of this century, awards of damages in personal injury claims were seen to be bringing the law, or more particularly the law of negligence, into disrepute. The public outcry was soon followed

by politicians falling over themselves to reform the law of negligence which had, according to many, caused a blow out in liability insurance premiums. The Federal Government appointed a panel of eminent persons, chaired by Justice David Ipp, to review the law of negligence and produce a report recommending desirable reforms. That report was released in September 2002¹⁶, and subsequently the Ipp Committee's recommendations were, to varying degrees, implemented throughout Australia by State and Territory Governments.

As part of the initiative, State and Territory Governments have legislated to:-

- Limit liability in a number of areas, and otherwise restate the elements of negligence and require courts to consider each of those elements in arriving at their decision.
- Reduce awards of damages in personal injury claims.

Many of the reforms found their way into the *Civil Liability Act (WA) 2002*.

1. Civil Liability Act 2002 (WA)

The *Civil Liability Act 2002 (WA)* applies to any civil claim for damages for harm, but has only a very limited application to:-

- Workplace claims;
- Motor vehicle injury claims;
- Tobacco claims;
- Asbestos claims.

1.1 Breach of Duty of Care

Section 5B sets out the general principles relevant to establishing a breach of a duty of care. It assumes the existence of a duty of care.

¹⁶ Review Of The Law Of Negligence – Final Report, September 2002.

“5B. General Principles

- (1) *A person is not liable for harm caused by that person’s fault in failing to take precautions against a risk of harm unless -*
- (a) *the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);*
 - (b) *the risk was not insignificant; and*
 - (c) *in the circumstances, a reasonable person in the person’s position would have taken those precautions.*
- (2) *In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) –*
- (a) *the probability that the harm would occur if care were not taken*
 - (b) *the likely seriousness of the harm;*
 - (c) *the burden of taking precautions to avoid the risk of harm;*
 - (d) *the social utility of the activity that creates the risk of harm.”*

In *Waverly Council v Ferreira*¹⁷ the plaintiff was the father of 12 year old Martin Ferreira, who was killed on 15 December 2000 when he fell through a skylight in a building at the Kimberley Reserve. The building, known as the Community Centre, and the surrounding park were under the care, control and management of the council, with the park containing swings and other playground equipment designed to attract children. The plaintiff sued the council for mental harm suffered by reason of his son’s death. The son and a friend were playing darts at the Community Centre when the son accidentally threw a dart on the roof. A fence and undergrowth adjacent to the community centre made climbing onto the roof a relatively easy exercise. The son climbed onto the roof to retrieve the dart and out of curiosity ended up standing on the skylight. The skylight collapsed and the boy died. The plaintiff succeeded at first instance, with the trial judge finding that the council ought to have removed the fence and undergrowth to reduce the likelihood of children climbing on the roof.

In considering the equivalent to section 5B, the NSW Court of Appeal held that:-

¹⁷ [2005] NSWCA 418

- The relevant risk of injury was that a child might fall to the ground once he had climbed onto the roof. That was a foreseeable risk of which the council knew, or ought to have known. It was immaterial that the council might not have been able to foresee the precise mechanism that caused the child to fall ie. the skylight collapsing.
- In response to such a risk, a reasonable council would have taken precautions by removing the fence and the undergrowth. By failing to do so, the council had breached the duty of care that it owed to the plaintiff.
- Specifically, with regard to subsection (2):-
 - The risk of the skylight collapsing was foreseeable and not insignificant;
 - The degree of probability that it might collapse, should it be required to bear the weight of a 12 year old child, was substantial;
 - The likely seriousness of the harm materialising was serious injury or death; and
 - The burden of taking precautions to avoid the risk of harm was small ie. installing a grill over or under the skylight.

With reference to the equivalent provision in the NSW Legislation, the Court of Appeal upheld the finding negligence.

Section 5B(2) contains what is known as the “negligence calculus”. It sets out a framework to assist in determining what a reasonable person should do in the face of a risk of harm. The list is not intended to be exhaustive.

Schools, kindergartens, childcare centres, local authorities and playground equipment manufacturers/suppliers should be able to make sensible use of subsection 5B(2) in playground injury claims. For example, subsection 5B(2)(d) provides that in considering whether there has been a breach of the duty of care the social utility of the activity that creates the risk of harm must be taken into account. In a playground injury case it might be argued that the risk of a child being injured, was outweighed by the physical and mental challenges and the element of risk taking involved in using the equipment, all of which are important in a child’s development, and in this context the risk involved was not such as to be considered unreasonable.

1.2 Recreational Activities and Obvious Risks

Recreational activities are given special consideration in the *Civil Liability Act 2002* (WA).

“Recreational Activity” is defined to include:-

- Any sport (whether or not the sport is an organised activity);
- Any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- Any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place (such as a beach, park or other open public space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.¹⁸

“Dangerous Recreational Activity” is defined to mean a recreational activity that involves a significant risk of harm.¹⁹

Section 5F of the *Civil Liability Act* sets out the meaning of “obvious risk”.

“13. Meaning of Obvious Risk

- (1) *For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.*
- (2) *Obvious risks include risks that are patent or a matter of common knowledge.*
- (3) *A risk of something occurring can be an obvious risk even though it has a low probability of occurring.*
- (4) *A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.”*

Under the Western Australian Act, the general rule is that a person is not liable to another person injured whilst engaged in a dangerous recreational activity if the harm is the result of an obvious risk.²⁰ For the most part, I don’t think that playground equipment and activities will fall within the definition of

¹⁸ section 5E
¹⁹ ibid
²⁰ Section 5H

“dangerous recreational activity”. If playground equipment does fall within the definition of “dangerous recreational activity” it should be removed. Exposing a child to a significant risk of harm could never be excused by the activity being “good for the child’s development”. Activities like skateboarding would, for example, fall within the definition of “dangerous recreational activity”.

1.3 Assumption of Risk and Obvious Risk

More generally, section 5N of the *Civil Liability Act* provides that people are presumed to be aware of obvious risks, unless they can prove on the balance of probabilities that they were not aware of the risk. There is no duty to warn of an obvious risk.

Whether a risk is obvious is to be viewed objectively. With child claimants, the question will be answered from the point of view of a reasonable child of the same age. The common law has always recognised that children have a limited capacity to make reasoned judgements regarding their safety. What may be obvious to an adult may not be obvious to a child, and what for instance may be obvious to a 14 year old may not be obvious to an 8 year old.

In *Doubleday v Kelly (by her next friend Kelly)*²¹ the plaintiff was injured on 22 December 1997 in an accident at the defendant’s house when she was 7. The plaintiff was a friend of the defendant’s 5 year old daughter. The plaintiff had stayed the night at the defendant’s house and when she and the daughter woke up early that morning, and whilst everyone else was asleep, they decided to roller-skate outside. After finding roller-skating on the dirt driveway hard going, the 7 year old plaintiff moved onto a trampoline in the backyard thinking that the hard surface of the trampoline would make it easier to roller-skate. She climbed onto the trampoline but soon found herself rolling off it and fractured her right arm. The plaintiff had never been on a trampoline before. The parents were not awake when the plaintiff injured herself. The court had to decide whether it could be said that the defendants were negligent for failing to supervise the children. The court agreed with the trial judge’s finding that the parents had breached the duty of care that they owed to the child. The relevant risk was the risk of the child injuring herself using the trampoline, and the fact that she was wearing roller-skates at the time, which was considered to be a “bizarre complexity”, was said not to be an important one.

The defendants argued that what had eventuated was an “obvious risk”. In deciding against the defendants on the obvious risk defence, the court said that deciding what risk would have been obvious to a reasonable person in the position of the person injured, requires one to take into account the characteristics of a 7 year old child, with no previous experience in the use of trampolines or roller-skates,

²¹ (2005) NSWCA 151.

who was playing unsupervised early in the morning. The court held that the risks involved in roller skating on a trampoline were not obvious to the plaintiff.

1.4 Contributory Negligence

The *Civil Liability Act* provides guidelines for determining contributory negligence.

“5K. Standard of contributory negligence

- (1) *The principles that are applicable in determining whether a person is liable for harm caused by the fault of the person also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.*
- (2) *For that purpose –*
 - (a) *the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and*
 - (b) *the matter is to be determined on the basis of what that person knew or ought to have known at the time.”*

In *Waverly Council v Ferreira*²², the case where the plaintiff’s son died after falling through the skylight, the court considered allegations of contributory negligence in relation to the actions of the plaintiff’s son. The trial judge found that the son would not have had any real perception of the risk involved in climbing onto the roof and sitting on the skylight, and therefore there was no contributory negligence on the part of the son.

In *Doubleday v Kelly*²³, where the plaintiff rollerskated off the trampoline, the defendants argued that the plaintiff ought to have had her damages reduced on account of her own negligence. The court refused to make such a finding. The Court of Appeal referred to the equivalent NSW provision and held that:-

“The characteristics of a reasonable person in the position of the person who suffered harm include the characteristics of being a child of 7 years. As the trial judge said ‘in assessing these matters, the law takes into account the age and the situation of the plaintiff’. His Honour’s statement ‘. . . it cannot be concluded against the plaintiff, that a 7 year old child normally would or should have a perception of those dangers. . .’ (ie. the danger of going on a trampoline) is plainly correct, and His Honour’s disposition of the issue of contributory negligence is correct.”

²² [2005] NSWCA 418

²³ [2005] NSWCA 151.

1.5 Public and Other Authorities

The *Civil Liability Act* is also concerned with the liability of public and other authorities. A “public body or officer” is defined to mean (amongst others):-

- The Crown;
- A local government;
- A body that is established or continued for a public purpose under a written law.

Section 5W of the *Civil Liability Act* sets out the principles to be considered in determining the liability of a public authority. It provides:-

“5W. Principles concerning resources, responsibilities etc of a public body or officer”

The following principles apply in determining whether a public body or officer has a duty of care or has breached a duty of care in proceedings in relation to a claim to which this Part applies -

- (a) the functions required to be exercised by the public body or officer are limited by the financial and other resources that are reasonably available to the public body or officer for the purpose of exercising those functions;*
- (b) the general allocation of those resources by the public body or officer is not open to challenge;*
- (c) the functions required to be exercised by the public body or officer are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate); and*
- (d) the public body or officer may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.”*

So for example, a section 5W defence may arise in a maintenance case, where a local council is able to argue that the deployment of more contractors to inspect playgrounds is not only unreasonable but also beyond its financial and human resources.

D. TRADE PRACTICES ACT

The *Trade Practices Act 1974* (Cth) (“TPA”) protects “consumers” who purchase goods by requiring certain levels of safety to be observed by manufactures and suppliers (amongst other things). The consumer protection provisions of the TPA usually apply where there is a contractual relationship between the supplier/manufacturer and the purchaser. However it also applies in some instances where an injury is sustained by a person who was not a party to the contract, for example a child injuring themselves on playground equipment.

Part VA of the TPA deals with the liability of manufacturers and importers for defective goods. Playground equipment is likely to fall within the definition of “goods” in section 4.

The TPA contains an extended meaning to the term ‘manufacturer’ (s 75AB). A corporation will be held to be a manufacturer of goods where:

- It manufactures the goods; or
- It holds itself out to the public as the manufacturer; or
- The goods are “home brand” manufactured under licence for the corporation; or
- The corporation permits someone to promote the goods as those of the corporation; or
- The corporation is the importer of the goods.

Section 75AC states that a good has a defect if its safety is not such as persons generally are entitled to expect, which is sometimes referred to as the “community expectations of safety” test. The right to compensation under Part VA applies to innocent bystanders who are injured by defective goods.

Section 75AC(2) contains a list of specific factors relevant to the safety of goods (it is not an exhaustive list). Courts must consider this list, and possibly other factors, to determine if a good is defective. Of relevance regarding playgrounds is the manner in which, and the purposes for which, a good has been marketed, instructions or warnings with respect to doing or refraining from doing something in relation to the good, and what might reasonably be expected to be done with or in relation to the good.

Under s 75AD a manufacturer or supplier may be held liable for defective goods causing injuries and resultant loss to the injured individual.

A plaintiff must establish that a corporation, in trade or commerce, supplied goods that it manufactured, that those goods had a defect (this is where those factors above become relevant in determining what is a defect) and that as a result the individual has suffered a loss.

If a plaintiff proves all of these factors, and if there is no defence that applies, a manufacturer or supplier is held liable.

Defences upon which the manufacturer can rely are found in s 75AK. A manufacturer will not be found liable if it can be established

- That the defect in the goods alleged to have caused the loss did not exist at the time of supply; or
- They had that defect only because there was compliance with a mandatory standard for them; or
- The state of scientific or technical knowledge at the time when it was supplied by their manufacturer was not such as to enable the defect to be discovered.

A manufacturer may be able to reduce the amount of compensation payable if the loss results partly from misuse. Section 75AN(1) prescribes that where a loss is caused by both a defect and an act or omission of the person who suffered injury, the amount of compensation can be reduced taking all circumstances into account.

E. CONCLUSION

The superior courts have, by and large, taken a sensible approach in balancing the non-delegable duty of care owed by schools to their students and the very high standard of care owed by local authorities and those involved in the playgrounds industry with the need for the younger generation to be both physically and mentally tested in the playground. The courts will ensure that the standards expected will not be relaxed (*The Commonwealth v Introvigne*) but at the same time acknowledge that kids will always be kids (*Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba*).

Schools, childcare centres and kindergartens need to bear in mind that:-

- There is no excuse for failing to provide adequate supervision, but at the same time the courts will rarely, if ever, demand continuous supervision of students in the playground.
- The duty to supervise does not extend outside of school hours so long as there is a policy in place which is communicated and actively enforced.

- Risks which are an allurement to children need to be identified and secured (for example the rope on the flagpole in *Introvigne*).
- There is no need to turn the school or kindergarten into a fortress to keep children in or out. To the contrary, prison-like security is believed to have an adverse effect on children.
- There is a need to exercise a high level of care in maintaining a safe playing surface on which children regularly exercise.
- A sufficient depth of soft fall material is to be kept below playground equipment. Soft fall material should also be aerated to ensure that it does not become too compacted.
- Playground equipment and the surrounding grounds ought to be inspected on a regular basis with a view to identifying defects which ought to be the subject of prompt remedial work.
- Random safety audits of playground equipment and playgrounds ought to be conducted.

Local authorities, whilst enjoying certain protections under the *Civil Liability Act* (2002), WA need to be vigilant in maintaining high safety standards and keep in mind that:-

- Councils will not be obliged to warn of risks which parents or carers of young children ought to be aware of and guard against.
- A local authority needs to be careful to maintain the surface area of its parks, particularly in places where children are known to exercise (subject to section 5W *Civil Liability Act 2003*).
- A sufficient depth of soft fall is to be maintained below playground equipment. Soft fall material should also be aerated to ensure that it does not become too compacted.
- Challenging pieces of equipment (such as flying foxes) or challenging areas (such as a BMX bike track) may form part of a local park, however, care needs to be taken to safeguard children from risks that act as an allurement to children (such as the skylight on the roof of the community centre in *Waverly Council v Ferreira*).
- Regulated safety audits of playground equipment and playgrounds ought to be conducted.
- Close attention ought to be paid to complying with relevant Australian Standards.

Playground equipment designers, manufacturers and suppliers need to be aware that:-

- The Australian Standards set out in some detail the safety criteria to be applied when designing, manufacturing and installing playground equipment and then maintaining it.
- Courts will pay close regard to the requirements set out in the Australian Standard when deciding on whether there has been a breach of a duty of care.

In my opinion there is no greater exposure to litigation arising from injuries in the playground under the *Civil Liability Act (2002) WA* and other legislation in Australian States and Territories. To the contrary the *Civil Liability Act 2002 (WA)* by bringing about greater certainty in the application of the law of negligence, ought to give playground owners and operators greater confidence to encourage kids to play and exercise and assume “reasonable” risks.

In many of the decided cases one gets the impression that judges often call upon their own experience as parents and grandparents, and even fading memories of their own childhood, in deciding what is and what is not reasonable in the playground. This factor I believe will also act as an important check and ensure that at the end of the day the law will only go so far, and not operate so as to effectively bubble wrap our children on their journey to adolescence.

Robert Samut

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