PLAYGROUNDS AND STRUCTURES, LIABILITY OF SCHOOL BOARDS AND MUNICIPALITIES

PART 1 – INTRODUCTION

According to the Canadian Institute for Health Information, across Ontario in 2002-2003 there were 8,698 Emergency Room visits due to playground related injuries. Of those injuries, 590 resulted in a hospital stay of at least one night. The majority (56%) of injuries occurred among children between the ages of 5 and 9. The majority of injuries were orthopaedic in nature, mostly upper extremity. However, there were also 131 reported head injuries. Most injuries were sustained due to falls, often from a considerable height onto a hard surface. Of all recreational injuries, only cycling leaves more children seriously injured than playground injuries.

With these statistics in mind, it is not surprising that many personal injury lawyers are periodically faced with representing a child in an action for injuries suffered while on a playground structure. This paper will address the specific issues related to such claims and will direct counsel toward the relevant duties, standard of care and safety standards applicable to playground structures.

PART 2 – DUTY AND STANDARD OF CARE

RELEVANT STATUTES

Occupier's Liability Act

3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

3(2) The duty of care provided for in subsection 1 applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

4(1) The duty of care provided for in 3(1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with a deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

The *Education Act*

264(1) It is the duty of a teacher and a temporary teacher,

(e) to maintain, under the direction of the principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground.

265(1) It is the duty of the principal of a school, in addition to the principal's duties as a teacher,

(j) to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the school, to the care of all teaching materials and other school property, and to the condition and appearance of the school buildings and grounds.

In addition to the specific sections referred to above, the *Education Act*, under Part XIII, also sets out provisions relative to behaviour, discipline and safety for schools.

COMMON LAW

In addition to the duties specifically numerated under the *Education Act*, teachers, principals and school boards also have a common law duty to its students for their safety. It has long been held that school authorities must conduct themselves in the same manner as a careful and prudent parent in all of the circumstances including the duty to guard against inherent and foreseeable elements of risk in the activities of the students. (*Myers et al v. Peel County Board of Education* (1981), 123 D.L.R (3d)1 (S.C.C.); *Sked v. Henry* [1991], O.J. No. 339 (Ont. Crt. Gen. Div.); *Moddejonge v. Huron County* (1972), 2 O.R., 37(H.C.); *Portelance et al v. Board of Trustees of Roman Catholic Separate School* [1962], O.R. 365, (C.A.))

PART 3. CANADIAN STANDARDS ASSOCIATION

There are voluntary standards published by the Canadian Standards Association. The most recent Standard is CAN/CSA-Z614-03 and is entitled "Children's Playspaces and Equipment". This Standard applies to all public use play spaces built and play equipment manufactured and all additions or replacement parts are installed after June of 2003. The applicable standards prior to June, 2003 are CAN/CSA-Z614-98 (for structures built and manufactured after 1998) and CAN/CSA-Z614-03 (for play equipment built and manufactured after 1990). These Standards can be purchased directly from the Canadian Standards Association on-line. The web site is www.CSA.ca. When on site, go into "archives" and follow the instructions to order the Standard. Alternatively, the CSA phone number is 416-747-4000. The current Standard is about 120 pages in length and costs $65.00.

The most recent CSA Standard applies to public use play spaces and play equipment found in schools, parks, child care facilities, institutions, multiple family dwellings, private resort and recreation developments, restaurants and other areas of public use. Therefore, this Standard applies not only to play structures found on school lots and in municipal parks, it also applies to play structures commonly found in retail outlets such as Ikea or Macdonald's or at vacation properties. Some of the highlights are as follows:

- User Age Groups

The Standard is intended to be applicable for children between the ages of 18 months and 12 years. All play equipment should be designed for a specific age group (18 months to 5 years; 5 years to 12 years; and 18 months to 12 years). All play activities for the age specific activity shall meet the requirements for the designated age group.

- Compliance

The Standard is a guideline. It is not mandatory. However, in any action involving an injury from a playground structure, plaintiff's counsel should question the defendant as to whether it is familiar with the CSA Standard and whether it follows the Standard. If the defendant purports to follow the Standard, then the defendant should be in a position to produce the maintenance reports that are mandated by the Standard. In fact, Section 6 of the Standard states:

> "Playground equipment represented as complying with this Standard shall meet all applicable requirements specified herein. Anyone claiming compliance with this Standard shall keep such essential records as are necessary to document the claim that the requirements of the Standard have been met."

Section 11 of the Standard deals with inspection and maintenance. Some specific sections are as follows:

"11.1.2 Maintenance Program

A program of daily, monthly and seasonal maintenance schedules shall be created by the owner/operator and strictly followed in order to promote a safe play environment and to minimize injuries for all children. The maintenance schedule shall include preparation for summer use and any special preparations for winter.

11.2 Maintenance

11.2.1 A comprehensive maintenance program shall be developed or each playground as a whole. Generally, all equipment shall be inspected frequently for any potential hazards. Inspections shall include, but not be limited to,

a) checking the entire playground area for hazardous debris or litter;

b) checking for any damage (i.e. any broken or missing components of equipment, anything tied to or added on to equipment or other playground damage caused by vandalism or wear);

c) checking for any broken or missing handrails, guardrails, protective barriers, steps, or rungs on ladders, and for damage to any fences, benches or signs on the playground; and

d) check for strings or rope of any kind and removing them.

Owner identification for emergency situations and for notification of defective equipment and hazards shall be posted on the premises.

At the documentary production stage, it is therefore important for plaintiff's counsel to demand and obtain all maintenance and inspection reports as mandated by the CSA Standard. Additionally, the manufacturer of the

structure will have provided installation and maintenance instructions. These should be demanded and obtained as well.

- The Standard also speaks of proper playground servicing. As earlier indicated, statistics bear out that most injuries are caused from falls. The CSA Standard is specific as to the energy absorbency of the surfacing material. Acceptable play space surfacing materials include sand, pea gravel and shredded wood products so long as they are installed at a sufficient depth.

PART 4. HAZARD IDENTIFICATION

The Canadian Playground Safety Institute, a division of the Canadian Parks and Recreational Association, offers a one week course for participants to become a Canadian Certified Playground Inspector. Any Examination for Discovery of a defendant should include questions as to whether the people inspecting the playground and it's structures are certified by the Canadian Playground Safety Institute. As part of the materials that go along with the program, participants are specifically instructed on playground hazard identification. As part of this instruction, participants are instructed that there is no uniquely correct way to use playground equipment. Children do not misuse or abuse playground equipment. They simply seek challenges and learning experiences while they play. Once a child safely plays on a structure it is common that he or she will seek the next level of difficulty. Take for example a common slide. A child may first climb the stairs to go up the slide, sit down and slide down. After safely doing that manoeuvre, a child may then go down the slide face first. The child may then decide to go down the slide in tandem with his or her friends. At some point, the child may decide to try to climb up the slide rather than going up the ladder. In doing so, the child is not misusing or abusing the slide. The child is simply behaving in a normal fashion and is going through a normal process of risk taking and challenge. This type of behaviour is entirely foreseeable.

Certain specific hazards are identified in the literature from the Canadian Playground Safety Institute. They include:

- Age appropriate equipment – A hazard can be created by the inability of a young child to cope with the play structures meant for older youngsters. This is one of the reasons why the CSA has addressed certain play equipment specifically for children age 18 months to 5 years. Things like sliding poles, cable and track rides and log rolls are not recommended for pre-schoolers since such young children may not have the body development to safety play on those types of structures.

- Supervision – Supervision is always a paramount factor in playground injuries. If the child was injured at the school yard, was he or she being properly supervised by staff? One of the problems that can develop is that school boards often use local parents as either lunch aides or recess helpers to supervise school playground activity. These volunteers are rarely trained in playground supervision. In any injury suffered on playground equipment, at the Discovery stage, plaintiff's counsel should determine what training any supervisor had undertaken prior to the injury. This includes injuries during school hours, at commercial premises or at retail premises.

- Surfacing – As earlier indicated, surfacing is a primary issue in playground injuries because most injuries occur from falls. In fact, the playground surface on which a child falls has been identified as the greatest injury causing factor on playgrounds in the United States. Even if the surface material is appropriate, the maintenance of the surface may be inadequate to prevent injury. If, for example, the surface is sand but is of insufficient depth, there is no way for the user to know whether or not the surfacing would be adequate for a potential fall. Like the sand in a sand trap at a

golf course, it must be periodically maintained, raked and inspected to ensure that it has the appropriate absorbing capacity to reduce the likelihood of injury.

- Design of Playground and Equipment – The most commonly found hazards on the playground are:
    - Entanglement of clothing and protrusions in the gaps
    - Entrapment of the head and neck (for example in ladders)
    - Hard swing seats
    - Absence of guardrails and barriers
    - Rung sizes and spaces
    - Pinch, crush and shear points (for example, spacing in the wooden slats of a suspension bridge where a child below could put his or her finger in the space which is crushed when a child above runs along the bridge)
    - Protrusions

PART 5. CASE LAW

Despite the high incidence of playground injury, there are relatively few decided cases specifically on playground injuries. Of the decided cases that are available, many were decided prior to the enactment of the *Occupier's Liability Act* where the primary issue before the Court was whether the plaintiff was a trespasser, invitee, licensee, etc. There are relatively few cases decided under the *Occupier's Liability Act* relative to playground injuries. However, as examples I can cite the following:

Kirshner v. West Lorne (Village) [1989] O.J. No. 140 (H.C.)

In this case, the plaintiff, an adult, brought an action against the town for injuries she incurred when using a playground slide with her two year old grandson at a public park. The plaintiff climbed with her grandson to the top of a spiral slide, sat down, put the grandson on her lap holding him in her right arm, placing her left arm along the outer rim and then pushed off. She described that the slide was "extremely, extremely fast". She hit the ground, heard a snap and realized that she had fractured her ankle. The plaintiff claimed that there was an inappropriate surface at the bottom of the slide, that the exit lip of the slide was at least five inches higher than the recommended height and that the slide should have warning signs warning of the risks of use. Mr. Justice McRae dismissed the plaintiff's case. He found that at that time there were no Standards in Canada relative to the ground surface at the exit of the slide. He also found that the recommended height for the bottom lip of the slide was for 4 to 14 year olds, not an adult. Lastly, he found that the defendant did not have the duty to post warning signs. He found that the plaintiff assumed the risk of injury when she decided to utilize the slide.

The result of this case may well have been different if the current CSA Standard was in effect. That Standard has very specific provisions relative to playground surfacing.

Re *Kelemen v. Delta (District)* [1991] B.C.J. No. 2452 (B.C.S.C.)

In this case a young adult who weighed 168 lbs. decided to use the swings at a public park. He was swinging to the limit of the swing, going up almost parallel to the ground when the seat gave way and he fell. The plaintiff brought his action under the British Columbia *Occupier's Liability Act*. Mr. Justice Shaw of the British Columbia Supreme Court found that there was a duty on the

District to undertake regular inspections including particular attention being paid to those aspects of the swings which were potential sources of danger. This encompassed the duty to observe flaws with the equipment that were available to be seen by reasonable inspection. He found that although the evidence established that in the week prior to the accident two separate inspections were carried out, these inspections were not done adequately and if they were properly carried out the danger would have been noticed and corrected. The Town tried to argue that the plaintiff was using the swing inappropriately. It argued that the plaintiff was swinging too high. However, Mr. Justice Shaw found that the plaintiff was using the swing within the normal expected usage of that type of equipment. He found the defendant liable for the accident.

In researching this paper, I was surprised by the lack of case law relative to children being injured on playground structures. Given the incidence of injury, I was expecting to locate a number of decided cases. However, I did not find such cases. In speaking with other counsel, it would seem that although playground injuries involving children are fairly common, judgments are not common. It would seem that the vast majority of these cases settle. I suspect that they settle for one or more of the following reasons:

- There was a clear case of inadequate supervision.

- There was a clear case of inadequate or improper inspection and maintenance.

- There was a clear case of an inadequate surface at the playground.

My own personal experience seems to be in accord with the results of my research. Although I have had a number of claims relating to playground injuries, all have settled.

PART 6. EXPERTS

It is recommended that a duly certified playground inspector be retained to inspect the specific playground structure that is the subject matter of the litigation. The expert will essentially undertake an accident reconstruction in an attempt to recreate the accident. Such an expert will be well familiar with the CSA Standard. In this regard, I am indebted to Richard Nellis of Kleinfeldt Consultants Limited, 2400 Meadowpine Blvd., Suite 102, Mississauga, Ontario, 905-542-1600 for the direction he has given me in the preparation of this paper. Richard is certified as a Canadian Certified Playground Inspector.

Additionally, depending on the nature of the claim and the injury involved and the mechanism of the injury, it may be necessary to retain either or both a human factors expert and a psychologist. On the assumption that the injury relates to a child, rather than an adult, such experts can give important evidence to understand the typical behaviours that led up to the accident.

PART 7. OTHER SOURCES OF INFORMATION

- Frost, Wortham & Reifel, *Play and Child Development*, 2001, Prentice Hall
- Canadian Playground Safety Institute, www.cpra.ca
- Canadian Standards Association, www.csa.ca