



## Duty of Care Checklist

### Learning Objectives

- List the relevant acts.
- Define what could be legally required of a *reasonable* person to maintain safety for visitors to a play space.
- Identify what may be reasonable from a legal perspective in the context of play spaces.

### Learning Outcome

To understand how to minimize liability and manage risks to a reasonable level while providing children's unstructured play opportunities.

**Note:** This resource provides an overview of some of the general principles of the law and should not be used as a substitute for legal advice or advice from regulatory bodies about professional obligations and practice standards. Your circumstances may be complex, and the laws in your province or territory may differ. If you want legal advice, you should talk to a lawyer licensed to practice law in your province or territory.

### Key Definitions

**Liability:** The state of being legally responsible for something; the responsibility for the consequences of one's actions or omissions that are enforceable by law.

**Tort law:** Tort law is a branch of civil law that is concerned with civil wrongs. It permits the provision of compensation (damages) to those who have been injured by the tortious acts of others.

**Tortious act:** A wrongful act that is considered to be a tort (wrongful or unlawful injury or damage that is not the result of a crime or which is tried in the civil courts).

**Negligence:** A breach of the standard of care that is owed by a person who has a duty of care. This usually includes doing or not doing something, that a reasonable person would do or not do, considering the circumstances and the knowledge of parties involved.

**Duty of care:** The responsibility or legal obligation of a person or organization to avoid acts or omissions that could likely cause harm to others.

**Standard of care:** Standard of care is only relevant when a duty of care has been established. The standard of care speaks to what is *reasonable* in the circumstances. If one does not owe a duty of care, there is no need to meet any standard of care.

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**Reasonable person:** A person who is thought to be careful and considerate in their actions. This ideal focuses on how a typical person with “ordinary prudence” would act. The reasonable person is used as a test of liability in cases of negligence.

**Plaintiff:** In tort law, the plaintiff is the person or entity who initiates a lawsuit against a defendant(s), claiming that the defendant(s) acted negligently toward them, and is seeking compensation.

**Defendant:** The defendant is the person or entity against whom a suit is brought, claiming that the defendant acted negligently towards the plaintiff(s).

### Acts, Common Law, and Duty of Care

A tort is a civil wrong or wrongful act which results in loss or harm (for example, an injury) to another, and can be classified as either unintentional or intentional.<sup>1</sup> Tort law is a branch of civil law that is concerned with civil wrongs and provides compensation to those who have been harmed by the wrongdoing of others. Compensation most commonly takes the form of monetary rewards for damages. In the context of play, there are several ways that tort claims may be relevant, including statutory and common law duties. To determine the duty of care owed in a play-related tort claim, there are various acts to consider depending on the province or territory in which the injury occurred. While specifications of regulations and requirements under Acts may differ across provinces and territories, a general summary is provided in Table 1.

**Table 1.** Provincial and Territorial Legal Regulations/Acts

Legal Regulation/Act	Responsibility	Other details
<b>Community</b>		
Provincial Occupiers’ Liability Acts* (BC, AB, MB, ON, NS, PEI)	These acts apply to any legal entity that occupies a property, for example private individuals, school boards, commercial enterprises, non-profits, etc. It dictates the level of responsibility/duty of care the premise occupier has in order to ensure safety for visitors.	An occupier has a duty to make the premise <i>reasonably</i> safe. This could include: the knowledge the occupier ought to have had about the visitors on the premise, age of the visitors, ability of visitors to appreciate danger, and the effort the owner (occupier) made to give warning. Liability is based on both the condition of the premise and any activities carried out on the premises.  The duty of care owed for occupiers’ liability is different than the duty discussed in negligence; it is a separate tort. For example, one might face a claim under both the Occupiers’ Liability Act and for negligence.
Common Law,	The responsibilities of occupiers are	While often not expressly stated in a

\* Occupiers’ liability has analogues in Quebec’s civil law, but it is not structured the same way as the common law provinces or occupiers’ liability legislation.

Case Law, or Related Statutes (SK, NFL, NB, NWT, NT, YK)	contained in the accumulated body of judicial decisions on occupiers' liability in that jurisdiction, and may also be informed by related legislative guidelines or requirements.	single legislative instrument, the duties of an occupier in jurisdictions where liability is derived from common law sources tend to be similar to the duties of occupiers under the other provinces' statutes.
Civil Code of Quebec and Case Law (QC)	The Courts will decide whether the case is criminal, civil extra-contractual or civil contractual liability by referring to the Civil Code of Quebec and case law.	The Courts will decide if the agent (e.g., person, school, company) is "endowed with reason" (i.e., is able to differentiate right from wrong) and then will assign decision on fault and cause accordingly.
Joint and Several Liability	<p>The <i>Civil Code of Quebec</i> (art. 1523 and 1526 C.C.Q. for joint and several liability and art. 1536 C.C.Q. for contribution), and <i>Contributory Negligence Acts</i> for the 11 common law jurisdictions (ON, BC, AB, MB, NB, P.E.I., NS, NFL, NWT, YK, NT) dictate that the plaintiff has a right to recover compensation. This can be obtained from any of the defendants, regardless of their individual share of the liability when another defendant(s) is unable to pay the damages awarded.</p> <p>The Negligence Act, Saskatchewan<sup>†</sup> provides for the 'apportionment of damage or loss' and dictates that if a defendant cannot afford the proportion of their liable damages, the remaining amount will be equally apportioned between all parties. This includes the plaintiff in the case that they are also found to be negligent (contributing to the loss they suffered).</p>	Joint and several liability can be seen as a barrier for municipalities and their insurers as the activities and services necessary for children's unstructured play may be scaled back (i.e. removal of skating rinks, tobogganing hills or other events) to limit the jurisdiction's liability exposure and duty of care. This approach may be viewed as a means of reducing the payment of damages for a larger proportion than is their actual responsibility. Municipalities are often perceived as having 'deep pockets' which can result in nuisance cases, increases in settlement costs and insurance premiums. This can affect smaller municipalities to a greater extent than larger ones. <sup>2</sup>
<b>School Board</b>		
Provincial/ Territorial Education Acts	These Acts dictate, in part, the level of responsibility that teachers and principals have when ensuring the safety of students. Details differ among provinces and territories, but generally the level of responsibility is <i>loco parentis</i> liability: to	These statutes do not expressly deal with premises-related duties and legal obligations, but instead deal with general duties to ensure the safety of children while they are in the care of someone other than their parents or legal

<sup>†</sup> Similar provisions apply in British Columbia, but only if the plaintiff is also found to have contributed to the loss by their own negligence.

	act as that of a careful and prudent parent, or similar to that of a kind, firm, and judicious parent. For example, Ontario’s Act states that teachers are to provide reasonable safety measures.	guardians.
<b>Early Childhood Education Centres/Daycares</b>		
Provincial/ Territorial Childcare/ Daycare/Early Learning/Early Years Acts	These Acts differ by name depending on the province or territory; however, they generally outline the responsibilities and requirements of facility managers and/or persons who operate or provide services (i.e. caregivers), including licensure, supervision, and programming details. For example, the <i>Manitoba Community Child Care Standards Act</i> states that “every person providing child care shall at all times provide an environment that is conducive to the health, safety and well-being of the children,” and that “caregivers shall provide a program of activities to promote the overall development of the children including physical, social, emotional and intellectual development of the children.”	These Acts focus on supervisory and operational requirements for day care and early childhood education centres which can conflict with the requirements set out in Education Acts.

**Introduction**

A thoughtful justification for why some risks are acceptable becomes the foundation of a legal defense, should an injury occur.<sup>3</sup> It is important that defendants demonstrate that a reasonable thought process was implemented, and that there were efforts taken to minimize potential harms. The attitude of Canadian courts suggests that there may be room to encourage challenging play because not all risks are the result of negligent behaviour.<sup>4</sup> Many risks could be deemed acceptable if the encouraged or facilitated behaviour conforms to the expected standard of care. However, if the standard of care is breached, legal action could arise.

**Duty of Care for Children**

The duty of care for an occupier is not limited to that required for a competent, able-bodied adult. Rather, it is based on the foreseeability of harm posed by the premises towards the types of entrants that are reasonably expected to be on the premises. If a facility is particularly designed, constructed or marketed to attract children, the occupiers’ duty of care will require that they keep the premises reasonably safe for children. This includes acknowledging that children may not be as able to perceive risks of harm or hazards as an adult would, and may be less willing or able to understand or follow warnings and instructions.

**Negligence Lawsuits**

Incidents can happen. A common incident becomes an action for negligence when there is a duty of care, the related standard of care is breached, and causation is established. Negligence is context

specific, and most cases will depend on their individual circumstances. Negligence lawsuits are governed by a four-step legal test, including:

1. **Duty of care:** Does the defendant owe the plaintiff a duty to take reasonable care to avoid causing an unreasonable risk of harm?
2. **Breached standard of care:** Did the defendant breach their standard of care? The plaintiff must prove that the defendant (occupier, school, municipality, teacher, etc.) did not live up to the standard of care of a reasonable person in preventing the harm the plaintiff suffered.
3. **Causality:** Did the defendant’s actions contribute towards the plaintiff’s injury, both factually and legally?
4. **Loss:** Did the plaintiff suffer compensable harm and to what severity?

### Sources of Liability

The legal system allows for the differentiation between how injuries arise; for example, was an injury caused as the result of an unkempt play space, or was it the result of a collision or fall caused by enthusiastic children? Municipalities and school boards, for example, may be liable under occupiers’ liability acts if the play space is unkempt. These acts generally require an occupier to take positive steps to ensure that a visitor will be reasonably safe when using the premises for the purposes for which he/she is invited, or for which the occupier can reasonably foresee the premises being used. The occupier must also avoid acts or inactions (i.e. omissions) which could reasonably be foreseen to result in injury or loss to the visitor. On the other hand, if the injury arises from children colliding while playing, it may not be an *Occupiers’* case depending on the type of activities being permitted. It could, however, be a negligence case if the activity was taking place in a supervised setting (e.g., school or daycare) and there was a standard of care expected of that supervision. Education Acts generally state that the duty of care of teachers and principals is to provide reasonable safety measures.

### Applying a Reasonable Approach

While duties of care in negligence law will vary based on the statute involved, or the relationship between the defendant and the plaintiff, negligence law usually requires no more than reasonable care on the part of the defendant. Reasonable care is based on the prevention of unreasonable risks of harm and is contrasted with the more onerous responsibility to prevent *all* risks of harm. Differences between the two approaches are described in Table 2.

**Table 2.** A cautious versus reasonable approach to providing access to play

<b>Cautious Approach</b>	<b>Reasonable Approach</b>
Making a space as safe as possible	Making a space reasonably safe; reduce risk to a reasonable limit <sup>‡</sup>
Complete removal or elimination of all risky apparatus or equipment	Identify and remove hazards, <sup>§</sup> and implement cautionary signage or warning that provides information on possible hazards
Complete removal or elimination of all risky activities	A risk-management approach identifies risks and their benefits, implements reasonable control

<sup>‡</sup> **Risks** are the challenges and uncertainties within the environment that a child can recognize and learn to manage by *choosing* to encounter them and determining their own limits.

<sup>§</sup> **Hazards** are dangers in the environment that could seriously injure or endanger a child and are beyond the child’s capacity to recognize.

	measures, and shares this knowledge with users and their parents/guardians
Play space design to eliminate hazard and reduce risk	Considers the input of children, their families and child-development experts to design a space that provides opportunities for age-appropriate graduated challenges

**A Note on the CSA Playground Standard Z614**

The Canadian Standards Association (CSA) standard for “Children’s Play Spaces and Equipment” (CAN/CSA-Z614) is intended, in part, to minimize the likelihood of serious and or life-threatening injuries. It is voluntary (not required by law for schools or municipalities) and its intended use is not specified. The user determines its application. However, the standard has been applied as a “minimum safety requirement” or safety guideline.<sup>4,5</sup> The standard also influences play equipment purchase decisions as schools and municipalities tend to purchase apparatus from catalogues of CSA approved play equipment when making such decisions.

Inspection records based on compliance to this Standard can also be used to determine if steps were taken to address safety through equipment maintenance and repair. The courts may choose to allow the use of the standard as part of a defence; however, they may also choose not to base their ruling solely on compliance to the standard. It is important to provide documentation that demonstrates that a space was developed and maintained by applying a reasonable and thoughtful risk management approach.

**Standard of Care Checklist – Applying a Reasonable Approach to Play**

The courts consider whether a *reasonable approach* was applied, i.e. *was the defendant reasonable in their approach?* It is important to document the thought processes and dialogue that resulted in the risk-management measures as a means of demonstrating this approach. Rather than complete risk elimination, the Courts may determine if there was management or reduction of risk to *prevent unreasonable risk of harm*. If a duty of care exists, examples of how one could demonstrate that their actions were reasonable are presented in Table 3, while Table 4 presents an example for signage.

**Table 3:** Example of a Standard of Care Checklist\* for Schools and Municipalities

***Is there documentation demonstrating...***

- ✓ **Assessment of environmental hazards:**
  - Have environmental dangers been identified and removed?
  - Have control measures been put in place (e.g., child education on safe play, environment adaptations to minimize danger by removing hazards)?
  
- ✓ **Assessment of an activity's risks and benefits\*:**
  - Have the inherent activity risks and risk-benefits been identified?
  - Have the risk-benefits been justified?
  - Have appropriate control measures or mitigation strategies been put in place (e.g., child education on safe play, parent education on risks)?
  - Have consultations with the parties responsible for the play space (primarily play space providers) been documented to demonstrate the process used to determine risks/risk-benefits and mitigation strategies? (e.g., child development experts, education consultants, facilities department, risk managers)
  
- ✓ **Staff training and certification:** are for example educators or play workers certifications up-to-date?
  - This could include first-aid, CPR, or risk-management training
  
- ✓ **Compliance to internal procedures:**
  - Is there compliance to all internal policies and processes (e.g., at school: supervision ratios, abiding by the intended use of an apparatus)?
  - Have safety standards been followed and audit records of compliance maintained?
  - Are providers overwhelmed by paperwork and what can be done about it? (e.g., Are reporting procedures replacing the time that providers have to care for children playing?)
  
- ✓ **Monitoring incidents:**
  - Are serious incidents recorded as they arise (e.g., child breaks their arm)?
  - Have *reasonable* mitigation strategies been implemented when appropriate (e.g., setting boundaries, informing children of safe play, removal of dangers)?
  
- ✓ **Knowledge sharing and informing of risks:**
  - Has education been provided to parents/guardians regarding the risks and benefits of engaging in an activity?
  - Have informed consent forms been used?
  - Is there reasonable cautionary signage to inform users of inherent risks?

*\*A risk benefit assessment framework for Canada is being developed by Child Nature Alliance Canada (CNAC).*

**Table 4:** Example of a signage checklist for municipal parks/playgrounds and after-hours park use at school.

<p><b><i>Does the sign...</i></b></p> <ul style="list-style-type: none"><li>✓ Provide clear risk communication messaging<ul style="list-style-type: none"><li>○ Simple and relevant language, multiple languages and images, considering the age and understanding of the persons entering the premises.</li></ul></li><li>✓ Placement of signage is visible, large and at the entrance to the space</li><li>✓ Outlines relevant safety guidelines (e.g., at a skate park, it is recommended to wear a helmet and pads)</li><li>✓ Identify opening and closing hours</li><li>✓ Identify action to take in the case of injury</li><li>✓ Describe how to report hazards or damage (number to call)</li></ul>
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## References

1. Nora R, Hoag V. *Foundations of Criminal and Civil Law in Canada (3rd ed.)*. Toronto, Canada: Emond Montgomery Publications, 2011;166–167.
2. Insurance Bureau of Canada. Disjointed- A Look at Joint and Several Liability, 2014. Available at: <https://www.thomsonrogers.com/wp-content/uploads/2015/06/IBC-disjointed-a-look-at-joint-and-several-liability-2014.pdf> (Accessed November 7<sup>th</sup>, 2018).
3. Ball D, Gill T, Spiegel B. *Managing Risk in Play Provision: Implementation Guide*. Play England, 2013. Available at: <http://www.playengland.org.uk/media/172644/managing-risk-in-play-provision.pdf> (Accessed November 7<sup>th</sup>, 2018).
4. BC Injury Law and ICBC Claims Blog. BC Supreme Court – Nothing Negligent About Kids Playing “Grounders”, 2015. Available at: <http://bc-injury-law.com/blog/bc-supreme-court-negligent-grounders> (Accessed November 7<sup>th</sup>, 2018)
5. Canadian Public Health Association. *Summary Report: Key Informant Interviews*, 2018. Available at: <https://www.cpha.ca/sites/default/files/uploads/resources/play/play-project-summary-key-informant-interviews.pdf> (Accessed November 7<sup>th</sup>, 2018).