How safe is too safe? Understanding the social utility of risk

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ABSTRACT

This paper considers the way in which the 'calculus of negligence', created by common law and now legislatively prescribed, deals with the 'social utility' of risk. Risk taking behaviour in play and social interaction are important parts of the learning process. It addresses the implications of risk averse policies in schools.

The law of negligence requires schools to comply with the standard of reasonable care to prevent injury to students. Whilst the standard is set by the common law and is independent of other standards and legislative prescriptions, it is both informed and influenced by those standards and prescriptions. The standard of reasonable care also changes as our own community standards alter. Typically modern schools are required to comply with a higher standard than in the past. However, the law of negligence also recognises countervailing factors which may balance perceptions of risk by accepting that risk is necessary for the physical, psychological and social development of children.

This paper will commence with an account of the modern 'calculus of negligence' in tort, which originated in common law but has been amended by legislation in all Australian jurisdictions. It will then consider cases in which the social utility of defendants' behaviour has been balanced against the probability of the risk eventuating, the gravity of the harm that may occur and the burden of taking precautions. By considering the most recent judicial analyses of this balancing process this paper will provide insight and guidance as to the trajectory of current authorities.

KEYWORDS

Negligence, school, standard of care, risk, social utility

1 INTRODUCTION

> God bless all little boys who look like Puck,
> With wide eyes, wider mouths and stickout ears,
> Rash little boys who stay alive by luck
> And Heaven's favour in this world of tears
> (Arthur Guierman, "Blessing on Little Boys" (US 1871 Nov 20 - 1943 Jan 11) quoted in *Ramsay v Larsen* [1964] HCA 40; 111 CLR 16 [3])

It is well established that physical exercise in both planned and unstructured activity is necessary for a child's physical and psycho-social development. This is particularly the case in early-years schooling. However, no physical activity is without risk of injury. Schools are at risk of litigation in the tort of negligence in any instance in which a child is injured; however it is recognised by Australian courts that there is social utility in

play and physical exercise. It is also understood that there is utility in risk-taking behaviour on the part of the child. The modern negligence model, which has taken common law principles and partially incorporated them in statute in all states, recognises that risk and social utility must be balanced. In the so-called 'calculus of negligence' which must be applied to determine whether a school has fallen below the required 'standard of care', social utility must be considered. This paper will describe the modern negligence model. It will then interrogate recent judicial applications of the concept of 'social utility' in school and non-school contexts. Whilst there is judicial recognition of the necessity for risk-taking behaviour in children, the balance between the 'social utility' of risk and the other factors in the 'calculus of negligence' is difficult to draw. This paper will draw out courts' reasoning with a view to making more explicit the characteristics of an argument that there is 'social utility' in risk itself, and drawing the boundaries of risk in relevant circumstances.

2 THE MODERN NEGLIGENCE MODEL

Negligence is a common law tort, deriving from a twentieth century deviation from the historical 'action on the case'. The ground-breaking case of *Donoghue v Stevenson* [1932] UKHL 100 generalised the previously situational categories of duty, establishing instead an overarching description of the duty relationship. Subsequent cases have, by application of this description of 'duty of care' widened the scope of potential liability. The tort has overtaken other torts in its usefulness to plaintiffs to become the most recognisable modern tort.

However, the relatively amorphous boundaries of 'duty of care' have created significant difficulties keeping the tort of negligence well-defined – the success of the tort has become problematic. In all states in Australia legislation has been passed with the explicit intention of bringing it within manageable limits. The legislation is not uniform (although there are common characteristics), and it does not codify the common law. Since passage of the legislation, courts have built upon the legislative prescriptions, recognising the underlying intent of the reforms. The concept of 'social utility', which was not well-developed at common law, is now a factor which must be explicitly balanced in determining whether a duty of care has been breached. Accordingly it is now receiving attention in a wide range of cases. For the sake of clarity I will consider in detail only the *Civil Liability Act* 2002 (NSW) as its provisions are broadly consistent with other jurisdictions and it is the most frequently applied. However, where cases arise in other jurisdictions I will indicate differences in the relevant Acts.

The modern negligence model retains the structure and trajectory of the common law. The section '[presuppose] the existence of the law of negligence, and operates against its background' (*Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263, [173]). It must be established that a duty is owed, that the duty has been breached, and that the breach caused compensable damage which was within the scope of the defendant's liability. The burden of proving these matters (on the balance of probability) lies with the plaintiff. The burden then shifts to the defendant to prove the elements of any relevant defences (such as contributory negligence, voluntary assumption of risk or legislative immunity).

2.1 The 'duty' concept

The duty of care at common law had become highly problematic at common law; the Australian requirements of 'foreseeability' and 'proximity' – which included a range of 'public policy' factors – had become too amorphous to perform an appropriate gatekeeper function. It contributed to a perception of 'indeterminacy of liability' in the tort of negligence, which is contrary to public policy. The concept of 'proximity' itself had been described as a 'conceptual black hole'. This was problematic, as the duty concept was the defining feature in the action. As Master of the Rolls Lord Escher noted, '[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them' (sic) (*Le Lievre v Gould* [1893] 1 QB 491, 497).

Accordingly, the High Court in *Sullivan v Moody* [2001] HCA 59 had moved away proximity as a descriptor.

The court noted:

> Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited.

Subsequent Australian cases thus moved away from descriptors of the relationship to a 'salient features' test, to be deployed in novel cases. The High Court began to articulate discrete features of the relationship between the plaintiff and the defendant in *Esanda Finance v Peat Marwick Hungerfords* (1997) 188 CLR 241. Subsequent elaborations in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515 expanded on the judicial reasoning. A recent articulation of all of the (currently articulated) 'salient' features occurs in *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258 (31 August 2009) 75 NSWLR 649. The New South Wales Court of Appeal noted that foreseeability was still a requirement, but the modern 'approach requires not only an assessment of foreseeability, but also attention to such considerations as control, vulnerability, assumption of responsibility and nearness or proximity.'

This 'test' remains part of the modern negligence model. The legislation, however, superimposed new 'gatekeeper' concepts in particularly problematic areas (such as in relation to liability for 'pure' mental harm), although it was still derived from the common law. Section 5B of the *Civil Liability Act* states explicitly that the 'insignificant' risks need not be guarded against:

> (1) A person is not negligent 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), and
> >
> > (b) the risk was not insignificant, and
> >
> > (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

This and equivalent provisions draw upon common law concepts ('foreseeability' and the 'reasonable person' test) although they introduce subtle differences (which will not be pursued here). The inclusion of the requirement that the risk be 'not insignificant' appears to reflect the legislative intent to rein in the growth of the tort.

2.2 The question of breach

The common law concepts of 'standard of care' and 'breach' have, by contrast, been quite straightforward, with the exception of the problem of setting the standard of care in cases involving negligence in an area of special skill. The common law test required two steps – identification of the relevant standard of care (a question of law based on the 'reasonable person') and a determination as to whether that the defendant fell below that standard (a question of fact). At common law the first of these two aspects had been problematic in cases involving special skills because of role of 'peers' in setting the requisite standard. A series of cases, typically involving medical negligence, had suggested, in turn, that the standard would be determined by reference to *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, (the Bolam test), which stated that 'a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice.' This was expressly rejected in Australia in *Rogers v Whitaker* (1992) 175 CLR 479. The problem, as was noted in *F v R* (1983) 33 SASR 189, is that the standard of care 'is a question for the court and the duty of deciding it cannot be

delegated to any profession or group in the community.' In later cases the High Court noted that '[t]he relevance of professional practice and opinion was not denied; what was denied was its conclusiveness. (*Rosenberg v Percival* (2001) 205 CLR 434 (Gleeson CJ).

The legislative reforms were specifically triggered by this issue. The 'Ipp Report' was commissioned as a result of an insurance 'crisis' due to the failure of a major medical liability insurer. Aggressive litigation against doctors, resulting in large compensation payments (particularly for babies and children who would require whole-of-life care if medical negligence caused long-term disability), threatened the viability of medical insurance. The legislative provisions were intended to address this potential 'crisis'. The legislative provisions relating to standard of care elevated a modified 'Bolam' test: section 5O of the *Civil Liability Act* states:

> (1) A person practising a profession …does not incur a liability in negligence …if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
>
> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
>
> (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
>
> (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

The effect of this provision is that whereas previously at common law a court *could* accept expert opinion to the effect that the defendant had acted competently in accordance with widely accepted professional practice, now a court *must* accept such expert opinion and find that a defendant who has acted in this way has satisfied the standard of care. In other words, the provision creates a defence of 'widely accepted competent professional practice'.

The second aspect of duty is the question of fact – whether the defendant actually did fall below the standard of care. As this is the primary question in this paper, I will defer consideration of it; however it is worth noting that the legislation typically adopted the common law 'calculus of negligence' – a set of four factors that had to be balanced to determine whether the defendant had taken reasonable steps to respond to the duty to take reasonable care to respond to the risk of injury identified in the 'duty' question.

2.3 Damage and causation

In negligence, unlike other torts, damage is the gist of the action. The legislation was particularly focused on clarifying the principles for liability for mental harm, but it also focused on causation and explicitly required courts to state the public policy aspects of the common law 'remoteness principle', renaming it 'scope of liability'.

3 THE SPECIAL RELATIONSHIP BETWEEN SCHOOL AND PUPIL

The liability of a school for injuries to a student depend partly on whether the harm arises from intentional harm or due to negligence. Generally, liability may arise directly, due to a failure by the school or the school authority, vicariously, or due to a non-delegable duty owed by the school to the student (*New South Wales v Lepore* [2003] HCA 4). . However, if the school is created by statutory authority the liability of the State is affected by the relevant statute:

> However, in my view, a teacher employed by the Department of Education in a State school is in loco

> parentis only in virtue of his appointment by the Crown as a teacher. The question of the responsibility of the Crown for any civil wrong which the teacher may commit against a pupil depends upon the statutes under which the Government establishes and maintains schools and appoints and controls the headmasters and teachers working in them.

The special position of schools is, accordingly, partly a function of the statutory framework which will influence questions of duty and breach. It will also affect the vicarious liability of the State or Federal authority (*Ramsay v Larsen* (1964) 111 CLR 16).

The standard of care of the school has had been affected by the doctrine that the school or teacher stands *in loco parentis*, but any analysis of standard of care also has to consider the statutory framework, by which I mean not merely the Act, but also the framework of curriculum, accreditation and assessment with which schools must comply. Whilst the tort of negligence does not permit the legislative standards to overwrite the common law duty of care, the legislative requirements provide the context in which schools operate and will be influential in establishing the standard. As a side not, there is also the possibility that the Act may be interpreted to create a statutory duty – so that the tort of breach of statutory duty may be applicable.

4 THE CALCULUS OF NEGLIGENCE

4.1 The social utility of the defendant's conduct

The question of breach, which had always been a question of fact balancing a number of different factors, is now systematised by the legislation (confusingly under the heading 'Duty of Care' in s.5B *Civil Liability Act*) into a requirement to consider (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.

All of the factors in this 'calculus of negligence' have their origin in the common law; however in the legislation they must all be considered (*Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council* [2015] NSWCA 320, [105]). No weighting, however, has been given to each factor and it is possible that in a relevant case any one of these factors may have no weight. Social utility had been relevant at common law (*Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; 208 CLR 460). With the elevation of 'social utility' as a prescribed consideration, the legislation has resulted in a greater articulation of the concept.

4.1.1 Identifying the relevant activity

So far cases have demonstrated that the identification of relevant activity (for the purposes of determining its 'social utility') may have critical implications. The 'activity' could be broadly conceptualised (as the entirety of the activity carried on by the defendant), Courts have gone so far as to indicate that '[a]ll lawful enterprise may be said to have social utility' (*Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy* [2015] NSWCA 253). Alternatively, the activity could be narrowly conceptualised (as the particular activity giving rise to risk). The social utility of the educative functions of a school, for instance, is undeniable. The social utility of allowing children to engage in a particular risk-taking activity is a closer-grained enquiry. In Table 1 below I summarise some of the activities subjected to an analysis according to the statutory 'calculus of negligence'. It should be noted that these cases come from various Australian state jurisdictions at a range of levels. I have made no distinction, in this preliminary analysis, between statements of prior findings (which were not specifically addressed on

appeal) and the discussion in the identified case.

It is apparent from this brief analysis that courts sometimes take a wide view, citing the general social utility of the activity, and in others take a narrow view, or alternatively compress the weighting of the utility and the risk of harm (so it might be said, for instance, that the carrying on of the activity without guarding against risk has no utility). This demonstrates that the 'social utility' concept, as it is currently being applied, is subject to multiple understandings and would benefit from a clear High Court authority. The New South Wales Court of Appeal noted that 'considerations from the text of the statute are of limited assistance in identifying the level of generality.' The Act, according to the Court, 'could not be expected to provide definitive guidance in particular cases'. A similar comment in relation to identifying obviousness of the risk of recreational activity was made in *Fallas v Mourlas* (2006) 65 NSWLR 418 (Ipp JA); he said 'it is inappropriate to adopt a theoretical or general level of abstraction when characterising the relevant activity.'

Table 1: Recent cases – defining 'activity'

Utility	Activity	Case
Social utility	Low ropes course (described by the Court as a healthy, moderate activity)	*Reid v South West Regional College of TAFE* [2015] WASCA 231
No social utility	Farmer carrying out a stubble burn on private land – as it was done to advance the appellants' private economic interests	*Boule v Yeing* [2015] WASCA 241
Minimal social utility	Not lighting the stairs	*Dwight v Supljeglav* [2015] NSWDC 26 (citing *Laresu Pty Limited v Clark* [2010] NSWCA 180)
Social utility	Finding placements for children the subject of guardianship orders	*ABC v State of Queensland* [2015] QDC 321
Some social utility	'All lawful enterprise' – creating jobs	*Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy* [2015] NSWCA 253
Not determined	Fast ball activity	*Sanchez-Sidiropoulos v Canavan* [2015] NSWSC 1139
Not determined	Diving into shallow end of pool	*Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council* [2015] NSWCA 320
Not determined	Aerial somersault on jumping pillow	*Stewart & Ors v Ackland* [2015] ACTCA 1
Social utility	Buying and selling of businesses in a market	*Equal 54 Pty Ltd v Dennis Galimberti*

	economy	[2016] VSC 588
'High' social utility	The activity of caring for a patient at the Deception Bay house (compared with another facility which might have had a negative effect)	*Stokes v House With No Steps* [2016] QSC 79
High social utility / No social utility	Supermarket services	*Guru v Coles Supermarkets Australia Pty Ltd* [2016] NSWDC 349
Significant positive social utility / no social utility	Provision of council premises for communal events	*Safar v Sutherland Shire Council* [2016] NSWDC 232
Social utility	The social utility of urgent and speedy responses by ambulances	*Logar v Ambulance Service of New South Wales Sydney Region* [2016] NSWDC 255
No social utility	Hospital operating as a tertiary referral centres for trauma cases – delay in treatment	*Gould v South Western Sydney Local Health District* [2017] NSWDC 67
Social utility	Supermarket using an automatic gate assembly to cost-effectively reducing theft	*Korda v Aldi Foods Pty Ltd* [2017] ACTSC 96
Limited social utility	Go-Karting	*Dixon v Apostolic Church Australia Limited* [2017] WADC 88
High social utility	Provision of educational facilities generally, and for children with special needs in particular.	*Gem v State of New South Wales* [2017] NSWDC 108

4.1.2 Allocating weight to social utility

The level of generality or abstraction in identifying the 'activity' to be allocated a 'social utility' is highly relevant to the weight to be applied to that activity. There appears to be recognition even in individual cases of the significance of assigning a relevant level of generality in entering into the analysis of the calculus of negligence. Hence, in *Dixon v Apostolic Church Australia Limited* [2017] WADC 88 the Court recognised that if the church had provided go-karts as an ongoing recreational activity it would have been assigned higher utility than as in this case - a one-off event to amuse a group of staff. In *Guru v Coles Supermarkets Australia Pty Ltd* [2016] NSWDC 349 the Court seemed to hedge its bets:

> There is a high social utility in providing supermarket services to the community. It is intended as part of such social utility, that the provision of such services would derive profit for the defendant. There is no social utility for such services to be provided without the concomitant exercise of reasonable care and skill on matters of the safety of entrants onto the premises.

Similarly, in *Safar v Sutherland Shire Council* [2016] NSWDC 232 the Court appeared to assign social utility to the generic level, then balance the social utility of the breach itself.

> There is significant positive social utility in the defendant providing the council premises it occupies for communal events such as an eisteddfod. …Where the defendant ordinarily employs staff to supervise, inspect, clean and maintain such premises, which are hired for a fee covered by an entry fee, there is no social utility in excusing a want of the exercise of reasonable care in such circumstances.

The Court of Appeal in New South Wales in *Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy* [2015] NSWCA 253 appears to express some frustration in its view that '[a]ll lawful enterprise may be said to have social utility.' It goes on to make a traditional balancing analysis – the social utility of enterprise in creating jobs against the probability and seriousness of harm arising from the breach.

> However in the present case that is not a factor outweighing the considerations which inform the answer to the s 5B(1)(c) question. The court would not wish to make a finding of negligence that jeopardised jobs, for instance, but that is not this case. There is nothing in the social utility of Patrick Stevedores operations which tells against a finding of negligence otherwise arising on the evidence.'

A similar general assignment of social utility occurs in *Equal 54 Pty Ltd v Dennis Galimberti* [2016] VSC 588 – the buying and selling of businesses in a market economy has social utility. Compare these views with that of the Western Australian Court of Appeal in *Boule v Yeing* [2015] WASCA 241. A farmer carrying out a stubble burn on private land had no social utility *as it was done to advance the appellants' private economic interests*.

In *Dwight v Supljeglav* [2015] NSWDC 26 the court did not apply this generic level of assignment; instead of allocating social utility to the activity of renting out housing to students (which could be argued to have the dual sources of utility of advancing the market economy and the availability of accommodation for students), the court nominated the 'activity' as 'not lighting the stairs'. This activity had minimal social utility:

> The only possible social utility of not lighting the stairs would be the saving of the electricity required to power a light. Whilst economy in the use of electricity is to be encouraged, any saving of this nature is not of significance in the present context, involving, as it did, the risk of serious injury.

In *Korda v Aldi Foods Pty Ltd* [2017] ACTSC 96 the Court assigned social utility to the activity of using an automatic gate assembly to cost-effectively reducing theft, instead of the high level social activity of provision of supermarket services.

The significance of this current confusion in the courts to school liability for student risk-taking is evident. Schools (along with hospitals and emergency services) have high social utility. There are a multiplicity of levels of generic utility in student acts of risk taking – from the activity of providing educational services (high level) to the specific utility of a particular fast-moving warm up activity on a gravel surface (*Sanchez-Sidiropoulos v Canavan* [2015] NSWSC 1139). In between these levels is the encouragement of risk-taking as an appropriate tool, necessary for physical and psycho-social development. The concern is that, in line with some of these judgments, the courts will recognise that utility but then compress the balancing task in the calculus of negligence to assert that encouragement of risk-taking *without appropriate supervision* or *in this particular venue* has no social utility at all. It is possible that current attempts to lever 'social utility' into all activities (as opposed to those activities considered at common law to have high social utility) may have the effect of diluting the effect of social utility in the calculus of negligence.

4.1.3 Applying the calculus of negligence to risk-taking

Courts have always acknowledged the special position of children taking risks. In *Jeffrey v London County Council* McNair J noted that 'school authorities … must strike some balance between the meticulous supervision of children every moment of the time when they are under their care, and the very desirable object

of encouraging the sturdy independence of children as they grow up' ((1954) 52 LGR 521, 523). In *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* the New South Wales Court of Appeal noted that:

> Children, and particularly young children, need protection from their environment, from others and from themselves… Some children tend to be mischievous. They may do mischievous things deliberately, and may also be unable to comprehend fully the consequences of what they do …Children of a particularly young age may also be prone to unpredictability of behaviour… These tendencies are likely to manifest themselves when high-spirited children participate in games … Nevertheless, although student participation in games may result in breaches of discipline and irresponsible behaviour, our society recognises that that is no reason, of itself, not to encourage and teach young children to engage in such activities ([2001] NSWCA 308, [55] - [56]).

Liability for accidents in a school or pre-school environment takes account of the necessity of children to take risks. In *Sanchez-Sidiropoulos v Canavan* [2015] NSWSC 1139 the Court noted that '[i]t has long been recognised that it is neither practicable nor desirable to attempt to establish a system of education that seeks to exclude every risk of injury and that schools must encourage and teach high spirited young children to engage in games and sporting activities, for their own health and wellbeing.' In *Brown v Hewson* [2015] NSWCA 393 it was common ground that, 'falls are a natural part of play and are important to the learning process. That risk is a significant factor in play.' It was noted that

> the duty was not merely to take reasonable care to prevent a risk of injury, since, had the avoidance of risk of injury been the overriding consideration, children such as the plaintiff would not have been permitted, much less encouraged, to play and to test their balance and jumping and landing skills by walking along an elevated beam ([2015] NSWCA 393, [131]).

This approach is consistent with contemporary knowledge about child development.

5 IMPLICATIONS FOR SCHOOLS

Facilitation of risk-taking behaviours in schools takes place in a challenging regulatory, cultural and social environment (Little, 2017). Aside from space and facility constraints, '[c]ompliance with regulatory requirements was identified by the teachers as having a significant impact on the types of experiences and play environments they provided for the children, particularly those involving heights [and in England] fears about injury-risk, their liability and possible litigation' (Little, 2017; p.85) have been identified by teachers as barriers to facilitation of risky play. Whilst the relatively recently implemented

The Early Years Learning Framework (Australian Government Department of Education, Employment and Workplace Relations (DEEWR), 2009)

> Outdoor learning spaces are a feature of Australian learning environments. They offer a vast array of possibilities not available indoors. Play spaces in natural environments include plants, trees, edible gardens, sand, rocks, mud, water and other elements from nature. These spaces invite open-ended interactions, spontaneity, risk-taking, exploration, discovery and connection with nature (pp. 15–16).

There remains a focus on the students' health and safety and the need for supervision, and although schools are not required by the National Law to eliminate all risk and challenge (Little, 2017; p.87), Little notes that schools generally restricted climbing heights to lower than the height specified by Australian Standards, didn't allow children to climb trees and only about half had an environment which could potentially 'encourage rough and tumble play, play with tools or play in secluded spaces (Little, 2017; p.95). As risk is a subjective concept, Little concludes that:

> [o]pportunities for risk-taking in play are likely to be restricted when teachers defer to the advice

> provided by regulatory authority assessors. Due to the subjective nature of risk perceptions, individual assessors may provide advice to centres that limits risk based on their own perception of what is dangerous or unsafe rather than considering the particular context including teachers' knowledge of the capabilities of the children in their care and their implementation of risk management strategies (Little, 2017; p.96).

Given the constraining influences of societal risk-aversion and regulation, the lack of clarity in the common law about identification of 'societal utility' in risk-taking behaviour may further impede the facilitation of risky behaviour in schools.

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