

# Rethinking risk: Making space for outdoor play in Canada

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Photo: Megan Zeni



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# Overview

- What is risky play and why is it important?
- What are the implications for insurance & law?
- How do we make a difference?



Photo: Megan Zeni

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## Girl's accident on playground not Saanich's fault, court rules

JEFF BELL / TIMES COLONIST  
OCTOBER 8, 2015 06:00 AM

Email Print



B.C. Supreme Court cases are heard at the Victoria Courthouse. Photograph by STAFFORD, Times Colonist

A "most unfortunate accident" in 2009 that left a then-11-year-old girl injured was not the fault of the District of Saanich, a B.C. Supreme Court ruling says.

In lawsuit filed by the girl and her guardian, the district was accused of being liable for what happened.

Justice Robin Baird said it was not established in court that Saanich employees exposed the girl to "an unreasonable risk of foreseeable harm, or failed to adequately supervise the innocent playground activities in which she was engaged with other blameless children on the occasion in question."

"I was told that the District takes a more robust approach to children's play. Its programs encourage physical outdoor activity. Risk-taking is encouraged within reasonable limits on the basis that children who never hazard a chance are unlikely to develop properly either physically or emotionally."



## Basic Facts

- Rebecca Thompson was 11 years old and registered in a day camp
- During a break the kids from the day camp played a game called Grounders on the playground equipment
- She fell from a 3 foot high platform and injured herself when she struck her head





## What is Grounders?

- Grounders was the game the children were playing
- Essentially it is tag, where the child who is “it” is on the ground and tries to tag other children on the playground equipment
- The children who are not “it” have their eyes open
- If the child who is “it” goes onto the playground equipment they have to close their eyes



## Where Was Grounders Played?



## Where Did Rebecca Fall?



# Allegations

## Allegations Summarized

- Grounders is inherently unsafe and should not be permitted
- If Grounders is not inherently unsafe it was unsafe because of where it was played.
- The supervision was negligent.
- **Grounders is a game which exposes children to unreasonable risk of harm and therefore parents ought to have been informed that Grounders was permitted—duty to warn.**



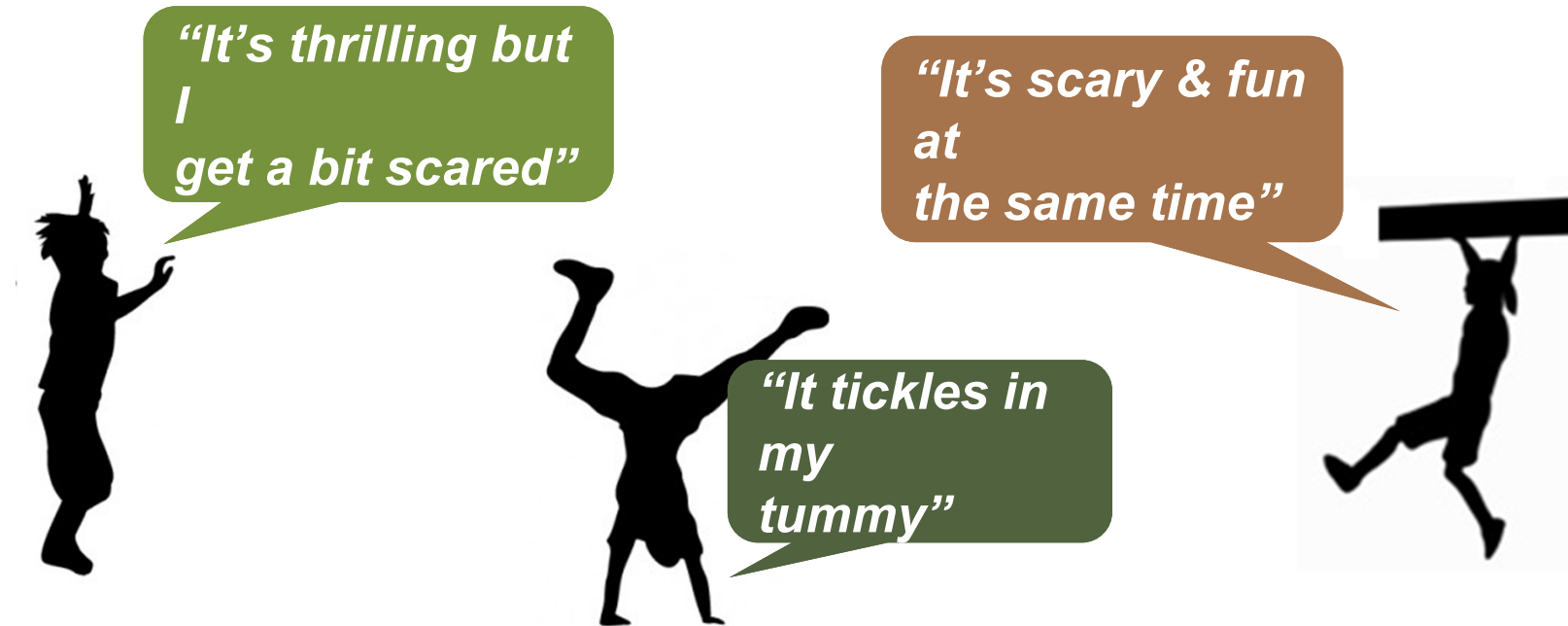
**Favourite play memory**

# What is Play?

- Fun, rewarding
- Voluntary
- Intrinsically motivated
- Self-directed
- Unstructured



# What is risky play?



*... thrilling & exciting forms of play involving uncertainty and the chance of physical injury*



**Play with height**



**Play with height**

# Why Outdoor Risky Play?

## Child Development

- Social
- Emotional
- Physical
- Cognitive
- Creativity
- Risk management

## Physical Health

- Physical activity
- Physical literacy
- Gut microbiomes
- Myopia

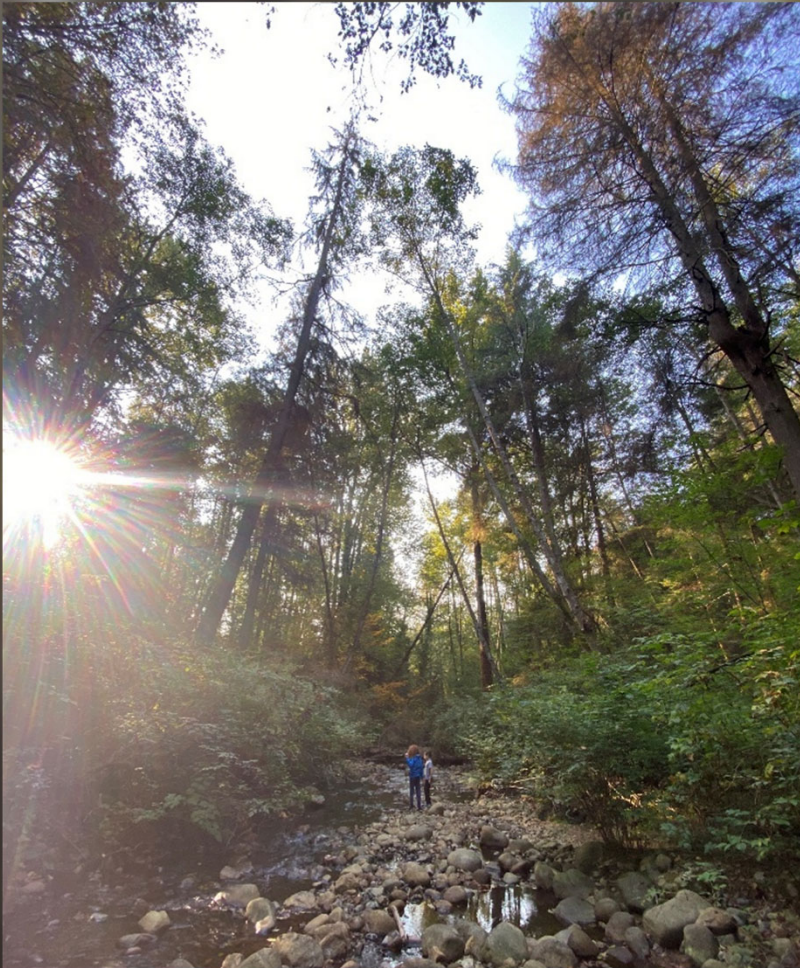
## Mental Health

- Well-being
- Anxiety
- Resilience
- Self-confidence

Brussoni et al (2015) IJERPH 12(6)

Ramsden et al (Under review) Risky play systematic review

# Play = Learning



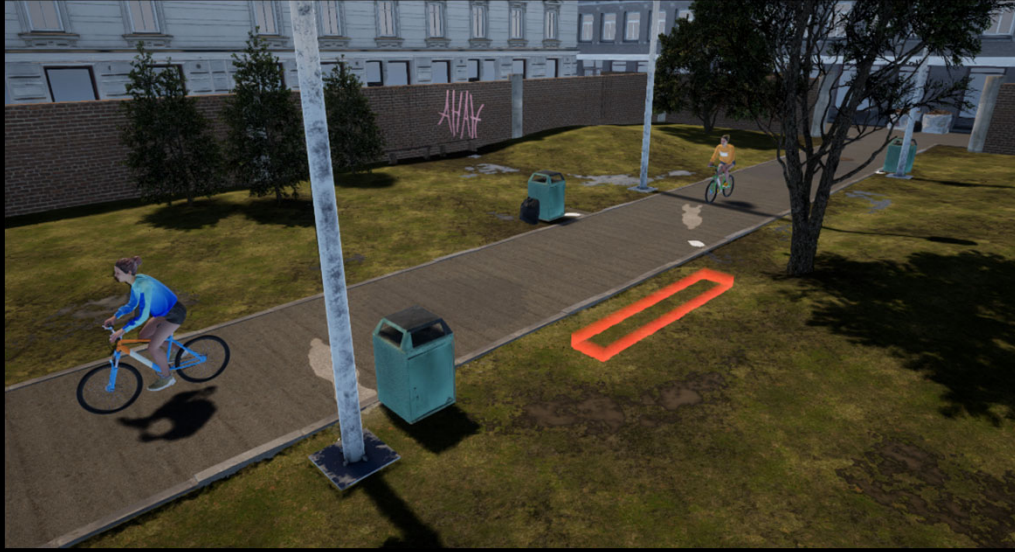
Keeping kids safe means  
letting them take risks





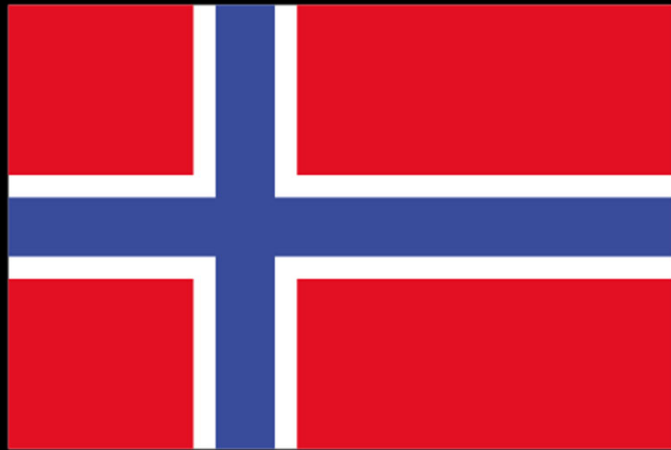
Sandseter et al (2023) JMIR Res Protocols, 12, e45857; Brussoni et al (Under Review)





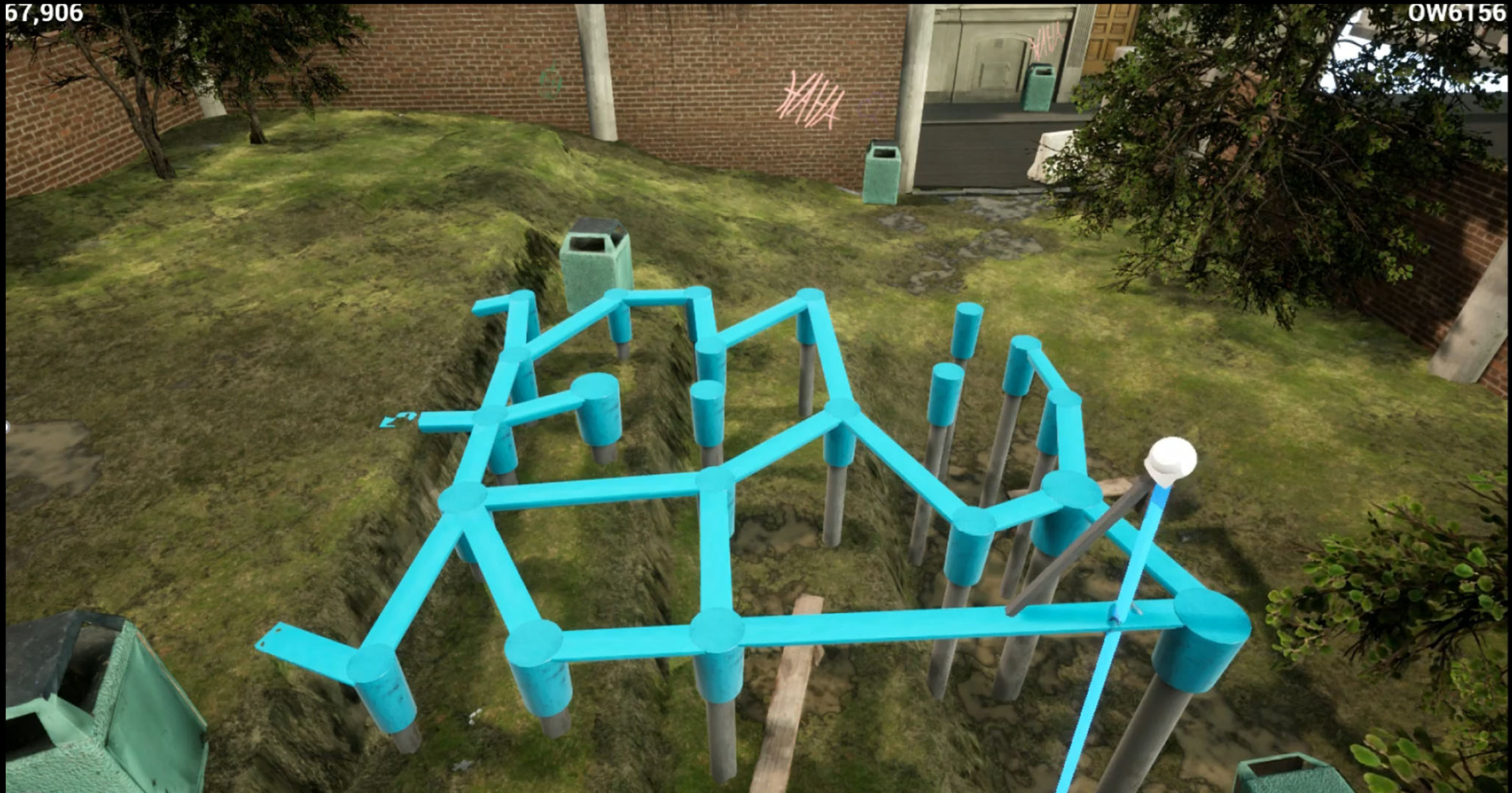


Norwegian children were more willing to take risks than Canadian children



67,906

OW6156



Children who took more risks in the play task “failed” (fell) more

39,003

0W6T56

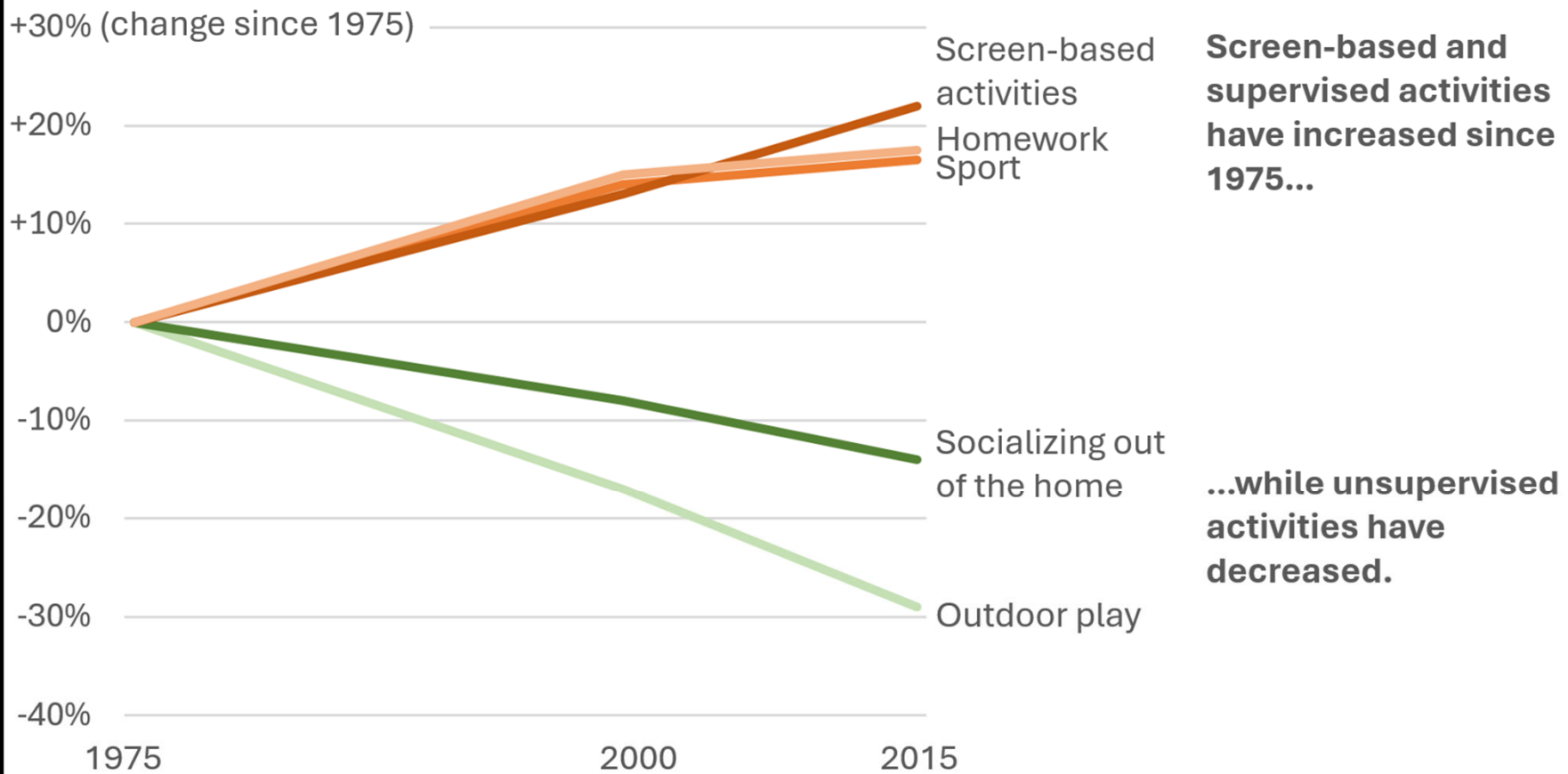


And showed more efficient risk management in the street crossing task

If we want our children to thrive  
in an unpredictable world,  
we need to let them play  
in unpredictable ways



## UK Children's Daily Time Use, 1975 - 2015



Brussoni (2024). *After Babel*, Adapted from Mullan, K. (2019). *British Journal of Sociology*, 70(3), 997–1024.

## Hazard



## Risk



As safe as *necessary*, not as safe as possible



## General Litigation Strategy – Advocacy Case

- This was an advocacy case because the question was: Why does it matter that Rebecca was allowed to play Grounders?
- The critical task was framing the case by providing a more coherent analysis of the evidence and the law than the opposing party.
- The challenge was overcoming any inherent bias towards an injured child who was being supervised by young adults.





## General Litigation Strategy – Advocacy Case

There are cases dealing with similar situations none of them are similar enough. As examples, there are cases about:

- Gymnastics;
- Piggy-back races;
- Snowball fights;
- Capture the flag; and
- Tug of war



## General Litigation Strategy – Framing the Case

- Saanich is the “good guy” and is a professional and competent organization entitled to deference.
- Accidents happen when kids engage in physical play but that does not mean there should be no physical play.
- This is not a situation where the actions of Saanich would shock the community.



## General Litigation Strategy – Framing the Case

Minimize opportunities for Grounders to be analogized to gymnastics and similar activities that require training by:

- avoiding expert evidence about how it is regulated in other places but explain the benefits of unstructured play to child development.
- emphasizing that Grounders is a ‘playground game’. Children control the game and make up the rules.



## General Litigation Strategy – How Do We Manage the Biggest Risks?



### ➤ Risk #1 - Sympathetic plaintiff

- Severed liability from quantum
- Emphasized legal principle: Evidence that an injury resulted is not evidence of an unusual risk of harm
- Gathered evidence and made submissions about why it is important to let kids participate in physical activity and the risk of “bubble-wrapping”
- Suggested a possible result of finding liability against Saanich would be the widespread banning of games similar to Grounders



## General Litigation Strategy – How Do We Manage the Biggest Risks?

- Risk #2 – Common sense says kids should not be permitted to chase each other around on a playground with their eyes closed.
  - The kid with their eyes closed was not the kid injured
  - Grounders is widely and frequently played with very few significant injuries



## Question 1: Is Grounders Ok? (Analysis)

- Generally stated, the law says an activity is OK if a prudent parent would allow their child to participate.
- This is a very context-specific finding and the cases identify some factors that a court should consider when trying to determine the perspective of a prudent parent.

## Question 1: Is Grounders Ok? (Analysis)

- The key factors include:
  - Is it a worthwhile activity?
  - Is it commonly played?
  - Is there a history of injury?
  - Does it require special training?
  - Does it require special protective equipment?
  - Does it require direct supervision?



## Question 1: Is Grounders Ok? (Evidence)

- It was critical that we established a prudent parent would allow their child to play Grounders because if a prudent parent would not allow their child to play Grounders there was an obligation to provide advance notice to the parents that it would be permitted (like a permission slip from school).
- We decided a combination of statistical and anecdotal evidence was the best strategy.



## **Question 1: Is Grounders Ok? (Evidence)**

### **Statistical Evidence**

- We asked Saanich for the records of registration for summer activities from 2007 to 2012 and every incident report related to an injury.
- Created a metric “Activity Days” which was the number of children registered in an activity multiplied by the number of days of the activity.
- Created a table which we included in an affidavit and the written submissions to the court.

## Question 1: Is Grounders Ok? (Evidence)

- Although our “statistical evidence” was of no value regarding how often Grounders was played the court referred to it in the decision.

Start Date	End Date	Activity Days	Incidents
July 3, 2007	August 17, 2007	2,200	0
June 30, 2008	August 15, 2008	1,938	0
June 29, 2009	August 21, 2009	2,123	4 (the Fall and 3 Skateboard Camp)
July 5, 2010	August 20, 2010	1,998	1
July 4, 2011	August 19, 2011	1,749	0
July 2, 2012	August 17, 2012	1,578	0

## **Question 1: Is Grounders Ok? (Evidence)**

### **Anecdotal Evidence**

- We made sure we had affidavit evidence from different witnesses that they had observed Grounders being played
  - High School teacher
  - Elementary School teacher
  - Supervisor for Neighbourhood Playground Program
  - Youth Leader
  
- Goal was to prepare for a judge who would think Grounders was “really dumb” (Mom’s statement)



## Question 1: Is Grounders Ok? (Judgment)



➤ Judge agreed with us!

- “Grounders falls within an everyday and reasonably safe range of playground activity”.
- Commonly played by children and “in the overwhelming majority of cases, no mischief comes to anyone from such innocent pleasures”.
- “Nothing inherently dangerous about Grounders such that special training or instruction is required”.
- Grounders does not require “parental consent or approval in advance”.



## **Question 2: Was it Ok for Rebecca to Play Grounders? (Analysis)**

- The law is clear that even when an activity is generally OK it also has to be OK in the particular circumstance and the court should consider:
  - Was the equipment appropriate?
  - Was the weather appropriate?
  - Was the kid an appropriate age?
  - Was the kid wearing appropriate clothes?
  - Did the kid have any disability?
  - Was the kid familiar with the game?



## Question 2: Was it Ok for Rebecca to Play Grounders? (Analysis)

- Did the kid want to play the game?
- Were the other kids playing appropriately?
- Was there a risk of reckless or aggressive behaviour by the other kids?



## Question 2: Was it Ok for Rebecca to Play Grounders? (Evidence)

- Because we had identified the factors from the case law we were able to have the supervisor swear an affidavit addressing each of those points.
- Rebecca's affidavit also helped – she said she had played it before and was excited about playing it at camp.





## **Question 2: Was it Ok for Rebecca to Play Grounders? (Judgment)**

➤ Judge agreed again!

- Rebecca was an appropriate age.
- Rebecca had appropriate experience.
- Rebecca was “playing the game voluntarily, happily, and in a spirit of fun that was shared by her playmates”.
- There was no evidence other children “were behaving recklessly or aggressively or that there was anything unpleasant, malevolent or hazardous about their manner of interaction”.

**Question 3: If Mom Was Told About Grounders Would the Injury be Prevented?**  
**(Evidence)**



- This was a risk because Mom was clear that she would have not let Rebecca play.
- We wanted to prove if Mom had said “don’t play Grounders” that Rebecca would have played anyway.
- Rebecca’s affidavit stated she thought a kid at her school broke his arm playing Grounders, Grounders was banned at her school, she knew her Mom did not want her playing Grounders and she didn’t tell her Mom she played Grounders the day before the Fall.

**Question 3: If Mom Was Told About Grounders Would the Injury be Prevented?  
(Judgment)**

➤ The Judge noted in the reasons that Mom would have told Rebecca not to play Grounders and that Mom knew Grounders was banned at Rebecca's elementary school but "was not aware that the District had failed to impose a similar ban".

**Question 3: If Mom Was Told About Grounders Would the Injury be Prevented?  
(Judgment)**

- The Judge avoided having to decide if Rebecca would have obeyed her Mom by finding that Saanich did not need to tell Mom it was being played.

“I must reject the argument advanced by [Rebecca] that [Grounders] was the sort of activity that required parental consent or approval in advance”
- This is an important part of the reasons because the “duty to warn” is currently an active issue.

## **Question 4: Would the Injury be Prevented by Better Supervision?** **(Analysis)**

- The law requires an increased level of supervision when:
  - play intensifies and kids become more distracted/excited because there is an increase in the risk of injury by “inadvertence or lack of self-control”; and
  - “the rising of emotions” makes physical contact or aggressive behaviour leading to injury much more likely



## **Question 4: Would the Injury be Prevented by Better Supervision?** **(Analysis)**

- This was a risk for us because opposing counsel was trying to make an issue out of where the second supervisor was at the time of the Fall.
- We managed that risk by arguing that a single supervisor (regardless of Saanich's policy) was all the law required by emphasizing:
  - There was no inadvertence or lack of self-control and Rebecca's affidavit stated she was "moving backwards away from the person who was 'it' when I lost my footing and fell".
  - There were no rising emotions and the supervisor's affidavit stated he was watching the children playing the game and "the Fall occurred suddenly and I had no time to do anything to stop her".

**Question 4: Would the Injury be Prevented by Better Supervision?  
(Analysis)**

➤ Judge found that the supervision was appropriate:

“A supervisor was close at hand...at a vantage that gave him a good view of the game and the state of play. There was no evidence that any of the children were behaving recklessly or aggressively or that there was anything unpleasant, malevolent or hazardous about their manner of interaction. The plaintiff was not pushed or touched. She said quite simply that she was moving backwards away from the child who was ‘it’ and lost her footing”

# Outdoor Play-related Fall Injury Deaths, Canada, Ages 1-14

Fall from play equipment (2007-2022)



Fall from tree (2000-2022)

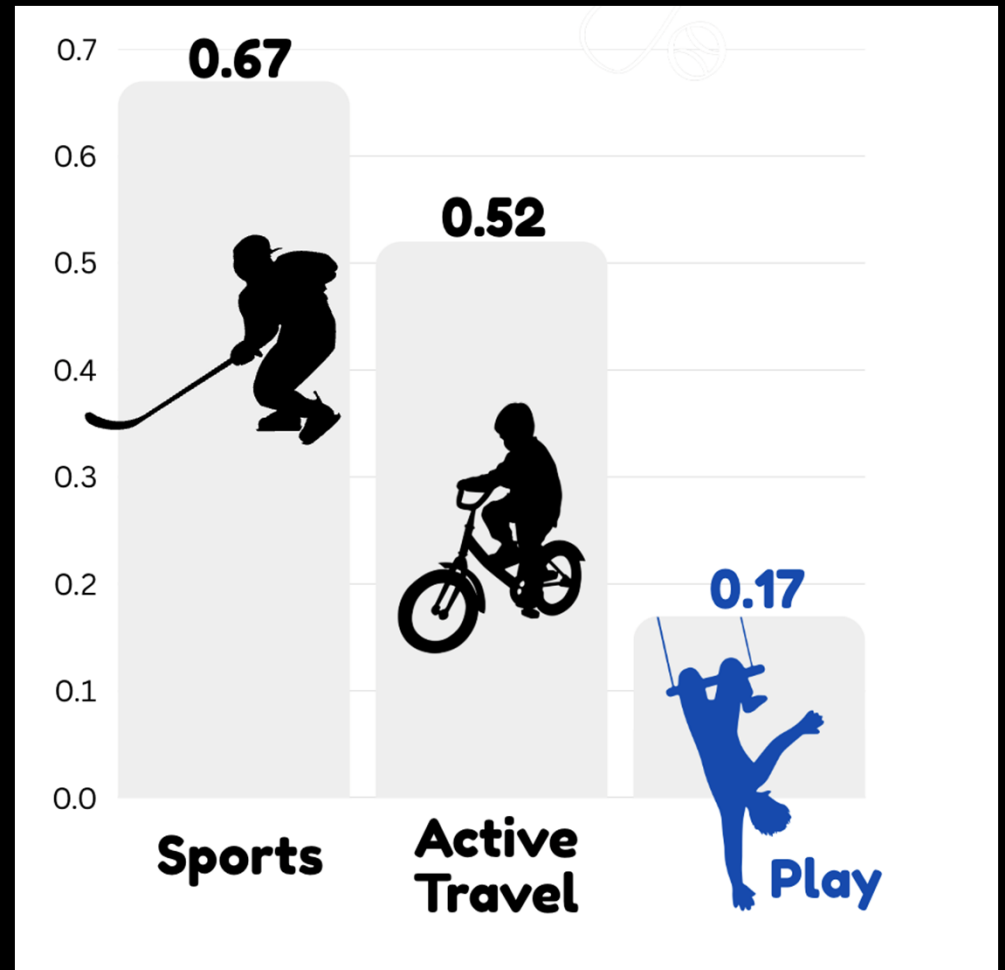


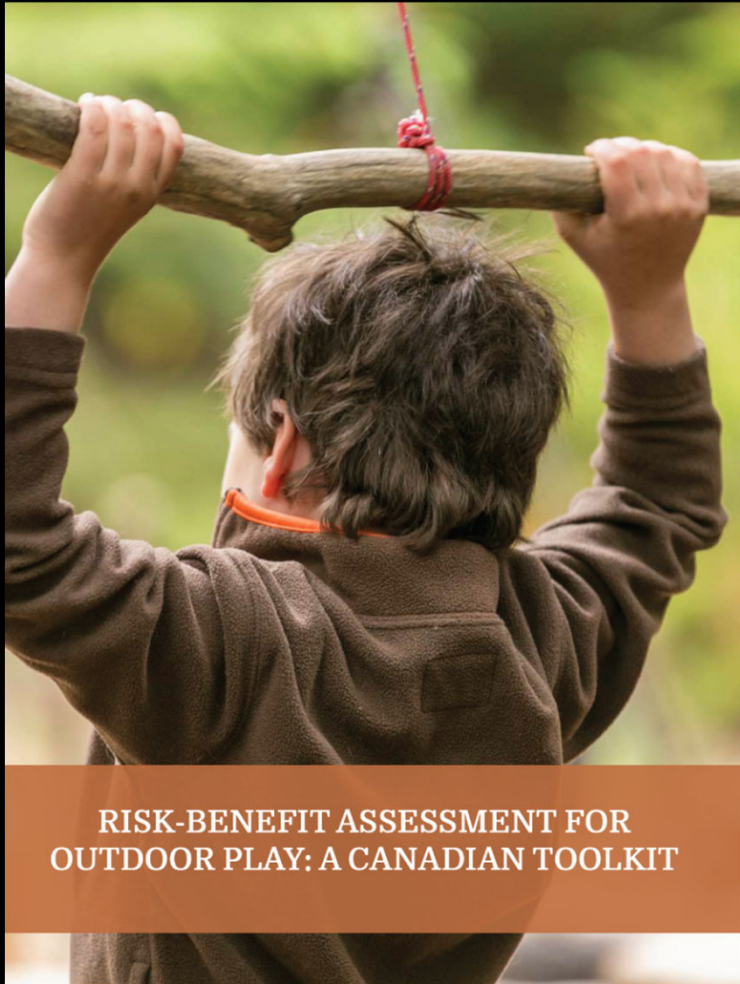
Statistics Canada, 2024

# Medically treated injuries by exposure time

Per 1000 hours spent doing the activity (ages 6-12)

Nauta et al., 2014, Sports Medicine





# Risk-benefit assessment (RBA)

Traditional = how do we  
eliminate risk?

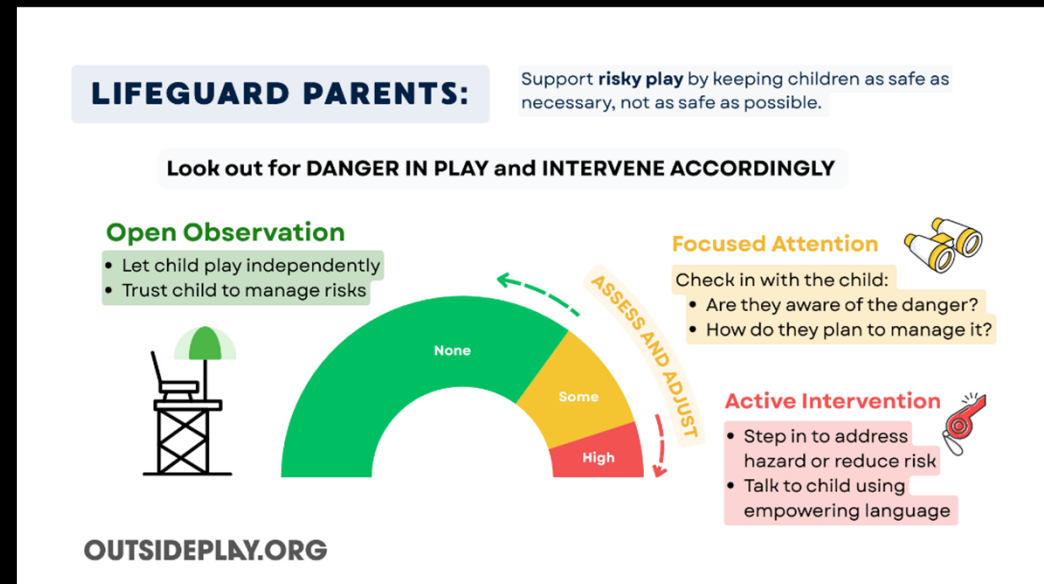
RBA = How can we manage  
hazards while preserving  
benefits of challenge and  
play?

Gill, Power & Brussoni (2019). Child &  
Nature Alliance of Canada  
<https://OutdoorPlayCanada.ca>

# Dynamic Risk Benefit Assessment

## Core concepts (1):

- Ongoing situational awareness (weather, abilities, group size, env. conditions)
- Proportional supervision
- Professional judgment



# Dynamic Risk Benefit Assessment

Core concepts (2):

- Supporting children's risk competence
- Flexible risk management



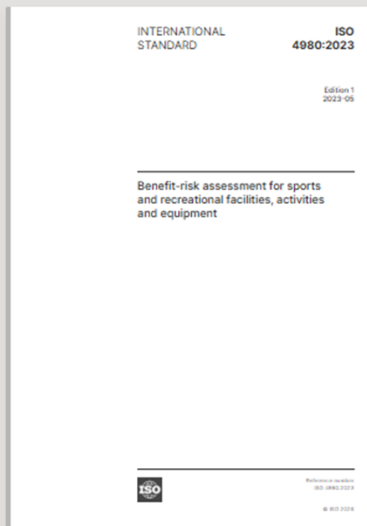


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# ISO 4980:2023

Benefit-risk assessment for sports and recreational facilities, activities and equipment

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## Discussion/Questions



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