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Published in:
Juridical Review

Publication date:
2021

Document Version
Author accepted manuscript

THE CALCULUS OF RISK (AND CRICKET!)

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The author revisits the standard of care in the law of negligence and examines the factors which inform a court's decision as to whether a breach of duty has been established, with a particular focus on the recent sporting case of *Lewis v Wandsworth London Borough Council*. [1]

Introduction

Injuries sustained as a result of sporting activities are nothing new and the infliction of injuries in such a context may result in litigation. Indeed, an examination of the law reports discloses cases where participants (*Phee v Gordon*[2]), spectators (*Wooldridge v Sumner*[3]), and mere bystanders (*Bolton v Stone*[4]) have been injured as a result of sporting activities. The author reviews the factors to which the courts traditionally have regard in determining the matter of breach of duty in negligence cases generally[5] before going on to consider the recent decision in *Lewis*[6] where the court, once again, was required to address the standard of care issue in the context of sporting activity (cricket, in the case in question).

Standard of care

It is well established that the applicable standard of care in the law of negligence is reasonable care in the circumstances. If the pursuer is to succeed, it must be established that the alleged wrongdoer failed to reach the standard of the reasonable person in the circumstances. Perhaps the most well-known authority in this regard is *Muir v Glasgow Corporation,*[7] a Scottish appeal to the House of Lords. The facts of the case can be briefly stated. The manageress of a tearoom, which was situated in a public park in Glasgow, permitted members of a Sunday school picnic party to finish their picnic in the tearoom owing to the onset of rain. Access to the tearoom was via a narrow passageway. The passageway was bounded on one side by a counter where sweets and ice cream were sold. Some children were gathered there. Two members of the picnic party carried their tea-urn down the narrow corridor, having first called out to the children to keep out of the way. Unfortunately, however, one of the carriers lost his grip on the handle of the urn and the urn was dropped. Six children at the counter were scalded. Parents of the children sued the Corporation on the basis of its vicarious liability for the alleged negligence of its employee, the tearoom manageress, Emily Alexander. It was alleged that the manageress was in breach of duty in having allowed the picnic party members to carry the urn through the passageway crowded with children.

The Lord Ordinary (Robertson) found that negligence was not established and assoilzied the defender. On the pursuers' reclaiming motion, the First Division, in a majority decision (Lord President Normand dissenting), recalled the interlocutor of the Lord Ordinary. On further appeal, the House of Lords was required to determine whether the manageress had breached the duty of care which she undoubtedly owed to the children. The decision of the House was unanimous. It was held that, as there was nothing intrinsically dangerous in the operation of carrying the tea-urn through the passage if done with ordinary care, the manageress could not be expected, as a reasonable

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[1] *Lewis v Wandsworth London Borough Council* [2020] EWHC 3205 (QB)

[2] *Phee v Gordon* [2013] CSIH 18; 2013 S.C. 379

[3] *Wooldridge v Sumner* [1963] 2 Q.B. 43

[4] *Bolton v Stone* [1951] A.C. 850

[5] We are not here concerned with cases of professional negligence. In this connection, see the "true test" expounded by Lord President Clyde in *Hunter v Hanley* 1955 S.C. 200 at 205 and the dictum of McNair J. in *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at 586.

[6] *Lewis* [2020] EWHC 3205 (QB)

[7] *Muir v Glasgow Corporation* 1943 S.C. (H.L.) 3

person, to have foreseen the occurrence of the accident as a natural and probable consequence of its carriage. Accordingly, she was not at fault in having taken no steps for the protection of the children. The speeches in the House of Lords are instructive.

Having noted the differences in judicial opinion expressed in the courts below, Lord Thankerton said:[8] "[I]t has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man…The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, *ex post facto*, that they did not take some step, which it is now realized would definitely have prevented the accident."[9] Lord Thankerton was not attracted to the majority view of the First Division which would effectively have placed the manageress in the position of an insurer. His Lordship stated:[10] "The ground of the majority judges, as I understand it, is that Mrs Alexander, while authorizing the transport of the tea-urn through the entrance passage where the sweets and ices were being sold to a large number of children, omitted to remove the children altogether from the passageway so as to avoid a danger which should have been obvious to her. In my opinion, this is to turn Mrs Alexander into something like an insurer against any risk of danger from the tea-urn." His Lordship observed that[11] "if carefully carried, there was no element of danger to be reasonably anticipated from the operation of carrying the urn." His Lordship concluded:[12] "I am not prepared to find that the careful carriage of the tea-urn past the dozen or so of children in the wider end of the passage involved such an obvious danger as would have been foreseen as a natural and probable consequence of such carriage by an ordinary reasonable person which would lead him to clear the children out of the passage."

Lord MacMillan stated:[13]

"The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life."

In Lord MacMillan's view, however, the urn was not an *inherently dangerous* thing. It could be carried quite safely and easily by two people exercising ordinary care. The manageress had no reason to anticipate the event which unfolded and was therefore under no obligation to guard against it. Indeed, "she was entitled to assume that the urn would be in charge of responsible persons (as it was) who would have regard for the safety of the children in the passage (as they did have regard), and that the urn would be carried with ordinary care, in which case its transit would occasion no danger to bystanders."[14]
For Lord MacMillan, the proposition that Mrs Alexander ought to have foreseen some accidental injury to the children if she allowed an urn containing hot tea to be carried through the passage, and that she ought to have cleared out the children entirely during its transit, "would impose on Mrs Alexander a degree of care higher than the law exacts."[15] For Lord Clauson, too, the imposition of

[8] *Muir* 1943 S.C. (H.L.) 3 at 8
[9] *Muir* 1943 S.C. (H.L.) 3 at 8
[10] *Muir* 1943 S.C. (H.L.) 3 at 9
[11] *Muir* 1943 S.C. (H.L.) 3 at 9
[12] *Muir* 1943 S.C. (H.L.) 3 at 9
[13] *Muir* 1943 S.C. (H.L.) 3 at 10
[14] *Muir* 1943 S.C. (H.L.) 3 at 11
[15] *Muir* 1943 S.C. (H.L.) 3 at 12

liability would involve "applying a standard of foresight not to be expected, in the world as it stands, in the ordinary reasonable man."[16]

Lord Wright emphasised that "[i]t is not a question of what Mrs Alexander actually foresaw, but what the hypothetical reasonable person in Mrs Alexander's situation would have foreseen."[17] His Lordship proceeded to pose the question: "Was the operation of carrying the tea-urn something which a reasonable person in Mrs Alexander's position should have realised would render the place in which it was performed dangerous to the children in the circumstances? This is the crucial issue of fact and the acid test of liability."[18] Lord Wright observed that while the introduction of a savage animal, such as a lion or a tiger, into the passage way would have been dangerous *per se,* the permitted operation in this case was "intrinsically innocuous."[19] Accordingly, no obligation was incumbent on Mrs Alexander to attempt to supervise how it was carried out. Lord Wright emphasised that the defenders were not insurers.

What constitutes reasonable care?

Clearly, therefore, the law of negligence does not impose a duty of insurance upon the defender. "There is no absolute requirement to eliminate risk."[20] Rather, the law of negligence imposes a duty to act as an ordinary reasonable person would do in the circumstances. [21] In *Blyth v Birmingham Waterworks Co.*[22] Alderson, B. stated:[23] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." A century later, in *Bolam v Friern Hospital Management Committee*,[24] McNair J. echoed those comments before positing the question:[25] "How do you test whether this act or failure is negligent?" McNair J. answered that question as follows:[26] "In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man."

In *Muir*, Lord MacMillan observed that "[s]ome persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence."[27]

What constitutes "reasonable care" in the circumstances is ultimately a matter for the court. Diplock L.J. (as he then was) put it thus in *Wooldridge:*[28] "What is reasonable care in a particular circumstance is a jury question and where…there is no direct guidance or hindrance from authority it

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[16] *Muir* 1943 S.C. (H.L.) 3 at 19
[17] *Muir* 1943 S.C. (H.L.) 3 at 13
[18] *Muir* 1943 S.C. (H.L.) 3 at 15
[19] *Muir* 1943 S.C. (H.L.) 3 at 17
[20] *Goodwillie v B&Q Plc* [2020] SC EDIN 2 per Sheriff Kenneth J McGowan at [171]
[21] "The defender is only obliged to take reasonable care: he is not expected to ensure that his acts or omissions never harm the pursuer." Joe Thomson, *Delictual Liability*, 5th edn (West Sussex: Bloomsbury, 2014), p.133. The law recognises that children may not possess the same foresight as adults –see *McHale v Watson* (1966) 115 C.L.R. 199; *Mullin v Richards* [1998] 1 W.L.R. 1304. The child's actions will be judged against the standard expected of a reasonable child of that age.
[22] *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex. 781
[23] *Blyth* (1856) 11 Ex. 781 at 784
[24] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582
[25] *Bolam* [1957] 1 W.L.R. 582 at 586
[26] *Bolam* [1957] 1 W.L.R. 582 at 586
[27] *Muir* 1943 S.C. (H.L.) 3 at 10
[28] *Wooldridge* [1963] 2 Q.B. 43 at 66-67

may be answered by inquiring whether the ordinary reasonable man would say that in all the circumstances the defendant's conduct was blameworthy."

Of course, judicial views may differ as to what the reasonable man ought to foresee. In *Muir*[29] Lord MacMillan, having stated that the standard of foresight of the reasonable man is an impersonal test which takes no account of personal idiosyncrasies[30], continued that "there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view…What to one judge may seem far-fetched may seem to another both natural and probable."

Calculus of risk

In determining whether a breach of duty has occurred, the courts traditionally employ a calculus of risk analysis. In other words, various factors enter into the decision making process and competing elements are balanced. The need to balance those competing elements was articulated by Lord Hoffmann in *Tomlinson v Congleton Borough Council*[31] a case arising from serious injuries sustained by the plaintiff in a diving incident in a country park lake. The lake had formed in a disused quarry and was known to attract visitors. Swimming in it was prohibited. The defendants displayed notices reading "dangerous water: no swimming." They employed rangers to distribute safety leaflets and issue oral warnings against swimming. The defendants knew that the notices were frequently ignored and that several accidents had resulted from swimming in the lake. They intended to plant vegetation around the shore to prevent people from entering the water but, owing to limited resources, the work had not yet been undertaken at the time of the plaintiff's accident. The plaintiff entered the lake and dived from a standing position in shallow water striking his head on the sandy bottom and breaking his neck. He alleged that the accident had been caused by the defendants' breach of the duty of care which they owed to him in terms of the occupiers' liability legislation. The House of Lords held that any risk of the plaintiff suffering injury had arisen not from any danger due to the state of the premises or things done or omitted to be done but from the plaintiff's *own* misjudgement in attempting to dive in too shallow water. That had not been a risk giving rise to any duty on the defendants. In any event, it had not been a risk in respect of which the defendants might reasonably have been expected to afford the plaintiff some protection. In the course of his speech, Lord Hoffmann stated:[32]

"[T]he majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the council was under a duty to do what was necessary to prevent it. But this in my opinion is an over-simplification... the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common

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[29] *Muir* 1943 S.C. (H.L.) 3 at 10

[30] *Nettleship v Weston* [1971] 2 Q.B. 691 presents one of the best known examples of this principle. There, it was held that a learner driver owes a duty to his instructor to drive with proper skill and care, the test being the objective one of the careful driver. It is no defence that the learner driver was doing his best. Lord Denning M.R. stated at 699: "The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care."

[31] *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] 1 AC 46

[32] *Tomlinson* [2004] 1 A.C. 46 at [34]. See, also, in the specific context of employer's liability, the observations of Swanwick J. in *Stokes v Guest, Keen & Nettleford (Bolt and Nuts Ltd)* [1968] 1 W.L.R. 1776 at 1783 in relation to the balancing exercise required: "He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other."

Attention is now turned to the factors identified by Lord Hoffmann and the influence which they have exerted upon judicial decision making in this area.

i)Probability (or likelihood) of injury

It may be that injury to another is foreseeable as a result of the defender's acts or omissions, but only as a very remote possibility. For liability to ensue, however, there must be sufficient *probability* of injury such that a reasonable person would anticipate it. That this is so is clear from the seminal case of *Bolton v Stone.*[33] There*,* the plaintiff was struck by a cricket ball while standing on the highway outside her house in Manchester. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground which was adjacent to the highway. The plaintiff sought damages from the committee and members of the club in respect of her injuries.[34] The strike in question was a straight drive. The cricket field, at the point at which the ball left it, was protected by a fence seven feet high but the upward slope of the ground was such that the top of the fence was some seventeen feet above the level of the cricket pitch. The distance from the batsman to the fence was some seventy-eight yards, and the distance to the place where the plaintiff was hit just under 100 yards. Balls had been hit out of the ground into the road on only six occasions in twenty-eight years and no ball had been proved to have struck anyone on the highways near the ground until the respondent was struck. The particulars of negligence were that the defendants "(A) pitched the cricket pitch too near to the said road; (B) failed to erect a ... fence ... of sufficient height to prevent balls being struck into the said road; (C) failed to ensure that cricket balls would not be hit into the said road".[35]

Oliver, J. found the defendants not to be liable in negligence. The Court of Appeal reversed that decision. The defendants appealed to the House of Lords. Counsel for the defendants argued that, while the chance of a ball hitting a person on the highway was not a fantastically remote possibility, it was improbable. Cricket had been played on this ground for almost ninety years, and never before had anyone been injured. The defendants' appeal was allowed. Lord Porter acknowledged that "[the defendants] knew that the hitting of a cricket ball out of the ground was an event which might occur and, therefore, that there was a conceivable possibility that someone would be hit by it."[36] His Lordship continued, however:

"It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."[37]

Lord Porter continued:

"[T]he appellants knew that balls had been hit out of the ground into the road, though on very rare occasions - and it is true that a repetition might at some time be anticipated. But its happening

[33] *Bolton v Stone* [1951] A.C. 850
[34] The batsman, who was a member of a visiting team, was not a defendant in the action.
[35] *Bolton* [1951] A.C. 850 at 852
[36] *Bolton* [1951] A.C. 850 at 858
[37] *Bolton* [1951] A.C. 850 at 858

would be a very exceptional circumstance, the road was obviously not greatly frequented and no previous accident had occurred."[38]

Lord Porter concluded: "It is not enough that there is a remote possibility that injury may occur: the question is, would a reasonable man anticipate it? I do not think that he would."[39]

Lord Normand stated: "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."[40] Having made reference to several of the speeches in *Muir*, Lord Normand continued: "It is …not enough for the plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road; she must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence."[41] His Lordship observed that "the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight."[42]

Lord Oaksey observed that "an ordinarily careful man does not take precautions against every foreseeable risk… He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation."[43]

In Lord Reid's view, while "it was readily foreseeable that an accident such as befell the respondent might possibly occur during one of the appellants' cricket matches…the chance of that happening was small."[44] From an examination of the case law, Lord Reid detected "a tendency to base duty rather on the likelihood of damage to others than on its foreseeability alone."[45] Among the authorities to which his Lordship made reference was *Fardon v Harcourt-Rivington*[46] where Lord Dunedin said: "People must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities."[47] For Lord Reid, the applicable test was "whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger."
The trial judge had concluded that the appellants' ground was large enough to be safe for all practical purposes. Lord Reid observed: "This is a question not of law but of fact and degree. It is not an easy question and it is one on which opinions may well differ... I think that this case is not far from the borderline."[48] Ultimately, however, Lord Reid agreed with the judge's assessment.

In Lord Radcliffe's view, too, the appellants had not been guilty of any culpable act or omission. His Lordship stated: "there was only …a very remote…chance of the accident taking place at any particular time, for, if it was to happen, not only had a ball to carry the fence round the ground but it had also to coincide in its arrival with the presence of some person on what does not look like a

[38] *Bolton* [1951] A.C. 850 at 859
[39] *Bolton* [1951] A.C. 850 at 860
[40] *Bolton* [1951] A.C. 850 at 860-861
[41] *Bolton* [1951] A.C. 850 at 861
[42] *Bolton* [1951] A.C. 850 at 862
[43] *Bolton* [1951] A.C. 850 at 863
[44] *Bolton* [1951] A.C. 850 at 864
[45] *Bolton* [1951] A.C. 850 at 865
[46] *Fardon v Harcourt-Rivington* (1932) 146 L.T. 391
[47] *Fardon* (1932) 146 L.T. 391 at 392
[48] *Bolton* [1951] A.C. 850 at 867. Lord Normand also considered the issue of liability to be "finely balanced" (at 861).

crowded thoroughfare and actually to strike that person in some way that would cause sensible injury."[49] His Lordship continued: "It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing."[50]

Accordingly, in *Bolton*, the risk of an accident of this nature taking place was so slight that, in the circumstances, the defendants were justified in taking no precautions against it. The particular circumstances were clearly critical to the outcome. It is notable that the cricket club was conducting a lawful and socially useful activity. Some years later, in *Overseas Tankship (U.K.) Ltd. v The Miller Steamship Co. Pty Ltd. (Wagon Mound No. 2)*[51] Lord Reid suggested that had Miss Stone's injuries resulted from an unlawful activity, *Bolton* would have been decided differently. Lord Reid, who delivered the judgment of the Board in *Overseas Tankship (U.K.) Ltd.*, stated:[52]

"*Bolton v Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and *if the circumstances are such* that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it." (emphasis added). [53]
It will not always be justifiable to disregard a risk of small magnitude.[54] The magnitude of risk must be balanced with the difficulty of eliminating it. The final decision will be a fact sensitive one in which other factors may point to a different conclusion.[55] Attention is now turned to those other factors.

ii) Degree or magnitude of harm (or seriousness of injury)

It has long been established that in the determination of whether reasonable care has been exercised in any given set of circumstances, the court is entitled to have regard not only to the probability of an injury occurring but also to the gravity of the consequences should an accident occur.[56] That the degree of harm or seriousness of injury is relevant to the analysis of breach of duty is clear from *Bolton.* In considering the matter from the point of view of safety, Lord Reid observed in *Bolton* that "it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is

[49] *Bolton* [1951] A.C. 850 at 868
[50] *Bolton* [1951] A.C. 850 at 869
[51] *Overseas Tankship (U.K.) Ltd. v The Miller Steamship Co. Pty Ltd. (Wagon Mound No. 2)* [1967] 1 A.C. 617
[52] *Overseas Tankship (U.K.) Ltd.* [1967] 1 A.C. 617 at 642-643
[53] Patten has observed that "Lord Reid is envisaging a position whereby a relatively low level of foreseeable risk can be legitimately ignored in some situations but not in others." (Keith Patten, "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" 2019 P.N. 35(4), 230, 237)
[54] See *Overseas Tankship (U.K.) Ltd.* [1967] 1 A.C. 617; *Jolley v Sutton London Borough Council* [2000] 1 W.L.R. 1082
[55] M. Jones and A. Dugdale, *Clerk & Lindsell on Torts,* 23rd edn (London, Sweet & Maxwell, 2020), para 7-176 observe: "*Bolton* is not authority for the view that it is always reasonable to disregard a low likelihood. The other factors in the balance, e.g. the severity of the harm and the cost of precautions, must also be taken into account."
[56] See *Mackintosh v Mackintosh* (1864) 2 M 1357, where Lord Neaves stated (at 1363): "The amount of care will be proportionate to the degree of risk run and to the magnitude of the mischief that may be occasioned."

struck."[57] Lord Normand, too, stated that "the serious injury which a cricket ball might cause must not be left out of account."[58]

The *locus classicus* in this regard is *Paris v Stepney Borough Council*.[59] There, an employer failed to provide goggles for a partially sighted employee. The employee became totally blind following an accident in the workplace when a chip of metal entered his good eye. A breach of duty was held to be established. Lord MacDermott observed: "[W]hatever may be said of the respondents' duty to their two-eyed employees, there was ample evidence to sustain the view that they failed in their duty to the appellant."[60] It follows that in order to attain the standard of reasonable care *in the circumstances*, more may be required of the defender in respect of a vulnerable individual.[61]

It is important to distinguish between the first and second factors in the calculus of risk analysis. In other words, the degree of risk should not be confused with the seriousness of injury. Indeed, in *Tomlinson*,[62] Lord Hobhouse cautioned against "the common but elementary error of confusing the seriousness of the outcome with the degree of risk that it will occur." His Lordship provided an example of the mistreatment of the concept of risk: "It is a fallacy to say that because drowning is a serious matter there is therefore a serious risk of drowning". His Lordship observed in *Tomlinson* that the risk of a drowning was very low indeed and there had never actually been one. The accident suffered by the claimant (a broken neck and paralysis) was unique. While this was undoubtedly a serious injury, there was no evidence of any previous incident where anyone had broken his neck by plunging from a standing position and striking his head on the sandy bottom on which he was standing. The probability of a broken neck being suffered in the circumstances of the claimant was so remote that the risk was minimal.

iii) Social utility

The third factor to which Lord Hoffmann referred in *Tomlinson* in relation to the balancing exercise was the social value of the activity which gives rise to the risk. This social utility factor essentially concerns the end to be served or achieved by the activity in question. It has been observed that "[t]he range of activities which could (plausibly) be considered to possess social utility is extensive and wide ranging."[63] Obvious examples include the recreational pleasure derived by third parties from the activity in question[64] as well as the value which emergency services provide. Clearly, recreational pleasure may be derived from the game of cricket and, interestingly, counsel for the defendants in *Bolton*[65] submitted that healthy recreation for young men should be encouraged even at some slight risk. Lord Normand in *Bolton* did not expressly mention "social utility" but did observe that "[t]he only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground."[66] Ultimately, it was held not to be negligent for the defendant cricket club to do nothing about the slight risk of someone being injured by a cricket ball

[57] *Bolton* [1951] A.C. 850 at 867
[58] *Bolton* [1951] A.C. 850 at 862
[59] *Paris v Stepney Borough Council* [1951] A.C. 367
[60] *Paris* [1951] A.C. 367 at 390-391
[61] See, also, the observations of Lord Malcolm in *Welsh v Brady* 2008 S.L.T. 363 at [16] and [20]
[62] *Tomlinson* [2004] 1 A.C. 46 at [79]
[63] Patten, "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" 2019 P.N. 35(4), 230, 231
[64] "Enjoyable competitive activities are an important and beneficial part of the life of the very many people who are fit enough to participate in them…such activities are almost never risk-free…a balance has to be struck between the level of risk involved and the benefits the activity confers on the participants and thereby on society generally." (per Field J. in *Uren v Corporate Leisure (UK) Ltd* [2010] EWHC 46 (Q.B.) at [59])
[65] *Bolton* [1951] A.C. 850 at 853
[66] *Bolton* [1951] A.C. 850 at 862

hit out of the ground. By way of contrast, a finding of liability was made by the Privy Council against the defendants in *Overseas Tankship (U.K.) Ltd.* when the plaintiff's vessels were damaged by fire**.** Although there was only a small risk that oil being discharged from the defendant's vessel might be ignited on the surface of the water (which indeed happened), there was no social value in the defendant's activity. Indeed, Lord Reid said:
"[T]here was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately."[67]

What influence has social utility exerted upon judicial analysis of breach of duty? The prevailing view is that it is a relevant consideration[68] although there are dissenters.[69] Certainly Lord Hoffmann's speech in *Tomlinson* indicates that social utility is a relevant factor in the breach of duty determination.[70] It will be remembered that, prior to the claimant's accident, the council had resolved to alter the landscape around the shore in order to make it more difficult for people to access the lake. This was notwithstanding that many visitors used the lakeside safely. The proposed work had not yet been done at the time of the claimant's accident. The claimant's action against the council in its capacity as occupier was dismissed by the House of Lords.[71] Lord Hoffmann, clearly mindful of the importance of preserving access to leisure facilities which were generally safe, observed: "The majority of people who went to the beaches to sunbathe, paddle and play with their children were enjoying themselves in a way which gave them pleasure and caused no risk to themselves or anyone else. This must be something to be taken into account in deciding whether it was reasonable to expect the council to destroy the beaches."[72] His Lordship continued: "It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious."[73] The widespread adoption of such defensive measures (as had been proposed here) "would damage the quality of many people's lives."[74] Lord Scott stated: "[W]hy should the council be discouraged by the law of tort from providing facilities for young men and young women to enjoy themselves in this way? Of course

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[67] *Overseas Tankship (U.K.) Ltd.* [1967] 1 A.C. 617 at 643 per Lord Reid

[68] See J. Thomson, *Delictual Liability*, 5th edn (West Sussex: Bloomsbury, 2014), p.137; B. Pillans, *Delict: Law & Policy*, 5th edn (Edinburgh: W. Green, 2014), pp.340-341; F. McManus and E. Russell with J. Bisacre, *Delict: A Comprehensive Guide to the Law in Scotland*, 2nd edn (Dundee: Dundee University Press, 2011), pp.60-61; M. Jones and A. Dugdale, *Clerk & Lindsell on Torts*, 23rd edn (London, Sweet & Maxwell, 2020), para 7-184; R. Mulheron*, Principles of Tort Law*, 2nd edn (Cambridge: Cambridge University Press, 2020), pp. 348-349

[69] Beever has asserted that "the leading cases on the standard of care in negligence do not support the view that utility is a relevant consideration." (Allan Beever, "Negligence and Utility" (2017) 17 OUCLJ 85, 86)

[70] See, also, *Scout Association v Barnes* [2010] EWCA Civ 1476 per Jackson L.J. at [34]: "It is the function of the law of tort to deter negligent conduct and to compensate those who are the victims of such conduct. It is not the function of the law of tort to eliminate every iota of risk or to stamp out socially desirable activities: see generally The Philosophical Foundations of the Law of Tort (Ed D. Owen, Clarendon Press, 1995), chapter 11 'The standards of care in negligence law'."

[71] Lord Hoffmann stated that "the fact that the council's safety officers thought that the work was necessary does not show that there was a legal duty to do it." (*Tomlinson* [2004] 1 A.C. 46 at [43])

[72] *Tomlinson* [2004] 1 A.C. 46 at [42]

[73] *Tomlinson* [2004] 1 A.C. 46 at [46]

[74] *Tomlinson* [2004] 1 A.C. 46 at [48]. It should be said that Lord Hoffmann was also heavily influenced by considerations of "individual autonomy," stating at [45]: "I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair."

there is some risk of accidents arising out of the joie-de-vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone."[75]

Later decisions confirm that social utility is a matter to be weighed in the breach of duty analysis. In *Uren v Corporate Leisure (UK) Ltd*[76], for example, a serviceman was seriously injured while taking part in a health and fun day at his RAF base. It is clear from the judgment of the Court of Appeal that social utility was a matter of which account could properly be taken in determining whether a breach of duty had occurred.[77]

Considerations of social utility can however be traced to judicial pronouncements made well before those in *Tomlinson* and *Uren*. An early case in which the relevance of social utility was discussed is *Daborn v Bath Tramways Motor Co Ltd.*[78] On 5 April 1943, during wartime, the plaintiff was driving an ambulance with a left-hand drive. There was one driving mirror on the left-hand side attached to the windscreen. The ambulance was completely shut in at the rear with the result that the plaintiff was unable to see anything close behind her. On the back of the ambulance a large warning notice declared: 'Caution – Left-hand drive – No signals.' The plaintiff was unaware that an omnibus was close behind her and that its driver was trying to overtake her. Having signalled with her left hand that she was intending to turn right, the plaintiff began to turn whereupon the ambulance was struck by the omnibus. The ambulance overturned and the plaintiff was thrown from it and sustained injury. She sued both the driver of the bus and his employers in negligence. The defendants contended that the plaintiff was contributorily negligent in having omitted to ensure that there was no vehicle behind her before turning right. The omnibus driver was found to have been negligent. The court held, however, that there was no contributory negligence on the plaintiff's part. Although Asquith L.J. does not use the terminology of "social utility" in his judgment, he does identify as a relevant factor in the contributory negligence enquiry "the end to be served" by the activity in question. His Lordship stated:[79]

"In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk. The relevance of this applied to the present case is this: during the war which was, at the material time, in progress, it was necessary for many highly important operations to be carried out by means of motor vehicles with left-hand drives, no others being available… I think the plaintiff did all that in the circumstances she could reasonably be required to do if you include in those circumstances, as I think you should: (i) the necessity in time of national emergency of employing all transport resources which were available, and (ii) the inherent limitations and incapacities of this particular form of transport. In considering whether reasonable care has been observed, one must balance the risk against the consequences of not assuming that risk, and in the present instance this calculation seems to me to work out in favour of the plaintiff."[80]

Asquith L.J.' s observations in *Daborn* were echoed in *Watt v Hertfordshire County Council*[81] which again demonstrates that social utility is a relevant consideration in the breach of duty analysis. The

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[75] *Tomlinson* [2004] 1 A.C. 46 at [94]

[76] *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66

[77] *Uren* [2011] EWCA Civ 66 at [13] per Smith L.J.

[78] *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All E.R. 333

[79] *Daborn* [1946] 2 All E.R. 333 at 336

[80] Had the plaintiff been found to have been contributorily negligent, she would have failed to recover because the circumstances of this case predated the Law Reform (Contributory Negligence) Act 1945.

[81] *Watt v Hertfordshire County Council* [1954] 1 W.L.R. 835

claimant, a firefighter, was travelling to an emergency situation involving a woman who was trapped under a vehicle. The claimant was sent to the locus in the back of a lorry with a heavy jack which was not secured. In transit, the jack moved, striking and injuring the claimant. A more suitable vehicle had not been available for transportation of the jack. The claimant's action against his employer failed. Denning L.J. said:[82]
"It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk."

Watt was followed in *King v Sussex Ambulance Service NHS Trust*.[83] Again, a distinction was drawn between an activity occurring in the context of a response by emergency services and one occurring in a commercial context. The claimant in *King* was an ambulance technician in the employment of Sussex Ambulance Trust. He suffered injury while moving an elderly patient down a narrow and steep stairway in the patient's home. He and a colleague had used a carry chair for this purpose and the claimant's injury was sustained when he was forced for a brief moment to bear the full weight of that chair. The claimant submitted that the defendant had been negligent in discouraging employees, in such circumstances, from calling the fire brigade to remove patients from their homes. There was, however, nothing to suggest that calling the fire brigade would have been appropriate in the instant case. Since there was no evidence of any other steps that the defendant could have taken to prevent the risk of accident, the Court of Appeal held (unanimously) that no breach of duty was established. The judgment of Hale L.J. (as she then was) is particularly instructive. Her Ladyship observed that the ambulance service owed a duty to members of the public who had called for its help. That might result in the imposition of liability for failure to attend to a patient within a reasonable time. Unlike a commercial enterprise, the ambulance service did not have the option of declining the job.[84] While that did not mean that the service could expose its employees to unacceptable risk, it did mean "that what is reasonable may have to be judged in the light of the service's duties to the public and the resources available to it to perform those duties."[85] In relation to the balancing of the various considerations, Hale L.J. observed that the task in which the claimant was engaged was a socially useful one. She stated:[86] "The risk to the employees in this case was not negligible. It was considerable both in the likelihood of its occurring and in the seriousness of the harm which might be suffered if it did….[T]he activity was clearly hazardous. Against that, it was of considerable social utility. The service did not have a choice but to respond to the patient's needs. Those needs were urgent but not an emergency. The service had limited resources, not so much in financial but in equipment terms, with which to respond."

Although Buxton L.J. agreed with the judgment of Hale L.J., some implications of the decision caused him concern. In particular, the case raised important considerations of distributive justice. Whether a different outcome should ensue in the emergency response context from that which might ensue in the commercial context was something which Buxton L.J. questioned. The ambulance service does not enjoy the luxury of being able to refuse the job. That public obligation protects it from liability for physical injury to its men because of "the specific balance between the meritorious ends that

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[82] *Watt* [1954] 1 W.L.R. 835 at 838
[83] *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] ICR 1413
[84] "If a removal firm cannot remove furniture from a house without exposing its employees to unacceptable risk then it can and should refuse to do the job." (*King* [2002] EWCA Civ 953 at [23] per Hale L.J.) Buxton L.J. endorsed that view at [40].
[85] *King* [2002] EWCA Civ 953 at [23] per Hale L.J.
[86] *King* [2002] EWCA Civ 953 at [24]

were to be served and the risk involved in serving them that was required to be struck."[87] Buxton L.J. quoted[88] from the judgment of Denning L.J. in *Watt*[89] as follows: "The saving of life or limb justifies taking considerable risk, and I am glad to say that there have never been wanting in this country men of courage ready to take those risks, notably in the fire service." Buxton L.J. proceeded to posit the question: "But why should those men of courage, who are the persons who run the risk on behalf of the public, suffer if the risk eventuates? If, as this court held in *Kent v Griffiths* [2001] QB 36, the public interest obliges the service to respond to public need, why should it not be equally in the public interest to compensate those who are foreseeably injured in the course of meeting that public need? I therefore do not see any reason why the employees of a public body that decides to go on with the job, albeit for meritorious public reasons rather than for private commercial gain, should be any less well protected."

Following a review of the authorities, Patten[90] argues that while social utility is a relevant factor, it is rarely a decisive one in the breach of duty analysis.[91] He suggests that the inclusion of social utility brings an "additional layer of uncertainty" to the enquiry and "involves judges in making value judgments about the kind of conduct that carries social utility."[92] Patten argues that the cost of a socially useful activity should fall on society and that it is "inherently unfair to ask one individual who has the misfortune of being injured to bear the whole of the burden of that injury as a proxy (one might even say a sacrificial lamb) for the rest of us."[93] He submits that "[i]t would not be unduly difficult for the Supreme Court, should an appropriate case come before it, to recognise this unfairness and remove social utility from the breach of duty balancing exercise."[94] Until such time as that happens, it would appear that social utility remains a factor to which the courts may have regard.[95]

iv) Practicability (including the cost) of precautions

The late Professor Thomson observed that "[t]he hypothetical reasonable person in the position of the defender will - indeed, can - only take such precautions as are practicable to avoid the risk of harm.[96] He continued that such a person "will take into account the cost of precautions and balance this against the probability of risk of harm and the seriousness of any injuries likely to be sustained."[97] Indeed, the cost of preventative measures was the fourth factor to which Lord Hoffmann made reference in *Tomlinson*. In the course of his judgment, his Lordship stated:[98]"The borough leisure officer said that he regretted the need to destroy the beaches but saw no

[87] *King* [2002] EWCA Civ 953 at [42]
[88] *King* [2002] EWCA Civ 953 at [47]
[89] *Watt* [1954] 1 W.L.R. 835 at 838
[90] Patten, "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" P.N. 2019, 35(4), 230
[91] Patten observes that in *Tomlinson*, for example, while social utility is discussed it "does not drive the outcome." (K Patten "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" P.N. 2019, 35(4), 230, 241) He concludes that "many cases stand and fall on the basis of the level of foreseeable risk" (245-246).
[92] Patten, "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" P.N. 2019, 35(4), 230, 243
[93] Patten "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" 2019 P.N. 35(4), 230, 245
[94] Patten "Public benefit, private burden? The role of social utility in breach of duty decisions in negligence" 2019 P.N. 35(4), 230, 245
[95] In England and Wales, the common law position is now reflected in statutory form-see s.1 of the Compensation Act 2006. The Act does not apply in Scotland.
[96] J. Thomson, *Delictual Liability*, 5th edn (West Sussex: Bloomsbury, 2014), p.138
[97] J. Thomson, *Delictual Liability*, 5th edn (West Sussex: Bloomsbury, 2014), p.138
[98] *Tomlinson* [2004] 1 A.C. 46 at [48]

alternative if the council was not to be held liable for an accident to a swimmer. So this appeal gives your Lordships the opportunity to say clearly that local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers."

It will be remembered that in the circumstances of *Bolton* the risk of a pedestrian being struck by a cricket ball hit from the cricket ground on to an adjacent street was so small that the defendants were justified in taking no precautions against it. In *Overseas Tankship (U.K.) Ltd.*[99] Lord Reid, under reference to *Bolton,* said: "[I]t does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it."
In *Overseas Tankship (U.K.) Ltd.*, the plaintiff's two vessels were damaged by fire when oil discharged from another vessel, the Wagon Mound, was ignited on the surface of the water as a result of nearby welding works. Delivering the judgment of the Board, Lord Reid stated:[100]

"If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense."

His Lordship concluded:[101]

"[T]he evidence shows that the discharge of so much oil onto the water must have taken a considerable time, and a vigilant ship's engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship's engineer probably ought to have known that this had in fact happened before. The most that can be said to justify inaction is that he would have known that this could only happen in very exceptional circumstances. *But that does not mean that a reasonable man would dismiss such a risk from his mind and do nothing when it was so easy to prevent it.* If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant is liable in damages." (emphasis added)

More recently, a finding of liability was made against the defendant council in *Jolley v Sutton London Borough Council* [102] in circumstances where it had failed to remove an abandoned boat from its land. A teenager who was attempting a repair of the boat suffered paraplegia when the boat fell upon him from a prop. The plaintiff's accident and the resulting injuries were reasonably foreseeable. The defendant had conceded that it ought to have removed the boat owing to the risk of minor injuries to children if the rotten planks gave way beneath them. The risk of more serious injury (such as occurred here) could have been eliminated without incurring additional expense. In weighing the risk against the difficulty of eliminating it, Lord Hoffmann observed that the concession made by the defendant was significant. His Lordship stated:[103]

"The council admit that they should have removed the boat. True, they make this concession solely on the ground that there was a risk that children would suffer minor injuries if the rotten planking gave way beneath them. But the concession shows that if there were a wider risk, the council would have had to incur no additional expense to eliminate it."

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[99] *Overseas Tankship (U.K.) Ltd.* [1967] 1 A.C. 617
[100] *Overseas Tankship (U.K.) Ltd.* [1967] 1 A.C. 617 at 643-644
[101] *Overseas Tankship (U.K.) Ltd.* [1967] 1 A.C. 617 at -644
[102] *Jolley v Sutton London Borough Council* [2000] 1 W.L.R. 1082
[103] *Jolley* [2000] 1 W.L.R. 1082 at 1092

In *Latimer v AEC Ltd*.[104], on the other hand, the cost involved in eliminating a risk would have been significant. There, a rainstorm flooded the defendant's factory. Oil which was contained in a channel on the floor (along which it was pumped to machinery) became mixed with the water. When the water subsided, the floor was left slippery. Sawdust was spread over it as far as supplies permitted but part of the floor remained untreated. The plaintiff slipped on an untreated part of the floor. His action in negligence against his employers failed. He had not established that a reasonably careful employer would have shut down the factory. No one else had slipped that day and the House of Lords held that it was not necessary to take the "drastic step"[105] of closing down the factory. That would have involved a loss of production. The employers had done all that a reasonable employer would have done in the circumstances.

Lewis v Wandsworth London Borough Council

Attention is now turned to the recent case of *Lewis v Wandsworth London Borough Council.*[106] Like *Bolton* before it, the case arose as a result of a pedestrian being struck and injured by a cricket ball. The cases are however quite different and the claims against the respective defendants were formulated in different terms.

Before examining the facts and decision in *Lewis*, it is perhaps useful to make some further observations about *Bolton*. The plaintiff's injury in *Bolton* was sustained in a lightly frequented street and the strike in question was an exceptional one. The probability of a cricket ball so struck hitting anyone in the road was very slight. Accordingly, it was not actionable negligence not to take precautions to avoid such a risk. The decision was a fact sensitive one, a point emphasised by Lord Reid when he stated:[107]

"If this appeal is allowed, that does not in my judgment mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organize matches there are safe to go on in reliance on past immunity. I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small."[108]

Indeed, the need to examine the magnitude of risk is illustrated by another cricketing case, *Miller v Jackson*.[109] In that case, evidence indicated that eight balls a year would land in the vicinity of the plaintiffs' house and indeed damage had been caused to their property on a number of occasions. Geoffrey Lane L.J. stated:[110] "The risk of injury to person and property is so great that on each occasion when a ball comes over the fence and causes damage to the plaintiffs, the defendants are guilty of negligence."

The circumstances of each individual case will clearly be pivotal to the outcome. Against that background, attention is now turned to *Lewis*. The facts were as follows. In the early evening of 28 August 2014, the claimant was walking with a friend along a path adjacent to a cricket pitch in Battersea Park when she was struck in the left eye by a cricket ball which was driven from the cricket pitch. She sustained serious injuries as a result. She brought a claim for damages against the council. Following trial in Wandsworth County Court, the recorder (Riza Q.C.) granted judgment in the

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[104] *Latimer v AEC Ltd*. [1953] AC 643

[105] *Latimer* [1953] AC 643 at 653 per Lord Porter and at 659 per Lord Tucker

[106] *Lewis v Wandsworth London Borough Council* [2020] EWHC 3205 (QB)

[107] *Bolton* [1951] A.C. 850 at 867-868

[108] This passage would subsequently be quoted by Stewart J. in his judgment in *Lewis* [2020] EWHC 3205 (QB) at [9]

[109] *Miller v Jackson* [1977] Q.B. 966

[110] *Miller* [1977] Q.B. 966 at 985

claimant's favour. The existence of a duty of care was not disputed[111] and the recorder found that the council had breached its duty because it allowed pedestrians to walk alongside the boundary of a cricket pitch that was not reasonably safe. The recorder stated that the possibility of an incident and the possibility of injury were "quite extensive"[112] given the respective locations of the path and pitch. The recorder continued: "Obviously if a ball rains down on one as one is walking on the pathway and causes an incident, the incident is probably going to be serious injury as occurred in this case to be the area of the head, and in particular the eyes."[113] In the recorder's view, the claim had been established primarily because of the council's failure to warn the claimant (i) that a game of cricket was in progress (ii) that a hard ball was being used and (iii) that the boundary of the cricket pitch went alongside the path which she was using.

The defendant appealed. Stewart J. allowed the appeal and dismissed the claim. He held that the recorder had been in error in awarding damages to the claimant. The council had been under no duty to warn users of the park that a game of cricket was underway or that a hard ball was being used. Having quoted extensively from the speeches in *Bolton,* Stewart J. stated that certain principles could be distilled from that case. One of these was that reasonable foreseeability of an accident is not sufficient to found liability. The court must consider the chances of an accident happening, the potential seriousness of an accident and the measures which could be taken to minimise or avoid an accident.[114] He continued:[115]

"*Bolton v Stone* is not a case which provides authority for a proposition that there is no liability for hitting a person with a cricket ball which has been struck out of the ground or over the boundary. It is clear from the decision that there needs to be careful analysis of the facts."

However, in Stewart J.'s view, the facts in *Lewis* indicated only a small risk of injury as evidenced by the relevant statistics. The council had adduced evidence to the effect that cricket had been played continually at the site, with the adjacent path in place, since 1897. The path and cricket pitch remained in the same locations today. Battersea park was a very busy park with some 10 million visits made to it throughout the course of the year. In the years 2014 – 2016 the cricket pitches had 317 bookings, 225 bookings and 258 bookings respectively. Evidence was led from a longstanding employee of the defendant who said that the risk of injury to spectators or casual passers-by was "extremely small." He provided a photograph with distances marked from the wickets to the path in order to provide context. He had no knowledge of any injuries of this type being caused by stray balls elsewhere in the borough during his employment with the council.

In the view of Stewart J., the recorder had been wrong to say that the statistics about the games played "[did] not really matter."[116] The recorder had found the defendant to be in a breach of duty (because it had allowed pedestrians to walk along the boundary of the cricket pitch that was not reasonably safe) but the recorder had failed to take account of the evidence as to statistics. That evidence was germane to the evaluation of the safety of pedestrians walking along the path. In that respect, the recorder had manifestly failed to take account of a material factor.

It will be remembered that the recorder found the claim against the council established primarily on the basis of a failure to warn. This alleged failure to warn had three limbs. The first was the failure to warn the claimant that a game of cricket was underway. The second was a failure to warn that a hard

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[111] Nor was there any dispute as the existence of a statutory duty in terms of the occupiers' liability legislation. It was not suggested that the content of the common law or statutory duties differed.

[112] *Lewis* "Unreported", 21 November 2019 Wandsworth County Court at [20] (quoted in *Lewis* [2020] EWHC 3205 (QB) at [5])

[113] *Lewis* "Unreported", 21 November 2019 Wandsworth County Court at [20] (quoted in *Lewis* [2020] EWHC 3205 (QB) at [5])

[114] *Lewis* [2020] EWHC 3205 (QB) at [11]. No mention of social utility appears here but, as will be noted later, Stewart J. took the view that s.1 of the Compensation Act 2006 was not engaged.

[115] *Lewis* [2020] EWHC 3205 (QB) at [11]

[116] *Lewis* [2020] EWHC 3205 (QB) at [19]

ball was being used and the third was a failure to warn that the boundary of the cricket pitch went alongside the path.

Stewart J. gave short shrift to these contentions. As far as the first was concerned, the claimant knew of the existence of the cricket pitch and acknowledged that she may have seen the game in progress. She accepted that there was a clear view for pedestrians using the path to see a cricket match taking place. Stewart J. stated:[117] "There were here, not very far away to the Claimant's left and in her full field of vision, 13 (presumably) adult male cricketers wearing whites. Yet the defendant was said to be under a duty to warn that a cricket match was taking place? This I do not accept. It is not a finding which was open to the Recorder."

In relation to the failure to warn that a hard ball was in use, Stewart J. greeted this contention with some incredulity. It was difficult to understand how any reasonable passer-by could assume (as the claimant appears to have assumed) that a cricket match being played by adult men wearing whites would involve the use of a soft ball. There was a strong presumption that adult men playing cricket would be using a proper (hard) cricket ball. Stewart J. concluded that the recorder's finding that there should have been a warning that a hard ball was being used could not be upheld.

As far as the warning in relation to the location of the boundary of the cricket pitch was concerned, Stewart J. was similarly dismissive. The claimant indicated that she had walked along the path on many previous occasions and "remembered seeing people sitting on the grass inside a white line which was on reflection obviously the boundary."[118] Irrespective of the location of the boundary, it was clear that there were men playing cricket and the distance they were from the path. Moreover, as Lord Porter had observed in *Bolton*, a batsman will seek to hit the ball out of the ground and so the position of the boundary was, in Stewart J.'s view, largely irrelevant.

Stewart J. concluded:[119] "If one adds all these elements together one can see why [the] statistics are of relevance. The lack of previous injury of itself is by no means sufficient to absolve a Defendant from liability. However when seen in the context of the analysis of the warning which the Recorder found should have been given, the absence of previous accident is in circumstances where (a) the fact that adults were playing cricket was clearly evident to people using the path, (b) reasonable people using the path would not assume that adults would be using a soft ball (c) precisely where the boundary was is of no relevance."

Stewart J. stated: "The risk of balls being hit towards the path was so evident that any warning should have been superfluous…To a reasonable person, a warning in the terms suggested by the Recorder was unnecessary and irrelevant."[120]

In Stewart J.'s view, the judgment of the recorder was wrong. Not only had he failed to take account of a material factor (namely the statistics) he had also displayed a lack of logic in his analysis of the facts. Stewart J. concluded:[121] "In the circumstances which obtained, allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) being remote. The remoteness is reinforced by [the defendant's] evidence as to statistics. Further and in any event the alleged breach by failure to warn the Claimant in the terms suggested does not withstand proper analysis."

One is inevitably reminded of the words of Lord Hobhouse in *Tomlinson*[122] that "the degree of risk is central to the assessment of what reasonably should be expected of the occupier and what would be a reasonable response to the existence of that degree of risk. The response should be appropriate and proportionate to both the degree of risk and the seriousness of the outcome at risk. If the risk of serious injury is so slight and remote that it is highly unlikely ever to materialise, it may well be that

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[117] *Lewis* [2020] EWHC 3205 (QB) at [25]
[118] *Lewis* [2020] EWHC 3205 (QB) at [29]
[119] *Lewis* [2020] EWHC 3205 (QB) at [30]
[120] *Lewis* [2020] EWHC 3205 (QB) at [31]
[121] *Lewis* [2020] EWHC 3205 (QB) at [36]
[122] *Tomlinson* [2004] 1 A.C. 46 at [80]

it is not reasonable to expect the occupier to take any steps to protect anyone against it. The law does not require disproportionate or unreasonable responses."

Although these words were stated in the context of occupiers' liability, they are equally apposite to cases of common law negligence.

Discussion

Decisions on breach of duty are entirely dependent on the particular circumstances of the case. Circumstances can, of course, vary infinitely and the analysis to be undertaken is an intensely fact specific one. One recalls Lord Wright's assertion in *Muir* that the introduction of savage animals to a narrow passageway crowded with children would be quite different from the introduction of a tea urn. In *Welsh v Brady*[123] a dog owner whose dog had run into and injured a fellow *adult* dog owner was held not to have been negligent. The Lord Ordinary (Malcolm) emphasised[124] that the decision related to the particular circumstances and that "to allow a black labrador to run around in a public place close to young children may well be very different." In *Jolley v Sutton*[125] Lord Steyn stated that "in this corner of the law the results of decided cases are inevitably very fact-sensitive." His Lordship went on to state that comparing the facts of one case with the facts of other decided cases in this branch of the law was "a sterile exercise" and "a misuse of the only proper use of precedent, viz., to identify the relevant rule to apply to the facts as found."[126]

In *Lewis*, both the recorder[127] and Stewart J.[128] recognised that *Bolton* was quite different from *Lewis*. However, Stewart J. did identify the relevant rule or principle to be extracted from *Bolton,* namely that foreseeability of injury was insufficient to establish a breach of duty. In *Bolton*, it was foreseeable that injury might be occasioned[129] but in view of the very slight risk involved, it was reasonable for the defendant to do nothing in the circumstances. It is clear from *Lewis*[130] too that the issue of foreseeability was never in issue. However, the degree of risk (as evidenced by the statistical evidence) was, again, small. Stewart J. does not fall into the common error identified by Lord Hobhouse in *Tomlinson* of confusing the degree of risk with the seriousness of injury. Indeed, he acknowledges that an accident could be nasty if it occurred.

Although the recorder had considered it to be incumbent on the council to ensure that the dangers were properly signposted, Stewart J. did not consider such precautions (in the shape of warnings) to be necessary-the defendant's evidence was that there was no signage about cricket being played in the park because it was quite obvious that games were in progress as one approached them.

What, then, of the social utility of the activity in question in *Lewis*? The Compensation Act 2006 (which applies only in England and Wales) provides, in s.1, that a court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet a standard of care (either by precaution or otherwise), have regard to whether a requirement to take those steps might prevent a desirable activity from being undertaken or discourage persons from

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[123] *Welsh v Brady* 2008 S.L.T. 363

[124] *Welsh* 2008 S.L.T. 363 at [20]

[125] *Jolley* [2000] 1 W.L.R. 1082 at 1089

[126] *Jolley* [2000] 1 W.L.R. 1082 at …. Similarly, Lord Hoffmann stated (at 1092): "I think that in a case like this, analogies from other imaginary facts are seldom helpful. Likewise analogies from real facts in other cases: I entirely agree with my noble and learned friend, Lord Steyn, in deploring the citation of cases which do nothing to illuminate any principle but are said to constitute analogous facts." See also, *Foskett v Mistry* [1984] R.T.R. 1, (a running down case) where May L.J. stated at 4: "[N]ot only do I think reference to authority in this type of case is unnecessary, but I would deprecate its repetition in similar simple cases in the future."

[127] *Lewis* "Unreported", 21 November 2019 Wandsworth County Court at [19]

[128] *Lewis* [2020] EWHC 3205 (QB) at [31]

[129] *Bolton* [1951] A.C. 850 per Lord Reid at 864

[130] *Lewis* [2020] EWHC 3205 (QB) at [33]

undertaking functions in connection with that activity.[131] One of the defendant's grounds of appeal in *Lewis* was that the recorder had failed to consider section 1 of the 2006 Act. However, given that the sole basis of the finding of negligence was failure to warn, Stewart J. did not consider that the section was engaged.

Concluding Remarks

The standard of care demanded in the law of negligence is that of reasonable care. The editors of *Clerk & Lindsell on Torts* have stated: "The key notion of reasonableness provides the law with a flexible test, capable of being adapted to the circumstances of each case. For example, a motorist should drive with reasonable care, but the speed at which it would be reasonable for him to travel when driving through a crowded town is slower than along an open and deserted country road. The behaviour of individuals and the circumstances giving rise to harm are so variable that a flexible test of this nature is essential."[132]

Whether the defender has attained the standard of reasonable care is a question of fact for the court to determine, having regard to the particular circumstances of the case. An important feature of the judgment in *Lewis* is that the court reiterated the importance of the highly fact sensitive nature of the enquiry. It would be quite wrong to assume that, because no finding of liability was made in *Bolton*, the same result would necessarily follow in *Lewis*. Indeed, a caution to that very effect had been sounded by Lord Reid in *Bolton*[133] and, indeed, in *Lewis,* Stewart J. emphasised that a careful analysis of the facts was required.[134] While no liability did attach to the defendant in *Lewis* that result followed from the application of principle to the particular factual matrix with which the court was presented. Breach was not to be determined on a consideration of foreseeability of injury alone–regard had to be had to the degree of risk involved. That point had been forcefully made in *Bolton*[135] and was re-emphasised in *Lewis*. In *Bolton*, Lord Reid stated: "What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial."[136] However, in *Bolton*, Lord Reid identified the risk as being "extremely small"[137] and for Lord Radcliffe it was "very remote."[138] The risk could be eliminated by abandoning the playing of cricket on the ground or increasing the height of the surrounding fences but Lord Radcliffe was clear that the reasonable man "would not have felt himself called upon"[139] to adopt either of those measures.[140]

It would be quite wrong to view *Lewis* as simply a carbon copy of *Bolton*. Indeed, the bases of claim in the two cases were quite distinct. It will be remembered that in *Bolton*, the plaintiff's case was formulated in the following way, namely that the defendants had "(A) pitched the cricket pitch too

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[131] The provision is designed to assuage fears of a compensation culture and reassure those who fear that normal activities might be prevented owing to a fear of litigation. The statutory provision simply reflects the existing common law position but it has no application in Scotland.

[132] M. Jones and A. Dugdale, *Clerk & Lindsell on Torts,* 23rd edn (London, Sweet & Maxwell, 2020), para 7-157

[133] *Bolton* [1951] A.C. 850 at 867-868

[134] *Lewis* [2020] EWHC 3205 (QB) at [11]

[135] Lord Reid in *Bolton* emphasised that the test of negligence did not depend on foreseeability of injury alone. If that were the correct test "it would be irrelevant to consider how often a ball might be expected to land in the road, and it would not matter whether the road was the busiest street, or the quietest country lane." (*Bolton* [1951] A.C. 850 at 866-867)

[136] *Bolton* [1951] A.C. 850 at 867

[137] *Bolton* [1951] A.C. 850 at 868

[138] *Bolton* [1951] A.C. 850 at 868

[139] *Bolton* [1951] A.C. 850 at 869

[140] Lord Normand stated: "The precautions suggested by the plaintiff, being either the moving of the wickets a few steps further away from the Beckenham Road end or the heightening of the fencing, would have had little or no effect in averting the peril. The only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground." (*Bolton* [1951] A.C. 850 at 862)

near to the said road; (B) failed to erect a … fence … of sufficient height to prevent balls being struck into the said road; (C) failed to ensure that cricket balls would not be hit into the said road."[141] positioned the cricket pitch too near to the road in question; they had failed to erect a sufficiently high fence to prevent balls being struck into the said road; and that they had failed to ensure that cricket balls would not be hit into the said road". *Lewis* proceeded on an entirely different basis, the case as pled being based upon a failure to warn. As the editors of *Clerk & Lindsell on Torts* have observed "the specific level of care required, e.g. whether a warning should have been given, will depend on the particular circumstances of the case."[142] In the particular circumstances of *Lewis*, Stewart J. concluded that the failure to issue warnings in the terms contended for by the claimant did not constitute a breach of duty on the council's part.

Lewis conspicuously underlines the fact sensitive nature of the enquiry in which the court must engage in the breach of duty analysis. In an echo of Lord Reid's caution in *Bolton*, however, it might be appropriate, by way of concluding comment, to observe that in other *different* circumstances, it may be incumbent on a defender to issue warnings in respect of dangers. The particular circumstances of the individual case will remain key in the breach of duty determination.

[141] *Bolton* [1951] A.C. 850 at 852

[142] M. Jones and A. Dugdale, *Clerk & Lindsell on Torts,* 23rd edn (London, Sweet & Maxwell, 2020), para 7-158